20 April 2015

Dear Christine,

Thank you for the opportunity to give evidence on the Human Trafficking and Exploitation (Scotland) Bill on 31st March 2015. During that session I undertook to provide the Committee with further information which is set out below.

a) **An update on progress with the twelve actions agreed at the Scottish Human Trafficking Summit in October 2012, and which are being taken forward by the Anti-Trafficking Progress Group.**

The annex attached to this letter provides the current position regarding the twelve actions agreed at the Summit.

b) **Details of the criteria which are being used by the Home Office to determine the location of the pilots arising from its review of the National Referral Mechanism.**

Home Office officials advise that UK Ministers have agreed to pilot in two locations - the South West, as a region, and West Yorkshire police force area. These areas have been considered appropriate because:

- Home Office have good links with NGOs and the police in both areas – particularly in the SW with Chief Constable Shaun Sawyer, who is supporting the introduction of the pilots.
- Home Office did not want to pilot in two large geographical locations to ensure that the pilots were manageable, hence one region-wide pilot and one force-wide.
- The number of potential victim referrals is sufficiently large in both pilot locations to draw conclusions about the viability of the approach.
- Two pilot locations will be sufficient initially to test the principles of the recommendations. Home Office want to ensure that the pilots are working well before introducing further changes, although UK Ministers agreed that Home Office should
work with Scotland and NI to see whether there is potential for further pilots later in the year.

- The case management function is key to the pilots and extending the pilots beyond the two agreed locations from the outset would most likely overwhelm this function and jeopardise the effective implementation – the parallel running of UKHTC/UKVI processes is also a consideration.

Home Office are therefore proceeding with the two identified pilot locations and are continuing to discuss further pilot locations with other jurisdictions. I have asked my officials to continue to engage closely with UK Home Office officials about the pilot process and to keep me informed of relevant developments.

c) **Details of the numbers of people being trafficked in Scotland, as compared to Cornwall and West Yorkshire where the first wave of pilots are taking place.**

Based on the National Crime Agency’s National Referral Mechanism figures for 2014 there were 80 referrals in the South West and 201 referrals in West Yorkshire compared to 111 referrals in Scotland.

d) **Whether the Crown Prosecution Service in England and Wales has issued any guidelines on the prosecution of victims of human trafficking/exploitation.**

The Crown Prosecution Service (“CPS”) first published legal and policy guidance to prosecutors on the non-prosecution of trafficked victims in May 2007. This has been developed and elaborated upon to reflect judgments, the Council of Europe Convention (2008) and the 2011 EU Directive, ratified in 2013. The CPS published the latest comprehensive and detailed revised guidance to prosecutors in England and Wales on this matter on 24 February 2014. In its current form CPS policy provides flexibility and retains discretion for prosecutors to consider the public interest in prosecuting or discontinuing a prosecution. A copy of the guidelines is attached.

e) **Whether forced criminality should be inserted as a separate type of exploitation with section 3 of the Bill.**

There are many forms of exploitation that trafficked victims may be subjected to that are not included on the face of the Bill, for example forced marriage. These forms and types of exploitation include both criminal (e.g. shoplifting) and non-criminal activities (e.g. begging or car washing).

Section 3 of the Bill recognises however that the exploitative purposes for which traffickers use their victims in order to make a profit are continually changing and evolving. Section 3(7) of the Bill therefore makes provision for exploitation by way of the provision of “services” or “benefits” which covers any service or benefit derived by the trafficker such as profit, personal benefit or privilege. This subsection is provided as an overarching ‘catch all’ for non-defined forms of exploitation including both criminal and non-criminal activities and is intended to “future proof” the Bill against new forms of exploitation being identified. Section 3(7) is intended to cover all of the additional forms of exploitation which stakeholders have mooted for inclusion in the Bill.

I am aware of the concern expressed by the Lord Advocate to the Scottish Parliament’s Cross Party Group on Human Trafficking that being too specific in legislation presents the possibility of drawing into question whether non-specified items are intended to be covered. In other words there is a danger if we list, on the face of the Bill, all types of exploitation that
victims are subjected to, then other exploitative purposes not listed would be missed and may draw into question whether these are covered as exploitative purposes for the trafficking offence. However, I will continue to explore whether there is merit in clarifying, either on the face of the Bill or in the explanatory notes to the Bill, that exploitation by way of forced criminality is included within the definition of exploitation.

The Committee also asked what information was given to the Finance Committee on any impact that the Bill will have on Named Person provisions in the Children and Young People (Scotland) Act 2014. Local authorities already have a duty to provide services to children under the Children (Scotland) Act 1995. The expectation is that the number of trafficked children will not increase as a result of this legislation, but may result in improved identification of trafficked children. The awareness-raising and training that will follow as a result of the Bill will mean that front-line services are better able to identify child victims of trafficking and provide more appropriate services, but not necessarily additional ones.

Consultation with local authorities has confirmed that many child victims of trafficking receive services for different forms of abuse and many are already known to services. Prior to identification as a trafficked child, a child may present as being a victim of abuse or as being vulnerable and in need of care. It is therefore likely that the child will be taken into care regardless of their identification as a trafficked child.

Trafficked children will be allocated a Named Person. However, it is not envisaged that there will be significant additional cost implications as the result of a child being identified as a victim of trafficking. The Named Person function for a trafficked child will be comparable to the Named Person function for any child in need, regardless of their specific vulnerability. The particular pre-existing services and structures required by many trafficked children, such as assistance with immigration processes, translation services or specialised advocacy, will not be delivered by the Named Person and therefore no additional direct costs to the Named Person service will be incurred. In the case of unaccompanied asylum-seeking children, services are provided by the Scottish Guardianship Service (SGS). On referral to the SGS, a young person is appointed a guardian.

In addition to the Named Person, every child who requires a targeted intervention, support or services which are not generally available will have the necessary support coordinated and recorded within a Child’s Plan. The Child’s Plan will include an overview of the child’s wellbeing and assessment of needs, actions that need to be taken, details of who is responsible for delivering those actions, and the expected outcomes.

For a child who is receiving support via a targeted intervention from a number of different agencies, the Child’s Plan will be multi-agency. Where a Child’s Plan is required there will be a Lead Professional to co-ordinate that help. The role of the Lead Professional is key to ensuring that support is coordinated across agencies where necessary and the agreed support is being taken forward in line with the Plan. The Lead Professional will be the professional who is best placed to carry out that coordinating role, given the child’s individual circumstances, working alongside the Named Person.

I hope you find the above helpful and I look forward to receiving the Committee’s Stage 1 Report in due course.

Sincerely,

MICHAEL MATHESON
Cabinet Secretary For Justice

St Andrew’s House, Regent Road, Edinburgh EH1 3DG
www.gov.scot
**Actions Agreed at Trafficking in Human Beings Summit on 18 October 2012**

All organisations to demonstrate leadership by taking forward a multi-agency approach to ensure that Scotland is a hostile environment for human traffickers.

<table>
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<th>Action</th>
<th>Progress</th>
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<tr>
<td><strong>Awareness Raising and Training of Frontline Professionals</strong></td>
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<td>1. Promote a “trafficking free” approach across businesses and the public sector in Scotland.</td>
<td>SG Officials have met and engaged with representatives of the Scottish Chambers of Commerce and individual sectors, e.g. fishing industry; hospitality sectors, identified as being at higher risk of infiltration by traffickers. Dialogue will inform work on the development of the Human Trafficking &amp; Exploitation Strategy. At UK level, Modern Slavery Act 2015, includes specific provisions placing reporting requirements on larger companies with reference to actions to ensure trafficking free supply chains. Engagement with the public sector has formed part of the awareness raising activity described below.</td>
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| 2. Encourage organisations to share training and awareness raising resources on human trafficking for frontline staff. | The objectives set by the Group at the outset were as follows:  
- Identify public, private and voluntary sector organisations that require training or awareness raising in respect of human trafficking  
- Establish training materials currently in use/under development  
- Develop levels of training materials for delivery as appropriate:  
The leaflet, ‘Reading the Signs’ was developed as a basic awareness raising tool and was endorsed by the Scottish Government. This leaflet has since been distributed to various private, public and third sector organisations. An existing Police Scotland e-learning training pack was revised for suitability for a broader audience. This was accepted as the approved training material in respect of enhanced awareness raising. |
| 3. Make use of existing networks, for example through Trades Union and private sector employer representatives and the public sector to spread awareness of human trafficking and the signs of potential trafficking. | The ‘Reading the Signs’ Leaflet has been distributed widely to private, public and third sector organisations. Initial distribution included 4000 businesses affiliated to the Scottish Business Resilience Centre, Scottish Prison Service, HMRC, Chief Executives and Directors of Social Work in the Scottish Local Authorities (via COSLA), Home Office and the 360 Registered Social Landlords across Scotland. Future distribution will focus on the pinch points as outlined in the ‘Mapping the Journey of a
**Data Collection and Analysis of Trends**

5. Review jointly the existing sources of data and analysis about trafficking in Scotland, such as the NRM including how it could be made more child friendly in line with the principles of Getting it right for every child and strengthen the quality of information about the scale of this issue.

Actions 4, 5 and 6. Action 5 was split into two with the children’s aspect being undertaken alongside Action 7. The sub group identified information similar to that identified by the UK Government’s National Referral Mechanism oversight group (which had representatives from the Scottish Government and Scottish first responders). These actions were overtaken by the Home Secretary’s decision to review the National Referral Mechanism to establish whether it provided an effective and efficient means of supporting and identifying potential victims of human trafficking.

The review looked at six key areas:
- identification of victims
- how they access support
- the level of support that victims receive
- decision making
- governance of the NRM
- collection and sharing of data.

The Review Report was published in November 2014 and the processes and procedures required for implementation of its recommendations are currently being considered. Officials are maintaining dialogue with UK officials as they take forward work in response to the review.

6. Identify alternative potential sources of data and intelligence, for example Registrars identifying sham marriages, licensing officials and estate agents letting properties where trafficking might be taking place and utility companies. (Also an action under awareness raising and training.)

See Action 5 above.

7. Acknowledge the specific needs of children at risk of trafficking, including, for example children who go missing.

The children’s aspect of action 5 and action 7 was taken forward by the sub-group. Data collection in respect of child victims of trafficking.
Action

Progress

has been strengthened in a number of ways. For example, data on children with trafficking identified as a concern at their case conference is being collected from 2015/16 and will in future form part of the Scottish Government’s Child Protection data set. As this information is collected from local authority management information systems, a lead in time of two years is required to allow changes to these systems to be incorporated. The first dataset is expected to be published in 2017.

Police Scotland have developed a Vulnerable Person Database. This has a function for recording Human Trafficking and Child Sexual Exploitation.

In respect of action 7 there have been several developments including:

- Publication of Inter-Agency Guidance for Child Trafficking (November 2013).
- The National Guidance for Child Protection in Scotland 2010, was refreshed in 2014, and other relevant national and international papers.
- Continued funding of the Scottish Guardianship Service.

Children who go missing from care:

Police Scotland is implementing a Looked After and Accommodated Missing Children Partnership Agreement, between the Service, local authorities and care providers which outlines partnership working to minimise harm and to help keep children safe across Scotland.

The Partnership Agreement is currently being piloted in three local authority areas.

The Scottish Government is working with partners including Police Scotland to develop a National Missing Persons Strategy for Scotland. This will be published for consultation in June 2015.

The Children and Young People (Scotland) Act 2014 introduced a new framework of Corporate Parenting duties and responsibilities for public bodies including Police Scotland, local authorities, Children’s Hearings Scotland, schools, health boards, etc. These new duties commenced on 1 April 2015 and require Corporate Parents to collaborate with each other.
**Action**

to safeguard and promote the wellbeing of looked after children and care leavers in their care. All Corporate Parents are required to develop and publish a plan detailing how they are going to meet their Corporate Parenting duties. The Act also introduces a new reporting and accountability framework, with national progress on improving outcomes reported by Scottish Ministers to the Scottish Parliament every three years. The first report will be prepared in 2018.

**Victim Care and Support**

8. Ensure a culture amongst agencies that focuses on the care and protection of the victims of trafficking.

Following on from work undertaken by TARA and Migrant Help to identify referring agencies (anc ‘gaps’), the 3 stages of support required to assist potential victims, the development and publication of the Human Trafficking Foundation’s Minimum Standards for Supporting Survivors, the Modern Slavery Bill (as was) and the consultation on the proposal for a Private Members Bill, Human Trafficking (Scotland) Bill it was agreed that the group would produce a ‘Key Principles’ document, informed by a Human Rights based approach and developed around the PANEL model for such approaches. With the approval of the Scottish Government the document could be disseminated widely to statutory and 3rd sector organisations who support vulnerable persons. The document was GIRFEC informed, designed to be user friendly and disseminated electronically, required a significant commitment from all working group members to ensure that the document could support a wide range of staff with varying skills/experience to work with victims from initial identification to the later stages of support if required.

The final document was presented to the ATPG where comment, approval and guidance were sought on the next steps required to ‘publish’ and launch. No further comments were received from the ATPG and the document is currently with the Scottish Government for consideration alongside the development of a draft Human Trafficking & Exploitation Strategy.

9. Map out all the organisations currently involved in providing support and assistance to the victims of trafficking to ensure an “end-to-end” approach to services.

Following discussions with members of the working group this action was discharged as it was felt that there was significant overlap with the work being undertaken by the Awareness Raising and Training Working Group. The limited number of specialist organisations in Scotland (CSG-TARA, Migrant Help and the Scottish Guardianship Service and Legal Services Agency all with national remits),
10. Identify and share Scottish and international examples of what works in terms of providing support and assistance to the victims of human trafficking.

The Group discussed this action and agreed that a brief should be produced for the Scottish Government recommending consideration of a dedicated website in Scotland for the topic where most recent information/reports/research and policy approaches can be shared. The brief is currently in development.

Legislation /Enforcement/Prosecution

11. Scottish Government will find an early legislative opportunity to introduce a specific statutory human trafficking aggravation.

Legislative opportunity was originally identified in the Criminal Justice (Scotland) Bill. However, following rescheduling of this Bill the provisions for aggravations are now included in the Human Trafficking and Exploitation (Scotland) Bill.

12. Agencies will review together the wider legislative framework for tackling human trafficking and any potential gaps.

This action was overtaken by the Scottish Government’s decision to bring forward a Scottish Human Trafficking and Exploitation Bill.
CPS Guidelines
Prosecution decisions and victims of human trafficking and slavery

This part of the guidance applies to both adults and children, but when dealing with cases involving a child, prosecutors must consider the additional requirements set out below in the section "Suspects who may be children".

Indicators of trafficking

Prosecutors should be alert to the particular circumstances or situations where someone suspected of committing a criminal offence might also be a trafficked victim, e.g. an unaccompanied foreign national child who is in the UK but committing offences such as pickpocketing or cultivation of cannabis or in the case of adults, crimes involving immigration document offences when fleeing their situation or controlling prostitution offences. However, these are examples of offences most frequently committed and is not an exhaustive list. Guidance is published to investigators on indicators of trafficking and this may also be of help to prosecutors.

Awareness of the prosecutor’s obligations

When considering whether to proceed with prosecuting a suspect who might be a victim of trafficking, prosecutors should be aware of the clear obligations imposed to consider whether to not prosecute where the suspect has been compelled to commit a criminal offence as a direct consequence of being trafficked.

The prosecutor’s obligations

These obligations arise under:

- Article 4 of ECHR which prohibits slavery and forced labour.
- Article 26 of the Council of Europe Anti-Trafficking Convention which requires the United Kingdom to: "... provide for the possibility of not imposing penalties on victims [of trafficking] for their involvement in unlawful activities, to the extent that they have been compelled to do so".
- Article 8 of EU Anti-Trafficking Directive 2011/36/EU whereby "national authorities are entitled not to prosecute or impose penalties on victims of trafficking human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to trafficking".

A three-stage approach to the prosecution decision

- In addition to applying the Full Code Test in the Code for Crown Prosecutors, prosecutors should adopt the following three stage assessment:
  
  (1) is there a reason to believe that the person has been trafficked? if so,
  (2) if there is clear evidence of a credible common law defence of duress, the case should be discontinued on evidential grounds; but
  (3) even where there is no clear evidence of duress, but the offence may have been committed as a result of compulsion arising from trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute.¹

¹ See the judgment in LM & Ors (2010) EWCA Crim 2327

St Andrew’s House, Regent Road, Edinburgh EH1 3DG
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The duty to make proper enquiries and to refer through the National Referral Mechanism (NRM)

In considering whether a suspect might be a victim of trafficking, as required in the first stage of the assessment, prosecutors should have regard to the following:

i. the duty of the prosecutor to make proper enquiries in criminal prosecutions involving individuals who may be victims of trafficking.

ii. The enquiries should be made by:
   - advising the law enforcement agency which investigated the original offence that it must investigate the suspect's trafficking situation; and
   - Advising that the suspect is referred through the NRM \(^2\) for victim identification. All law enforcement officers are able to refer potential victims of trafficking through the NRM. Referral forms can be found here: referral form
   - If an adult suspect does not consent to their referral, the charging decision should be made on whatever other information might be available, without the benefit of the Competent Authority’s (CA) decision on their victim status (See below for explanation of the CA).
   - These steps must be done regardless of what has been advised by the investigator or whether there is an indication of a guilty plea by the suspect’s legal representative (see the section “Early guilty plea” below). It should be noted that adults must consent to have their case referred through the NRM.

Referral through the NRM and the Competent Authority decision

- Following the NRM referral, the Competent Authority (CA) will first make a “reasonable grounds” decision. In the United Kingdom, the CA is either the Home Office or the UK Human Trafficking Centre (UKHTC) depending on the victim’s immigration status. A positive reasonable grounds decision is made when there are reasonable grounds to believe the individual is a potential victim of human trafficking. This decision should take 5 days. The trafficked victim will then be eligible for government funded support during a recovery and reflection period for 45 days.
- During the 45 day period, the CA gathers further information about the victim; and this additional information is used to make a conclusive decision on whether the referred person is a victim of human trafficking.
- A conclusive decision is whether on the balance of probability it is more likely than not that the individual is a victim of human trafficking.
- Prosecutors should take account of the CA decision (reasonable grounds or conclusive grounds) of the identification and status of the suspect as a victim of trafficking when considering the decision to prosecute.

Where there is credible evidence of trafficking (a positive CA decision)

- Prosecutors should consider whether or not there is clear evidence of a credible common law defence of duress, as required in the second stage of the assessment. If so the case should be discontinued on evidential grounds.
- If not consider whether or not the trafficking victim was compelled to commit the offence.

Has the victim been compelled to commit an offence?

The following guidance on considering whether a victim has been compelled, as required in the third stage of the assessment, applies to adults only and does not apply to child victims of trafficking (see the section below “children and the means of trafficking”).

"Compulsion" includes all the means of trafficking defined by the United Nations Protocol on

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\(^2\) Further information concerning the NRM can be found on the Council of Europe Convention on Action against Trafficking in Human Beings.

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Trafficking: threats, use of force, fraud and deception, inducement, abuse of power or of a position of vulnerability, or use of debt bondage. It does not require physical force or constraint.

In considering whether a trafficked victim has been compelled to commit a crime, prosecutors should consider whether any of these means has been employed so that the victim has effectively lost the ability to consent to his / her actions or to act with free will.

The means of trafficking used in an individual case may not be sufficient to give rise to a defence of duress, but how the person was trafficked will be relevant when considering whether the public interest is met in deciding to prosecute or proceed with a prosecution.

In assessing whether the victim was compelled to commit the offence, prosecutors should consider whether:

(1) the offence committed was a direct consequence of, or in the course of trafficking and
(2) whether the criminality is significantly diminished or effectively extinguished because no realistic alternative was available but to comply with the dominant force of another.

Where a victim has been compelled to commit the offence, but not to a degree where duress is made out, it will generally not be in the public interest to prosecute unless the offence is so serious or there are other aggravating factors.

If the defendant has previously been a trafficked victim but the offence has been committed without reasonable compulsion occasioned by the trafficking, there are no particular trafficking related public interest considerations, and the Full Code Test should be applied in the usual way.

Early guilty plea indicated

- Where there is (1) an indication of an early guilty plea, (2) a full investigation has not been carried out and (3) the circumstances are such that there is suspicion of trafficking: at the first hearing prosecutors should request an adjournment for further investigation and ask that a plea is not formally entered.

Credible evidence of trafficking post-charge

- In cases where a decision has already been taken to charge and prosecute a suspect, but further information or evidence comes to light, or the status of a suspect as a possible credible victim of trafficking is raised post-conviction, for example in mitigation or through a pre-sentence report, then prosecutors should seek relevant adjournments and ensure that the steps outlined in the section "The duty to make proper enquiries and to refer through the NRM" above are carried out.

Suspects who may be children – Additional requirements

Assessing age and trafficking status

In cases where the defendant may be a child victim of trafficking, two linked questions must be addressed:

(1) what is the defendant's age?.
(2) what evidence is there to suggest that the defendant has been trafficked?

If the defendant is a child victim of trafficking, the extent to which the crime alleged against him was consequent on and integral to his / her exploitation must be considered. In some cases the criminal offence is a manifestation of the exploitation. 4


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Due enquiry as to age

Section 99(1) of the Children and Young Persons’ Act 1933 directs the court to “make due inquiry” about the defendant’s age and “take such evidence as may be forthcoming at the hearing of the case” for this purpose. Similar provisions require the court addressing the age question to consider “any available evidence” (Section 150 of the Magistrates Court Act 1980; Section 1(6) of the Criminal Justice Act 1982; and Section 305(2) of the Criminal Justice Act 2003).

Where any issue as to the age of a defendant arises, it must be addressed at the first court appearance. The documentation accompanying the defendant to court should record his date of birth, whether as asserted by him, or as best known to the prosecution, or indeed both.

If age becomes or remains an issue at the Plea and Case Management Hearing in court, prosecutors should ensure that the appropriate age-assessment enquiries are carried out. This may require a request for an adjournment to the court.

Prosecutors should consider the separate CPS guidance concerning age assessment.

Presumption that a victim is a child

Article 10(3) of the Council of Europe Anti-Trafficking Convention provides: “When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall presume to be a child and shall be accorded special protection measures pending verification of his/her age”. If at the end of a “due enquiry” into age the age of the defendant remains in doubt s/he must be treated as a child.

Referring children through the NRM

In the case of suspects who are (or appear to be) children, the NRM referral should be made through the relevant social services department.

Children and “the means of trafficking”

In determining whether a child is a victim of trafficking, his or her consent to being trafficked is irrelevant and the means by which they are trafficked is also irrelevant. Therefore it is not necessary for any of the following to be present: threats, use of force, fraud and deception, inducement, abuse of power or of a position of vulnerability, or use of debt bondage.

When considering whether to prosecute a child victim of trafficking, prosecutors will only need to consider whether or not the offence is committed as a direct consequence of, or in the course of trafficking.

Crown Prosecution Service
January 2014

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See paragraph 20 of L. HVN, THN and T [2013] EWCA Crim 991.

See paragraphs 31 and 32 of L. HVN, THN and T [2013] EWCA Crim 991.

See Council of Europe Convention on Action against Trafficking in Human Beings.


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