Dear Christine,

Thank you for the Justice Committee’s Stage 1 report on the Human Trafficking and Exploitation (Scotland) Bill. Ahead of Stage 2 on Tuesday 16 June, I enclose details in annex A of the Scottish Government’s initial response to the recommendations made in the report.

I look forward to continuing to work effectively with the Committee and the wider Parliament in making the Bill as good as it can be to give Scotland’s law enforcement agencies greater tools in their armoury to bring those responsible for human trafficking and exploitation to justice as well as guaranteeing support for victims.

I hope this information is helpful.

With Best Wishes,

Michael Matheson

MICHAEL MATHESON
ANNEX A

The Scottish Government (SG) is grateful to the Justice Committee for its Stage 1 Report and recommendations on the Human Trafficking & Exploitation (Scotland) Bill.

SG response to Justice Committee's Stage 1 report recommendations (for ease of reference, the Committee's comments are shown in bold and our responses are shown in italics)

1. The Committee supports the creation of a single offence of human trafficking for the purpose of all forms of exploitation of adults and children. While we note the explanation provided by the Cabinet Secretary for Justice that the definition in section 1 is wider than the international definitions to ensure that existing Scottish offences can still be captured, we have concerns that this may leave Scotland at odds with the other UK nations and could make international comparisons difficult. We therefore call on the Scottish Government to look again at the section 1 offence to establish whether it can be better aligned to international definitions without decriminalising conduct which is currently criminal.

We note the Committee's support for a single offence of human trafficking covering both child and adult victims and all forms of potential exploitation. The new single offence complies with international standards and will ensure that all actions under international definitions of human trafficking can be prosecuted. It will also ensure that it is not more difficult to prosecute relevant criminal activities in comparison with current Scottish offences or those in other parts of the UK. A key aim of the Bill is to ensure that police and prosecutors have the powers they need to respond to this complex and constantly changing crime.

Section 1 is consistent with the other UK nations. As with section 1 of the Bill, the human trafficking offences in England and Wales and in Northern Ireland define the offence as being committed where a person arranges or facilitates the travel of another person with a view to the other person being exploited (see section 2 of the Modern Slavery Act 2015 and section 2 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015). We are aware a number of witnesses expressed some concern regarding the use of 'travel' in section 1. However, section 1 is read with section 36 of the Bill, which defines "travel" as including travel within any country (as well as arriving, entering, or departing from any country). However, ahead of Stage 2 we are currently looking at the wording of the offence to consider whether it should be modified to remove references to travel.

2. The Committee notes the concerns of a large number of witnesses regarding the emphasis in the section 1 definition on 'travel' and therefore asks the Scottish Government to give further consideration to the wording in this section.

As mentioned above, we note the concerns raised by stakeholders. We are confident that the current definition of the offence of trafficking in the Bill will criminalise the movement of victims both internationally and within the UK and ensure that those who arrange that movement and those who facilitate it, for example by harbouring or receiving people, can be brought to justice. As noted, definition of "travel" in section 36 makes it clear that travel within the UK is part of the offence.

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3. The Committee welcomes the Cabinet Secretary’s commitment to consider whether a reference to ‘forced criminality’ can be included in the description of what constitutes exploitation for the purposes of human trafficking under section 3 of the Bill. The Committee would welcome an update on the Scottish Government’s position on this matter prior to Stage 2 proceedings on the Bill.

We note the Committee’s comments on the issue of forced criminality. We are clear that the single offence of human trafficking covers trafficking for all potential forms of exploitation. This includes exploitation through forced activities which are either criminal (e.g. shoplifting) or non-criminal (e.g. car washing). For some individual victims, exploitation might take a number of different forms. In preparing the offence, a key aim has been to avoid being overly prescriptive in trying to list all potential types of exploitation. As noted above, human trafficking and exploitation are complex and constantly changing crimes. Being overly specific about different types of exploitation covered by the offence risks excluding activities that are not listed. Therefore, we do not propose to make a change to the Bill at Stage 2.

4. The Committee welcomes the Cabinet Secretary’s commitment to bring forward an amendment at Stage 2 to ensure that ‘consent’ by a person who has been held in slavery or servitude or has performed compulsory or forced labour under section 4 of the Bill is not a defence for the perpetrator.

We will bring forward an amendment at Stage 2 to clarify that the ‘consent’ of a person who has been held in slavery or servitude or has performed compulsory or forced labour under section 4 of the Bill will not by itself preclude a prosecution for this offence.

5. The Committee welcomes the provisions in the Bill to create statutory aggravations to any criminal offence where it can be proved that the offence had a connection with a human trafficking background or where a public official commits the offence of human trafficking in the course of their duties.

We note the Committee’s support for this provision.

6. The Committee notes the suggestion of some witnesses that a statutory aggravation relating to the vulnerability of children should also be included in the Bill, and seeks the Scottish Government’s views in this regard prior to Stage 2.

The Bill includes provisions for a statutory aggravator which will apply in cases where an accused person commits an offence, other than the offence under section 1, which is connected with human trafficking, involving either a child or adult victim. If satisfied of the connection to human trafficking, the court must take the aggravation into account when determining the appropriate sentence within the maximum for that crime. Separate from the aggravator, the main offence of human trafficking under section 1 will carry a maximum potential penalty of life imprisonment. It is not clear, therefore, that a statutory aggravator relating specifically to children, applied either to the main section 1 offence or other offences would have a practical impact.

7. The Committee notes the calls from a number of witnesses to include a statutory defence for a person who commits an offence as a consequence of their victim status on the face of the Bill in addition to placing a duty on the Lord Advocate to publish guidelines on prosecution of victims of offences. The Committee has

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considered the evidence received on this issue carefully. The Committee considers that the Lord Advocate’s argument in favour of prosecutorial guidelines was persuasive and indeed that the view of the Dean of the Faculty of Advocates and others in favour of including a statutory defence in the Bill was also persuasive. Given that the Cabinet Secretary has confirmed that prosecutorial guidelines and a statutory defence are not mutually exclusive, the Committee asks the Cabinet Secretary to consider the position further.

We note the Committee’s comments on the calls from a number of witnesses for a statutory defence for a person who commits an offence as a consequence of their victim status. Detailed consideration was given to this matter prior to the introduction of the Bill and we have considered very carefully the views raised during Stage 1 evidence.

Stakeholders noted the existence of statutory defences in other jurisdictions, but also the difficulties in implementing these in practice and the number of exempted offences. It was noted that the most effective means of protection for victims forced into criminality was early identification and not prosecuting them.

During his evidence, and in subsequent correspondence to the Committee, the Lord Advocate stated clearly that he would not prosecute an identified victim of human trafficking forced to commit criminal acts and that published Lord Advocate instructions would provide a flexible and comprehensive safeguard in relation to victims exploited through forced criminality. As noted in evidence, a statutory defence and Lord Advocate instructions are not, legally, mutually exclusive. However, the Lord Advocate also noted that, if a statutory defence was included within the Bill, any instructions he published would be governed and influenced by the terms of statutory defence. The Lord Advocate has expressed concern that a statutory defence, including specific exemptions, could restrict the protection of victims.

On balance, we are not convinced of the benefit of including a statutory defence within the Bill, placing the burden on accused persons to demonstrate to the satisfaction of the court that they are victims of human trafficking.

8. The Committee welcomes the Lord Advocate’s commitment to produce ‘instructions’ rather than ‘guidelines’ for prosecutors and the police on prosecution of victims and asks the Cabinet Secretary to bring forward amendments at Stage 2 to reflect this in the Bill.

We will bring forward amendments at Stage 2 to reflect the Lord Advocate’s proposal to prepare ‘instructions’ rather than ‘guidelines’ under the terms of Part 2 of the Bill.

9. The Committee agrees with Police Scotland that the duty to secure support and assistance for adult victims should be strengthened.

Subsection 8(1) and 8(2) of the Bill places an absolute duty on Scottish Ministers to secure for adults, where there are reasonable grounds to believe they are victims of human trafficking, the provision of such support and assistance as is considered necessary given the adult’s needs during a relevant specified period. This commitment is clear. Subsection 8(3) provides Scottish Ministers with necessary additional flexibility to provide support and assistance outwith the specified period relevant to the needs and circumstances of individuals. We do not propose to make any amendment to these provisions.
10. The Committee is persuaded by evidence received from witnesses working in this field that the term ‘counselling’ should be removed from the list of support and assistance that may be provided under section 8 of the Bill and replaced with the term ‘psychological assessment and treatment’ to better meet the complex mental health needs of some trafficking victims. The Committee invites the Scottish Government to bring forward an amendment at Stage 2 to effect this change.

We note the Committee’s comments. It is important to emphasise that the list of support and assistance under subsection 8(4) is not exhaustive. Indeed the provision makes clear that support and assistance is not limited to the items listed. The list provides for access to ‘medical advice and treatment’, which would cover both physical and non-physical health needs, as well as for ‘counselling’. However, we will look at amending the Bill at Stage 2 to address the issues raised.

11. The Committee seeks clarification from the Scottish Government whether access to support and assistance under section 8 of the Bill is dependent on entry to the National Referral Mechanism as implied by use of the same terminology in this section of the Bill as is used in the NRM.

The National Referral Mechanism is the current mechanism for identifying, on a consistent basis, whether there are reasonable grounds that someone is a victim of human trafficking and ensuring that they have access to appropriate support and assistance. There is no other existing mechanism for identifying victims. It is also worth noting that the terminology used is consistent with the Council of Europe Convention on Action against Trafficking in Human Beings.

However, we plan to make amendments at Stage 2 to allow Ministers to amend through secondary legislation, with Parliament’s approval, the process for identifying “reasonable ground”. This will ‘future proof’ against any change to the mechanism for identifying and referring potential victims of trafficking to access appropriate support and assistance.

12. The Committee welcomes the Cabinet Secretary’s offer to examine the Faculty of Advocates’ interpretation of section 8 of the Bill and seeks an update prior to Stage 2 on whether the Scottish Government considers that an amendment is necessary.

During evidence, it was questioned whether the duty under section 8 to secure support and assistance to potential victims of trafficking should be placed on Scottish Ministers or other local agencies. Under current grant funding arrangements, Scottish Ministers fund third sector organisations with expertise in human trafficking to assess and co-ordinate access to both specialist and mainstream services for potential victims of human trafficking identified through the NRM. Provisions in section 8 will place these arrangements on a statutory basis and allow the Scottish Ministers to secure the provision through local agencies. We are therefore content that no amendment is required to the proposed provisions.

13. The Committee notes the Cabinet Secretary’s assurances that the Scottish Government will monitor the costs arising from supporting the expected increase in the number of victims identified following implementation of the provisions in this Bill. We would welcome regular updates from the Scottish Government on this issue.

Scottish Ministers will monitor closely the numbers of victims and associated costs for support and assistance. We would be happy to keep the Committee informed on this issue.
The numbers of identified victims and associated support will also form part of the review and reporting to Parliament on the proposed Human Trafficking & Exploitation Strategy.

14. The Committee welcomes the Cabinet Secretary's commitment to amend the Bill so that the power to specify the period of provision of assistance to adult victims under Section 8(2)(b)(i) is subject to affirmative rather than negative procedure.

We will bring forward an amendment at Stage 2 to require that any change to the 'specified period' under Section 8(2)(b)(i) is subject to affirmative rather than negative procedure.

15. The Committee note the concerns of some witnesses that there is a danger of innocent parties being affected by provisions in sections 9 and 10 of the Bill relating to the detention and forfeiture of vehicles, ships or aircraft. However, the Committee is persuaded that there are sufficient safeguards in the Bill to prevent this from happening.

We note that the Committee is content that sufficient safeguards are in place to protect innocent parties from being affected by provisions in sections 9 and 10 of the Bill relating to the detention and forfeiture of vehicles, ships or aircraft.

16. The Committee welcomes the provisions under section 11 of the Bill to categorise all trafficking and exploitation offences as lifestyle offences in order that confiscation procedures in the Proceeds of Crime Act 2002 can be used against traffickers.

We note the Committee's support for these provisions.

17. The Committee welcomes the measures in the Bill relating to Trafficking and Exploitation Prevention and Risk Orders and accepts the view of police and prosecutors that the orders have the potential to reduce and prevent human trafficking and allow proper monitoring of offenders.

We note the Committee's support for these provisions.

18. The Committee however notes the concerns raised by witnesses in relation to the proportionality of imposing a Risk Order where a person does not have a conviction and the impact this may have on an individual's rights under ECHR.

We note the Committee's concerns on this issue and views expressed by the Law Society Any decision to impose a Risk Order will be a matter for a court to consider, taking full account of ECHR requirements.

19. The Committee welcomes the proposed duty on the Scottish Ministers to prepare, publish, regularly review and update a trafficking and exploitation strategy under section 31 of the Bill and the matters listed which may be set out in the strategy.

We note the Committee's support for these provisions.

20. The Committee seeks clarification on whether and how prevention work will be reflected in the strategy, as suggested by TARA, details of the timescales for publication of the first strategy, and further information on the proposed consultees.

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Scottish Government officials have been taking forward dialogue with relevant stakeholders, including COSLA, third sector bodies, law enforcement, children’s organisations, etc., about the proposed Human Trafficking & Exploitation Strategy and likely content, including with reference to prevention. The aim is to have a first Strategy available for formal consultation shortly after legislation is in place, if approved by Parliament. Exact timings will depend on the progress of the Bill.

21. The Committee notes the Cabinet Secretary’s assurances that the Scottish Government will monitor costs of the training and awareness-raising likely to be promoted through the trafficking and exploitation strategy. We invite the Scottish Government to provide further details of these costs while the trafficking and exploitation strategy is being developed.

Scottish Ministers will monitor closely the costs of training and awareness raising. We would be happy to keep the Committee informed on this issue. Information about training and awareness raising will also provide part of the review and reporting to Parliament on the proposed Human Trafficking & Exploitation Strategy.

22. The Committee invites the Scottish Government to reflect on the concerns raised by the Law Society of Scotland and Information Commissioner’s Office relating to data protection and consent in respect of the duty to notify and provide the Chief Constable with information about victims, as set out in section 34 of the Bill.

We note the Committee’s comments on this matter. Subsection 34(2) of the Bill makes clear that information should not be provided that either identifies a person or enables them to be identified, without their consent. We note the offer from the Information Commissioner’s Office to work with us in the drafting of any regulations made under this clause to ensure that specific individuals cannot be identified from what may be very unique circumstances. We will be pleased to take up this offer at the relevant time.

23. The Committee welcomes the measures under section 35 relating to bodies corporate, Scottish partnerships and other unincorporated associations, or any individual acting on behalf such a body, who commit an offence under the Bill.

We note the Committee’s support for these provisions.

24. There was widespread concern amongst witnesses surrounding the lack of provision in the Bill relating to child victims of trafficking, including the absence of: a specific offence of child trafficking; details of support and assistance for children; a presumption of age clause and provisions placing guardians on a statutory footing. The Committee explores each of these issues later in this report, but considers that there would be significant merit in including a section in the Bill relating to child victims.

We comment on each of these issues in response to the Committee’s specific recommendations.

25. The Committee notes the views of a number of witnesses that more detail is required in the Bill on the support and assistance that is available for child victims, whether that be through the inclusion of a specific provision on support for child victims or through appropriate cross-referencing with relevant existing legislation. We are persuaded that more clarity is required to ensure that child victims receive
appropriate and consistent support and assistance across all areas of Scotland. We therefore invite the Scottish Government to consider whether cross-referencing this Bill with existing legislation on child victims or whether the trafficking and exploitation strategy can adequately address this issue.

We note the Committee’s comments on this issue, including the potential for cross-referencing with existing legislation. The provisions of the Children (Scotland) Act 1995, the Children’s Hearings (Scotland) Act 2011 and the Children and Young People (Scotland) Act 2014 provide for the needs of all vulnerable children to be assessed and addressed. As we do not intend to alter these legal duties, we do not believe that it would be appropriate for the Bill to cross-reference, as the Bill is primarily a vehicle to change the law. Such a provision would not add to the support to child victims and may instead have an unintended limiting consequence if a particular child support duty was omitted.

There are however other means than cross-referencing on the face of the Bill to make such matter clear and we recognise that more clarity is required here. We propose, therefore, to clarify and reinforce the existing legislative obligations on local authorities through the proposed Human Trafficking & Exploitation Strategy.

26. The Committee notes the Cabinet Secretary’s suggestion that there could be unintended consequences relating to the safety of children from including a presumption of age clause in the Bill, but also that the Scottish Government intends to consider whether this issue can be clarified at Stage 2. The Committee also notes that the Lord Advocate supports the inclusion of such a clause in the Bill, but is willing to include a presumption of age within his instructions on prosecution of victims if it is decided that it should not appear in the Bill. The Committee also supports the inclusion of a presumption of age clause in the Bill and asks the Scottish Government to give careful consideration as to how this might be achieved.

We note the Committee’s comments on this issue and also the views expressed by the Lord Advocate. We have given very careful consideration to this issue. We propose to bring forward an amendment to include provision for presumption of age at Stage 2 and are considering carefully the extent to which relevant authorities can be afforded a degree of flexibility in the application of any such presumption to mitigate against any unintended consequences.

27. The Committee notes the evidence on both sides of the debate regarding placing guardians for child victims of trafficking on a statutory footing. While we recognise 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, we consider that this matter may be better addressed within the forthcoming strategy.

We note the Committee’s recommendation that the issue of child guardians may be better addressed through the proposed Human Trafficking & Exploitation Strategy. We recognise the excellent work of the Scottish Guardianship Service to support unaccompanied asylum seeking children, including those who may have been trafficked. We are reflecting on the comments and concerns made on guardianship during the Stage 1 debate. We are continuing to work with stakeholders to determine if further measures are required – including statutory provisions.

28. The Committee notes the calls from some witnesses for a separate offence of
trafficking in children to be included in the Bill, however, we are concerned that two separate offences could lead to difficulties in prosecution and securing convictions. We are therefore not persuaded that a separate child trafficking offence is required.

We note and agree with the Committee’s recommendation that a separate child trafficking offence is not required.

29. The Committee does however agree with witnesses’ concerns that the references to ‘youth’ and ‘young’ in section 3(8) of the Bill are unclear and we therefore call on the Scottish Government, in the interests of clarity, to replace these terms with ‘child’ and to define a child as any person under the age of 18.

We note the Committee’s comments on this issue and the concern raised by stakeholders. Concern was also raised in evidence that reference to ‘youth’ would not reflect the circumstances of people who are vulnerable because they are elderly. We will bring forward an amendment at Stage 2 to seek to respond to these concerns.

30. The Committee notes that Scottish Ministers agree that there is need for focused awareness raising and training to help better identify and provide support for potential child victims of trafficking and asks the Scottish Government to provide further details of how it intends to approach this issue.

Specialist guidance already exists to assist agencies and front-line staff in identifying potential child victims of human trafficking. For example, an Interagency Guidance on Child Trafficking toolkit was published in 2013. Amongst the key aims of the toolkit was to raise awareness of the indicators of child trafficking and to facilitate consistent responses. The toolkit was prepared within the context of Scotland’s national child protection guidance and Getting it Right for Every Child approach. The Bill will place a further statutory duty on Scottish Ministers to raise awareness, including through training, about the trafficking of both children and adults as part of the proposed Human Trafficking & Exploitation Strategy.

31. The Committee notes the views of some witnesses and respondents to the call for evidence on the Bill that provisions criminalising the purchase of sex should be included in the Bill at Stage 2. We further note that the Cabinet Secretary intends to meet with stakeholders on both sides of the debate to inform his decision on the matter before Stage 2. While we note that this issue may be worthy of further review and detailed consultation, we are of the view that this Bill is not the correct vehicle for taking the matter forward. The criminalisation of the purchase of sex would have implications beyond the matters dealt with in this Bill.

We note and agree with the Committee’s recommendation on this issue. The SG will therefore, not support any amendments to include provisions criminalising the purchase of sex in the Bill at Stage 2. The SG has now held meetings with stakeholders from both sides of the debate, and it is clear that there is a lack of consensus on the strength of the evidence base in this area. The SG will therefore commission independent academic research to review the evidence on the impacts of the criminalisation of the purchase of sex, including consideration of the impacts on wider SG policy and to gather evidence on the sex work industry in Scotland. It is planned that research findings will be submitted to the Scottish Government and Scottish Parliament in early 2016 to help inform any future decision about whether the purchase of sex should be criminalised. We consider this is the most appropriate way to deal with this substantive issue by looking at the specific issues facing Scotland which will allow a holistic approach to be developed to deal with this complex issue.

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32. The Committee sees merit in having a UK-wide Anti-Slavery Commissioner in relation to sharing expertise, information and best practice across the UK, but considers it essential that the Commissioner reflects Scottish interests, concerns and issues. We therefore ask the Scottish Government to provide further detail on how it intends to hold the Commissioner to account on his work relating to Scotland, as envisaged under the Modern Slavery Act 2015.

Human trafficking is a cross-border crime. After careful consideration, we determined that there was merit in having an Anti-slavery Commissioner with a remit extending to Scotland, England and Wales and Northern Ireland. The Modern Slavery Act 2015 requires that Scottish Ministers are consulted on the appointment of the Commissioner and on the Commissioner’s proposed strategic plan, setting out how he will fulfil his functions across all parts of the UK. The Scottish Ministers can ask the Commissioner to report on specific issues. Any report must be placed before the Scottish Parliament. More detailed arrangements for engagement between the Commissioner, Scottish Government and relevant Scottish stakeholders are being prepared.

33. The Committee notes that there may be benefits in developing a Scotland-based identification process to replace the National Referral Mechanism and that the Cabinet Secretary seems open to this idea. However, we accept that there are advantages of having a UK-wide approach to human trafficking and therefore agree that, in the first instance, a Scotland-specific panel should be created along the lines proposed in the recent Home Office review of the NRM. The Committee also considers that there would be merit in Scotland hosting a pilot to test how the new identification process would work in practice and therefore urges the Scottish Government to press the Home Office on this matter.

We note the Committee’s comments on this issue and will continue to engage closely with the Home Office, including with reference to the NRM pilots.

34. The Committee supports the general principles of this Bill. We have however made a number of recommendations aimed at improving certain aspects of the Bill which are set out in the main body of this report.

We welcome the Committee’s support for the general principles of the Bill.

Scottish Government
June 2015