Justice Committee

Stage 1 Report on the Human Trafficking and Exploitation (Scotland) Bill
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Justice Committee

To consider and report on a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice and b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

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Summary of recommendations

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.

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.

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.

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.

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.

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 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 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.

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.

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

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

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.

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.

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.

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.

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.

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. 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.
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.

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.

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.

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.

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.
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.

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.

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.

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.

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.
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 sex would have implications beyond the matters dealt with in this Bill.

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.

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.

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.
Introduction

Overview

1. The Human Trafficking and Exploitation (Scotland) Bill was introduced in the Scottish Parliament on 11 December 2014. The Justice Committee ("the Committee") was designated as lead committee for Stage 1 consideration of the Bill on 6 January 2015.

2. The Committee issued a call for written evidence on 13 January 2015 which received 58 written submissions. The Committee took evidence on the Bill over five meetings between 3 and 31 March 2015, hearing from a range of criminal justice bodies, victims' groups, legal and human rights experts, and children's organisations, as well as from the Cabinet Secretary for Justice.

3. In addition to taking formal evidence on the Bill, the Committee undertook a series of visits to speak directly with victims of human trafficking and exploitation and with the frontline staff who support them on a day-to-day basis. The Committee wishes to thank those involved for giving us a valuable insight into their experiences, how the current arrangements work in practice, and how they can be improved. Key themes arising from the visits to the Trafficking Awareness Raising Alliance (TARA), Barnardo's Scotland Safer Choices Project, and the Scottish Guardianship Service, have been explored by the Committee during its formal scrutiny of the Bill and are reflected in this report.

Justice Committee members visiting Barnardo’s Safer Choices Project to inform scrutiny of the Bill
4. The Finance Committee received eight responses to its call for views on the Financial Memorandum (FM) on the Bill and also heard from Scottish Government officials on 18 March. That Committee published its report on the FM on 26 March. The Delegated Powers and Law Reform Committee published its report on the Delegated Powers Memorandum on the Bill on 18 February. The Justice Committee questioned the Cabinet Secretary on the recommendations contained in both reports during evidence; further details of that session are explored later in this report.

Background to the Bill

Nature and extent of human trafficking in Scotland

5. The SPICe briefing on the Bill describes human trafficking as a hidden crime and sets out possible reasons for this—

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

6. The SPICe briefing also notes that the majority of victims share the trait of vulnerability. It highlights a report from the Equality and Human Rights Commission (EHRC) on human trafficking in Scotland (2011), which found that vulnerability was sustained beyond the initial control of a victim and increased by the experience of exploitation; control techniques such as emotional dependence on traffickers, low or no pay, or violence; and dislocation from home and support.

7. Given the nature of human trafficking, it is difficult to estimate the actual number of individuals who may be victims. However, official figures collected through the National Referral Mechanism (NRM) suggest that there were 1,746 potential victims of human trafficking at UK level in 2013, of which 55 were reported from agencies in Scotland. In 2014, the NRM received 111 referrals of potential victims of trafficking first encountered in Scotland. Of those referrals, 62 (56%) were female and 49 (44%) were male. The NRM is discussed in more detail later in this report.
Current legislative framework

European context

8. The UK is bound by the Council of Europe Convention on Action against Trafficking in Human Beings (“the CoE Convention”), which aims to protect and safeguard the rights of trafficking victims. The CoE Convention defines human trafficking as:

‘Trafficking in human beings’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person, having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.\(^8\)

9. It also sets out three essential elements of human trafficking:

- the ‘act’, i.e. the recruitment, transportation, transfer, harbouring or reception of individuals;
- the ‘means’, i.e. the use of coercion, including threats, deception, fraud, abuse of power and vulnerability, etc; and
- the ‘purpose’, i.e. any form of exploitation, including sexual exploitation, forced labour, begging, slavery, servitude, etc.\(^9\)

10. For child victims to be trafficked, the ‘means’ are not required; a child is deemed to have been trafficked if the first and third elements are present.

11. The UK Government has also opted in to the EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims (2011/36/EU),\(^10\) which builds on the CoE Convention and defines the minimum common rules for identifying and sanctioning offences of trafficking in human beings. The Directive identifies the following as ‘punishable acts’: the recruitment; transportation; transfer; harbouring or reception of persons, including the exchange or transfer of control over those persons, for the purpose of exploitation.\(^11\)

UK and Scottish context

12. The Policy Memorandum on the Bill sets out the current legislative framework in Scotland relating to human trafficking and exploitation, including:

- section 22 of the Criminal Justice (Scotland) Act 2003 which created the offence of engaging in trafficking people into, within or out of the UK for the purpose of exploitation, by way of control over an individual for prostitution or
involvement in making or producing obscene or indecent material, with a maximum penalty of 14 years;

- sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, which created offences of trafficking people into, within or out of the UK for the purpose of exploitation, with a maximum penalty of 14 years;

- section 46 of the Criminal Justice and Licensing (Scotland) Act 2010, which amended and extended the 2003 and 2004 Acts to ensure that the offence covers acts committed in or outwith the UK and created a new offence of trafficking of people into, within or out of a country other than the UK. This Act also expanded the definition of exploitation;

- section 47 of the 2010 Act, which created a standalone offence covering exploitative behaviours of holding someone in slavery or servitude, or requiring a person to perform forced or compulsory labour, with a maximum penalty of 14 years; and

- section 99 of the 2010 Act which extended powers to police to close premises associated with human exploitation.

### Previous work on human trafficking in Scotland

13. The Policy Memorandum highlights a number of recent reports which have sought to raise awareness of human trafficking and exploitation in Scotland, including:

- the Scottish Parliament’s Equal Opportunities Committee’s report of its inquiry into migration and trafficking (2010) which, amongst other things, concluded that the definition of human trafficking in the CoE Convention offered front-line services the best means of understanding the issues associated with the crime of human trafficking;

- the Equality and Human Rights Commission’s report of its inquiry into human trafficking in Scotland (2011); and

- the Scottish Commissioner for Children and Young People’s report, Scotland: A safe place for child traffickers? (2011)

14. It also states that “the Scottish Government, working with other relevant agencies, has taken forward a range of actions in response to the Equal Opportunities Committee inquiry and subsequent reports, to strengthen Scotland’s approach to combating human trafficking”, including:

- continuing to take an active part in the UK Interdepartmental Ministerial Group on Human Trafficking;

- continued provision of direct grant funding to TARA and Migrant Help to support victims and improve training among frontline professionals;
• hosting a Scottish human trafficking summit in October 2012;
• the creation by Police Scotland of a dedicated National Human Trafficking Unit to enhance the police response to human trafficking; and
• appointment by the Crown Office and Procurator Fiscal Service (COPFS) of a National Lead Prosecutor for Human Trafficking and Exploitation to ensure a consistent and robust approach to the prosecution of these cases.  

Members’ Bill proposal

15. In September 2013, Jenny Marra MSP lodged a proposal for a Members’ Bill in the Scottish Parliament which sought to require the creation of a Scottish anti-human trafficking strategy; provide for the special treatment of human trafficking related crime within the criminal justice system, and provide for the support of survivors of human trafficking. On 17 March 2014, the then Cabinet Secretary for Justice, Kenny MacAskill MSP, gave an indication under Rule 9.14.13(a) of Standing Orders that the Scottish Government would initiate legislation, within the same session, to give effect to her final proposal.

Other UK jurisdictions

16. The UK Parliament and Northern Ireland Assembly recently considered and passed their own laws relating to human trafficking and exploitation.

17. The Modern Slavery Act 2015, which received Royal Assent on 26 March 2015, consolidated offences relating to trafficking and slavery; created two new civil orders; established an Anti-Slavery Commissioner, and made provision for the protection of modern slavery victims. Provisions in the Bill which applied to Scotland were the subject of a legislative consent memorandum considered by the Justice Committee in December 2014. These provisions related to police powers to pursue, board and detain ships at sea in relation to investigating various slavery and human trafficking offences, and the establishment of an independent UK-wide Anti-Slavery Commissioner. The relevant legislative consent motion was agreed by the Scottish Parliament on 15 January 2015.

18. In Northern Ireland, the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Act (Northern Ireland) 2015 received Royal Assent in January 2015. Measures in the Act, which originated as a private members’ bill, include new consolidated offences, changes to sentencing, new civil protection orders, measures to support victims, confiscation of criminal assets, and provisions to criminalise payment for sex.

Summary of key provisions in the Bill

19. The Policy Memorandum states that “the overarching policy objectives of the Bill are to consolidate and strengthen the existing criminal law against human trafficking and the offence relating to slavery, servitude and forced or compulsory labour and enhance the status of and support for victims”. The Bill would:
• create a single offence of human trafficking for all forms of exploitation for adults and children;

• strengthen the current slavery, servitude and forced labour offence by allowing the court to consider, in assessing whether a person has been a victim of an offence, the victim’s characteristics such as age, physical or mental illness, disability or family relationships. The maximum penalty would be increased from 14 years to life imprisonment;

• establish statutory aggravations (a) to any criminal offence where it can be proved that the offence had a connection with a human trafficking background, and (b) where a human trafficking offence has been committed by a public official while acting, or purporting to act, in the course of the official’s duties;

• place a duty on the Lord Advocate to publish guidance about the prosecution of credible trafficking victims who have committed offences;

• place a duty on Scottish Ministers to secure the provision of relevant immediate support and recovery services for adult victims of trafficking;

• categorise all trafficking and exploitation offences as lifestyle offences in order to automatically trigger the confiscation procedures in the Proceeds of Crime Act 2002;

• create trafficking and exploitation prevention orders and risk orders;

• place a duty on the Scottish Ministers to prepare, publish and regularly review and update a trafficking and exploitation strategy to be laid before the Parliament; and

• place a duty on public bodies to provide anonymised data about potential human trafficking and exploitation victims to Police Scotland.

The Bill: overview of provisions and evidence received

Part 1: Offences

Offence of human trafficking

20. Section 1 of the Bill would create a single offence of human trafficking for the purpose of all forms of exploitation of adults and children, and defines this offence as follows—

“A person commits an offence if the person—

(a) arranges or facilitates another person’s travel, including in particular, by—
(i) recruiting the person with a view to transporting or transferring the person,

(ii) transporting or transferring the person,

(iii) transferring or exchanging control of the person,

(iv) harbouring or receiving the person, and

(b) arranges or facilitates travel with a view to the other person being exploited.”

21. The maximum penalty for a person who commits an offence under section 1 of the Bill would be life imprisonment.

22. The Policy Memorandum states that “having a single offence should assist in clarifying the law and in detecting and prosecuting trafficking offences”\(^{18}\). It explains that the new offence does not replicate the international definitions of trafficking as the conduct covered by these international definitions is narrower than that covered by existing Scottish offences and, therefore, this approach may have had the effect of decriminalising some conduct which is currently criminal. It also argues that “adding extra evidential burdens with strict adherence to international norms would present significant challenges to the successful prosecution of trafficking offences in Scotland and make these harder to prosecute in comparison with other UK jurisdictions.”\(^ {19}\)

23. There was broad support amongst witnesses for the creation of a single offence of human trafficking, including from the Law Society of Scotland,\(^ {20}\) the Crown Office and Procurator Fiscal Service (COPFS),\(^ {21}\) Faculty of Advocates,\(^ {22}\) Edinburgh Bar Association\(^ {23}\) and Care for Scotland,\(^ {24}\) amongst others. Some witnesses however called for the definition to more closely reflect EU definitions. For example, Helen Martin from the Scottish Trades Union Congress (STUC) argued that “if there is a clear definition at the European level that people are agreed on and which people think is a good definition, why should it not just be incorporated in the Bill as is, so that we all know where we stand and we all know that the entire Convention definition is covered?”\(^ {25}\) James Wolfe QC, Dean of the Faculty of Advocates, highlighted that “it is worth noticing that there are differences [between the Directive and the Bill], which always presents at least a risk that we will not fully implement our obligations”\(^ {26}\) and Kirsty Thomson of the Legal Services Agency (LSA) told the Committee she was worried about the consequences of the definition not complying with the EU Directive in practice.\(^ {27}\)

24. There was also some concern amongst some witnesses regarding the emphasis placed on ‘travel’ within the section 1 offence despite the term not appearing in the EU definition. Bronagh Andrew of TARA told the Committee that use of the word ‘travel’ implies international movement and “leaves it unclear whether, in British cases of sexual exploitation involving children and adults, people being moved from one part of a city to another would constitute ‘travel’”.\(^ {28}\) The Committee also heard from Moira McKinnon of the Scottish Child Protection Committees Chairs Forum (SCPCCF) that “there are children who are regularly being moved from city
to city or from one area to another, and the Bill must take account of that and emphasise it strongly”. Ian Cruxton of the UK Human Trafficking Centre told the Committee that “we have always taken the view that the wider definition—the European definition—is sufficiently broad to allow us to use it for individuals who may not geographically move around and may not cross a land boundary but who pass through the hands of different individuals who seek to exploit people”.  

25. However, a number of witnesses were content with the definition as drafted, including Assistant Chief Constable Malcolm Graham, who indicated that “the definition of ‘travel’ is quite adequate and has deliberately been made broad”. Asked whether the Bill as currently drafted could benefit from some clarification in relation to the word ‘travel’, the Lord Advocate said that “to my mind the definition of travel does not mean that someone must have moved from country to country”, adding that “if I was defending the Bill in a court I would not think that it was in any way flawed [as] the Parliament’s intention is clear”.  

26. The Cabinet Secretary for Justice, Michael Matheson MSP, responded to evidence heard in relation to the definition in section 1 of the Bill, stating: “there is a level of flexibility for member states in how they define offences in taking forward the provisions that are set out in the EU obligations”, and reiterating the explanation provided in the Policy Memorandum. In respect of the references to ‘travel’, he went on to argue that—

> It is worth keeping in mind that the travel provision in section 1 is about criminalising not travel itself but arranging and facilitating travel, which does not have to be a cross-border activity, and that subtle difference allows us to consider the prosecution of individuals who have been involved in that. We are trying to widen the scope and provide more flexibility to prosecute those who are involved in, if you like, the whole trafficking pathway.  

27. He added that while “I do not think the term ‘travel’ will make prosecutions unduly difficult, … I am more than happy to explore whether the Committee feels that there is a way of expressing or providing for the term in the Bill to address some of the concerns that you have received”.  

28. 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.
29. 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.

Exploitation for purpose of offence of human trafficking

30. Section 3 describes what constitutes exploitation for the purpose of the offence of human trafficking, including forced or compulsory labour, prostitution and sexual exploitation, and removal of organs, etc. In its written submission, Police Scotland suggested that the Bill should also include reference to ‘forced criminality’ as the police continue to come across human trafficking victims in circumstances where they have been forced to commit crimes for the benefit of a trafficker, such as shoplifting, begging or maintaining cannabis cultivations. It argued that this separate definition would clearly highlight the fundamental differences between forced criminality and forced labour, and increase awareness and appreciation of the scope of exploitation.

31. A number of other witnesses shared this view, including Gordon Macdonald from CARE for Scotland who told the Committee that he had concerns that forced begging or criminal activities, which are included in the EU Directive, are not reflected in the Bill. Nicola Merrin of Victim Support Scotland agreed that forced begging, forced marriage and forced criminal activity should be specified in the Bill.

32. The Cabinet Secretary, when asked to respond to these comments, said that “Police Scotland makes a reasonable point on the issue [and] we are more than happy to look at whether we can address that at Stage 2.”

33. 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.

Slavery, servitude and forced or compulsory labour

34. As referred to earlier in this report, section 47 of the Criminal Justice and Licensing (Scotland) Act 2010 currently criminalises holding a person in slavery or servitude or requiring a person to perform compulsory or forced labour. The Bill would repeal section 47 and replace it with strengthened provisions to allow the court to consider, in assessing whether a person has been a victim of an offence, the victim’s characteristics such as age, physical or mental illness, disability or,
where relevant, family relationships. The maximum penalty for the offence would be increased from 14 years to life imprisonment for a conviction on indictment.

35. The section 1 offence specifies that “it is irrelevant whether the … person consents to any part of the arrangement or facilitation of travel”. The Committee heard concerns that there is no such provision in relation to consent in section 4 of the Bill. Assistant Chief Constable Graham told the Committee that “we are keen to ensure that, as far as the issues of forced labour and servitude set out in section 4 are concerned, consent should not necessarily be an issue”.39 In written evidence, Police Scotland suggested that section 4 of the Bill should provide similar clarity to relevant provisions in the Modern Slavery Bill which specify that “the consent of a person (whether an adult or child) to any of the Acts alleged to constitute holding the person in slavery or servitude, or requiring the person to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour”.40

36. The Lord Advocate shared this view. He told the Committee that—

Consent is not a defence in section 1 and I notice that it is not mentioned in section 4. I would like it to be in section 4. On the principles of statutory construction and interpretation, the danger is that the courts would say, ‘Well, Parliament has taken the view that it should be provided for in section 1 and Parliament has taken the view that it should not be provided for in section 4’.41

37. The Cabinet Secretary told the Committee that the Scottish Government intends to bring forward an amendment at Stage 2 to remedy this issue.42

38. 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.

Statutory aggravations

39. Section 5 of the Bill makes provision for a statutory aggravation to any criminal offence where it can be proved that the offence had a connection with a human trafficking background. In effect, this would require the court to take into account where an offence is proven to be connected with human trafficking activity when determining sentence on the offence. The court would also be required to state on conviction that the offence is aggravated by a connection with human trafficking activity and record the conviction in a way that the offence is so aggravated.

40. The Policy Memorandum explains that “the underlying purpose or motivation of committing or conspiring to commit, any offence should be considered to be more
serious when it takes place against a human trafficking background”. 43 This follows a recommendation by the EHRC in its report on human trafficking in Scotland (2011) that a trafficking background should be made a statutory aggravation in the sentencing of those convicted of related criminal offences. 44

41. Section 6 makes similar provision about a statutory aggravation which would apply in cases where a public official, acting or purporting to act in the course of official duties, commits the offence of human trafficking. The Policy Memorandum indicates that this provision meets the Scottish Government’s obligations under Article 4.3 of the EU Directive. 45

42. Provisions in line with the approach taken in sections 5 and 6 of the Bill are currently included in the Criminal Justice (Scotland) Bill and it is intended that these will be removed at Stage 2 proceedings of that Bill. 46

43. There was broad support for the proposals to introduce statutory aggravations as set out in the Bill. 47 For example, the Scottish Women’s Convention, in welcoming the provisions, suggested that “the introduction of a statutory aggravator, whereby human trafficking forms the backdrop to the main offence … shows that the Scottish Government takes the prosecution of all crimes related to human trafficking very seriously”. 48

44. A number of children’s organisations suggested that consideration should also be given to including in the Bill a statutory aggravation relating to the vulnerability of children. Barnardo’s Scotland suggested such a measure would recognise the vulnerability of children and the seriousness of a trafficking offence against a child, at the stage of sentencing”, adding that “the Northern Ireland Act … sets a precedent for such a measure”. 49 Scotland’s Commissioner for Children and Young People supports this proposal. 50

45. 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.

46. 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.
Part 2: Protection of victims

Lord Advocate’s guidelines on prosecution of victims of offences

47. Section 7 of the Bill places a duty on the Lord Advocate to publish guidance about the prosecution of credible trafficking victims who have committed offences. The COPFS already produces guidance for prosecutors which provides for consideration of the non-prosecution of credible or confirmed victims of trafficking.

48. The Policy Memorandum highlights that Section 48 of the Scotland Act 1998 protects the independence of the Lord Advocate in taking decisions about the prosecution of crime. However, it goes on to state that “placing a statutory duty on the Lord Advocate to produce such guidelines further demonstrates compliance with Article 8 of the EU Directive in relation to trafficking victims and ensures that these guidelines will also now cover victims of the standalone exploitation offence”. The Lord Advocate has produced, and is currently consulting on, draft guidelines/instructions which would be introduced if the Bill is passed. These guidelines/instructions specify the circumstances in which there is a strong presumption against prosecution of child and adult victims of trafficking or exploitation who have committed an offence.

49. The Policy Memorandum acknowledges that “an alternative approach would be to introduce a statutory defence for a person who commits an offence as a consequence of their victim status if a reasonable person would have acted in the same way in similar circumstances”. However, it concludes that “doing this would place a burden on victims to prove the connection between their offending behaviour and trafficked status, which would run contrary to the Scottish Government’s victim-centred approach to the issue”. Both the Modern Slavery Act 2015 and the 2015 Northern Ireland legislation contain a statutory defence.

50. While supporting the provisions under section 7 of the Bill, a number of witnesses also called for a statutory defence to be included in the Bill, including Victim Support Scotland, Amnesty International Scotland, and the Scottish Refugee Council (SRC). Mr O’Neill from the SRC explained that “we do not see statutory guidelines, which are about prevention, and a statutory defence, which provides an additional safeguard for individuals when the system—for whatever reason—breaks down, as being mutually exclusive; we see them as being part of a holistic approach”. Mr Page of the EHRC highlighted that “there are still problems with victims of human trafficking being prosecuted for offences that formed part of the exploitation that they experienced” and therefore suggested that “guidelines do not offer the same security as statutory defence”.

51. Mr Wolffe QC explained that “the concern is that, without a statutory defence, the protection for victims in this jurisdiction might be less than that in other parts of the UK”. However, Ms Thomson of the LSA suggested that “my understanding of the statutory defence as it is worded in the other jurisdictions is that it would be quite hard to implement in practice [as] there are quite a lot of exceptions to it, and it puts the burden on the victim of human trafficking to establish X, Y and Z”. She
added that “the principle of non-prosecution takes away that burden and ensures that all competent authorities, working with victims, have an obligation to ensure that victims are identified as such and are not prosecuted or subject to penalties”. Assistant Chief Constable Graham had similar concerns around placing the onus on the victim to demonstrate that they are a victim of human trafficking and argued that “robust instructions from the Lord Advocate to the police would adequately deal with the circumstances”.

52. The Lord Advocate told the Committee: “I think that if you put a statutory defence on the face of the Bill, it would lead to more injustices than if I, as Lord Advocate, were to issue instructions”. He reiterated the view of some witnesses that a statutory defence would place the onus on the accused to raise the defence and that such a defence would, in general terms, need to be lodged before the trial commenced. He argued that “we need a more flexible approach, in which the Lord Advocate issues not guidance but instructions to our prosecutors and the police [as] that will be far more productive and lead to fewer injustices than a rigid statutory defence in the Bill would”. He added that, whereas a statutory defence would require a victim to say at the outset of a trial that they are a victim, prosecutorial guidelines would provide flexibility for prosecutions to be abandoned or for the court to set aside a conviction based on credible evidence or intelligence that is provided at any time.

53. When asked to respond to the evidence received on this issue, the Cabinet Secretary stated that—

"The approach that we have set out allows the Lord Advocate to issue guidance—or instructions, as the Committee discussed with him last week—taking an intelligence-based approach, considering the information that the Crown has received from the police and other parties about a given individual, and making a judgment on that basis about whether someone should be prosecuted. That gives us what I believe to be a much more victim-centred approach and greater flexibility to address any concerns about individuals who have been trafficked committing offences as a result."

54. The Cabinet Secretary confirmed that issuing the Lord Advocate’s instructions and placing a statutory defence in the Bill were not mutually exclusive. He also indicated that he was “open to looking at moving towards instructions, rather than guidance, as the Lord Advocate said last week.”

55. 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 considered the evidence received on this issue carefully.
56. 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.

57. 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.

Duty to secure support and assistance

58. Article 12 of the CoE Convention sets out the support and assistance which must be provided for trafficked victims. Currently there is no statutory basis for potential victims of trafficking to access support and information on the type of support that they are entitled to. The Policy Memorandum states that, “although the Scottish Government, in line with its obligations under the CoE Convention and EU Directive, currently provides grant funding to support agencies to deliver this support and assistance, this funding could be withdrawn at any time”. It therefore concludes that “there is benefit in placing on a statutory basis the entitlement of these services to victims”.

59. Section 8 of the Bill therefore places a duty on the Scottish Ministers to secure the provision of support and assistance for adult victims of human trafficking, on an assessment of needs, during a defined period. It also sets out a discretionary power for the Scottish Ministers to arrange the provision of support and assistance outwith the mandatory period. The Bill lists the kind of support and assistance that may be provided, including: accommodation; day-to-day living; medical advice and treatment; language translation and interpretation; counselling; legal advice; information about other services available to the adult; and repatriation.

60. The Bill does not specify the provision of support and assistance for child victims of human trafficking. This was an issue of concern for a number of witnesses and is explored in detail, along with a number of other issues relating to children, in a dedicated section later in this report.

Strengthening the duty

61. Police Scotland argued that the duty to secure support and assistance for adults could be strengthened by replacing the word “‘may’ also secure the provision of … support and assistance” in section 8(3) with the word ‘must’. Assistant Chief Constable Graham explained to the Committee that, “from a law enforcement perspective, support and assistance are critical to maintaining people’s presence in and assistance to the criminal justice process”. He added that “if that safeguard,
more than anything else, is not in place, it will be a substantial barrier to our getting more people through the court process”.  

69. The mental health consequences of trafficking are complex and include post-traumatic stress disorder (PTSD), depression, anxiety disorders and complex PTSD. Best practice treatment guidelines advise that victims who have complex mental health difficulties linked to cumulative trauma, including trafficking, should receive psychological therapy tailored to specific presenting mental health difficulties. Counselling is not a recommended psychological treatment for the mental health effects of cumulative trauma. Neither is the need for psychological provision adequately captured under ‘medical assessment and treatment’. To ensure there is clarity around entitlement, access and psychological service provision for victims of trafficking, we would propose instead that the term ‘counselling’ be replaced with ‘psychological assessment and treatment’.

62. The Committee heard from a number of witnesses that the term ‘counselling’ should be removed from the list of types of support and assistance that may be provided under section 8 of the Bill. In a joint written submission, Dr Sharon Doherty and Dr Lisa Reynolds, both Consultant Clinical Psychologists, explained that—

63. Katie Cosgrove of NHS Health Scotland agreed that the term ‘counselling’ did not adequately cover the complex needs of victims, and highlighted that “as far as best practice advice is concerned, we would be looking for a much more thorough psychological assessment”. Victim Support Scotland and TARA also supported the approach proposed by Dr Doherty and Dr Reynolds.

64. A number of witnesses raised concerns that the wording used in section 8 was too closely aligned to that used in relation to the National Referral Mechanism (NRM). Dr Paul Rigby cited some of the terminology used in both the NRM and Bill, such as “with ‘reasonable grounds’, ‘conclusive determination’, and ‘relevant periods’ being central to the provision of services”, and argued that “the provision of services to victims of trafficking should not be contingent on the victim status being conferred on a person by a ‘competent authority’”. TARA too had concerns around this issue and sought “clarification on whether access to support will be dependent on entry to the NRM”.

65. The Faculty raised concerns about how section 8 of the Bill would be implemented in practice. Mr Wolffe QC suggested that the wording appears to imply that the Scottish Ministers would have to make an assessment on the support and assistance that an individual requires, and then secure that support and
assistance. He argued that “if that is not what is intended, one will need a different provision that would place the appropriate responsibilities on local authorities and other agencies”.  

66. When asked to respond to the Faculty’s interpretation of section 8, the Cabinet Secretary said he was “happy to take away those comments and consider the issue”.  

67. The Finance Committee highlighted that further detail was needed on the Scottish Government’s plans to monitor the potential costs of the legislation particularly in relation to the support for victims. The Justice Committee explored this issue with the Cabinet Secretary during evidence. He advised that—

As we have reflected in the Financial Memorandum, we expect costs to rise as more victims are identified. Part of that will be as a result of the role of the reflection and recovery period to help adult victims. We will monitor that as it moves forward to see what additional resource might be required in order to meet any increasing demand that occurs as a result. That will enable us to determine whether there is a need for increased resources to support those who are meeting the increased demand.  

Power to specify the period of assistance to adult victims

68. The Delegated Powers and Law Reform (DPLR) Committee reported on the delegated powers in the Bill on 18 February 2015, recommending that it would be more appropriate for the power under Section 8(2)(b)(i) to specify the period of provision of assistance to adult victims to be subject to affirmative rather than negative procedure. The Justice Committee raised this issue with the Cabinet Secretary during evidence. He responded that “we are more than content to take forward what the DPLR Committee has recommended, and we will look to make provisions at stage 2 to achieve that”.  

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

70. 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.
71. 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.

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

73. 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.

Part 3: Confiscation of property

Detention and forfeiture

74. The Policy Memorandum states that existing powers under the Immigration Act 1971 for the detention of vehicles, ships and aircraft used in the commission of certain trafficking offences are little known and not widely used by police or prosecutors. It also highlights calls by the EHRC and others for asset recovery powers to be used widely in human trafficking and slavery operations.

75. Section 9 of the Bill therefore consolidates existing powers in the 1971 Act and applies them to the human trafficking offence. These powers would allow the police to detain vehicles, ships or aircraft owned or possessed by anyone arrested on suspicion of a trafficking offence if there were reasonable grounds to believe that, on conviction of that person, the property could be subject to forfeiture. Section 10 would allow the courts to order forfeiture of a vehicle, ship or aircraft used or intended to be used in connection with the human trafficking offence. The Policy Memorandum states that “this measure is intended to disrupt and deter trafficking activity by preventing further criminality or disposal of assets”.

76. Both Police Scotland and the COPFS support the measures proposed under sections 9 and 10 of the Bill. Mr Wolffe QC raised concerns however that an innocent party could potentially be subject to forfeiture in circumstances where they have chartered a vehicle, ship or aircraft which has been used in the commission of a trafficking offence. He suggested that “one could readily see how an innocent owner could bring an ECHR challenge in a situation in which their property had been taken away from them without good reason”. The Edinburgh Bar Association (EBA) also had concerns about “the potential disproportionate impact” on owners of property who were not involved in the human trafficking as outlined in the Bill as drafted. It suggested that “the aims sought by this Part of the
Bill could be adequately met through less punitive measures of detention and forfeiture. 88

77. However, Assistant Chief Constable Graham challenged this assertion, arguing that “the legislation comprehensively outlines the requirement to justify the circumstances in which something would be confiscated and retained, so I do not see that there is a risk that something would be wrongly taken or retained in circumstances in which somebody was innocent”. He added that “the legislation is designed to prevent that from happening”. 89

78. The Cabinet Secretary said he shared Police Scotland’s view that there are sufficient safeguards in the Bill to avoid innocent parties being affected, including the requirement for the sheriff to hear representations from anyone who claims to have an interest in the vehicle, ship or aircraft and the discretion for sheriffs to be able to determine what is appropriate in individual circumstances. 90

79. 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.

Proceeds of crime

80. Section 11 of the Bill would categorise all trafficking and exploitation offences as lifestyle offences in order to automatically trigger the confiscation procedures in the Proceeds of Crime Act 2002. 91 The Policy Memorandum states that this will help towards creating a hostile environment for traffickers to operate in. 92

81. A number of witnesses, including the COPFS 93 and Victim Support Scotland 94 indicated their support for the proposals under section 11 of the Bill. In their submission, Dr Liz Campbell and Dr Sharon Cowan of the University of Edinburgh suggested that “it may be difficult to rebut the assumption that any property/income gained in the previous six years is derived from general criminal conduct [but] despite this, we do not feel that the assumptions relating to a criminal lifestyle are unduly broad or harsh, given that conviction on the criminal burden of proof is first required, and given the ability of the individual to rebut these assumptions”. 95

82. 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.
Part 4: Trafficking and Exploitation Prevention and Risk Orders

83. Part 4 of the Bill would provide the courts with powers to issue two new types of preventative orders and associated interim orders to assist with preventing trafficking: trafficking and exploitation prevention orders (TEPOs) and trafficking and exploitation risk orders (TEROs).

84. Under Section 13 of the Bill, the Court would be able to impose a TEPO where an individual has been convicted of a trafficking or exploitation offence or an offence with a statutory trafficking aggravator, if it is satisfied there is a risk that the individual may commit a further human trafficking offence and it is necessary to make the order to protect people from the physical or psychological harm which might occur if such an offence were committed. The TEPO would be time limited and would prevent the individual from engaging in activities described in the order, such as employment of staff, travelling overseas, having contact with children etc. and/or impose certain requirements. The court may impose an interim TEPO while it is considering an application for a full TEPO.

85. Section 22 provides that the Chief Constable would be able to apply for a TERO against an adult where a person has not previously been convicted of a trafficking or exploitation offence but the person's behaviour indicates a risk that others may be at harm as a result of that person committing such an offence. The TERO would also be time limited and would restrict certain activities or impose requirements on the individual. The sheriff may also make an interim TERO if he/she considers it just to do so.

86. The Policy Memorandum states that “these measures are intended to help prevent harm by disrupting and deterring trafficking and exploitation activity” and that “availability of these orders would encourage law enforcement authorities to take further preventative action they may not otherwise consider”. It also highlights that, at the time of drafting the Policy Memorandum, “the Scottish Government is currently seeking a legislative consent motion to extend to Scotland serious crime prevention orders (SCPOs) via the Serious Crime Bill which is before the UK Parliament and there may be potential for these orders to overlap”. The Scottish Parliament agreed the legislative consent motion regarding these provisions on 17 February 2015 and the Serious Crime Act 2015 received Royal Assent on 3 March 2015.

87. While witnesses did not comment on these provisions in oral evidence, respondents to the call for written evidence were broadly supportive of the measures. Victim Support Scotland indicated its support for introduction of the Orders “as we support any instrument that will work to prevent further people from falling victim to known traffickers”. The COPFS argued that “the Orders proposed in the Bill will afford an extra measure for ensuring that offenders, or those who are suspected of offending, can be properly monitored from reoffending”. Police Scotland agreed that “the reduction and prevention of human trafficking will be enhanced” by the introduction of the Orders, and
highlighted that the management of registered sex offenders has been enhanced by the use of Sexual Offences Prevention Orders, which allow similar conditions to be imposed.\textsuperscript{101} The Information Commissioner’s Officer also welcomed particular provisions allowing the Orders to be varied, renewed or discharged “as they support people’s rights under the Data Protection Act 1998 for their personal information to be accurate and, where necessary, kept up to date”.\textsuperscript{102}

88. However, a number of respondents had concerns regarding the proportionality of the measures proposed, particularly in relation to the Risk Orders which are sought where a person does not have a relevant conviction. The Law Society said it was “concerned that a person who has not been convicted of a trafficking or exploitation offence can have a Risk Order imposed in terms of section 22 of the Bill” and noted that “there is no provision for any level of suspicion that the Chief Constable must have in making such a Risk Order”.\textsuperscript{103} The EBA had similar concerns and suggested that “for a Risk Order to be imposed, the test ought to be one of ‘significant risk’ that the adult may commit a relevant trafficking and exploitation offence”. It went on to explain that “the content of Risk Orders will clearly engage the individual’s rights under ECHR and it is suggested that a ‘significant risk’ test would more appropriately satisfy the proportionality requirement”.\textsuperscript{104} In a joint submission, Dr Campbell and Dr Cowan raised similar concerns regarding the proportionality of Risk Orders, highlighting ECHR concerns and also arguing that “the likely effectiveness of the proposed TEROs is unclear”.\textsuperscript{105}

89. 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.

90. 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.

Part 5: Strategy and reporting

Trafficking and exploitation strategy

91. An outcome from the Scottish Government’s Summit on human trafficking in October 2012 was that, although there was a need to strengthen legislation in this area, many other actions did not require legislation, for example, promoting awareness and understanding of human trafficking, providing training for frontline workers, and improved data collection and intelligence sharing.\textsuperscript{106}

92. Section 31 of the Bill places a duty on the Scottish Ministers to prepare, publish and regularly review and update a trafficking and exploitation strategy. Listed
under this section are a number of matters which may be set out in the strategy, including:

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

93. The Explanatory Notes indicate that this list is not exhaustive. 107

94. The Bill places a duty to consult with those likely to have an interest in the strategy before preparing or reviewing the strategy. Those listed in the Explanatory Notes as likely to have an interest include, but are not limited to, businesses, support agencies, faith based groups, etc. 108

95. There was widespread support from witnesses for these provisions. Mr O’Neill of the SRC told the Committee “it is commendable that the Scottish Government has set down a legal duty to report to the Parliament on the strategy … because the strategy will be the vehicle for the long-term approach we need if we are going to tackle such a severe crime and human rights violation”. 109 Some other witnesses argued that the strategy should focus on awareness-raising and training for front-line professionals, such as the fire and rescue service, and regulatory officers in environmental health, housing, trading standards and licensing who visit homes and premises to enable them to identify and report possible signs of trafficking and exploitation. Ms Andrew of TARA argued for prevention work to be reflected in the strategy to prevent people from becoming vulnerable to trafficking and ensuring safe returns. 110

96. As regards the training and awareness-raising aspects of the strategy, the Finance Committee, in its report, invited the lead committee to seek further detail on the level of funding to be allocated to these areas. The Justice Committee raised this issue with the Cabinet Secretary during evidence on 31 March. He responded that—

Training is already taking place with Police Scotland and the NHS, so materials and provisions are already in place. I know that part of the training toolkit that was developed by Police Scotland is being used by local authorities for their training purposes. I would anticipate more of that taking place. A part of the strategy will involve consideration of training, provision of information and ways in which we can support more of that work. In the Financial Memorandum, we estimate that there will be additional costs of between £100,000 and £150,000 in that area of activity as the strategy moves forward. We expect there to be a need for further financial resource
to assist as that is rolled out further across the public sector and the third sector. How that will be done will largely be covered within the strategy itself.111

97. 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. 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.

98. 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.

Duty to notify and provide information about victims

99. Section 34 of the Bill would place a duty on public authorities specified by regulations to provide anonymised data about potential human trafficking and exploitation victims to Police Scotland. The Policy Memorandum on the Bill indicates that “although it will not be possible to confirm whether these individuals were or were not victims, the anonymised data will provide wider information about trafficking activity in Scotland not currently collected through the NRM or criminal justice processes”. It argues that “this will assist in providing intelligence to build a more accurate picture of the scale and extent of trafficking and slavery, servitude and forced or compulsory labour in Scotland and of the people, adults and children, most affected”. It adds that “non-public authorities, such as third sector organisations, will be asked to provide similar anonymised information about potential victims through a memorandum of understanding”.112

100. Again, this issue was not raised in oral evidence, however, a number of written submissions commented on particular aspects of the provision. The Law Society highlighted that “while similar provision is contained at Clause 51 of the Modern Slavery Bill, there is no provision at Section 34 [of this Bill] to disapply information to be provided to the Chief Constable if that disclosure contravenes the Data Protection Act 1998” and argued that a similar disapplication should be placed in this Bill.113 The Information Commissioner’s Office suggested that section 34(2), which includes provision that an adult victim might consent to being identifiable, should be removed from the Bill, as it questions whether “victims who are likely to be in a vulnerable state and may have little, if any, understanding of the English language and the Scottish legal system” would be capable of providing fully informed and freely given consent.114
101. 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.

Part 6: Final provisions

Offences by bodies corporate etc.

102. Section 35 provides that where an offence under the Bill was committed by a body corporate or a Scottish partnership or other unincorporated association, or an individual acting on behalf of such a body, that they are liable to be proceeded against and punished accordingly.\textsuperscript{115}

103. The Committee received little evidence on this provision. It was however welcomed by Dr Paul Rigby\textsuperscript{116} and the Joseph Rowntree Foundation, which noted that the provision “brings Scotland in compliance with Article 5 of the EU Trafficking Convention and makes it plain that companies as well as individuals are to be liable for modern slavery offences”.\textsuperscript{117}

104. 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.

Related policy issues

105. In addition to views received on the particular provisions in the Bill, a large body of evidence was provided on related policy issues not covered in the proposed legislation. This section explores each of these issues in turn.

Protection and support for child victims

Overview

106. A general theme arising in evidence was that the Bill should place a greater emphasis on the needs of child victims of trafficking and exploitation. In general terms, Mr Wolffe QC noted that the EU Directive contains a series of provisions in relation to children which are not provided for in this Bill. Although he acknowledged that all of the obligations relating to children may be met through existing legislative and administrative arrangements, he suggested that “the Committee might need to be confident that the Scottish Government has ticked the boxes to ensure that all those provisions will be in force in our system”.\textsuperscript{118}
Scotland’s Commissioner for Young People and Children also argued that “the complete absence of children from this Bill fails to take into account the vulnerabilities of children and young people as in need of specialist care and support when identified as trafficked, exploited or separated”.\textsuperscript{119}

107. 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.

Support and assistance for child trafficking victims

108. As referred to earlier in this report, the Bill will place on a statutory footing Ministers’ duty to secure the provision of relevant and immediate support and recovery services for victims of trafficking known to be 18 years or over. The Scottish Government has stated that this provision applies to adults only because the necessary support for children who may be victims of trafficking is already enshrined in legislation which provides for all vulnerable children. The Policy Memorandum indicates that—

The provisions of the Children (Scotland) Act 1995, the Children’s Hearings (Scotland) Act 2011 and the Children and Young People Act 2014 provide for the needs of vulnerable children in all circumstances to be assessed and addressed. Guidance for public authorities in identifying and meeting the needs of vulnerable children specifically references child trafficking, while recognising that vulnerable children may have additional needs that do not arise solely from their trafficked status. The existing children’s legislation, therefore, provides for services to be provided to potentially trafficked children: this applies to children under the age of 18. It is, therefore a priority to ensure that existing legislation with reference to children … is applied appropriately. However, this is a matter for effective engagement and good practice rather than further legislation.\textsuperscript{120}

109. A number of witnesses argued that the Bill needs to provide more detail on the support and assistance that is available for child victims, with some, including the LSA\textsuperscript{121}, arguing that specific provision for child victims should be included on the face of the Bill, and others, such as NHS Health Scotland\textsuperscript{122}, preferring the approach of cross-referencing with existing legislation on support for children.

110. COSLA argued that “there is no requirement for new legislation, as the necessary support for children who may be victims of trafficking is already enshrined in legislation which provides for all vulnerable children”.\textsuperscript{123}
111. Barnardo’s and the Aberlour Child Care Trust highlighted that the nature of protection provided by local authorities under section 24 of the 1995 Act varies across Scotland and therefore argued that the Bill should provide clarity around the support that should be provided under the 1995 Act.\(^{124}\) Ms Cosgrove of NHS Health Scotland suggested that cross-referencing should be made in the Bill “if there is not the will to include stronger provisions in the Bill itself”\(^{125}\) and WithScotland agreed with this position, arguing “it should be made certain that the existing legislation contains all of the necessary support provisions for trafficked and exploited children”.\(^{126}\)

112. In evidence, the Cabinet Secretary responded to the suggestion that some cross-referencing was required to clarify the support provided to child trafficking victims through existing legislation—

> I think that the matter will be dealt with largely with the strategy, which sets out more clearly what would be expected of local authorities, given the existing legislative provisions for supporting vulnerable children. However, I am more than happy to explore whether there is anything further that may be necessary to address concerns about the bill’s provisions.\(^{127}\)

113. 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.

### Presumption of age clause

114. The EU Directive states that “Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child that person is presumed to be a child in order to receive immediate access to assistance, support and protection”.\(^{128}\)

115. Unlike the Modern Slavery Act 2015 and the relevant Northern Ireland legislation, this Bill does not include a presumption of age clause. A significant number of witnesses told the Committee that they would support the inclusion of such a clause on the face of this Bill.\(^{129}\) Ms McKinnon of the SCPCCF explained that some young people say they are older than they are believed to be to protect themselves\(^{130}\), while Ms Andrew of TARA highlighted difficulties where women who the service believe to be under 18 have to access adult services until a formal age assessment is made.\(^{131}\)
116. Mr O’Neill of the SRC went so far as to say: “I do not know whether omission in the Bill of the presumption of age is tenable, given that it is a clear requirement in the EU human trafficking directive, as well as the Council of Europe Convention”, adding “it is something that I—and, I am sure, many others—would hope and expect would be resolved in the Bill”. Mr Wolfe QC also had views on compliance with the EU Directive, arguing that “as a jurisdiction, we have an obligation to ensure that the presumption [specified in the Directive] is applied”.

117. The Lord Advocate told the Committee that “on balance, it might be helpful to have [a presumption of age clause] in the Bill, because we know that on occasion there is some dubiety about the age of the victim or victims”. He added that “I would not be upset if you were to decide that the measure should not be in the Bill, but in that case I would certainly include it in the instructions”.

118. The Cabinet Secretary however suggested that there could be unintended consequences of a presumption of age clause, highlighting for example where an adult claiming to be a child could in fact pose a risk to children. He advised that “we will consider at Stage 2 whether we can clarify the matter further”.

119. 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.

120. 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.

Guardianship service

121. The Scottish Guardianship Service is a partnership between the Scottish Refugee Council and Aberlour Child Care Trust which provides support to separated children and young people from outside the European Economic Area who are in the asylum process. The Service, which has operated since 2010, allocates a guardian to a young person to assist them to understand, participate in and navigate the complex immigration, legal and welfare processes. The Service estimates that approximately one third of the youngsters it has helped to date have indicators of trafficked exploitation.

122. A number of witnesses highlighted the important work carried out by the Scottish Guardianship Service in supporting particular child victims of trafficking and argued the service should be placed on a statutory footing. Some highlighted
obligations under the EU Directive for the appointment of guardians, including Ms Thomson of the LSA, who argued that “for us to say that the EU Directive has been transposed, we must be clear about who a guardian is and who the guardian for all children is”. She said she was “not sure that the named person provision in the Children and Young People (Scotland) Act 2014 does that.”

123. However, COSLA argued that this issue “should be dealt with in the strategy … because it involves a very particular set of children.” In a supplementary written submission on the Bill, COSLA suggested that “if this was to be made a statutory duty there would need to be clarity on: who this service would apply to and an acknowledgement that this does not cover all child victims of trafficking; and the role of child protection procedures and the role of the guardian, i.e. the specific duties and legal responsibilities local authorities have regarding looked after children and Unaccompanied Asylum Seeking Children”. COSLA indicated that it would oppose any move to change these legal requirements.

124. In evidence, the Cabinet Secretary said “I am conscious that if a child has a named person or, if they are vulnerable, a social worker, to introduce a third person [a guardian] could create conflict and confusion about who has the lead responsibility for dealing with the child’s needs”. He added that “I am open to exploring the provision and how we can improve on it, but I think that we have in place robust measures that are different from the approach in England and Wales.”

125. 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.

**Specific offence of child trafficking**

126. The offence of human trafficking under section 1 of the Bill would apply to children as well as adults. The Policy Memorandum indicates that the Scottish Government considered carefully whether there would be benefits in having a separate child trafficking offence. It states that “Scottish Ministers agree the need for focused awareness raising and training to help better identify potential child victims of trafficking and to ensure relevant support and protection for child victims, both generally and specifically within any criminal justice process”. However, the Scottish Government concluded that “there is no clear basis or benefit in having a separate child trafficking offence” and that “Ministers’ preference is for a single unified offence, in line with established international norms, covering trafficking of all victims for all potential forms of exploitation.”
127. The Law Society, in its written submission, made specific reference to there being no separate child trafficking offence. It noted that while “the necessary support for children who may be victims of trafficking is already enshrined in legislation, it … would be helpful if specific reference could be made to child victims of trafficking, particularly so given that provision is made for child victims of trafficking within both the CoE Convention and EU Directive”. TARA recommended that consideration be given to including a specific offence of trafficking in children.

128. In evidence, the Cabinet Secretary provided further explanation as to why a specific offence of child trafficking was not included in the Bill. He suggested that “if there were two different offences—one for trafficking a child and one for trafficking an adult—there could be difficulty, in that prosecutors would have to prove the individual’s age, whereas having a single offence means that we can prosecute irrespective of whether the person who has been trafficked is a child or an adult”. He added that “this gives us greater opportunity to prosecute and secure convictions”.

129. A number of witnesses raised specific concerns regarding the references to ‘young’ and ‘youth’ in section 3(8) of the Bill (on securing services and benefits) and argued that ‘child’ should instead be used and defined as any person under the age of 18. TARA indicated that the Modern Slavery Bill as introduced included the term ‘young’, but this was subsequently replaced by ‘child’ and accurately defined. The Faculty also highlighted that—

> There is no definition of ‘young’ or ‘youth’ for the purposes of section 3(8), and we question whether this provides sufficient clarity. The Directive treats all persons under 18 as children, and use of a similar provision might assist. It may be that the intention is to allow persons over the age of 18 to be treated as young as a factor in assessing their vulnerability to exploitation. If so, that should be stated expressly.

130. 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.

131. 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.
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.

Criminalisation of the purchase of sex

133. The Northern Ireland Act contains provisions criminalising paying for sexual services of a person. A number of witnesses and respondents to the Committee’s call for written evidence argued that this Bill should be amended to include similar provisions. A number cited arrangements in Sweden and Norway where, they suggested, the demand for paid-for-sex and human trafficking had reduced as a result of similar legislation. Ms Andrew of TARA told the Committee that TARA would support this measure as “our experience over 10 years has clearly evidenced the strong links between the sex industry and trafficking of the women to meet the demand”. Ms Cairns of Soroptomist International warned that “Northern Ireland has criminalised the purchase of sex and one of our fears is that those who want to be involved in that will move across to Scotland unless we have strong robust laws to protect our people”.

134. While Ms Martin of the STUC suggested that “there is no real reason not to include such a provision, given that the approach has been shown to reduce trafficking in other countries”, adding that “it would clearly fit in the Bill”, other witnesses were less convinced that the Bill was the correct vehicle for this measure. For example, Dr Rigby highlighted that “there are many arguments about whether all types of prostitution are exploitation” and said he was “not sure whether the Bill is the right forum for that discussion, but the exploitation of women or men through exploitation is something that needs to be looked at more broadly.” Ms Rearden of Amnesty International Scotland shared this view, stating “we do not believe that we would do a service to either victims of human trafficking or victims of sexual exploitation and prostitution if we conflated the issues in one piece of legislation”. She added that “Amnesty International Scotland strongly advocates, as we did in the context of the Northern Ireland Bill, that, if the criminalisation of the purchase of sexual services is to be taken forward, the Justice Committee takes on research to find out what the Scotland-specific context is for the issue”.

135. In evidence, the Cabinet Secretary told the Committee that he intends to meet with stakeholders on both sides of the debate before coming to a final decision on the matter before Stage 2. He also acknowledged that there are “others who are not keen on having such a provision in the Bill because, irrespective of whether they agree with the proposal, they just do not believe that the Bill is the right place for the matter to be dealt with”.
136. 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.

137. 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.

Anti-Slavery Commissioner

138. The Modern Slavery Act 2015 created a UK-wide Anti-Slavery Commissioner to encourage good practice in the prevention, detection, investigation and prosecution of slavery and human trafficking offences and the identification of victims of those offences. The Commissioner is required to consult Scottish Ministers in the preparation of a strategic plan and to publish and lay before the Scottish Parliament an annual report. The Act also allows the Scottish Ministers to commission Scotland-specific reports. As referred to earlier in this report, provisions in the Modern Slavery Bill relating to the Commissioner were the subject of a legislative consent memorandum considered by the Justice Committee in December 2014. The relevant legislative consent motion was agreed by the Scottish Parliament on 15 January 2015.

139. The Policy Memorandum explains that, “as human trafficking is a cross-border crime the Scottish Ministers believe that sharing of good practice and expertise will best be achieved by having a UK-wide Commissioner”. It highlights that Northern Ireland has adopted a similar position.\textsuperscript{159}

140. However, Ms Martin of the STUC argued that “it would be useful if the Bill were to establish an independent trafficking commissioner for Scotland [as] we are hugely worried about the [UK] Commissioner's independence, and we think that there is far too much focus on law enforcement”.\textsuperscript{160}

141. Other witnesses raised concerns that this Bill does not include provisions setting out the role of the UK Commissioner in Scotland. For example, Mr O’Neill of the SRC said that “there is a serious question about whether the provisions in the English and Welsh legislation are adequate to safeguard Scottish interests, given that the vast majority of the competencies and powers that relate to the wellbeing of survivors and tackling the crime are devolved.”\textsuperscript{161} Ms Rearden of Amnesty International Scotland told the Committee that “we believe that the Bill should explicitly state the legal duties and obligations of the Commissioner’s role as it pertains to Scotland [as] one of the problems comes from a misunderstanding or ignorance of different aspects of devolved Administrations and institutions”.\textsuperscript{162}
142. Ms Cook of COSLA highlighted benefits from having a Commissioner operating across the UK in terms of sharing information and best practice and potential cost benefits, but, like others, stated that “it is crucial that there is a Scottish perspective within that Commissioner’s remit and a clear Scottish perspective that reflects our concerns and issues”.¹⁶³

143. The Cabinet Secretary explained that “we continue to have a UK-based approach with the National Referral Mechanism [and so] we have gone for a UK-based Commissioner [who] will have particular functions in Scotland”. He advised that he had already met with the UK Commissioner to discuss taking forward engagement with third sector and public sector organisations in Scotland and how to ensure that “there is a balanced approach in the way in which he and his staff operate”.¹⁶⁴

144. 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.

National Referral Mechanism

145. The National Referral Mechanism is the process by which people who have been trafficked are identified, assessed and supported by the UK Government. The process was set up in 2009, following the signing of the CoE Convention. As at 30 September 2014, approximately 6,800 people had been referred into the NRM since its establishment. The NRM process comprises three decision points:

- **referral** – a decision to refer a person into the NRM - this decision is made by a first responder;¹⁶⁵
- **reasonable grounds** – a decision by a “Competent Authority”, of which there are currently three: the UK Human Trafficking Centre; UK Visas and Immigration; and, in a very small number of cases, Immigration Enforcement. The Competent Authority decides if there are reasonable grounds to believe that the person referred may be a victim of trafficking, using the “suspect but cannot prove” test; and
- **conclusive grounds** – a balance of probabilities decision that there is sufficient information to decide that a person is a victim of human trafficking. This decision is taken by the relevant competent authority.¹⁶⁶

146. In November 2014, the Home Office published a report of its review of the NRM for victims of human trafficking,¹⁶⁷ which identified many areas of good practice, but criticised decision-making, the quality and communication of decisions and the ability to manage and share information effectively in the best interests of victims.
It further found concerns over the conflation of human trafficking decisions with asylum decisions; elongated timeframes for decisions; a lack of shared responsibility; and provision of relevant information for decisions. The review recommended that a process of conclusive identification of trafficking victims through regional multi-disciplinary panels should be tested with a view to ceasing the sole decision-making roles of UK Visas and Immigration and UK Human Trafficking Centre and Immigration Enforcement. The UK Government accepted all of the review’s recommendations in principle and is currently developing pilots to test the proposals.

147. The Scottish Government, in the Policy Memorandum on this Bill, indicates that “the Scottish Ministers will consider the outcome of the review and any implications and opportunities for the better identification and support of victims in Scotland as the Bill progresses”. 168

148. A number of witnesses from the services working with human trafficking victims were critical of the NRM as it currently operates. For example, Ms Andrew of TARA argued that “the NRM should be about identification and protection, but the system has become one that is about testing credibility, about data collection, and about a lot of other things”. 169 Ms Merrin from VSS agreed that “there is too much emphasis on credibility and suggested that “if someone said to Victim Support Scotland that they were a victim of rape, theft or whatever, we would never say to them, ‘You have to prove it before we provide you with the service’”. 170 Ms Gamble of Barnardo’s Scotland 171 and Dr Rigby shared the view that decisions in relation to children would perhaps be better made by child protection teams rather than through the NRM. 172

149. Some witnesses argued that there would be benefits in developing a Scotland-based identification process to replace the NRM, for example, Mr O’Neill from the SRC who suggested that “the Bill gives us a real opportunity to think about how to design a better system”. He added that “of course, one wants the system to be consistent with that in the rest of the UK, because of the international crime dimension, but nonetheless one should never compromise on it”. 173 Ms Rearden of Amnesty International Scotland indicated that “simply for reasons of geographical closeness to support services, we believe that having a multi-agency and multidisciplinary model for the identification and support of victims of trafficking—both adults and children—would and could be delivered very well in Scotland”. 174

150. Mr Page of the EHRC suggested that—

The Home Office was right to recognise that the law and the policy around children are too distinctive in Scotland to allow it to make broad recommendations. It would make sense, through pilots or further consideration, to consider the distinctive policy and legal environment that we work in here in Scotland in the round. That would help to provide a more definitive answer on whether we need a separate Scottish NRM or
just an NRM that is better able to place the victim at the centre of its deliberations but which is also alive to the complex differences in law and policy across the UK jurisdictions.\textsuperscript{175}

151. In evidence, the Cabinet Secretary told the Committee that “I am personally persuaded that a Scottish panel would be a helpful approach, but I am also open to the idea of a specific NRM in Scotland”. He added that, “at the very least, once the pilots have been completed, I would like to try the panel approach to see whether that helps to improve things sufficiently in Scotland.”\textsuperscript{176}

152. 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.

Policy and Financial Memorandums

153. The lead committee is required under Rule 9.6.3 of Standing Orders to report on the Policy Memorandum which accompanies the Bill. The Committee considers that the level of detail provided in the Policy Memorandum on the policy intention behind the provisions in the Bill and why alternative approaches were not favoured was extremely useful in assisting the Committee in its scrutiny of the Bill.

154. The same rule requires the lead committee to report on the Financial Memorandum (FM). The Committee notes the issues raised by the Finance Committee in its report on the FM and has sought to reflect these throughout the report.

General principles

155. Under Rule 9.6.1 of Standing Orders, the lead committee is required to report to the Parliament on the general principles of the Bill.

156. 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.
1 Policy Memorandum, paragraph 9.
2 Themes arising from the Committee’s visits. Available at: http://www.scottish.parliament.uk/S4_J usticeCommittee/Meeting%20Papers/Papers20150303.pdf (page 3 to 5 of paper 1)
3 The Scottish Guardianship Service is run by the Scottish Refugee Council and Aberlour Child Care Trust.
5 SPICe briefing 15/12.
6 The National Referral Mechanism (NRM) is a framework for identifying victims of human trafficking and ensuring they receive the appropriate protection and support. It was introduced in 2009 to meet the UK’s obligations under the CoE Convention. The NRM is also the mechanism through which the UK Human Trafficking Centre (UKHTC) collects data about victims.
7 SPICe briefing 15/12.
8 SPICe briefing 15/12.
9 Human Trafficking and Exploitation (Scotland) Bill. Policy Memorandum (SP-Bill 57-PM), Session 4, paragraph 24.
10 The UK opted in to the EU Directive on 18 October 2011.
11 SPICe briefing 15/12.
12 These offences apply to UK nationals, persons habitually resident in Scotland and UK corporate bodies.
13 Policy Memorandum, paragraph 15.
14 Policy Memorandum, paragraph 5.
15 Policy Memorandum, paragraphs 6-7.
16 Jenny Marra MSP Members’ Bill proposal.
17 Policy Memorandum, paragraph 16.
18 Policy Memorandum, paragraph 27.
19 Policy Memorandum, paragraph 33.
20 Law Society of Scotland. Written submission, page 2.
22 Faculty of Advocates. Written submission, paragraph 2.
23 Edinburgh Bar Association. Written submission, paragraph 2.
24 Care for Scotland. Written submission, paragraph 1.1.
35 Police Scotland. Written submission, page 2.
40 Police Scotland. Written submission, paragraph 7.
43 Policy Memorandum, paragraph 44.
44 Policy Memorandum, paragraph 42.
45 Policy Memorandum, paragraph 45.
46 The Criminal Justice (Scotland) Bill has passed Stage 1. Stage 2 proceedings on the Bill will take place after Lord Bonomy has reported on the findings of his review into post-corroboration safeguards.
48 Scottish Women’s Convention. Written submission, paragraph 5.
Barnardo's Scotland. Written submission, paragraph 34.

Scotland’s Commissioner for Children and Young People. Written submission, paragraph 34.

Policy Memorandum, paragraph 55.

Lord Advocate’s draft Instructions for prosecutors when considering prosecution of victims of human trafficking and exploitation offences.

Policy Memorandum, paragraph 56.


Policy Memorandum, paragraph 58.

Human Trafficking and Exploitation (Scotland) Bill, Explanatory Notes (SP-Bill 57-EN), Session 4, paragraph 45. Available at:


Dr Sharon Doherty and Dr Lisa Reynolds, NHS Greater Glasgow and Clyde Psychological Trauma Service. Written submission, paragraph 5.


Dr Paul Rigby. Written submission, paragraph 10.

Trafficking Awareness Raising Alliance. Written submission, paragraph 24.


Policy Memorandum, paragraph 66.

Policy Memorandum, paragraph 64.

Policy Memorandum, paragraph 66.


Edinburgh Bar Association. Written submission, paragraph 11.

A number of human trafficking offences are already included as criminal lifestyle offences in the 2002 Act.

Policy Memorandum, paragraph 59.


Dr Liz Campbell and Dr Sharon Cowan, School of Law, University of Edinburgh. Written submission, page 2.

Policy Memorandum, paragraph 78.

Policy Memorandum, paragraphs 80-81.

Policy Memorandum, paragraph 76.


Police Scotland. Written submission, pages 4-5.
Information Commissioner’s Office. Written submission, paragraph 8.
Edinburgh Bar Association. Written submission, paragraph 12.
Dr Liz Campbell and Dr Sharon Lawson of the University of Edinburgh School of Law. Written submission, page 3.
SPICe briefing 15/12.
Explanatory Notes, paragraph 132.
Explanatory Notes, paragraph 134.

Policy Memorandum, paragraphs 93-94.
Law Society of Scotland. Written submission, pages 6-7.
Information Commissioner’s Office. Written submission, paragraph 9.
Explanatory Notes, paragraph 140.

Dr Paul Rigby. Written submission, paragraph 11.
Joseph Rowntree Foundation. Written submission, paragraph 11.

Scotland’s Commissioner for Children and Young People. Written submission, paragraph 12.
Policy Memorandum, paragraph 59.

Convention of Scottish Local Authorities. Written submission, paragraph 6.
Written submissions from Barnardo’s (paragraph 19) and Aberlour Child Care Trust (page 4).

WithScotland. Written submission, page 3.

EU Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

Scotland’s Commissioner for Children and Young People, Trafficking Awareness Raising Alliance, Victim Support Scotland, Police Scotland, Faculty of Advocates, Scottish Child Protection Committees Chairs Forum.

Scottish Guardianship Service. Written submission, paragraph 8.

Barnardo’s Scotland, Trafficking Awareness Raising Alliance, CARE for Scotland, Scottish Guardianship Service.

The Getting it right for every child (GIRFEC) approach includes making a Named Person available for every child, from birth until their 18th birthday (or beyond, if they are still in school).


Convention of Scottish Local Authorities. Supplementary written submission, pages 3-4.


Policy Memorandum, paragraph 35.

Law Society of Scotland. Written submission, page 3.

Trafficking Awareness Raising Alliance. Written submission, paragraph 11.


Written submissions from Police Scotland, Trafficking Awareness Raising Alliance, Faculty of Advocates.

Trafficking Awareness Raising Alliance. Written submission, paragraph 16.

Faculty of Advocates. Written submission, paragraph 5.

Policy Memorandum, paragraph 9.


159 Policy Memorandum, paragraph 98.
165 The First Responder may be a police or immigration officer; social worker; other government official; or someone working for a support organisation or other Non-Governmental Organisation.
166 The Competent Authority is the UK Human Trafficking Centre for UK and EEA nationals and by UK Visas and Immigration for non-EEA nationals and Immigration Enforcement for criminal cases.
168 Policy Memorandum, paragraph 105.
Annexe A

Extracts from the minutes of the Justice Committee and associated written evidence

2nd Meeting, 2015 (Session 4) Tuesday 13 January 2015

Human Trafficking and Exploitation (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed (a) the timetable for scrutiny of the Bill; (b) to issue a call for written evidence; and (c) to further consider at a future meeting a list of suggested witnesses.

3rd Meeting, 2015 (Session 4) Tuesday 20 January 2015

Human Trafficking and Exploitation (Scotland) Bill (in private): The Committee further considered its approach to the scrutiny of the Bill at Stage 1 and agreed (a) panels of witnesses for its forthcoming evidence sessions; and (b) to undertake fact-finding visits in February.

4th Meeting, 2015 (Session 4) Tuesday 27 January 2015

Work programme (in private): The Committee considered its work programme and agreed [ . . . ] (b) to undertake fact-finding visits in relation to its Stage 1 scrutiny of the Human Trafficking and Exploitation (Scotland) Bill.

7th Meeting, 2015 (Session 4) Tuesday 3 March 2015

Human Trafficking and Exploitation (Scotland) Bill: The Committee took evidence, in round-table format, on the Bill at Stage 1 from—
Gordon Macdonald, Abolition Scotland;
Lisa Gamble, Research and Policy Officer, Barnardo's Scotland;
Christopher Gaul, Head of Service, Victims of Slavery Support Services, Migrant Help;
Chloe Swift, Policy Officer, Office of Scotland's Commissioner for Children and Young People;
Catriona MacSween, Service Manager, Scottish Guardianship Service;
Graham O'Neill, Policy Officer, Scottish Refugee Council;
Dr Pamela Cairns, Regional President, Soroptimist International - Scotland North Region;
Bronagh Andrew, Service Manager, Community Safety Glasgow Trafficking Awareness Raising Alliance;
Nicola Merrin, Policy Officer, Victim Support Scotland.

Roderick Campbell declared an interest as a member of the Faculty of Advocates.

Written Evidence

Abolition Scotland
Barnardo’s Scotland
Migrant Help
Scotland's Commissioner for Children and Young People
Scottish Guardianship Service
Scottish Refugee Council
Soroptimist International Scotland North Region
Community Safety Glasgow (TARA Service)
Victim Support Scotland

8th Meeting, 2015 (Session 4) Tuesday 10 March 2015

Human Trafficking and Exploitation (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Dr Maria O'Neill, Senior Lecturer, Dundee Business School - Law Division, Abertay University;
Dr Paul Rigby, Lecturer Social Work, University of Stirling;
Lorraine Cook, Migration, Population and Diversity Team, Convention of Scottish Local Authorities;
Katie Cosgrove, Gender based violence programme, NHS Health Scotland.

Written Evidence

Dr Paul Rigby, Dr Margaret Malloch, Dr Bill Munro and Dr Niall Hamilton-Smith
Convention of Scottish Local Authorities
NHS Health Scotland
9th Meeting, 2015 (Session 4) Tuesday 17 March 2015

Human Trafficking and Exploitation (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Paul Broadbent, Chief Executive, Gangmasters Licensing Authority;
Helen Martin, Assistant Secretary, Scottish Trades Union Congress;
Ian Cruxton, Director of National Crime Agency Organised Crime Command, UK Human Trafficking Centre.

Work programme (in private): The Committee considered its work programme and agreed: [ . . . ] (b) to invite Immigration Enforcement to provide written evidence on the Human Trafficking and Exploitation (Scotland) Bill.

Written Evidence

Scottish Trades Union Congress

10th Meeting, 2015 (Session 4) Tuesday 24 March 2015

Human Trafficking and Exploitation (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Siobhan Rearden, Programme Director, Amnesty International Scotland;
Euan Page, Parliamentary Affairs Manager, Equality and Human Rights Commission;
Kirsty Thomson, Legal Services Agency;
James Wolfe QC, Dean, Faculty of Advocates;
James Mulgrew, Member, Criminal Law Committee, Law Society of Scotland;
Assistant Chief Constable Malcolm Graham, Police Scotland;
Moira McKinnon, Chair, Scottish Child Protection Committee Chairs Forum;

Roderick Campbell declared interests as a member of Amnesty International and of the Faculty of Advocates. John Finnie declared an interest as a member of Amnesty International.

Written Evidence

Equality and Human Rights Commission
Legal Services Agency
Faculty of Advocates
Law Society of Scotland
11th Meeting, 2015 (Session 4) Tuesday 31 March 2015

Human Trafficking and Exploitation (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—Michael Matheson, Cabinet Secretary for Justice, Ann Oxley, Criminal Law and Licensing Division, and Kevin Gibson, Directorate for Legal Services, Scottish Government.

Roderick Campbell declared an interest as a member of the Faculty of Advocates.

12th Meeting, 2015 (Session 4) Tuesday 21 April 2015

Human Trafficking and Exploitation (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed its report to the Parliament.
Annexe B

List of other written evidence

- Aberlour
- Academics
- Anti-Trafficking Monitoring Group
- Association of Licensed Adult Entertainment Venues
- Brush, Susan
- Campbell, Dr Liz and Cowan, Dr Sharon, School of Law, University of Edinburgh
- CARE for Scotland
- Children in Scotland
- Dundee Violence Against Women Partnership
- Eaves Research and Development
- ECPAT UK
- Edinburgh Bar Association
- End Demand Alliance
- Engender
- Equality Now
- European Women’s Lobby
- Exodus Cry
- Information Commissioner’s Office
- Joseph Rowntree Foundation
- Kalayaan
- Kyambi, Dr Sarah, Boswell, Professor Christina and Bancroft, Dr Angus, School of Social and Political Science, University of Edinburgh
- Malloch, Steve
- Mission and Ministry Board of the General Synod of the Scottish Episcopal Church
- National Alliance of Women’s Organisations
- NHS Greater Glasgow and Clyde Psychological Trauma Services
- NSPCC Scotland
- Salvation Army
- Scottish Churches Anti-Human Trafficking Group
- Scottish Council on Human Bioethics
- Scottish Police Federation
- Scottish Women’s Convention
- Scottish Youth Parliament
- Space International
- UK Feminista
- White Ribbon Campaign
- WithScotland
Women's Support Project
Women's Aid South Lanarkshire
Zero Tolerance