



# FACULTY OF ADVOCATES

**RESPONSE**

by

**FACULTY OF ADVOCATES**

to

**THE JUSTICE COMMITTEE OF THE SCOTTISH PARLIAMENT**

on

**HUMAN TRAFFICKING AND EXPLOITATION (SCOTLAND) BILL 2015**

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1. The Faculty welcomes legislation the aims of which are to provide coherence in relation to the criminal law against human trafficking, and to place on a statutory basis the recognition of certain of the United Kingdom's international obligations.

## Part 1 – Offences

2. We welcome in principle the introduction of a single offence, in the interests of clarity.
3. We note that section 1(2) provides that it is irrelevant whether the person consents to any part of the arrangement or facilitation of travel. Article 2.4 of Directive 2011/36/EU and Article 4(b) of the Trafficking Convention both provide that the consent of the victim to the intended or actual exploitation is irrelevant where this is achieved by oppressive means. In our view, it should be made clear at some point in the provisions relating to the offence of human trafficking that the consent to exploitation or intended exploitation is irrelevant also.
4. Article 2.5 of Directive 2011/36/EU and Article 4 of the Trafficking Convention make it clear that where a child is concerned, it is not necessary that threat, force, abduction, deception etc have occurred in order for that child to have been trafficked for exploitation. Children are in a particularly vulnerable position, and this is recognised in the relevant international instruments. Section 3 should clarify that

no requirement of force, threat or deception is necessary in order to show that a child has been subjected to exploitation. We have in mind particularly subsection (7). It is important that the provision of help and assistance by children to family members does not fall foul of the criminal law simply because the children may have travelled in order to provide that assistance, and that this means that formulating a suitable provision may not be straightforward. We do not consider, however, that subsection (8) goes far enough in relation to the protection of children, having regard to the terms of the Directive and the Convention.

5. 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.
6. We appreciate that the words “services” and “benefits” will have been chosen in order to comprehend a wide variety of activities. There might be some advantage in providing non exhaustive examples such as provision of services/benefits by way of begging or forced criminality.
7. We were concerned as to a lack of clarity in section 6(6)(c), which provides that an international organisation means, inter alia, an organisation whose members are other international organisations. This seems potentially circular and confusing. A similar difficulty arises in relation to section 6(6)(d). The definition in section 6(6) applies for the purpose of subsection (5)(c). Is it intended, or not, to apply to “international organisations” in subsection 6(6)(c)?
8. We have no particular comment in relation to the sentencing power, other than to note that it provides the widest possible discretion to the sentencing court.
9. We have no particular comment in relation to the creation of aggravations. The approach is broadly consistent with that in legislation creating other aggravations of criminal offences.

## Part II – Protection of Victims

10. We note paragraph 56 of the Policy Memorandum relates that the introduction of a statutory defence has been rejected because it would place a burden on victims to prove the connection between their offending behaviour and their trafficked status, running contrary to a victim-centred approach. We take no issue with the desirability of having guidelines designed to avoid inappropriate prosecution of victims of trafficking. We consider, however, that the availability of a statutory defence would provide a significant additional protection to victims of trafficking,

and that it would be desirable to protect victims by this means as well as by means of the Lord Advocate's guidelines. We see no reason why the Lord Advocate's Guidelines and a Special Defence should be regarded as mutually exclusive alternatives, as implied in the Policy Memorandum at paragraph 56, and recommend that both approaches be included in the legislation.

11. If an individual is not recognised by the Crown as being, or appearing to be, a victim of trafficking, or the Crown does not accept that there is a link between the offending behaviour and status as a victim, the individual may have difficulty in challenging effectively a decision to prosecute. If prosecuted, it may be very difficult to establish, for example, a common law defence of necessity. This leaves a gap in the protection of the victim. In formulating a statutory defence, particular attention should be made to the position of child victims, for the reasons set out below.
12. In England and Wales the appellate courts have been prepared to quash convictions of victims of trafficking on the grounds that the prosecution ought never to have proceeded at all: *R v L* [2013] EWCA Crim 991. The basis of the decision was that the prosecutions were an abuse of process. The case is a stark example of circumstances in which the existence of a discretion whether to prosecute was not enough, on its own, to comply with the requirements of Article 8. The court required to intervene in order to secure compliance. It is possible that a victim, in Scottish proceedings, might successfully challenge a prosecution on grounds such as oppression, and be acquitted as a result, although the concept of abuse of process in English criminal law does not translate directly into substantive Scottish criminal law. It would therefore be markedly preferable that the statute recognise explicitly, by means of providing a statutory defence, that the court has power to acquit a person who has committed an offence because he or she is a victim of trafficking.
13. Section 7(2) makes reference to a person having done an act because compelled to do so. The use of "compelled" is taken directly from Article 26 of the Trafficking Convention and from Article 8 of Directive 2011/36/EU. The reference to "directly attributable" appears to have been taken from the language of Article 8, which refers to a person being "compelled to commit [criminal activities] as a direct consequence of being subjected to any of the acts referred to in Article 2".
14. As mentioned above, Article 4 of the Trafficking Convention and Article 2.5 of the Directive make it clear that, where a child is concerned, it is not necessary that threat, force, abduction, deception etc have occurred in order for a child to have been trafficked for exploitation. Provision in relation to the prosecution of children should make clear that it is not necessary that a child have been compelled by any of those means in order to access protection against prosecution.

15. It is not clear what criteria will be applied in deciding (in relation to the guidelines for which provision is made) whether a person is, or appears to be, the victim of an offence of human trafficking. We wonder whether or not the decision will be linked to “reasonable grounds” and “conclusive grounds” decisions made by a competent authority (referred to in section 8), and if so whether there will be room for decisions favourable to accused persons notwithstanding a negative decision from the competent authority. The National Referral Mechanism is not infallible and the guidance under which it operates has itself on occasion been subject to judicial criticism on the grounds that it did not properly reflect the United Kingdom’s international obligations. It is also open to the perception of conflict of interest
16. We welcome the introduction in section 8 of a statutory basis for the provision of support and assistance in accordance with the UK’s international obligations. We note, however, that the Bill does not include provision for a Survivors’ Service (in place of the NRM) and Survivors’ Standard Code as mooted in the consultation document which preceded the Bill. As mentioned above, the NRM is not immune from criticism, although we are aware that the Scottish Ministers are awaiting the outcome of a review of the NRM and its functioning. Legislative provision as to minimum standards for support and assistance, whether by way of primary legislation, by regulations, or even by statutory Code of Practice to be published under the legislation with a requirement that it be followed by relevant agencies, along the lines of the standards described in the consultation document would provide a degree of clarity and certainty as to what victims are entitled to expect.

### Part 3 – Confiscation of Property

17. The United Kingdom is obliged to take the necessary measures to ensure that their competent authorities are entitled to seize and confiscate instrumentalities and proceeds from trafficking offences. Interim detention of vehicles, ships and aircraft under section 9 may have serious financial consequences for the owners of the property in question, where the owner may not be the person arrested for the relevant offence. Section 9(5) and (6) make provision for applications to the sheriff for the release of a vehicle, ship or aircraft, and for release of the property where satisfactory security is tendered and on condition that it is made available where the person arrested for the offence is convicted and an order for forfeiture is made under section 10. This may not adequately protect the financial interests of an innocent owner of property which is in the possession of another person on hire purchase or charter.
18. There will be no real prospect of forfeiture if the accused person is not the owner, the Crown is not in a position to prove that the owner knew or ought to have known of the purpose for which it was to be used, and/or the craft in question is larger than those specified in section 10(4)(b) or (c). There is, however, no ground specified in

the Bill, other than the provision of security, on which an innocent owner can regain possession of property that has been detained in the interim. It seems to us that the sheriff ought to be provided with broader powers to achieve justice in a case where there has been detention but it is unlikely that forfeiture will eventuate.

19. So far as forfeiture is concerned, it seems to be the legislative intention that even an innocent owner might be permanently deprived of his property where the tonnage of a ship is below a certain level and the maximum weight on take-off of an aircraft less than 5,700kg. The court has a discretion as to whether to order forfeiture, but it is not clear why any innocent owner ought to be deprived of property of any value because a hirer or charterer has used it for improper purposes. This perhaps highlights further the need for broader powers for the sheriff to achieve a just result on an application for release of property.

#### Other matters

20. We invite the Justice Committee to consider whether additional investigatory powers might be included in the Bill in order to further the effective detection and investigation of human trafficking. In particular we have in mind questions as to whether additional forms of statutory search warrant might assist, and whether any additional powers are required in order to facilitate searches of vessels or other vehicles.
21. We make no particular comment in relation to the provision for prevention orders and risk orders; those relating to a trafficking and exploitation strategy; or the duty in relation to anonymised data.