

# Human Trafficking (Scotland) Bill

A proposal for a Bill to:

- (a) Require the creation of a Scottish anti-human trafficking strategy
- (b) Provide for the special treatment of human trafficking-related crime within the criminal justice system
- (c) Provide for the support of survivors of human trafficking

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## Foreword



If you were to stop anyone in a Scottish street today and tell them that people are sold into Scotland, held and some forced to commit crimes against their will, they would most likely not believe you. Human trafficking is met with disbelief because it is such a heinous crime and it is difficult to accept that modern day slavery happens in our communities.

Every four days a victim of human trafficking is identified in our communities and rescued from one of the most searing human rights abuses to exist in Scotland today.

Trafficking thrives on deception and coercion, and is sustained by the fear and the reality of physical harm on the victim and on their families. The trauma caused by sexual abuse, forced labour, and servitude that stem from trafficking is immeasurable to victims.

Our obligation to do all we can to prevent trafficked exploitation is clear. Since 2008 when Amnesty International published its pioneering report into human trafficking in Scotland, a series of expert reports and inquiries have assessed our anti-trafficking response, and recommended ways to stop traffickers and protect their victims. With a new EU directive and a growing body of European case law, we have a clearer picture than ever before of how to make Scotland a no-go destination for traffickers.

I am keen to get as wide a variety of views and evidence as possible on the practical implications of this proposal. I hope you will respond to this consultation, and I would of course be happy to meet with organisations or individuals with a particular interest in human trafficking to discuss these measures. With your views and expertise, together we can drive forward this legislation to improve care for victims of human trafficking in our communities and prevent modern day slavery in Scotland.

**Jenny Marra MSP**

September 2013

I would like to thank Graham O'Neill, and Ross McKenzie from my office for their help in drafting this consultation.

## How the Consultation Process Works

This consultation is being launched in connection with a draft proposal which I have lodged as the first stage in the process of introducing a Member's Bill in the Scottish Parliament. The process is governed by Chapter 9, Rule 9.14, of the Parliament's Standing Orders which can be found on the Parliament's website at:

<http://www.scottish.parliament.uk/parliamentarybusiness/17797.asp>  
[X](#)

A minimum 12 week consultation period is required, following which responses will be analysed. Thereafter, I would expect to lodge a final proposal in the Parliament along with a summary of the consultation responses. If that final proposal secures the support of at least 18 other MSPs from two or more political parties, and the Scottish Government does not indicate that it intends to legislate in the area in question, I will then have the right to introduce a Member's Bill. A Member's Bill follows a 3-stage scrutiny process, during which it may be amended or rejected outright. If it is passed at the end of the process, it becomes an Act.

At this stage, therefore, there is no Bill, only a draft proposal for the legislation.

The purpose of this consultation is to provide a range of views on the subject matter of the proposed Bill, highlighting potential problems, identifying equalities issues, suggesting improvements, considering financial implications and, in general, assisting in ensuring that the resulting legislation is fit for purpose.

Details on how to respond to this consultation are provided at the end of the document.

Additional copies of this paper can be requested by contacting me at MG.14, The Scottish Parliament, Edinburgh EH99 1SP, or by telephone - 01313486427, or at [jenny.marra.msp@scottish.parliament.uk](mailto:jenny.marra.msp@scottish.parliament.uk).

Enquiries about obtaining the consultation document in any language other than English or in alternative formats should also be sent to me.

An on-line copy is available on the Scottish Parliament's website under Parliamentary Business/Bills/Proposals for Members' Bills/Session 4 Proposals

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/12419.aspx>

## Section 1: Background

### What is Human Trafficking?

“It ought to concern every person, because it’s a debasement of our common humanity. It ought to concern every community, because it tears at the social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organised crime. I’m talking about the injustice, the outrage, of human trafficking, which must be called by its true name—modern slavery”

- *President Barack Obama* (1)

1. Human trafficking is modern day slavery. It is a crime and a violation of human rights. Trafficking is perpetrated by organised, familial and opportunistic criminals. It is grounded in inequality and the abuse of power. Through deception, coercion or violence it forces individuals into a life of abuse and exploitation.
2. The United Nations defines human trafficking in the ‘Palermo Protocol’:
  - (a) “Trafficking in persons” 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;
  - (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
  - (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;
  - (d) “Child” shall mean any person under eighteen years of age. (2)
3. Anti-Slavery International, the worlds oldest anti-slavery charity, estimates that 21 million people are trapped in modern slavery worldwide (3). Three quarters of trafficking victims are women and girls, with sexual servitude and forced labour being the most common forms of trafficked exploitation (4).

1. Extract from Speech by President of the United States, Barack Obama, (2012) “Remarks by the President to the Clinton Global Initiative”
2. pp42-43, United Nations (2004), “United Nations Convention Against Transnational Organized Crime and the Protocols Thereto”
3. Anti-Slavery International, “What is Modern Slavery?” [http://www.antislavery.org/english/slavery\\_today/what\\_is\\_modern\\_slavery.aspx](http://www.antislavery.org/english/slavery_today/what_is_modern_slavery.aspx)
4. p10, United Nations (2012), “Global Report on Trafficking in Persons” (New York; the United Nations)

4. As a destination state, trafficking is not a marginal problem in the UK, it is at the heart of where and how we live. Front line practitioners, national reports, and the Scottish Parliament have acknowledged that trafficked exploitation and its victims exist in communities throughout Scotland.

## Section 2: Why is this Bill Necessary?

5. This proposal is to create unified, clear, and consistent legislation on human trafficking for Scotland. I have shared this proposal with selected experts in the field of human rights law and human trafficking legislation. These include Baroness Helena Kennedy QC who led the authoritative Equality and Human Right Commission Inquiry on this matter; with Dr. Anne T. Gallagher, the distinguished legal scholar and practitioner on the international law of human trafficking; and Parosha Chandran, the barrister at the jurisprudential cutting edge of human trafficking in the UK and Europe.
6. This section provides an overview of the key reasons why this Bill is necessary. They range from Scotland's high and growing number of victims, to expert recommendations and political developments throughout the UK. Each argument is expanded in the proposals set out in subsequent sections of this consultation.

### A High and Growing Number of Victims

7. It is extremely difficult to know exactly how many victims of human trafficking there are in Scotland. By its nature, trafficking is a hidden crime that relies on fear and the threat of harm to keep victims from speaking out, meaning many go unidentified.
8. However, figures show that in 2011, 93 victims of human trafficking were identified in Scotland <sup>(5)</sup> - one every four days.
9. Compared to Wales and Northern Ireland, this figure is high. In the same year, Scotland recovered nearly double the number of victims of Wales and Northern Ireland put together <sup>(6)</sup>.
10. Furthermore, the number of victims is growing in Scotland. In 2012, 3% more victims were identified than in 2011 <sup>(7)</sup>.
11. With a disproportionately high and growing number of victims, it is critical we have robust standards of care and a comprehensive survivors service.

5. p9, Inter-Departmental Group on Human Trafficking (2012), "First Report of the Inter-Departmental Ministerial Group on Human Trafficking" - The IDMG report

6. ibid

7. Serious Organised Crime Agency (2012)  
"United Kingdom National Referral Mechanism Provisional Statistics 2012"

### Low Numbers of Convictions

12. Despite the growing number of victims of human trafficking in Scotland, convictions remain low.
13. To date, there have only been two prosecutions and five convictions for human trafficking offences in Scotland.
14. This compares to over 600 prosecutions that have been raised in England and Wales since 2007 <sup>(8)</sup>.
15. With such a low number of prosecutions and convictions, we must take further steps to ensure our police and prosecutors have every opportunity to bring traffickers to justice.

### The Criminalisation of Victims

16. In June of this year, the Anti-Trafficking Monitoring Group uncovered evidence of victims of human trafficking, including children, who are on remand or serving sentences in Scottish prisons for crimes they may have been forced to commit by traffickers:

“Most seriously, was information of potential victims of trafficking - including children - being penalised and held in young offenders’ institutions or prisons on remand with some also being convicted of crimes that may have been committed under duress and as a consequence of their trafficking.” <sup>(9)</sup>

17. The criminalisation of victims of human trafficking is a serious failure of our legal system to protect and support those who have suffered grave human rights abuses. It amounts to triple victimisation, where an individual is trafficked to this country, forced to commit crime against their will, and is subsequently punished for that crime. International law makes it clear that our legal system must take adequate steps to ensure the criminalisation of victims of trafficking does not occur:

“Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.” <sup>(10)</sup>

18. The provisions in this Bill will enshrine the principle of non-criminalisation within Scots law, allowing us to meet our international obligations to ensure every opportunity is taken to prevent victims being prosecuted or penalised for crimes they were forced to commit.

8. p32, The IDMG Report

9. p.134, Anti-Trafficking Monitoring Group (2013) "In the Dock. Examining the UK's Criminal Justice Response to Trafficking" (London: Anti-Slavery International). - The ATMG Report

10. Article 8, Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims - The EU Directive



## Developments in International Law

19. There is now a coherent body of international law on human trafficking, with Europe and hence the UK and Scotland fortunate to benefit from the world's two exemplar international legal instruments, namely the Council of Europe's (CoE) Human Trafficking Convention, and the European Union's (EU) Human Trafficking Directive, which came into force in April this year.
20. Together they categorise obligations and commitments under three heads: (a) preventing human trafficking; (b) criminalising, investigating, and prosecuting human trafficking, and (c) identifying and assisting victims. Importantly, these standards are underpinned by positive anti-trafficking duties from the European Convention on Human Rights (the ECHR) particularly through its Article 4 case law on human trafficking.
21. This framework is reflected in this proposal for clarity, to secure and to move beyond compliance, and to bolster a strategic approach that recognises the severity and breadth of human trafficking.

## Consensus for Change

22. The case for a single Human Trafficking Act has been articulated and welcomed by numerous experts and reports over recent years:

“The Scottish Government should consider introducing a comprehensive human trafficking bill.” (11)

“The ATMG is pleased to find that Scotland [...] (has) already taken steps to consider enacting a single anti-trafficking law.” (12)

“We need a separate piece of Scottish legislation that brings it all together and makes it easier for everyone [...] to understand.” (13)

23. The proposal also seeks to capture in legislation the consensus among experts in Scotland on what action should be taken to prevent and tackle human trafficking. This consensus has four parts, all of which are reflected in this proposal, and they are (a) government leadership, (b) reform in criminal law, (c) an enhanced criminal justice response and, (d) a comprehensive survivors service for Scotland.

11. p26, Equality and Human Rights Commission (2013), “Inquiry into Human trafficking in Scotland, Follow on Report” (Edinburgh: The Equality and Human Rights Commission) - The EHRC Inquiry

12. p11, The ATMG Report

13. Quote from Jim Laird, in MacNab, Scott, “Scotland Needs Own Human Trafficking Laws MSPs Told”, *The Scotsman*, 21<sup>st</sup> March 2012, <http://www.scotsman.com/news/scotland/top-stories/scotland-needs-own-human-trafficking-laws-mmps-told-1-2185193>



*(a) Government Leadership*

24. Leadership against human trafficking should be taken and demonstrated through a strategic approach led by the Scottish Government:

“The Committee believes that there needs to be leadership in driving through the anti-trafficking agenda in Scotland as this will help to provide more focus on the issue.” (14)

“Scotland needs to have a comprehensive strategy to prevent and tackle human trafficking.” (15)

“[The Scottish Government should] Act (and be seen to act) as a lead on the efforts of local authorities across Scotland to combat child trafficking.” (16)

“The Scottish Government must take responsibility for criminal justice, support and accommodation and prevention.” (17)

*(b) Reform in Criminal Law*

25. A change is needed in how Scots Law deals with human trafficking, through simplifying criminal definitions and codifying human rights anti-trafficking duties into law for clearer and more practically useful legislation:

“The Inquiry was told by a number of lead practitioners in Scotland’s law enforcement community that the criminal legislation on human trafficking needed to be clearer.” (18)

“A clearer definition of what activities or actions might fit within the definition of exploitation provided within legislation would be helpful for law enforcement agencies” (19)

“On [...] the idea that we need new legislation, there is something to be said for that [...] the clearer we are about statutory definitions and the criminal offences, the better it will be for all of us.” (20)

“separation of the different forms of exploitation is unhelpful, and creates unnecessary confusion for those whose job it is to implement the legislation.” (21)

*(c) A Better Criminal Justice Response*

26. Our Criminal Justice response should be enhanced by deepening anti-human trafficking specialisms in key institutions, such as the Crown Office and Procurator Fiscal Service, the Police Service of Scotland, and in Scotland’s Courts. This should be done in a manner that integrates policy, intelligence, and operations with responses throughout the criminal justice system that are focussed on the victim.

14. Point 421, The Equal Opportunities Committee (2010) “Inquiry on Migration and Trafficking” (Edinburgh: The Scottish Parliament) - The EoC Inquiry

15. P24, The EHRC Inquiry

16. p75, Scotland’s Commissioner for Children and Young People (2011) “Scotland: a Safe Place for Child Traffickers” (Edinburgh: Scotland’s Commissioner for Children and Young People) - The SCCYP Report

17. p17, Amnesty International in Scotland (2008) “Scotland’s Slaves” (Edinburgh: Amnesty International)

18. p64, The EHRC Inquiry

19. ibid

20. Column 292, The Equal Opportunities Committee (2012) ‘Official Report of the Equal Opportunities Committee, 20<sup>th</sup> March 2012’ (Edinburgh: The Scottish Parliament)

21. P155, The Centre for Social Justice (2013) “It Happens Here” (London: The Centre for Social Justice)

“The prosecution services in each UK country [should] develop their specialism [in trafficking] with a view to improving the collection of sufficient evidence to successfully prosecute more traffickers.” (22)

“The Committee believes it is important for support agencies to work with the police and prosecutors so that the victims of trafficking are provided with the best possible support.” (23)

“Scottish law enforcement and its partner agencies currently hold limited intelligence on how these networks operate and this is still an area where the true nature of the crime is difficult to determine.” (24)

### (d) A Distinct Scottish Survivors Service

27. Responsibility should be taken in Scotland for the approach to, decisions on, and the monitoring of outcomes relating to the identification, onward referral, provision of assistance, legal justice, and recovery for victims of human trafficking:

“The Committee notes the recommendation made in the Anti-Trafficking Monitoring Group report *Wrong Kind of Victim?* that a localised multi-agency NRM should be established in Scotland alongside a local infrastructure of support.” (25)

“It is only proper that victims of trafficking have practical access to an end-to-end recovery service delivered by one or more specialist agencies” (26)

“Whilst Amnesty International acknowledges the efforts to expand support services, the practitioners we interviewed are concerned that many women and girls are being detained, dispersed or placed by the authorities in inappropriate and/or unsafe accommodation, often without access to support services either because they have not been identified as trafficked or due to the lack of sufficient specialist accommodation and support services for trafficked persons.” (27)

### Political Developments in Scotland and the UK

28. In his response to the Equality and Human Rights Commission's *Inquiry into Human Trafficking in Scotland*, the Cabinet Secretary for Justice stated: “*I do not rule out the idea of bringing together all aspects of human trafficking legislation under one umbrella*” (28).
29. Furthermore, similar legislation is being taken forward in Northern Ireland through the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill, and in England and Wales in a Bill recently announced by the Home Secretary. It is important Scotland keeps up with progress being made in other parts of the UK.

22. p8, GRETA (2012) “Evaluation of the United Kingdom’s Implementation of the Council of Europe’s Human Trafficking Convention” (Strasbourg: Council of Europe) - the CoE’s GRETA Evaluation

23. point 667, The EoC Inquiry

24. p67, The EHRC Inquiry

25. point 584, The EoC Inquiry

26. p85, The EHRC Inquiry

27. p12, The Amnesty Report

28. Official Report of the Scottish Parliament, 29<sup>th</sup> February 2012, (The Scottish Parliament: Edinburgh)

## Section 3: Proposal Aims and Objectives

30. This proposal is for a Human Trafficking Act that fulfils three aims:
31. (a) Crystallise in legislation the consensus in Scotland on anti-human trafficking, as set out above, and which has emerged from the various Inquiries, research, and best practices in this subject in Scotland since 2008.
32. (b) Ensure Scotland complies, and moves beyond, its obligations and commitments on anti-human trafficking, as outlined above, and as set out in relevant specialist international legal instruments and in human rights law.
33. (c) Enable Scotland to pioneer a "system-wide" approach to anti-human trafficking, by involving in a clear and proportionate manner, its public, regulatory, private, and civil society sectors, as well as its communities.
34. More specifically, this proposal is for a Human Trafficking Act that comprises of the following summary objectives:
35. Require (a) long-term, strategic, and political leadership through a Duty on Scottish Ministers to collaboratively develop, implement, and publicly report on, a Strategy for Scotland against Human Trafficking, potentially including:
  - Systematic approach to raising awareness amongst communities and key professional sectors and groups, including through training.
  - Maximises the contribution to and impact of Scottish public policy to the reduction of the human vulnerability that is at the heart of human trafficking.
  - Systematic approach is taken to reduce the demand for the goods and services that feeds demand for trafficked exploitation.
36. (b) Adopt a comprehensive approach to the criminalisation of human trafficking through:
  - New single criminal offence reflecting best practice, developments, and standards in international law.
  - New associated offence of aiding, abetting, or attempting to commit human trafficking.
  - Clearer liability of legal persons to criminal offences of human trafficking.
  - Sanctions regime for natural and legal person offenders convicted of human trafficking offences.

37. (c) Require specialist, integrated and comprehensive criminal justice response to human trafficking: that is victim-centred, proactive, and cooperative; applying in investigation, prosecution, and asset recovery, through:
- Duty for the effective criminal investigation and prosecution of human trafficking.
  - Ensure anti-trafficking specialisms for criminal investigations and prosecutions.
  - Embed asset recovery in the investigation and prosecution of human trafficking.
  - Provide for non-prosecution and non-application of penalties to victims of human trafficking for criminal acts committed as a direct consequence of their trafficked predicament.
  - New associated offence of aiding, abetting, or attempting to commit human trafficking.
  - Require inspection of the performance of the Police Service of Scotland and the Crown Office and Procurator Fiscal Service of duty to investigate and prosecute human trafficking.
38. (d) Harness the regulatory, private, and civil society sectors in anti-human trafficking so they take responsibility through embedding it, into their policy, practices, and information sharing with others, by:
- Scottish Ministers requiring regulators with responsibility in sectors where human trafficking is known or suspected, to include anti-human trafficking in regulatory approaches, guidance, and practices.
  - Scottish Ministers to develop partnerships on human trafficking with relevant parts of private sector and civil society; to promote awareness, identification and detection, and systematic cooperation.
  - Consideration of how to engender, through a voluntary partnership approach, large companies operating in Scotland to take transparent responsibility to prevent, identify, and tackle human trafficking in their supply chains, reflecting best practice from California.
39. (e) Ensuring an independent and transparent system in Scotland that is dedicated to identification of, decisions on, and coordinated assistance and remedies for survivors, to secure both their recovery and access to legal justice, with potential measures including:

- Replace the National Referral Mechanism (NRM) in Scotland with an independent Identification, Referral, and Monitoring Service for Survivors of Human Trafficking (the "Survivors' Service"), to report periodically to this Parliament.
- Duty for the effective criminal investigation and prosecution of human trafficking.
- Introduce statutory minimum Standards for the Assistance and Recovery of Survivors of Human Trafficking (the "Survivors' Standards") to be offered, and observed in relation to, suspected and confirmed survivors in Scotland. Children are perhaps best identified and assisted through Scotland's mature and interests-focused child protection institutions.
- Create, in statute, specialist rights and minimum standards for child survivors of human trafficking; as well as all in terms of criminal investigations, prosecutions, and proceedings.

**Question 1: Do you agree with the aims and summary objectives of the proposed Bill? Please indicate "yes/no/undecided", with reasons for your position.**

## Section 4: Prevention through a Strategic Approach, Leadership, and Coordination

“We’re talking about a phenomenon [human trafficking] that first of all has been around forever but perhaps even more importantly is now entrenched into the fabric of our societies and our economy and the way that we live.”

*Dr Anne T. Gallagher (29)*

40. Human trafficking is a cross-cutting, complex symptom of a deeper, uncomfortable truth that human exploitation is perpetrated by the few whilst being tolerated or simply not registered by the many.
41. Understanding the nature of human trafficking means grasping three essential aspects: (a) it is hidden as awareness remains low, (b) it is central to how and where we live - stretching across our labour market, our cities, towns, and villages, and in our criminal underworld, and (c) it penetrates deep into our society, reflecting many of our under-acknowledged social truths, such as how demand for cheap goods and services fuels demand for cheap, exploitable, and labour.
42. It is this nature of human trafficking that we are required to move beyond incremental, reactive, and short-term practice towards a whole society, relentlessly proactive, and long-term approach crystallised in a national strategy. Only that may move Scotland’s mind-set on human trafficking; place it at the vanguard globally; and sustain a generational push against modern slavery.
43. Underlying the proposal is a vision of legislation being the catalyst for a shared sense of responsibility against human trafficking in Scotland. My premise is that as human trafficking is in the fabric of modern consumerist societies, it indirectly touches most of our lives. It follows that we all have a role, however small, to play in undermining it. International law recognises that preventing human trafficking is at best difficult and at worst intractable. Effective interventions must be long-term, coordinated, and cooperative <sup>(30)</sup>; and for Scotland this means working together through our public, private, and civil society sectors, through our communities, as well as with partners in the rest of the UK and internationally.

29. p58, Gallagher, Anne (2010) “The International Law of Human Trafficking” (Cambridge: Cambridge University Press)

30. Articles 5(1) and 5(6) The CoE Convention, and Article 18(2) The EU Directive

44. Scotland needs a legally binding national strategy against human trafficking in Scotland, which is (a) developed and delivered collaboratively through systematic multi-agency working; (b) comprises all those key short and long term activities, respectively, that are essential to an integrated approach such as taking a systematic approach to, respectively, (i) raising awareness and training, and (ii) to reducing the human vulnerability and the demands for commoditised sex and cheap goods and services that give rise to demand for trafficked prostitutes and labour, respectively; and (c) that is underpinned with clear lines of accountability from the Scottish Government to The Scottish Parliament with public reporting on progress required at least every three years.
45. I invite your opinions, evidence, and suggestions on the following proposal:

“Scottish Ministers have a legal duty to lead the development and implementation of a Strategy for Scotland against Human Trafficking. This Strategy is formulated and delivered through multi-agency collaboration led by the Scottish Government. The Strategy should have particular regard to the need to:

(a) prevent human trafficking, with potential measures and actions to (i) raise, in a systematic manner, public and professional awareness, especially via public campaigning with evaluation, as well as through multi-disciplinary training in audience and delivery; (ii) contribute to the reduction of the human vulnerability often behind the supply and on-going exploitation of survivors; and (iii) recognise Scotland’s responsibility as primarily a “destination” state in trafficking chains and, accordingly, act towards reducing the demand for such exploitation in Scotland;

(b) respond effectively to human trafficking through criminal justice, public regulation, and non-public sector activity with potential measures and actions to (i) enhance its investigation, prosecution, and disruption, particularly through an integrated specialist approach; (ii) harness the contribution of public regulators taking appropriate action, especially to identify suspected human trafficking; and (iii) effectively involve and utilise the private sector and civil society bodies in Scotland against modern slavery;



(c) enhance the arrangements, practices, and cooperation for the identification, assistance, and recovery of victims, with potential measures and actions to (i) enhance the independence, rigour, and transparency of arrangements and practice for identifying, referring, and monitoring outcomes for survivors;(ii) develop, implement, and review survivor-centred standards for the assistance and recovery of survivors of human trafficking; and (iii) enhance survivors' rights to remedies, access to justice, and compensation for the harms suffered.

The collaborative development of the Strategy should include, but not be limited to, those with responsibilities in the following areas, namely: (a) policing; (b) criminal prosecution; (c) disruption of human trafficking and related serious crime through asset recovery; (d) prisons; (e) identification, assistance, and recovery for survivors of human trafficking; (f) healthcare, especially in psychological assistance and in sexual health services; (g) child protection and social work; (h) labour market regulation; (i) local government, particularly in licensing and environmental health; (j) immigration and asylum; (k) revenue and customs; (l) international development; (m) the legal profession, especially those likely to have contact with victims; and (n) strategic commercial organisations, such as banks, smartphone networks, internet service providers, the travel sector, and key multinationals.

Reasonable effort should also be made to involve survivors of human trafficking in this collaborative process with their long term best interests paramount throughout.

The Strategy will be delivered through a transparent action plan that also ensures Scotland meets its international commitments. As part of this legal duty, the Scottish Government will report publicly, and to the Scottish Parliament, on progress on the Strategy at least every three years; with public reporting followed by the development of a new Strategy.”

**Question 2: Do you agree with the proposal for a legal duty on Scottish ministers for a Strategy for Scotland against Human Trafficking? Please indicate "yes/no/undecided", with reasons for your position.**

## Section 5: Criminalisation of Human Trafficking in Scots Law

“In view of its obligation to interpret the [European] Convention [on Human Rights] in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the [European] Convention [on Human Rights].”

- *Para 282, European Court of Human Rights in Rantsev v Cyprus and Russia [2010]*

46. The European Court of Human Rights (ECtHR) and the Human Rights Act 1998 place clear obligations on the UK to ensure proper arrangements are in place to effectively prevent and respond to human trafficking. European Convention on Human Rights Article 4 case law recognises human trafficking as a form of slavery <sup>(31)</sup> and, significantly, it does so by defining it in line with the international gold standard of the “Palermo Protocol” <sup>(32)</sup> as set out in the UN’s Human Trafficking Protocol, which has been recently enshrined, among other nations, in South Africa <sup>(33)</sup>. This case law requires those with responsibility for such matters within States to ensure there is: (a) a legal and administrative framework to prohibit and punish trafficking; (b) this enables the effective penalisation and prosecution of acts of human trafficking; and (c) it is part of a comprehensive approach including measures to (i) prevent human trafficking and (ii) to protect its victims <sup>(34)</sup>.
47. Such vertical prescription of human rights anti-trafficking duties is enhanced by the interpretative duty in section 3 of the Human Rights Act that requires, so far as is possible, that primary and subordinate legislation is read and given effect in a way compatible with the European Convention on Human Rights as incorporated in the Human Rights Act. Article 4 has vertical and horizontal effect requiring a comprehensive legal framework that mainstreams anti-trafficking across the statute book.
48. The fundamental obligations on anti-trafficking arising from the European Convention on Human Rights and the Human Rights Act are overlaid, in the UK and therefore in Scotland where competence is devolved, by more precise commitments in the Council of Europe’s Human Trafficking Convention and the EU Human Trafficking Directive.

31. Paragraph 282, in *Rantsev v Cyprus and Russia* (2010)

32. Article 3(a) UN Human Trafficking Protocol

33. Prevention and Combating of Trafficking in Persons Act 2013: <http://www.info.gov.za/view/DownloadFileAction?id=195534>, especially section 4.

34. Paragraph 285, *Rantsev v Russia and Cyprus* (2010)

49. The criminalisation of human trafficking is one such obligation required by both the Council of Europe <sup>(35)</sup> and the EU <sup>(36)</sup>. However, the UK and Scotland did not adopt the criminal definition of human trafficking - the “Palermo Protocol” - which has been rigorously debated, refined, and adopted by the UN, the Council of Europe, the EU and, as outlined above, by the European Convention on Human Rights.
50. The approach taken to criminalisation to date in Scotland has mirrored that in the UK, with section 22 of the Criminal Justice Act 2003 introducing the criminal offence of trafficking into prostitution or for producing obscene or indecent material, which, problematically, is significantly narrower in scope than its equivalent offence in England and Wales that criminalises trafficking into sexual exploitation <sup>(37)</sup>. Section 4 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 is intended to cover non-sex forms of human trafficking but, again problematically, it is a criminal offence in UK immigration statute.
51. Section 4 reflects, (a) an inappropriate conflation of human trafficking and immigration that serves to undermine in public consciousness, in Scottish governance, as well as in our front-line response, the international legal recognition that trafficking need not have a cross-border element to be trafficking <sup>(38)</sup>; as well as (b) that this Parliament has not yet legislated on a crime that is actually in its legislative competence as a consequence of Schedule 5 of the Scotland Act 1998. Human trafficking is crime not asylum or immigration and comprehensive legislation against it is in the gift of this Parliament.
52. The Council of Europe, the Centre for Social Justice, and the Equality and Human Rights Commission have all recommended the need for significant change in how UK and Scottish legislation deals with human trafficking and, particularly, in how it defines the crime. The Centre for Social Justice recommended a Modern Slavery Act stating “separation of the different forms of exploitation is unhelpful, and creates unnecessary confusion for those whose job it is to implement the legislation” <sup>(39)</sup>. The Council of Europe was concerned that the “co-existence of several partially overlapping offences related to human trafficking undermines legal clarity and can be problematic in practice when it comes to prosecution and convictions” <sup>(40)</sup>. The Equality and Human Rights Commission found that legislation against human trafficking in Scotland had developed piecemeal; was inconsistent; and lacked clarity on what trafficked exploitation is <sup>(41)</sup>.

35. Article 18, The CoE Convention
36. Article 2, The EU Directive
37. See Annex A
38. See Annex A
39. pp155-157, The CSJ Report
40. p26, The CoE’s GRETA Evaluation
41. pp63-69, The EHRC Inquiry

53. Accordingly, the Equality and Human Rights Commission recommended the Scottish Government consider introducing a “comprehensive Human Trafficking Bill”. In February 2012, the Cabinet Secretary for Justice expressed sympathy for this recommendation stating he did “not rule out the idea of bringing together all aspects of human trafficking legislation under one umbrella, but we need to be aware that parliamentary time is precious”.
54. There is a discernible consensus on the need for a change in how Scots law deals with human trafficking, as reflected in part by the shared desire for a statutory aggravation. This consensus is reinforced by the unfortunate but unavoidable fact that only five people have been convicted for human trafficking in a decade of criminal law in Scotland <sup>(42)</sup>. I fully respect the Cabinet Secretary’s commitment, sincerity, and sympathy for change but I believe clear and comprehensive legislation is now essential and this Parliament can and should legislate against this modern slavery.
55. Human trafficking does not exist only at the margins of our society, nor is it confined to our criminal underworld, rather it penetrates into our legitimate economy. As the Equality and Human Rights Commission Inquiry reported: “victims trafficked into forced labour were found in restaurants, hospitality, and agriculture” in Scotland <sup>(43)</sup>. The nexus between human trafficking, business, and organised crime is well established. This is reflected in international law against human trafficking, notably, again, through Article 4 case law <sup>(44)</sup> and, most comprehensively, in both the Council of Europe’s Human Trafficking Convention <sup>(45)</sup> and the EU Human Trafficking Directive <sup>(46)</sup>, which dedicate provisions to require those responsible for such matters within a State to ensure legal persons are liable for criminal offences of human trafficking. Criminal liability for bodies incorporated under UK law for human trafficking offences is provided within the section 22 and section 4 offences, respectively. This liability is supplemented by amendments in 2010 to the Anti-Social Behaviour (Scotland) Act 2004 enabling the closure of establishments associated with human exploitation offences <sup>(47)</sup>.
56. However, I am interested to learn how we may do more by creating a comprehensive section on the liability of legal persons to offences of human trafficking.

42. See Annex A

43. p36, The EHRC Inquiry

44. Paragraph 284, *Rantsev v Cyprus and Russia* (2010)

45. Article 22, The CoE Convention

46. See Annex A

47. See Annex A

57. This would reflect the approach of the Council of Europe and the EU, as both set out clearly the conditions for legal persons being liable for an offence of human trafficking <sup>(48)</sup>. In Scotland, greater legal clarity may also be a helpful way to raise awareness amongst the business community in Scotland of their anti-human trafficking criminal law responsibilities.
58. However, any new legislation should draw upon the positive elements in the current approach. For example, I think Scotland has reasonable legislative provisions in areas such as (a) the extra-territorial jurisdiction of its two present criminal offences of human trafficking; (b) in its regime for sanctions that reflect requirements in both the Council of Europe’s Human Trafficking Convention <sup>(49)</sup> and the EU Human Trafficking Directive <sup>(50)</sup>. Nonetheless, this consultation is an opportunity to consider whether and where improvements may be made.
59. Accordingly, I am interested to explore if we can and should enhance the sanctions available to our courts when sentencing natural and legal persons for human trafficking by expressly drawing upon and enshrining in new legislation (a) the aggravating factors and sanctions set out in the EU <sup>(51)</sup> and the Council of Europe <sup>(52)</sup>, as well as (b) considering whether the principles of relevant domestic statute, such as the Corporate Manslaughter and Corporate Homicide Act 2007 <sup>(53)</sup>, may improve the present regime to ensure it effective and proportionate, and (c) whether there is merit, as envisaged by the Council of Europe’s Human Trafficking Convention and the EU Human Trafficking Directive, to have a criminal offence of aiding, abetting, or attempting to commit the core offence of human trafficking <sup>(54)</sup>, particularly on whether this would add value by making activities supplementary to human trafficking more visible, in particular, to our criminal justice institutions.
60. I invite your opinions, evidence, and suggestions on the following proposal:

“That the provisions for the criminalisation of human trafficking in Scotland are enhanced through drawing upon the best in the international law of human trafficking and, in particular, on the obligations that flow from European Convention on Human Rights Article 4 jurisprudence on human trafficking as well as from the comprehensive anti-human trafficking legal instruments of the Council of Europe and the EU.

48. Article 5, The EU Directive and Article 22, The CoE Convention

49. Article 23, The CoE Convention

50. Article 4 and Article 6, The EU Directive

51. Article 4, The EU Directive

52. Article 23, The CoE Convention

53. See Annex A

54. Articles 20 and 21 The CoE Convention, and Article 3 The EU Directive

I propose (a) a single, comprehensive, and clear criminal offence reflecting best standards in international law; (b) a new, associated offence of aiding, abetting, or attempting to commit human trafficking; (c) a section dedicated to the criminal liability of legal persons for these new core offences of human trafficking; and (d) an enhanced regime of sanctions for legal persons that explicitly includes statutory aggravating factors to be considered, where relevant, in sentencing.

I also wish to ensure, as a minimum, that the proposed new scheme retains the scope and extra-territorial range of existing provisions. Finally, I propose that any new arrangement is inclusive, to avoid conflating or confining human trafficking to cross-border cases, and that consent in situations that transpire as trafficked exploitation are disregarded in human trafficking cases in so far as they relate to children.”

**Question 3: Do you agree with the approach to criminalising human trafficking in Scotland as proposed above? Please indicate "yes/no/undecided", specifying any elements you support or disagree with, with reasons for your position.**



## Section 6: Criminal Justice Response to Human Trafficking: Specialist, Cooperative, and Systematic

“International law, policy, and practice are beginning to confirm that a dedicated, specialised anti-trafficking capacity is essential to an effective investigative response ... Specifically, specialist personnel must be trained in reactive investigation including victim identification, management of trauma and cultural challenges, specialised video-recorded interview techniques for adult and child victims, collection of corroborative evidence, witness protection and witness management, and international cooperation. The specialist unit should also possess a comprehensive capacity to undertake proactive investigation, including intelligence gathering and management, human and technical surveillance, undercover operations, controlled deliveries, and parallel financial and money-laundering investigations.”

*Dr. Anne T. Gallagher and Paul Holmes (42)*

61. Scotland’s criminal justice institutions have significantly improved their performance in recent years against human trafficking. The Police have been at the forefront of this development through Strathclyde Police’s pioneering vice and anti-trafficking unit; the innovative and technically rigorous organised crime mapping from the Scottish Crime and Drug Enforcement Agency (SCDEA); and the recent “aide mémoire” on tell-tale signs of exploitation, which has been distributed to thousands of front-line police officers, and, which explains the reality of trafficked exploitation by using the Palermo Protocol definition.
62. Importantly, Police Scotland has maintained the policy, analytical, and mapping specialism inherited from SCDEA. Similarly, the Crown Office and Procurator Fiscal Service have developed a procedure whereby Crown Counsel considers all reports and prosecutions where human trafficking has been identified <sup>(55)</sup>. I am not aware, however, of any training on human trafficking amongst Scotland’s judiciary and courts or, indeed, of any systematic approach across criminal justice pathways <sup>(56)</sup>.
63. Whilst there is not one specific comprehensive obligation to investigate, prosecute, and punish traffickers either in the Council of Europe’s or EU’s anti-human trafficking instruments, the criminal justice response is integral to both, as indeed it is to the European Convention on Human Rights, particularly through its Article 4 jurisprudence. All define human trafficking as a crime, regard tackling it as a crime as a precondition for any successful approach; and, accordingly, suggest in an increasingly clear and prescriptive manner how the criminal justice response should be organised, supported, and implemented.



64. The starting point is, again, European Convention on Human Rights case law, initially through *Siliadin v France* <sup>(57)</sup>, where the European Court of Human Rights confirmed that Article 4 requires States to penalise and prosecute effectively “any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour” and, more recently, the “*Rantsev*” decision which confirmed unambiguously that the crime of human trafficking was now part of the “*Siliadin*” obligation <sup>(58)</sup>. Notwithstanding that clear, comprehensive, and consistent anti-human trafficking legislation is a necessary condition for any effective criminal justice response there is now a discernible consensus in international law and evidence on sufficient conditions.
65. These sufficient conditions include: (a) front-line, criminal justice professionals have the requisite basic knowledge and skills <sup>(59)</sup> to identify potential trafficking, retain key evidence, and lessen any immediate risks to victims by removing them from harm <sup>(60)</sup>; (b) specialist approach <sup>(61)</sup> for actual investigation of potential situations of human trafficking from recruitment to exploitation <sup>(62)</sup> with expertise in human vulnerability, victim care <sup>(63)</sup>, and organised crime <sup>(64)</sup> a prerequisite; (c) similarly, the recommended specialism in investigation is complemented by increasing recognition of the importance of prosecutors and the judiciary reflected by the status accorded to criminal prosecution in relevant international law <sup>(65)</sup>; (d) that asset recovery <sup>(66)</sup> of ill-gotten profit is integrated into the criminal justice response against organised crime <sup>(67)</sup>; and (e) cooperation, within and across borders, is necessary, as touched on in various reports <sup>(68)</sup>, as a theme in international law on human trafficking <sup>(69)</sup>, as well as a requirement arising, in cross-border cases, from “*Rantsev*” <sup>(70)</sup>.
66. I want to explore the implications of this discernible consensus in international law and evidence for Scotland’s criminal justice response to human trafficking. Following on from my earlier question I am particularly interested to identify whether and how the present approach may be enhanced in terms of deepening and extending existing specialisms in our criminal justice institutions, as well as improving cooperation especially with those assisting victims, and most fundamentally whether and how legislation can best assist in ensuring there is the requisite capacity, for the long term, in our institutions for an exemplar criminal justice response.

57. *Siliadin v France* (2005)

58. Paragraph 285, *Rantsev v Cyprus and Russia* (2010))

59. For references 59-70, see Annex A

67. I anticipate any regime or framework will focus on not only investigation, prosecution, and asset recovery, but also on how attuned our institutions are to the non-prosecution / punishment principle integral to international law on human trafficking, especially to prevent the risks of, and to safeguard victims from, wrongly, being suspected, treated, or convicted as criminals. As implied above, I suspect there is an inspection gap around our criminal justice response to human trafficking, which I anticipate needs to be addressed, not least to reflect the aforementioned specific obligations and commitments on criminal justice responses, which arise, respectively, from European Convention on Human Rights jurisprudence as well as from the EU Human Trafficking Directive and the Council of Europe Human Trafficking Convention.
68. I invite your opinions, evidence, and suggestions on the following proposal:

“That those responsible for criminal investigations and prosecutions in Scotland, and especially Police Scotland and the Crown Office and Procurator Fiscal Service shall have a legal duty to:

- Fulfil the positive human rights duties as described above arising from the European Convention on Human Rights and especially its Article 4 jurisprudence; from the EU Human Trafficking Directive; as well as those set out in the Council of Europe Human Trafficking Convention; and
- Take necessary measures to have the requisite capacity and approach for the effective investigation and prosecution of human trafficking, by:

*For Police Scotland:*

(a) Creating a multi-disciplinary specialism on anti-human trafficking that integrates functions, such as, (i) intelligence gathering, mapping, and analysis; (ii) the conduct of criminal investigations; and (iii) the provision of advice, guidance, and awareness raising;

(b) Equip such a specialism with (i) the training; (ii) the investigative tools - especially those utilised in combating organised and financial crime and other serious crime cases -; and (iii) the resources to effectively investigate human trafficking; and;

(c) Ensure the specialism is part of systematic multi-agency cooperation on human trafficking, particularly but not only linking with agencies operating in Scotland, especially the Crown Office and Procurator Fiscal Service, as well as other relevant law enforcement bodies, and those involved in identifying and assisting survivors.

*For the Crown Office and Procurator Fiscal Service:*

(a) Creating a multi-discipline specialism on anti-human trafficking that integrates functions, such as, (i) the consideration of reports of crime; (ii) the conduct of criminal prosecutions and appeals against disposal; and (iii) the provision of advice, guidance, and awareness;

(b) Equipping this specialism in particular with (i) the training; (ii) the investigative tools - particularly those utilised in combating organised and financial crime and other serious crime cases -; and (iii) the resources to effectively prosecute human trafficking;

(c) Ensuring the specialism is part of systematic multi-agency cooperation on human trafficking, particularly but not only linking with agencies operating in Scotland, especially Police Scotland, as well as other relevant law enforcement bodies, and those involved in identifying and assisting survivors; and

(d) Taking the necessary measures to ensure that asset recovery is considered as a potential element in all investigations or prosecutions, or including human trafficking offences.

I propose, further:

That there is a legal duty on HM Inspectorate of Constabulary for Scotland and HM Inspectorate of Prosecution for Scotland to, at least triennially, conduct, and publicly report the findings and recommendations of, a joint inspection of Police Scotland and the Crown Office and Procurator Fiscal Service in terms of how they have met relevant legal duties.”

**Question 4: Do you agree with the approach to the criminal justice response to human trafficking in Scotland as proposed above? Please indicate "yes/no/undecided", specifying any elements you support or disagree with, with reasons for your position.**

## Section 7: Non-Prosecution / Penalisation of Victims of Human Trafficking

“Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities ... that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. The safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.”

- *Recital 14, EU Human Trafficking Directive (2011)*

69. Prosecuting, detaining, or penalising survivors of human trafficking for crimes they committed as a manifestation of, or as a direct consequence of their trafficking situation, is the antithesis of a human rights, survivor-centred approach. It amounts to triple victimisation and injustice whereby a person becomes a trafficking victim, then is compelled to commit crime, and is then punished for such a crime.
70. This offends the fundamental criminal legal principle of intent as well as undermining the prospect of a victim becoming a witness. At the core of this injustice is the State through its criminal justice institutions either not looking for, not adequately checking whether, or not giving proper regard to, the possibility that an “offender” may be a victim who by definition lacks the requisite autonomy, legal competence, and criminal responsibility to be subjected to prosecution or punishment.
71. There is a clear framework of EU obligations and standards on the UK, and therefore Scotland, for the non-prosecution, detention, or penalisation of victims for offences committed as a manifestation of, or as a direct consequence or as arising from, their trafficked predicament. Therefore the non-criminalisation principle is widely recognised as a prerequisite to any genuine survivor-centred approach to human trafficking. This is reflected in the Council of Europe Human Trafficking Convention (Article 26) and the EU Human Trafficking Directive (Article 8) as well as, significantly again, in how the European Court of Human Rights, through *Rantsev*, weaved the State’s core anti-trafficking obligations into an intertwined whole<sup>(71)</sup>.
72. As a result, the UK, and therefore Scotland, must now as a matter of European Convention on Human Rights jurisprudence fulfil, in an interconnected manner: (a) the obligation to identify, protect and assist victims, including, significantly, in circumstances when criminal justice institutions “ought to have been aware” that a person may be at risk of, is being, or has been a trafficking victim;

73. With (b) the duty to investigate a trafficking situation from recruitment to exploitation so as to identify and prosecute the genuine traffickers; with, by necessary implication, (c) the obligation not to prosecute, detain, or penalise victims for offences they were, in essence and in effect, compelled to commit <sup>(72)</sup>.
74. Therefore, human rights jurisprudence has, rightly, evolved to prioritise international legal precedent on this practice as, in the words of the Organisation for Security and Cooperation in Europe, “few acts could constitute a more flagrant violation of a victim’s rights than for the State to prosecute or otherwise punish a person for acts they were compelled by their trafficker or trafficking to do” <sup>(73)</sup>. Indeed, the corollary of the duties on criminal justice institutions is a right for victims not to be subject to criminal justice processes in so far as these relate to offences that were caused by their trafficked predicament. It is important, therefore, to conceive non-criminalisation as a matter of state obligation and victim rights, so to prevent unintended displacements of victim interests in any associated criminal justice, assistance and recovery, and legal compensation processes; as well as in, if relevant, immigration decisions.
75. The prevailing approach to the interpretation of the non-criminalisation duties in Scotland and, indeed, in the UK has for the most part been limited to guidance. Inevitably, correctly, and in simple reflection of the fact that breaches of this principle have occurred in the UK and, potentially in Scotland too, I feel we are now moving beyond only having prosecutorial guidance to courts actively interpreting the principle, setting legal precedent on it, and in so doing, framing the parameters for the lawful handling of such cases by our criminal justice institutions.
76. In June 2013, in the case of *R v L, HVN, THN, & T*, the Court of Appeal (Criminal Division) for England and Wales overturned the conviction of four individuals who were deemed as trafficking victims on the grounds that the prosecutions were an abuse of process and by implication should not have proceeded in the first place. In effect, the Lord Chief Justice set out an integrated interpretation of the Rantsev doctrine and Article 8 EU Human Trafficking Directive to lever the strongest presumption yet that criminal justice institutions do not prosecute or penalise survivors for offences arising from their exploitation.

72. Paragraph 286, *Rantsev v Cyprus and Russia* (2010)

73. p4, Organisation for Security and Cooperation in Europe (2013) “Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking” (Vienna: Organisation for Security and Cooperation in Europe)

77. National reports have documented in 2013 that Scotland may not be immune from the criminalisation of trafficking victims, and it may be but a matter of time before an appeal is laid in a Scottish court by a trafficking victim to test this presumption in terms of citing their conviction as unsafe and / or their sentence as disproportionate <sup>(74)</sup>.
78. I invite your opinions, evidence, and suggestions on the following proposal:

*Non-prosecution and non-penalisation of survivors*

“That provision is made in a Human Trafficking Act in Scotland to ensure that:

Where a victim has committed a criminal act as a direct consequence or as a manifestation of their human trafficking predicament;

And for adult victims only: unless it is strictly necessary and in the public interest to do so;

No prosecution should proceed or continue, or penalties are imposed, if the:

- (a) Victim has been compelled to commit the criminal act as a direct consequence or as a manifestation of being subjected to -  
(i) threats, the use of force, or other forms of coercion, (ii) abduction, (iii) fraud, (iv) deception, (v) the abuse of power or of a position of vulnerability, or (vi) the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;
- or
- (b) The victim was a child”

**Question 5: Do you agree with the approach on the non-prosecution and non-penalisation of trafficking survivors in Scotland as proposed above? Please indicate "yes/no/undecided", specifying any elements you support or disagree with, with reasons for your position.**



## Section 8: Contribution of Regulatory, Private Sector, and Civil Society against Human Trafficking

“Sometimes, there is a thin line between legal and illegal, between ethical and unethical. Laws may be ambiguous or missing. However, corporations enjoy enormous power today and they have the means available to make sure that they are not implicated directly or indirectly in illicit practices such as human trafficking. In today’s global economy, the combined efforts of business leaders can serve to combat this scourge internationally. Businesses can leverage their resources and existing alliances, and build on efforts that raise awareness among employees, partners and clients in companies.”

- David Arkless (75)

79. The Equality and Human Rights Commission Inquiry uncovered trafficked exploitation in the kind of residential sex flats we live beside, in some of the farms, fishing vessels, and factories we get our food from, in restaurants we dine in, in hotels that we enjoy for leisure, as well as through ISPs hosting websites advertising sex “escorts” and “services”. It also learned how traffickers move their victims to exploitation: planes, cars, mini-buses etc., as well as facilitating travel by the smartphones and mobile technologies we all use. We know that domestic servitude is in Scotland, as is forced criminality for drugs offences and petty crime. This is not to mention some of the clothes being sold and worn by us right now may well derive from supply chains tainted by slave labour.
80. Human trafficking is part of how we live; it is outside and inside our legitimate economy, and there may well be many more opportunities to spot it than we would think. Rendering visible this purportedly invisible crime; through awareness, training, and critically the application of existing professional expertise; is pivotal to shifting our mind-set on human trafficking from conventional perceptions to the consistent recognition of the full range of its implications in Scotland - e.g. it is not only about sex, nor is it confined to the criminal underworld, or for that matter is it limited to our major cities; it is all these and, unfortunately, more.
81. Therefore, I want to explore in this consultation, how to best harness, proportionately but systematically, regulators, private organisations, and diverse civil society against contemporary slavery. As I said, the breadth of human trafficking in Scotland provides opportunities: to detect, identify, and disrupt the crime.



82. My sense is these opportunities are not being taken as much as they could be, and whilst the Scottish Government's Summit is generating good initiatives e.g. the recent aide mémoire for businesses on the signs of trafficking, I think we need a systematic approach to raising awareness, but also to start to embed anti-trafficking into the frameworks and practices of key regulators, as well as to begin engaging relevant private and third sector bodies in a partnership approach, grounded in the leading international principles connecting human rights <sup>(76)</sup>, human trafficking <sup>(77)</sup>, and business.
83. I invite your opinions, evidence, and suggestions on the following proposal:

*Harnessing Regulators, the Private Sector, and Civil Society against Human Trafficking*

“As part of fulfilling the duty to have a Strategy for Scotland against Human Trafficking, Scottish Ministers shall consult on and publish a triennial list of regulatory bodies operating in Scotland demonstrating how each integrates anti-human trafficking into their on-going activity. Such integration may include: (a) embedding anti-human trafficking into policy and operational practice especially in terms of identifying suspected victims, perpetrators, and those aiding human trafficking in some way; (b) gaining formal status in and generally contribute to relevant arrangements for the identification, referral, and assistance for victims of human trafficking; and (c) setting up and implementing appropriate arrangements for cooperation and information sharing with other regulators and law enforcement and prosecuting bodies, both inside and outside Scotland.

As part of fulfilling the duty to have a Strategy for Scotland against Human Trafficking, Scottish Ministers shall engage relevant parts of the private sector and civil society in Scotland, for the purpose of developing, publishing, and following partnership guidance that enables such bodies to: (a) raise their own awareness of human trafficking; (b) identify suspected human trafficking, especially victims, perpetrators, and those aiding human trafficking in some way; and (c) set up and implement appropriate arrangements for cooperation and sharing information with others, particularly law enforcement and prosecuting bodies, both inside and outside Scotland.”

**Question 6: Do you agree with the approach to harnessing regulators, the private sector, and civil society against human trafficking, as proposed above? Please indicate "yes/no/undecided", specifying any elements you support or disagree with, with reasons for your position.**

## Section 9: Identifying, Assisting, and Promoting Good Outcomes for Survivors of Human Trafficking

“But in their unbreakable will, in their courage, in their resilience, they remind us that this cycle can be broken; victims can become not only survivors, they can become leaders and advocates, and bring about change.”

- *President Barack Obama* <sup>(78)</sup>

84. Scotland has a rich heritage, a reservoir of professional expertise, and some excellent legislation relating to vulnerable persons, victims of crime, and abuse survivors. I want victims of human trafficking to benefit always and across Scotland from that learning, by exploring in this consultation how that may best be achieved. We are fortunate already to benefit from the pioneering, survivor-centred work of the Trafficking Awareness Raising Alliance in assisting and empowering adult women survivors trafficked into commercial sexual exploitation, with assistance for all other victims of trafficking provided by Migrant Help. Both enjoy the support of the Scottish Government. However, funded assistance is largely contingent on survivors being in the UK-wide National Referral Mechanism <sup>(79)</sup>, which derives from policy rather than setting out in primary legislation the system for identifying, assisting, and facilitating the recovery of trafficking survivors
85. Survivors of human trafficking have experienced one of the most severe human rights abuses imaginable. It is appropriate, therefore, to start from first principles, precisely to ensure that any scheme for survivors is completely in their best interests. I am keen to explore how we can ensure that Scotland extends its proud tradition of compassion by inviting views on what the core principles are for working with trafficking survivors, before exploring how these may be practically applied within the present legislative competence of the Scottish Parliament. I am particularly interested in whether this approach entails a scheme that is independent and hence unambiguously dedicated to the best interests, human dignity, and long-term safety of those who experience trafficked exploitation.

86. I believe there are ten core principles that should underscore any new scheme for the identification, assistance and recovery of survivors. They overlap: some are on how to work with survivors, some relate to decisions affecting them, and some are concerned with their longer term wellbeing. However, what links them all is that is the survivor, always, that matters. The ten core principles are: (a) the best interests of the survivor is paramount, (b) empathy with their vulnerability; (c) non-discriminatory and equality-sensitive practice especially on gender and children; (d) decisions are unfettered by extraneous concerns, such as asylum, so they should be fully independent, multi-agency, and made objectively by those with best knowledge; (e) decisions are prompt as far as is compatible with best interests; (f) decisions should be evidenced and rigorous; (g) they should be transparent, accountable, and reviewable through the courts; (h) assistance is high-quality, coordinated, and empowering; (i) it is never conditional on cooperation with law enforcement; and (j) assistance is for outcomes of short, medium, and long-term recovery.
87. Following through on the logic of these core principles, I would like to consult on a new, independent approach in Scotland to the identification, assistance, and recovery of survivors of human trafficking. This is set out in greater detail below. It (a) draws inspiration from the first principles approach set out in recommendations 9 and 10 of the Equality and Human Rights Commission Inquiry; (b) builds on the best in the NRM whilst shedding any perceptions of conflicts of interests in decisions or lack of appeal rights that are undermining confidence in the current NRM process; and, critically, (c) places on a statutory basis a system dedicated to answering the fundamental question of whether a person has been a victim of human trafficking.
88. The international law of human trafficking and, indeed the UN's core human rights instruments, all recognise the distinctive vulnerability of young people. I wish to explore how we should reflect this important principle in human trafficking legislation.
89. Child protection principles "Getting it Right for Every Child" and "Safeguarding Children in Scotland who may have been Trafficked", have informed my proposed statutory adult survivor advocacy service and the associated human trafficking care standard, as did the recommendations on identification and survivors made in the Equality and Human Rights Commission Inquiry. Whilst I think the proposed survivor service and our child protection institutions can and should comfortably complement each other, I would appreciate your views in this consultation.

90. I invite your opinions, evidence, and suggestions on the following proposals:

*The Survivors' Service and Standards*

"I propose an Identification, Referral and Assistance, and Monitoring Service for Survivors of Human Trafficking (the Survivors' Service), which shall be an independent body accountable to and required to report annually on its activities and performance to the Scottish Parliament.

The Survivors Service shall be responsible for fulfilling four duties:

- (a) Identification of survivors of human trafficking;
- (b) Take decisions on identification of and referral for victims in an independent, rigorous and evidence based, and consistent and transparent manner;
- (c) Refer survivors into coordinated assistance packages; and
- (d) Monitor the progress of and outcomes for Survivors so referred.

The Survivors' Service shall have the following functions:

- (a) Receive referrals, or self-presentations from persons that are or have been a survivor of human trafficking in or in relation to Scotland, with referrals only from designated referring bodies that as such have been trained and accredited by the Survivors' Service; ;
- (b) Conduct inquiries, engage in formal multi-agency discussions, and make decisions on (i) whether there are reasonable grounds to believe that such persons are or have been survivors of human trafficking, (ii) whether there are conclusive grounds to decide that such persons are or have been a victim of human trafficking in, or in relation to, Scotland; and all decisions will be (iii) based on a publicly available code for decisions of the Survivors' Service; (iv) inclusive of an assessment that gives due regard to the rights, safety, and dignity of the claimant, as well as to the status of any legal proceedings, criminal or civil, which are related to their claim; and (v) if positive at stage (b)(i) and / or (b)(ii) above, such decisions will, as a minimum, comprise the offer of a coordinated assistance package; including, where applicable, recommendations for specific assistance that require the approval of a UK Minister before they may have effect;

(c) Convey the offers of, and if accepted, organise for the implementation of the decisions at (b)(i) and / or b(ii) above, to both successful and unsuccessful claimants; but in those cases where claimants are subject to immigration processes: (i) any assistance that is recommended, as opposed to offered within either of the decisions at subsections (b)(i) or (b)(ii), because it is a reserved matter under Schedule 5 of the Scotland 1998, then such recommended assistance will require approval by the relevant UK Minister, before it may have any effect; and (ii) such recommended assistance may include, in cases of a positive decision at subsection (b)(ii) above, measures assessed as necessary to ensure the dignity, safety, and rights of victims in so far as these may be undermined by future involuntary repatriation, and such measures may accordingly include those designed to prevent risks such as re-trafficking or secondary victimisation of survivors; or to prevent other serious risks to safety including but not limited to torture or other forms of inhuman and degrading treatment and punishments; or to prevent diminutions in the rights of victims to participate effectively in criminal and / or civil proceedings connected to their trafficking situation;

(d) Liaise with survivors and those providing part or all of the coordinated assistance for the purpose of ensuring smooth transitions, coherent provision of services, as well as to monitor progress of and outcomes for survivors;

(e) Comprise staff with the requisite knowledge of human trafficking, the skills essential to identify whether persons are victims or not, and the experiences necessary to contribute to the delivery of the functions of the Survivors' Service;

(f) Train and accredit potential designated referring bodies;

(g) Engage in regular discussion, information sharing, and cooperation with equivalent organisations in the UK and beyond;

(h) Conduct analysis of its cases, its activities, and relevant issues in order to enhance understanding; and

(i) Publish an annual report, including recommendations for improvement, to inform this Parliament and others of its activities, learning, and achievements; as well as the basis for scrutiny in this Parliament within three months of publication.

The decisions of the Survivors' Service shall be reviewable with negative decisions at both reasonable and conclusive grounds stages to be open to be subject to appeal within the relevant High Court area; with any appeal requiring to be lodged within 14 days of receipt of either decision."

I propose, further:

*The Survivors' Standards*

"There shall be national Standards for the Assistance and Recovery of Survivors of Human Trafficking (the Survivors' Standards). These should be interpreted in accordance with the following principles:

- (a) Recognition that survivors have suffered a serious violation of their dignity and human rights and, accordingly, assistance should always be in their best interests;
- (b) Understanding the inherent vulnerability of survivors of human trafficking that arises, as a minimum, from the nature of the crime they have suffered;
- (c) Securing access for survivors to assistance in accordance with these Standards without unlawful discrimination on protected characteristics at s.4 of the Equality Act 2010; and
- (d) Assistance shall not be conditional on victims' willingness to cooperate in any criminal investigations, prosecutions, or any proceedings not concerned with the trafficking situation.

The Survivors' Standards set standards and rights for victims identified in or in relation to Scotland, for the purpose of promoting their physical, psychological, and social recovery; and their minimum content shall be that those with positive reasonable and / or conclusive grounds are offered coordinated assistance sufficient for a standard of living capable of securing their subsistence and wellbeing, by means of at least:

- (a) Appropriate and safe accommodation;
- (b) Appropriate medical treatment;
- (c) Psychological support and / or counselling;
- (d) Material assistance;
- (e) Information, especially relating to legal rights and services available, in a language the survivor can understand;



- (f) Translation and interpretation services, where appropriate;
- (g) Assistance that enables rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders, if applicable; and
- (h) Reflection and recovery period of at least 45 days from the date of a positive reasonable grounds decision, during which period such persons are to be left to reflect, make decisions, and receive appropriate assistance; and, in particular, for those who otherwise have no right at that time to stay in the UK, no expulsion order may be enforced against them, unless (i) authorised by a UK Minister (ii) if public order requires it, or (iii) when survivor status is being claimed improperly:

Any coordinated assistance for persons with at least a positive reasonable grounds decision shall be based on an individual risk assessment, as well as be planned, provided, and reviewed in a manner giving due regard to their safety, and special needs they may have, particularly but not limited to special needs deriving from:

- (a) Psychological, physical, or sexual violence suffered;
- (b) Mental or psychological disorder;
- (c) Disability;
- (d) Pregnancy;
- (e) Ill-health; or
- (f) Status as an unaccompanied child.

For clarity, the Survivors' Standards shall apply to survivors of human trafficking at not only the positive reasonable and conclusive grounds' stages, but also irrespective of whether they are lawfully resident in the UK."

#### *Child-specific rights in the Survivors' Standards*

"There shall be child-specific rights in the Survivors' Standards, which are in addition to, rather than substitutes for, the minimum standards and rights for all survivors, and these are:

- (a) Presumption to consider as a child, persons of an uncertain age, but about whom there are reasons to believe that they are under the age of 18;



(b) Individual assessment is conducted for each child, giving due regard to their views, needs, and concerns; for the purpose of agreeing and undertaking actions directed to a durable physical, psychological, and social recovery for the child;

(c) Guardian or formal representative, with the requisite child sensitive approach and expertise, to be appointed by the relevant authority to represent the child's best interests in all matters related to their status as a survivor, if:

(i) Those with parental responsibility for the child are precluded, due to a conflict of interest, from acting in and / or ensuring the best interests of the child;

(ii) The child is separated from the holders of parental responsibility and it is unreasonable for any of the parties to establish and maintain sufficient contacts; or;

(iii) The child is unaccompanied;

(d) Provide those with parental responsibility for the child, if they are in Scotland, with any forms of assistance to the extent it is considered appropriate and possible to do so; and

(e) Access to education for the child, within a reasonable period, which shall be such period as assessed by the relevant authorities.”

#### *Criminal justice-specific rights in the Survivors' Standards*

“There shall be rights in the Survivors' Standards for appropriate conduct towards survivors in criminal justice settings that are related in some way to their trafficking predicament, these are in addition to, rather than substitutes for, the other rights in the Survivors' Standard, and these are:

(a) Access to legal counselling and, if appropriate in the course of criminal investigations and prosecutions, to legal representation, including for the purpose of claiming compensation from either existing schemes of compensation for survivors of crime and / or from the perpetrator of the crime;

(b) On the basis of and subject to:

(i) Individual risk assessments for survivors; and

(ii) Judicial discretion at the relevant court

Survivors shall have access to any of the following special measures; which shall be provided for any of the following purposes:

- (iii) Promoting protection for survivors in such criminal investigations and prosecutions;
- (iv) Minimising the risk of secondary victimisation through such criminal investigations and prosecutions; or
- (v) Enabling better evidence from survivors in criminal investigations and prosecutions;

These measures may include but are not limited to:

(vi) Measures within the meaning of s.271 of the Criminal Procedure (Scotland) Act 1995, as amended by s.1 of the Vulnerable Witnesses (Scotland) Act 2004, as well as by s.87, s.88, and s.90 of the Criminal Justice and Licensing (Scotland) Act 2010; and

(vii) Measures below, but only if they are not encompassed by paragraph (vi), and which may be appropriate in the following settings:

Arrangements for planning and conducting interviews with survivors of human trafficking, including as far as is appropriate and possible in all the circumstances: - holding interviews without undue delay; interviews lasting only for the time required; -conducted by persons trained in survivor-sensitive approaches; - held in environments adapted for interviews with such vulnerable persons; - and perhaps using audio/video recording technologies especially to obtain evidence from victims for potential use in criminal court proceedings.

Provision for the giving of evidence in criminal court proceedings may, as far as is appropriate and possible in all the circumstances, include: - preventing visual contact in cross-examination between the survivor and the accused; - allowing pre-recorded audio or visual evidence to be considered in proceedings; - and permitting proceedings without the presence of the public.

All the measures as described or encompassed within paragraphs (vi)-(vii) are without prejudice to the rights of the accused in defence in criminal investigations and proceedings.

The Survivors' Standards as described shall be developed, elaborated, and presented in a code of the Survivors' Standards, to be prepared and published by the Survivors' Service, following consultation with key partners and survivors - as far as is possible to do -; with the Survivors' Standards and the Code being subject to review, revision, and re-publication at least every three years."

**Question 7: Do you agree with the approach the Survivors Service and minimum standards for victims as proposed above? Please indicate "yes/no/undecided", specifying any elements you support or disagree with, with reasons for your position.**

## Section 10: Equalities Impact (Race, Gender, Disability and Age)

91. The majority of trafficking victims are female <sup>(80)</sup>. It is therefore anticipated that the provisions within the bill will have a positive equalities impact on this group. Many are children, young people, and from overseas. Therefore, it is anticipated this proposal will not only benefit girls and women, but also boys, other young people, and persons from outside the UK. It should also assist potential victims who may or are targeted due to perceived or actual disabilities. More fundamentally, the proposal should assist all those groups vulnerable to human trafficking, including lower socio-economic groups from the UK and beyond, e.g. those in chronic or deep poverty, homeless persons, and other groups systematically discriminated against.

**Question 8: Is the proposed Bill likely to have any substantial positive or negative implications for equality? If it is likely to have a substantial negative implication, how might this be minimised or avoided?**

## Section 11: Financial Impact

92. It is anticipated that there will be a cost to the Scottish Government in setting up and running the Survivors Service. While Police Scotland and The Crown Office already have human trafficking specialisms, I am interested to know what, if any, cost the provisions in the Bill will add. It is anticipated that the Strategy will have modest cost implications for the Scottish Government. Similarly, I am interested to know what the cost implications of the changes to criminal law will be.
93. However I am keen to seek your views on any anticipated cost to your organisation, and any areas where you anticipate their being a significant cost.

**Question 9: What is your assessment of the likely financial implications of the proposed Bill to you or your organisation; if possible please provide evidence to support your view? What (if any) other significant financial implications are likely to arise?**

## Section 12: Further Provisions

94. While I believe this proposed bill sets out a comprehensive range of measures to fulfil its stated aims, I am keen to learn whether you have any further comment or questions on the provisions within it.

**Question 10: Do you have any other comments on or suggestions that would prevent trafficking in Scotland?**

## Summary of Questions

**Question 1:** Do you agree with the aims and summary objectives of the proposed Bill? Please indicate "yes/no/undecided", with reasons for your position.

**Question 2:** Do you agree with the proposal for a legal duty on Scottish ministers for a Strategy for Scotland against Human Trafficking? Please indicate "yes/no/undecided", with reasons for your position.

**Question 3:** Do you agree with the approach to criminalising human trafficking in Scotland as proposed above? Please indicate "yes/no/undecided", specifying any elements you support or disagree with, with reasons for your position.

**Question 4:** Do you agree with the approach to the criminal justice response to human trafficking in Scotland as proposed above? Please indicate "yes/no/undecided", specifying any elements you support or disagree with, with reasons for your position.

**Question 5:** Do you agree with the approach on the non-prosecution and non-penalisation of trafficking survivors in Scotland as proposed above? Please indicate "yes/no/undecided", specifying any elements you support or disagree with, with reasons for your position.

**Question 6:** Do you agree with the approach to harnessing regulators, the private sector, and civil society against human trafficking, as proposed above? Please indicate "yes/no/undecided", specifying any elements you support or disagree with, with reasons for your position.

**Question 7:** Do you agree with the approach the Survivors Service and minimum standards for victims as proposed above? Please indicate "yes/no/undecided", specifying any elements you support or disagree with, with reasons for your position.

**Question 8:** Is the proposed Bill likely to have any substantial positive or negative implications for equality? If it is likely to have a substantial negative implication, how might this be minimised or avoided?

**Question 9:** What is your assessment of the likely financial implications of the proposed Bill to you or your organisation; if possible please provide evidence to support your view? What (if any) other significant financial implications are likely to arise?

**Question 10:** Do you have any other comments on or suggestions that would prevent trafficking in Scotland?

## How to Respond to this Consultation

You are invited to respond to this consultation by answering the questions in the consultation and by adding any other comments that you consider appropriate.

Responses should be submitted by Friday the 6<sup>th</sup> of December 2013 and sent to:

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Scottish Parliament  
Edinburgh EH99 1SP

Tel: 0131 348 6427

E-mail: [jenny.marra.msp@scottish.parliament.uk](mailto:jenny.marra.msp@scottish.parliament.uk)

Please indicate whether you are a private individual or an organisation.

Respondents are also encouraged to begin their submission with a short paragraph outlining briefly who they are, and who they represent (which may include, for example, an explanation of how the view expressed was consulted on with their members).

To help inform debate on the matters covered by this consultation and in the interests of openness, please be aware that the normal practice is to make responses public - by posting them on my website: [www.jennymarra.com](http://www.jennymarra.com) and in hard copy in the Scottish Parliament's Information Centre (SPICe).

Therefore, if you wish your response, or any part of it, to be treated as anonymous, please state this clearly along with the reasons for this. If I accept the reasons, I will publish it as "anonymous response". If I do not accept the reasons, I will let you know and give you the option of withdrawing it or submitting it on the normal attributable basis. If your response is accepted as anonymous, it is your responsibility to ensure that the content of does not allow you to be identified.

If you wish your response, or any part of it, to be treated as confidential, please state this clearly and give reasons. If I accept the reasons, I will not publish it (or publish only the non-confidential parts). However, I am obliged to place a redacted copy of the responses to my consultation when lodging my final proposal. As the Parliament is subject to the Freedom of Information (Scotland) Act (FOISA), it is possible that requests may be made to see your response (or the confidential parts of it) and the Parliament may be legally obliged to release that information. Further details of the FOISA are provided below.



In summarising and analysing the results of this consultation we will normally aim to reflect the general content of any confidential response in that summary, but in such a way as to preserve the confidentiality involved. You should also note that members of the committee which considers the proposal and subsequent Bill may have access to the full text of your response even if it has not been published in full.

There are a few situations where not all responses will be published. This may be for practical reasons: for example, where the number of submissions we receive does not make this possible or where a large number of submissions are in very similar terms. In the latter case, only a list of the names of people and one response who have submitted such responses would normally be published.

In addition, there may be a few situations where I may not choose to publish your evidence or have to edit it before publication for legal reasons. This will include any submission which contains defamatory statements or material. If I think your response potentially contains such material, usually, this will be returned to you with an invitation to substantiate the comments or remove them. In these circumstances, if the response is returned to me and it still contains material which I consider may be defamatory, it may not be considered and it may have to be destroyed.

#### *Data Protection Act 1998*

As an MSP, I must comply with the requirements of the Data Protection Act 1998 which places certain obligations on me when I process personal data. Normally I will publish all the information you provide (including your name) in line with Parliamentary practice unless you indicate otherwise. However, I will not publish your signature or personal contact information (including, for example, your home telephone number and home address details, or any other information which could identify you and be defined as personal data).

I may also edit any information which I think could identify any third parties unless that person has provided consent for me to publish it. If you specifically wish me to publish information involving third parties you must obtain their consent first and this should be included in writing with your submission.

If you consider that your response may raise any other issues concerning the Data Protection Act and wish to discuss this further, please contact me before you submit your response.

Further information about the Data Protection Act can be found at: [www.ico.gov.uk](http://www.ico.gov.uk).

### *Freedom of Information (Scotland) Act 2002*

As indicated above, once your response is placed in the Scottish Parliament Information Centre (SPICe) or is made available to committees, it is considered to be held by the Parliament and is subject to the requirements of the Freedom of Information (Scotland) Act 2002 (FOI(S)A). So if the information you send me is requested by third parties the Parliament is obliged to consider the request and provide the information unless the information falls within one of the exemptions set out in the Act, even if I have agreed to treat all or part of the information in confidence or to publish it anonymously. I cannot therefore guarantee that any other information you send me will not be made public should it be requested under FOI.

Further information about Freedom of Information can be found at:

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

## Annex A - Extended Footnotes (by number)

37. Human trafficking into sexual exploitation is criminalised for England and Wales through sections 57 to 59 of the Sexual Offences Act 2003. Sexual exploitation is defined in that Act as the commission of any of the wide range of offences detailed under its Part One, including rape and sexual assault, or any of the offences under section 1 (1) (a) of the Protection of Children Act 1978 which made it illegal to make indecent images of children.
38. The requirement for a cross-border element to be present for there to be a crime of human trafficking under section 4 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 was removed in Scotland and England and Wales, respectively, through (a) section 46 of the Criminal Justice and Licensing (Scotland) Act 2010; and (b) section 110 Protection of Freedoms Act 2012.
42. The first two convictions were in September 2011 secured under the Scots law offence of trafficking into prostitution etc., at section 22 Criminal Justice (Scotland) Act 2003, with the accused - both Scots - pleading guilty before trial, and then receiving custodial sentences of 44 and 18 months, respectively. The remaining three convictions were in December 2012 under the offence of trafficking into exploitation at section 4 Asylum and Immigration (Treatment of Claimants etc.) Act 2004, with a trafficking purpose of "sham marriage", and the three accused, all Slovakian, denying the charges before being found guilty and receiving, in January 2013, a custodial sentence of 3 years each.
46. Article 5 EU, which states: "1. Member States shall take the necessary measures to ensure that legal persons can be held liable for the offences referred to in Articles 2 and 3 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person; 2. Member States shall also ensure that a legal person can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of the offences referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority. 3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles 2 and 3.

46. For the purpose of this Directive, 'legal person' shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations
47. Section 99 of the Criminal Justice and Licensing (Scotland) Act amended various provisions of the Antisocial Behaviour etc. (Scotland) Act 2004.
53. Sections 9 and 10 of this Act provide for the possibility of placing a publicity or remedial order, respectively, for those legal persons convicted of, in Scots law, corporate homicide; such a conviction would generally be when a legal person has been found liable for a fatality so applied to human trafficking this sanction would be confined to only the most serious cases.
55. The importance of deepening the Crown Office and Procurator Fiscal Service's specialism has been set out at p.71 of the EHRC Inquiry: endnote ii; and at pp.38-39 of the Follow On Report to the EHRC Inquiry: endnote xxiii.
56. Particular regard should be given to the recommendation at p.134 of the Anti-Trafficking Monitoring Group's recent, comprehensive analysis of the UK's criminal justices responses to human trafficking, "In the Dock", published in June 2013. The headline recommendation is that criminal justice institutions in Scotland "ensure professional awareness-raising for all frontline staff" but, drilling down, this entails, inter alia, that any approach on the identification and handling of the journey of adult and child victims of trafficking in Scotland's criminal justice system is thoroughly grounded in consistent awareness and training for relevant professionals in criminal justice pathways: from initial identification and safety; through to involvement in any investigations, prosecutions, or even defence proceedings; onto engagement with, if applicable, social work, NHS, or child protection professionals.
59. See: (a) *Rantsev v Cyprus and Russia* [2010], specifically paragraph 287 which includes the obligation that States are "required to provide relevant training for law enforcement and immigration officials"; (b) Article 9(3) EU; and (c) Articles 5(2) and 10(1) CoE. Further, the importance of a general law enforcement capacity to an effective criminal justice response was emphasised at pp.326-327 by Gallagher and Holmes in their pioneering, empirical article cited at endnote lxii.

60. Paragraph 286 in *Rantsev v Cyprus and Russia* [2010] formulates a positive duty on States to take protective measures to ensure immediate safety for victims: "Article 4 may, in certain circumstances, require a State to take operational measures to protect victims, or potential victims, of trafficking ... [in order for such a positive duty to arise in a particular case it must be shown] ... that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited ... there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk".
61. There is now widespread international agreement that dedicated resource and expertise in anti-human trafficking is essential to any effective criminal justice response. For instance, (a) Gallagher and Holmes at p.323 in their empirical article referenced at endnote lxii state: "international law, policy, and practice is beginning to confirm that a dedicated, specialized anti-trafficking capacity is essential to an effective investigative response"; and (b) unsurprisingly this recognition is reflected in both the CoE Human Trafficking Convention (primarily Article 29) and the EU Human Trafficking Directive (mainly Article 9) that both look for States to ensure those dealing with human trafficking have a higher level of training and expertise as well as being practised in the methods and tools appropriate for both serious crime cases (e.g. rape, domestic servitude etc.,) and organised crime (covert surveillance, forensic accounting etc.,).
62. Paragraph 288 in *Rantsev v Cyprus and Russia* [2010] states: "Article 4 also entails a procedural obligation to investigate situations of potential trafficking. The requirement to investigate does not depend on a complaint from the victim or next-of-kin: once the matter has come to the attention of the authorities they must act of their own motion". Further, paragraph 307 in the same decision makes clear that this procedural duty applies to the entirety of the trafficked experience: "the need for a full and effective investigation covering all aspects of trafficking allegations from recruitment to exploitation is indisputable".

63. The importance of appropriate victim care in general as well as in criminal justice settings is reflected in how (a) the EU Human Trafficking Directive provides for (i) both general assistance and support for adult and child victims of human trafficking, at Articles 11 and 14, respectively; as well as (ii) for dedicated provisions for adult and children in relation to criminal investigations and proceedings; and (b) in that the CoE Human Trafficking Convention provides generally for assistance for victim through its Article 12, as well as specific assistance for victims in relation to criminal justice matters, through its Articles 28 and 30.
64. The importance of expertise in handling organised crime and serious crime matters was emphasised through: (a) Article 9(4) of the EU Human Trafficking Directive requires "necessary measures" to be taken so that "effective investigative tools, such as those which are used in organised crime or other serious crime cases are available to persons, units or services responsible for investigating or prosecuting" human trafficking; and (b) Article 29(1) of the CoE Human Trafficking Convention requires more generally that a specialised approach is taken against human trafficking, including implicitly by criminal justice institutions
65. Criminal prosecution against those perpetrating or ancillary to human trafficking is a theme across international law on this crime. For instance: (a) , as mentioned above, EHRC Article 4 case law requires the effective prosecution and penalisation of human trafficking; (b) Article 9(4) EU Human Trafficking is dedicated to investigation and prosecution; and (c) Article 1(1)(b) states that one of the purposes of the CoE Human Trafficking Convention is the investigation and prosecution of human trafficking.
66. The importance of asset recovery has been documented in domestic evidence as well as in the international law of human trafficking, for example: (a) the EHRC Inquiry stated asset recovery, or slightly more broadly the disruption of organised crime, as vital: "Disrupting serious organised crime is a key part of anti-trafficking efforts. Disruption refers to the identification, tracing, restraint and confiscation of the assets, instruments and proceeds of serious and organised criminal activity"; and (b) Article 7 of the EU Human Trafficking Directive strongly recommends that those responsible for asset recovery should ensure they undertake disruption actions so they may seize and confiscate instrumentalities from those convicted of human trafficking offences.



67. There has been one use of asset recovery powers in Scotland for a convicted human trafficker which, inter alia, reflects the comparatively low number of such convictions in Scotland since 2003. The relevant action involved a Compensation Order seizing £45,000 from Stephen Craig, who had been convicted in September 2011, of trafficking into prostitution under section 22 of the Criminal Justice (Scotland) Act 2003.
68. The need for systematic cooperation between criminal justice agencies and other organisations, particularly those working with and assisting victims, has been articulated, inter alia, in: (a) the EHRC Inquiry which envisaged from its recommendation on overcoming Scotland's intelligence gap on human trafficking, an ideal outcome of "the police service and its law enforcement partners have robust and effective mechanisms for intelligence gathering and sharing, for cooperation particularly in terms of services for victims, and for joint enforcement action against traffickers who are operating in Scotland", p.69; as well as in (b) the GRETA Evaluation that echoed the EHRC's Inquiry's recommendation (point 354, p.79) on the need for greater cooperation in the criminal justice response to the human trafficking that involved all "relevant actors" (point 357, p.79)
69. The necessity of inter-agency/-sector cooperation at the domestic and international levels is reflected, inter alia, through (a) Article 1(1)(c) CoE Human Trafficking Convention that explicitly recommends there be international cooperation against human trafficking, and implicitly calls for the need for domestic cooperation through its emphasis that States "design a comprehensive framework for the protection and assistance of victims and witnesses ... as well as to ensure effective investigation and prosecution", which is elaborated on in the Explanatory Report to the Convention (para., 56) through the concept of "multidisciplinarity" that is considered necessary to combat human trafficking as well as being "basic to the Convention ... it must also be basic to any national action on trafficking in human beings"; as well as by (b) paragraph 5 of the Preamble in the EU Human Trafficking Directive, which recommends that the "law enforcement authorities of the Member States should continue to cooperate in order to strengthen the fight against trafficking in human beings. In this regard, close cross-border cooperation, including the sharing of information and the sharing of best practices, as well as a continued open dialogue between the police, judicial and financial authorities of the Member States, is essential".



70. The ECtHR stated at paragraph 289 of its decision in *Rantsev v Cyprus v Russia* [2010] that: "in addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories".
74. O'Neill, G., (2013) "Is Justice Penalising the Slaves Not the Slavery" in "The Scotsman" on 2nd July 2013, in which the author referenced three national reports, namely (a) the Follow -On Report to the EHRC Inquiry (March 2013), (b) the independent evaluation of the Scottish Guardianship Service (May 2013), and (c) the first comprehensive analysis of criminal justice responses in the UK to human trafficking by the Anti-Trafficking Monitoring Group (June 2013); with each of these reports noting the possibility that some persons with trafficking indicators were being treated as potential offenders in Scotland and were subject to criminal justice processes up to and including criminal prosecution and conviction.
76. The leading international framework on optimising human rights through the private sector are the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (2011); they are informally known as the "Ruggie Principles", a reference to the UN Special Representative on Human Rights who developed and proposed the framework, John Ruggie.
77. The main international principles on the integrating anti-human trafficking through businesses are the Athens Ethical Principles, developed by the global End Human Trafficking Now coalition, which were published in 2006, and have the commitment of over 180 major companies worldwide, albeit very few if any have signed from Scotland. There are seven principles that, taken together, should amount to the development by the private organisation of an anti-human trafficking strategy that explicitly dissociates the business from the "illicit practices" in human trafficking. The seven principles are: "(a) demonstrate the position of zero tolerance towards trafficking in human beings, especially women and children for sexual exploitation; (b) contribute to prevention of trafficking in human beings including awareness-raising campaigns and education; (c) develop a corporate strategy for an anti-trafficking policy which will permeate all our activities; (d) ensure that our personnel fully comply with our anti-trafficking policy;

77. (e) encourage business partners, including suppliers, to apply ethical principles against human trafficking; (f) in an effort to increase enforcement it is necessary to call on governments to initiate a process of revision of laws and regulations that are directly or indirectly related to enhancing anti-trafficking policies; and (g) report and share information on best practices".
79. The National Referral Mechanism (NRM) is a framework for identifying victims of human trafficking and ensuring they receive the appropriate care. Authorised agencies, such as the Police, social services and certain Non-Governmental Organisations (NGOs), who encounter a potential victim of human trafficking, can refer them to the Competent Authority (CA). The initial referrer is known as the 'First Responder'. The UK's CAs are the Serious Organised Crime Agency (SOCA) through its UK Human Trafficking Centre and the UK Border Agency (UKBA). SOCA deals with referrals from the police, local authorities and NGOs. UKBA deals with cases where trafficking is raised as part of an asylum claim or is in the context of another immigration process.

# Human Trafficking (Scotland) Bill

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