



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 10 March 2015

Session 4

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JUSTICE COMMITTEE
8th Meeting 2015, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Jayne Baxter (Mid Scotland and Fife) (Lab)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*Gil Paterson (Clydebank and Milngavie) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Lorraine Cook (Convention of Scottish Local Authorities)
Katie Cosgrove (NHS Health Scotland)
Hazel Dalgard (Scottish Government)
Catriona Mackenzie (Scottish Government)
Jenny Marra (North East Scotland) (Lab)
Dr Maria O'Neill (Abertay University)
Dr Paul Rigby (University of Stirling)
Alastair Smith (Scottish Government)
Paul Wheelhouse (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Joanne Clinton

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 10 March 2015

[The Convener opened the meeting at 10:30]

Human Trafficking and Exploitation (Scotland) Bill: Stage 1

The Convener (Christine Grahame): Good morning and welcome to the eighth meeting of the Justice Committee in 2015. I ask everyone to switch off mobile phones and other electronic devices, as they interfere with broadcasting even when switched to silent. We have received no apologies.

Agenda item 1 is our main item of business: our second evidence-taking session on the Human Trafficking and Exploitation (Scotland) Bill. We will hear from two panels of witnesses, and I welcome to the meeting our first panel: Dr Maria O'Neill, senior lecturer in the law division of Dundee business school, Abertay University; and Dr Paul Rigby, lecturer in social work, University of Stirling.

I immediately invite questions from members. Are you awake?

Gil Paterson (Clydebank and Milngavie) (SNP): Good morning. One or two organisations have raised with us concerns about the definition of human trafficking in the bill but, having looked through the written evidence, I note that the Edinburgh Bar Association, the Faculty of Advocates and the Crown Office and Procurator Fiscal Service take a different view on the matter. For the sake of clarity, I will put on record some of their key observations.

The Edinburgh Bar Association says that it

“welcomes, in principle, the introduction of a single offence to be known as the offence of human trafficking. We note that the offence is drawn sufficiently broadly to criminalise those whose roles may be ancillary to some extent—i.e. the ‘facilitators’—but whose participation is nonetheless an essential element in the process of trafficking of human beings.”

I will not take too long over this, convener, but I think that it is worth bringing these points to the witnesses' attention.

The Faculty of Advocates says:

“We welcome in principle the introduction of a single offence, in the interests of clarity.”

Finally, the Crown Office and Procurator Fiscal Service makes the short statement that it

“supports the move to consolidate the existing law in order to provide a single Human Trafficking offence and a single offence of Exploitation both of which will assist prosecutors with preparation and presentation of evidence.”

Therefore, the people who are involved in prosecuting these cases seem to support the bill

If we read through the evidence, we can see that such support is quite substantial. In light of the evidence that we have been presented with, can the witnesses give us some views and information that might assist us in the long run?

The Convener: I should tell the witnesses that their microphones will come on when I call them and that they do not need to press any buttons. Please indicate if you wish to respond. Which of you wants to answer Gil Paterson's question first?

Dr Maria O'Neill (Abertay University): First of all, I should say that, as I come to this as a European Union lawyer rather than a Scots criminal lawyer, there might be some discrepancies in my approach. However, I welcome the bill as introduced and the single definition of human trafficking. Previous legislation on the issue was pretty complex, and I am interested in the fact that the bill puts it together with slavery and forced labour. That said, like some of the submissions, I am concerned about the use of the word “travel”. Although the EU directive on human trafficking focuses on transnational crime, the fact is that human trafficking can happen within a jurisdiction and even—to take an extreme case—from one street to the next.

Moreover, in comparing the definition with the provisions in the EU directive, I note that the bill does not appear to refer to begging or forced begging, which was a big issue down in London and on which there has been a big cross-border police operation called operation golf. There is also no reference to exploitation of criminal activities, illegal adoption or forced marriage, which I know is covered by Scots law but which I think could be referred to in the bill.

Those are my points on the definition.

Dr Paul Rigby (University of Stirling): I have occasionally questioned the word “travel” in the context of trafficking, as trafficking is not just about travel; it also covers recruitment, harbouring, receipt and so on. The focus on travel takes the focus away from some of the other acts involved.

I am particularly concerned that the bill does not give much prominence to children. Specifying the means is not really necessary to constitute an offence of trafficking of children. As long as we have the act and the purpose, which is recruitment for the purposes of exploitation, that would constitute trafficking of children. However, I do not

think that that is reflected enough in the bill, specifically in relation to children.

Otherwise, I agree with Maria O'Neill regarding the issues that she raised.

The Convener: Do we require something other than just “person”? Do we need a separate section that refers to children, including a definition of “child”?

Dr O'Neill: I, too, have some views on the position of children. I have compared the bill with the EU directive, and I am aware that there are provisions in Scottish legislation that deals with children, but the directive's implementing legislation requires distinct provisions regarding children, so that could be a problem.

Furthermore, the directive is clear in defining children as anybody under the age of 18. Should there be a lack of certainty, the presumption is that the individual is under the age of 18 until their age is proven. It would be helpful if that was expressly stated in the legislation, even though the Scottish Parliament would no doubt intend that to be the case.

There are requirements in the directive for support and assistance for children. It would be helpful if those, too, were in the implementing provisions. The bill provides for support and assistance for adult victims. I presume that you intend to rely on the Victims and Witnesses (Scotland) Act 2014, but an express reference to that act would be useful.

The directive contains provisions on access to legal guardians and the need for special investigation and criminal procedures in the case of a child, which I presume would be automatic in Scotland. Some of those who have submitted evidence to you have raised concerns about children aged 16 or 17, and that issue would need to be expressly addressed, for the avoidance of doubt.

Dr Rigby: I echo most of those points. There needs to be something about the definition of a child. Most crucially, there should be something on the age presumption, where there is any doubt, for the purposes of support and assistance.

I understand that there is recognition that existing legislation in Scotland on the child protection system and the children's hearings system is sufficient. The evidence from the few years that we have been considering the matter suggests that that is not always the case, however, and that some young people, especially 16 and 17-year-olds, are falling through the gaps in the provisions of the Children and Young People (Scotland) Act 2014 and the Children's Hearings (Scotland) Act 2011, on access to children's hearings. There needs to be something

specific about the age of a child, with a presumption that a person is a child until that is proven otherwise.

Gil Paterson: My question was about the single definition and the principle of a single offence. My interpretation is that it catches everything, such that, in every eventuality, a prosecution can take place. I am not quite sure from your answers how you feel about that. You have moved on to other aspects. I have a question about children, and I will perhaps pose that now—you can answer the two questions together.

When we adopted a child from abroad, we had a self-support group, and many of the children involved came from different circumstances. Some people thought that, because of the circumstances in the home country, where the child might have been abandoned, nobody could have a clue about their age. An age was given, but people remained convinced that the child was not that age. If we define a child without knowing their age, could they in some way be left out of the bill's provisions? As I understand it, it is not possible to tell the age of many children.

Let me play devil's advocate. Would a reference in the bill to “youths” be a broader way to capture children and assist them rather than defining children as those aged under 18? I am not a lawyer and am not sure whether a child's actual age would need to be proven.

The Convener: I think that previous evidence said—you were also perhaps saying this—that there might be a presumption in a reasonableness test that the person is 18 or under, given that, as you just narrated, we know that there are many countries in which there may not be documentation on or even anecdotal knowledge of the age of a child. I think that Dr O'Neill addressed that. We would need something in a test.

Dr O'Neill: In the directive, the EU made a specific policy decision to assume that an individual is under the age of 18 in the absence of evidence to the contrary. I think that the requirement is for the bill to protect all children equally, even if they are 16 or 17. Even though there are different ages for different purposes in other parts of society, for the purposes of the bill, people are still considered to be very vulnerable at the ages of 16 and 17.

Dr Rigby: The presumption—if you have it—that a person is under 18 is sufficient in terms of the EU directive. In practice, assessing age is extremely complex. At the moment, the matter generally rests with social workers working to guidance that I think was published two or three years ago. The complexities of identifying the age of a young person are immense—there is no scientific test that can do that. I think that we

should work with the presumption that somebody is under 18 until proven otherwise, which would be done through an age assessment.

I would like to pick up on the issue of a single definition, which is an extremely welcome way forward. In my experience, a single definition will never address or capture the full complexities of all the different behaviours that may constitute trafficking that we have identified over the years, so there has to be some flexibility. Naming types of exploitation is useful, but we will always identify other types of exploitation in practice and it is really difficult to stick with a set definition that cannot be changed as we learn more about what happens in trafficking.

For both adults and children, we probably need to focus on the definition of what exploitation is as opposed to what the acts are. The United Nations briefing paper “Abuse of a position of vulnerability and other ‘means’ within the definition of trafficking in persons” is quite useful as it looks at what exploitation is without naming the exploitation. That leaves different types of exploitation a bit more wide open and would be a useful starting point when you come to look at offences and exploitation or actions and exploitation.

The Convener: But someone can be exploited without being trafficked.

Dr Rigby: Absolutely.

The Convener: That is the problem.

Dr Rigby: Yes.

Gil Paterson: I have similar thoughts. I always worry when everything is defined that something will be missed out and therefore excluded. I think that the intention is to leave a broad definition that captures everything, so that nothing escapes through the net.

That is more a comment than a question. I am grateful for the point that has been made.

The Convener: Are you suggesting that there should be a catch-all provision somewhere—something like “or such other activities as could be reasonably deemed to be trafficking”—so that there is such flexibility? Are you suggesting that that should be in section 1(1)?

Dr Rigby: That would be useful. I am not legally trained, so I do not know how that could be worded to capture all the different actions that could constitute exploitation.

The Convener: We see catch-all provisions in other acts of Parliament so that people are not hemmed in.

Elaine Murray (Dumfriesshire) (Lab): Some of the witnesses at last week’s meeting felt that the presumption against the prosecution of victims of

trafficking should be in the bill rather than in the guidance from the Lord Advocate. What are your views on that?

10:45

Dr Rigby: A presumption against prosecution would be useful. I appreciate that the Lord Advocate has ultimate discretion on those issues, so I am not sure how that works legally and whether such a presumption could apply in all cases. Where a child is involved, the presumption that the child is a victim should be strengthened, probably more so than in cases involving adult victims, given the specific vulnerabilities of children. There should also be a presumption on the non-prosecution of children. It is clear that that should be much more to the fore in the bill.

Dr O’Neill: I note that the directive allows for the options that the bill has taken, but it might be worth noting that the United Kingdom bill at Westminster has taken the option of non-prosecution. That is relevant because it could open up opportunities for serious and organised crime gangs to exploit the differences between the jurisdictions. When it came to the UK-wide Crime (International Co-operation) Act 2003, the Scottish Parliament was mindful at the time that those involved in organised crime could exploit jurisdictional issues.

Elaine Murray: I want to ask about something that is not in the bill but which was raised with us in writing last week. The Northern Irish legislation criminalises the purchase of sex and decriminalises the sale of sex. The argument was that that would reduce some of the demand that causes human trafficking. Do you have any views on that?

Dr Rigby: Yes. It is difficult to comment purely in terms of the Human Trafficking and Exploitation (Scotland) Bill, because the purchase of sex might also happen outwith trafficking, but I know that there are many arguments about whether all types of prostitution are exploitation. I am not sure whether the bill is the right forum for that discussion, but the exploitation of women or men through prostitution is something that needs to be looked at more broadly.

Dr O’Neill: Unfortunately, prostitution is not my area of expertise, so I will not offer a view.

The Convener: You might want to rephrase that, Dr O’Neill. *[Laughter.]*

Dr O’Neill: I cannot offer a view in any context.

Elaine Murray: I am interested in the question whether, even if the committee was sympathetic to the arguments presented by some witnesses, it would be appropriate to address that issue in the Human Trafficking and Exploitation (Scotland) Bill.

That said, it is in the Northern Irish legislation, so it must have been felt that it was appropriate there.

The Convener: You have had your answer from Dr Rigby, and Dr O'Neill has advised us that she has no expertise in the area, so I think that we should move on.

Elaine Murray: That is fine.

Margaret Mitchell (Central Scotland) (Con): My question is specifically for Dr O'Neill. I noticed that your written submission gives a comparative overview of human trafficking in terms of the legislation from Northern Ireland, England and Wales, and Scotland. Broadly speaking, how do the different jurisdictional approaches measure up to one another?

Dr O'Neill: In general, all three jurisdictions are trying to do something similar. The differences come down to the detail of the various provisions. The intention clearly exists and the Westminster bill is more advanced than the Scottish bill in its progress through Parliament, so there is still an opportunity to revise the Scottish bill. An act has been passed in Northern Ireland and I have already had feedback from the Northern Ireland Department of Justice on my comments. It has raised a few issues that I still need to consider and reflect upon.

Margaret Mitchell: Is that something that you would like to comment on now?

Dr O'Neill: I will not comment at this point. I am sure that the Scottish Parliament will wish to take its own view on the legislation.

Margaret Mitchell: You suggested that there could be a need to revisit the issue of consent.

Dr O'Neill: Yes—there are certainly issues about consent. I understand that children can never give consent. The lack of express reference to children is an issue. There is also a question around whether consent can be given by people, including adults, who are under extreme duress. We are, for the most part, talking about vulnerable people, irrespective of how that vulnerability may have arisen. The feedback says that although there would be certain groups of people who may be classified as vulnerable, other people may become vulnerable due to their personal situation, which we cannot always anticipate.

Margaret Mitchell: More generally, is the bill well drafted? Can you focus on any specific areas?

Dr O'Neill: There are a few points to make. In the version of the bill that I saw, there was a discrepancy between the human trafficking and modern slavery provisions. I presume that you intend to have the same provisions for both.

The Convener: Are you talking about the bill as laid?

Dr O'Neill: Yes.

The Convener: Thank you.

Dr O'Neill: The consent issue arises there.

Aiding and abetting or, as it is known in Scotland, art and part is an issue. I am not an expert on that. However, it is covered for human trafficking, but it does not appear to be covered for slavery, servitude and forced or compulsory labour. I presume that Parliament meant to do that: it will need to assure itself that that is covered one way or another.

The Convener: Section 4(1)(b), which comes under the heading "Slavery, servitude and forced or compulsory labour", says:

"the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform such labour."

Does not that cover art and part?

Dr O'Neill: That may well cover it. If you feel that it does, then yes.

The Convener: But you have doubts.

Dr O'Neill: Yes. That is what occurred to me when I was reading the bill but, as I said, I am not a Scots lawyer.

I have a concern about the establishment of jurisdiction, in that section 2(2) might not cover persons who are temporarily present in the jurisdiction. For example, what about someone who was delivering a victim into the country along a transnational human trafficking chain? The bill is very clear about establishing jurisdiction against Scottish nationals and people who are resident in Scotland.

The Convener: The bill is clear about establishing jurisdiction against UK nationals.

Dr O'Neill: I am sorry—UK nationals.

Margaret Mitchell: Dr Rigby mentioned in his submission the viewing of human trafficking through a "reductionist lens". Does the bill sufficiently capture all the complicated issues that human trafficking involves?

Dr Rigby: That is a good question. The bill captures many issues that are involved in human trafficking, but I do not think that any single piece of legislation can be sufficiently nuanced to address all the issues that we have come across. The point was made about the need to keep the bill sufficiently wide; that may be the way forward. I am not sufficiently legally trained or aware to know how the wording of the bill could cover all the different aspects.

I am particularly interested in the bill's focus on victims, but unfortunately it focuses on adults and not children. However, the provision of support and the assistance to victims is very welcome. That was not covered in the past in many other pieces of legislation.

Margaret Mitchell: Thank you. That is helpful.

The Convener: We have got the message about children. Perhaps there could be a separate section, or whatever, on them. The drafters can do that and amendments can be lodged.

John Finnie (Highlands and Islands) (Ind): Good morning, panel. I have a couple of questions for Dr O'Neill. They are less technical and cover your introductory statement in your submission, which states that

"The issue of human trafficking law is almost as diverse. Issues arise in distinguishing human trafficking from human smuggling".

What is the difference between them?

Dr O'Neill: The main difference is the voluntary aspect: human smuggling is when a person wants to come into a country illegally and pays human smugglers to facilitate that. That is an immigration crime in which the individual who is crossing the border is the criminal. It can be difficult to distinguish between that and human trafficking, because sometimes a person may volunteer to be smuggled but is exploited by people when they are brought across a border—as they are no longer volunteering for what happens next, they are turned into a human trafficking victim. In such cases, EU law is certainly clear that the individual is a victim, and that the criminals are the people who brought them into the country. They might be part of an organised crime gang, although it can happen that individuals are brought in by other individuals.

The reality is that it is sometimes very difficult to distinguish between the two, but the laws regarding each should be quite different in how they operate and in how they classify the target of the legal framework and the law enforcement operation.

John Finnie: Finding out whether someone is a victim or otherwise shows the challenge that faces the authorities.

Dr O'Neill: That is very difficult, and the law enforcement community would argue that those who want to be smuggled into the country might claim to have been trafficked. In fact, the EU directive is aware of that, and there are also EU human smuggling provisions that we in this country might or might not be involved with, through our opt-out from the Schengen agreement. If individuals claim to be trafficked, the assumption in the EU directive is that they should

be treated as human trafficking victims until the contrary is proven, at which point they might well be treated as criminals who have crossed the border as illegal immigrants. Of course, that takes us into a completely different area of law.

John Finnie: Thank you for that. In the introduction to your submission, you refer to

"the appointment of the Welsh Government's anti-trafficking co-ordinator in 2011."

Are you able to comment on the effectiveness of that role?

Dr O'Neill: No. I have not done a lot of work on or gone into great detail on the Welsh jurisdiction; however, I am aware that Wales has such a co-ordinator, and that the Westminster legislation will contain provision for one, who will operate for the whole UK jurisdiction. I should point out that an anti-trafficking co-ordinator has also been appointed at EU level.

John Finnie: In his submission, Dr Rigby mentions illegal intercountry adoption. Again, there will be complexities in that respect. Dr O'Neill—do you believe that the bill could pick up on that? Is the issue pertinent?

Dr O'Neill: I think that the draft directive referred to forced adoption and forced marriages, possibly of people under the age of 18. Many complexities will emerge in the more difficult areas of human trafficking; all that we can expect is that the best is done and that the matter will be reviewed later to find out whether there are other areas to address. It might be useful to have a catch-all provision as well as exemplars of human trafficking, because it is very difficult to anticipate the direction in which organised crime will go. Other jurisdictions take slightly different approaches, including on forced involvement in medical research, but a catch-all provision will future proof the legislation.

John Finnie: Dr Rigby's submission refers to

"child victims of trafficking"

being treated

"as 'mini-adults'",

and

"an agency whose primary function is border control"

creating

"a conflict of interest"

with regard to the child. Can you expand on the issues surrounding those two comments?

Dr Rigby: With regard to the national referral mechanism and ways of identifying victims of trafficking, I think that the experience in Scotland raises a number of issues about children being subject to an approach that involves lots of

interviews and questions from different state actors without any due regard to their age, the trauma that they have experienced, their movement—or, indeed, their lack of movement—or their understanding of where they are. The fact is that under-18s are not mini-adults; they are children, and they have their own vulnerabilities and needs. It is important to recognise what has been happening in that respect.

As for decision making within the competent authority, the competent authority is not necessarily that which was envisaged in the original national referral mechanism document of the Organization for Security and Co-operation in Europe. In that document, the mechanism was to be a multi-agency grouping or panel that would make decisions on whether someone had been trafficked.

Especially in respect of children, there was recognition that we need child-protection experts to be involved, but that does not happen at the moment. The annex that I have included about the model that we propose for Scotland recognises that child trafficking has distinct issues that differ from the issues around trafficking in general, and that the child-protection system in Scotland as it stands, albeit with some problems and issues, is probably the best forum for identification, protection and on-going support of all children who have been trafficked or exploited.

I obviously would not take away from the reserved decisions that UK visas and immigration makes on asylum and immigration. Those decisions would clearly stay with UKVI, but any other aspect of exploitation or abuse is clearly within the remit of the statutory authorities in Scotland, and I believe that that is probably the best route to approach working with vulnerable young people and children, which would leave decision making and support in the hands of trained experts in child protection.

11:00

John Finnie: Could it be the case that UKVI's involvement, or its profile or where it sits in the pecking order of decision making, means that it does not act in the interests of children as things currently stand?

Dr Rigby: The evidence from the national monitoring that we completed in 2011 suggests that a lot of local authorities consider that to be an issue, and that a referral through the national referral mechanism is at times not in the best interests of children because the decision-making focus is linked too closely to immigration.

The Convener: I hope that Gil Paterson will forgive me, but I will allow members who have been waiting to ask questions to come in before

him. We are going all round the subjects, but we shall come back to children.

Gil Paterson: That is okay.

Roderick Campbell (North East Fife) (SNP): I would like Dr O'Neill to recap on her views on protection of victims. Your written submission seemed to make it fairly clear that the policy provisions would not comply with the EU directive, but from listening to you this morning I get the impression that you take the view that there is a bit more latitude and that things are not quite so clear cut.

Dr O'Neill: Are you talking about non-prosecution of victims?

Roderick Campbell: Yes.

Dr O'Neill: The Department of Justice in Northern Ireland pointed out an error in my paper, so I am happy to take that point on board. I have revisited the directive, which does allow for some flexibility. My point was about the differences between the jurisdictions at this point.

There are other points on protection of victims and witnesses that might be worth mentioning. For example, there is no reference in the bill to access to witness protection programmes. I know that there is a UK-wide witness protection programme, under section 82 of the Serious Organised Crime and Police Act 2005. I do not know whether it expressly includes, or whether the new UK-wide legislation would include, the victims of human trafficking or the slavery offences.

There is also a reference in the directive to compensation for victims. Again, I am aware that there are compensation schemes operating in Scotland, but I am not sure whether they would include compensation in the two particular crime areas of human trafficking or slavery offences, which may be covered in schedules. I would also be concerned about whether section 8 of the bill, on support and assistance to victims, is sufficiently robust to ensure that that actually happens, although it is clearly the intention of the Parliament that it should do so.

Roderick Campbell: Let us go back to protection of victims. Paragraph 56 of the policy memorandum rejects the idea of a statutory defence, because that would place a burden on victims to prove the connection between offending behaviour and their trafficked status, which runs contrary to the victim-centred approach. I do not know what your view is on that, but the requirement in section 45 of the Modern Slavery Bill to prove that connection is fairly clear. Do you have any comment on that?

Dr O'Neill: No, but I read the feedback from the Faculty of Advocates and the Edinburgh Bar Association, and I defer to Scots lawyers on

interpretation of the provisions. It obviously depends on how the courts operate in Scotland.

Roderick Campbell: Aside from the Lord Advocate's guidelines, under section 12 of the Criminal Procedure (Scotland) Act 1995, the Lord Advocate may issue instructions in relation to offences directly to the chief constable. That might provide an additional line of protection.

Dr O'Neill: We are at a disadvantage, in that we do not have a preliminary draft. The provisions may be stronger or weaker than what is anticipated in the directive. At this point, there is a lack of information on those provisions.

Roderick Campbell: Independent child-trafficking advocates do not feature in the bill, but we have heard some evidence that they should. Do Dr Rigby or Dr O'Neill have views on that?

Dr Rigby: Through the experience of the guardianship project in Scotland, we have identified that that can be good practice. One of the major issues in the Northern Ireland and Westminster legislation is whether that needs to be a legal guardian or a guardian, there being subtle differences. My view is that, at the moment, a guardian would be sufficient. We have provision, I think, under section 11 of the Children (Scotland) Act 1995, for the appointment of a person with legal responsibilities. That might address the legal issue if there is nobody with parental responsibilities—for example, to instruct a lawyer.

At the moment, the evidence from the guardianship project suggests that a legal guardian is not required in Scotland at this time, because of the systems that are already in place for protecting and working with young people.

Roderick Campbell: Are there any particular aspects of the national referral mechanism and the impact of the review that was received in November 2014 that we should take on board in Scotland?

Dr Rigby: In my opinion, the national referral mechanism is probably not fit for purpose for children. There probably needs to be a separate national referral mechanism, or equivalent, for children in Scotland. There is no requirement to follow the national referral mechanism for the rest of the UK. It is a policy decision, not a legislative one, to address the matter through that route.

We have the expertise among the professional population in Scotland to take the national referral mechanism, or equivalent, through the child protection process, so that a decision may be made at a multi-agency child protection case conference for somebody who has been trafficked regarding the assistance and support that is available to that young person. At that point, when somebody is identified, notification could be sent

to UKVI or UKHTC—the UK human trafficking centre—that a young person has been identified as a trafficking victim. That leaves all the work, all the support and all the identification within the Scottish system, which is entirely in keeping with our obligations under the EU directive.

The Convener: Dr O'Neill talked about concerns about the duty to secure support and assistance. The wording of section 8(1) says:

"Where there are reasonable grounds to believe that an adult is a victim of an offence of human trafficking, the Scottish Ministers must, during the relevant period, secure for the adult the provision of such support and assistance".

Let us park the bit about children just now—we have accepted that. Those provisions are mandatory, so is that not enough?

Dr O'Neill: I suppose that it will depend how they work in practice.

The Convener: Yes—everything is about how things work in practice. However, the measures are mandatory, and they could be founded on by anyone who has not had the assistance required.

Dr O'Neill: Yes.

Christian Allard (North East Scotland) (SNP): Dr O'Neill, I want to know a bit more about sections 5 and 6, on sentencing. You told us in your written submission:

"On the issue of penalties then all UK jurisdictions are diverging from the provisions of the directive, and from each other."

What kind of problems will that cause? What is the remedy?

Dr O'Neill: All three UK jurisdictions are going further on the sentencing of the offences than is required under the directive, so that does not cause me a problem at all.

Sorry—which particular provision came before the divergence bit?

Christian Allard: It reads:

"On the issue of penalties then all UK jurisdictions are diverging from the provisions of the directive".

We agree on that.

Dr O'Neill: Yes, but that is not necessarily a negative thing.

Christian Allard: You also say, "and from each other." Could that become a problem? Earlier, you said that having different sentences in different parts of the UK might make some parts of the UK a soft target in comparison with others.

Dr O'Neill: In general, the UK will not be regarded as a soft target once all three bills have been enacted. There might be an issue with the treatment of victims and their prosecution or non-prosecution, which we have already covered. In

particular, if victims are not prosecuted in England and Wales, whereas the Scottish jurisdiction is prepared to hold victims to account for some crimes, there is a concern that that might have an impact by contributing to a lack of enthusiasm on the part of victims to report their crimes or to give evidence in the Scottish jurisdiction.

Christian Allard: I understand that. I just wanted you to clarify the point about sentencing, which you have done. Thank you.

Dr Rigby, you talked about the national referral mechanism. You made the forceful point that it is not fit for purpose for children. In the evidence that we have taken, we have heard that it does not seem to be fit for purpose for adults either, particularly adults with learning difficulties or mental health issues, or people who are going through a traumatic time. The system that is in place does not seem to understand that. Do you think that the national referral mechanism is not fit for purpose only for children, or do you accept that it is not fit for purpose for anyone?

Dr Rigby: It is certainly problematic for people in the situations that you gave examples of. The EU directive makes it quite clear that particular attention should be paid to some of those issues.

Over the years, the national referral mechanism has been too closely aligned with the immigration system. That is the key problem. As has been mentioned, a national referral mechanism per se is not necessarily unfit for purpose; the devil is in the detail of the implementation of it. At the moment, because the decision-making process takes place in England, it is away from the provisions of support and assistance that we have in Scotland.

One of the main concerns that I have had with the national referral mechanism over the years is the fact that it relies on victim status to be conferred on someone by a separate body. Even though it is a fact that someone is a victim of trafficking, it is necessary to wait for a decision to be made on that. In this area, it is very rare to have to wait for an outside body to make a decision on whether someone is a victim. If someone is a victim of trafficking, they are a victim of trafficking, no matter what any external agency says.

As Victim Support Scotland said in evidence last week, if a rape victim approached support services and said that they were a victim of rape, they would not be asked to prove that before any support was provided. The national referral mechanism is in danger of relying on a single agency to make decisions about whether people are victims.

Christian Allard: That is the point—the national referral mechanism is as problematic for adults as it is for children. If the bill is changed such that

there is a statutory requirement regarding guardianship for children, there might be an imbalance in relation to adults who will not have such protection. I am talking about people who have been trafficked and whose first language—like mine—is not English. They might not get the same help that children will get if there is statutory guardianship.

As far as the spirit of the bill is concerned, maybe not focusing on children but trying to keep things as open as possible, particularly with regard to the national referral mechanism, is the best way to go about it, or do you still think that children should be treated differently?

Dr Rigby: It is clear from the directive that we have to have special provision for children. Articles 13 to 16 are quite clear on the special vulnerabilities of children. I take your point about guardianship for adults. That would probably be welcomed, too. However, it does not seem to be an issue.

On children specifically, locating the guardianship project or guardians in an integrated child protection system is key. Guardians on their own will not be able to protect children; it is the integrated child protection system that is key.

11:15

Across the EU, there is a move towards child-sensitive integrated child protection systems. That will be key, not specialist expertise in trafficking. Trafficking must be brought into the broader child protection agenda. The point was made that exploitation happens outwith the remit of the trafficking description. We have child abuse and child sexual exploitation. All those issues are generally dealt with under the child protection system and there is no reason why child victims of trafficking should not be part of a child-sensitive and centred approach.

Christian Allard: The national referral mechanism has been reviewed. Should we have a different mechanism for Wales, Scotland, Northern Ireland and England? The legislation will be different for different jurisdictions. Perhaps the bill will supersede some of the mechanism's effects.

Dr Rigby: I can speak only from the Scottish perspective and my experience. It is quite possible to have a national referral mechanism in Scotland, especially for children located in the child protection system. From the work that has been done over the years in Glasgow the evidence is that, if the child protection system is working around a child, the protection that is offered is greater than it would be if a single service or agency were making the decisions.

Locating the mechanism in the child protection system is the key. We must acknowledge that there have been problems with that, so there must be training and development associated with that. However, as it stands, the national referral mechanism does not serve Scotland's children.

Christian Allard: You would recognise that it does not serve some of the adults as well.

Dr Rigby: Sorry—or adults as well.

Gil Paterson: You used the phrase “mini adults” and said that children are often treated the same as adults. In Scotland, particularly through the work of this Parliament, we have spent an awful lot of time providing different services for children, whether in the health service, in the court system or through social work. Most of the people who are coming forward are saying that, in this case, they want to see children embedded in the bill. That goes against what we have been trying to achieve. We have a system for children that is robust under all circumstances. I was going to leave my question for the Convention of Scottish Local Authorities because it has submitted evidence in that regard, but I wondered whether you had an opinion on that. Would we not, by incorporating children into the bill in the way that some people are suggesting, do the very thing that we want to avoid and be treating them like mini adults? Is there a danger of that happening?

Dr Rigby: We are required under the EU directive to include children in any bill. I fully take your point. We have an excellent system in Scotland that identifies children. Indeed, getting it right for every child and other policies operate across health, education and social work. I would not disagree that we have a good system. However, including children in the bill will not negate that in any way; rather, it will strengthen our obligations and our commitment to the EU directive. It will also identify children as specific victims with their own specific vulnerabilities and needs that are different from those of adults. The mechanism could then be located in the child protection system.

I fully agree that our system identifies children as different. However, across the UK but especially in Scotland, what we are experiencing is that children are often treated by the system, through the national referral mechanism, as mini adults and their specific vulnerabilities are not met by the services. There must be a link in the bill to the existing legislation, which is strong. However, from experience, we know that local authorities and other statutory bodies do not always fulfil their duties towards children once they have been identified. It is key to recognise child victims of trafficking in the broader remit of a trafficking offence or definition and to locate the support and the assistance in the child protection system,

which is, largely, the best place to protect the children.

Dr O'Neill: I have one more point to make on children. The EU directive provides that domestic laws should ensure that it is possible for a prosecution to be taken for a sufficient time after the victim reaches the age of majority. That is also missing from the bill.

The Convener: An important point. Thank you very much for your evidence, both written and oral. This session is concluded. We will kick off again at 11.25.

11:20

Meeting suspended.

11:25

On resuming—

The Convener: For our next session, I welcome to the committee Jenny Marra and our second panel of witnesses: Lorraine Cook, migration, population and diversity team, COSLA; and Katie Cosgrove, gender-based violence programme, NHS Health Scotland. I thank everyone for their submissions and I invite questions from members.

Margaret Mitchell: My first questions are for COSLA. You raised the issue of training and awareness raising on trafficking. What is in place in local authorities now and what do you propose to raise awareness?

Lorraine Cook (Convention of Scottish Local Authorities): There is a range of diverse practice across all local authorities. For example, there is a lot of awareness raising in Falkirk on human trafficking; a stall is set up in the shopping centre there. Examples of good practice in Glasgow are TARA—the trafficking awareness-raising alliance—as well as the child protection system, the trafficking models and the work that was done way back with the London safeguarding children project pilot, which Glasgow City Council has built on. A diversity of work has been going on.

Margaret Mitchell: How do you see the bill helping that?

Lorraine Cook: We have taken papers to COSLA leaders. Our first paper went in 2006 and its aim was to garner support from the leaders of all 32 local authorities to make Scotland a hostile environment for human traffickers. It promoted an anti-human-trafficking agenda.

I am sorry—could you repeat the question?

Margaret Mitchell: Erm—yes.

The Convener: Obviously not.

Margaret Mitchell: I have lost the thread as well. [Laughter.]

How will the bill improve the arrangements? How will it help you?

Lorraine Cook: The bill will provide support. Different areas of local government are crucial to training and awareness raising. Awareness raising will be crucial in training for many front-line services and officers. We are looking at training for regulatory officers in environmental health, housing, trading standards and licensing.

We need to harness the good practice in Glasgow's child protection system and get it across Scotland. Training and awareness raising are crucial and we should look at how we can develop those things in the strategy.

Margaret Mitchell: So the focus on raising awareness flags it up to the various departments.

Lorraine Cook: Yes.

Margaret Mitchell: I imagine that not only those in local government but those in the health service in its various forms might come across victims of trafficking. Is there awareness-raising training in the national health service?

11:30

Katie Cosgrove (NHS Health Scotland): There is. The NHS is a pivotal organisation for identifying human trafficking. It is a fairly new issue for the health service, primarily because the focus has been predominantly on law enforcement and immigration. It is only relatively recently that we have taken a victim-centred approach to the issue.

In 2012, the health directorate issued a chief executive's letter, and we produced guidance for all health staff on identifying and responding sensitively to potential victims of trafficking, including how to record and report information. Since then, we have developed a suite of resources for staff, including an e-learning module on human trafficking, which each health board has made available to its staff. In the year or so that it has been available, the resource has been used by more than 1,000 members of staff.

The alignment of human trafficking with the health directorate's wider gender-based violence programme has allowed us to use that programme's infrastructure to support the dissemination of materials and the uptake of training. However, in common with issues such as forced marriage and female genital mutilation, one of the difficulties is that we cannot release thousands and thousands for bespoke training. Instead, we have looked at incorporating it in the existing body of training on gender-based violence across health board areas. A number of health

boards have taken a proactive approach to ensuring that staff are aware of the issue and know who to contact if they need to make a referral.

Margaret Mitchell: Are staff comfortable with the distinctions between immigration, smuggling and trafficking that, according to TARA, are often blurred?

Katie Cosgrove: It is difficult to know the extent to which people appreciate the difference, but the issue has certainly been highlighted in the guidance. What is more of an issue for staff is what to do in cases of potential trafficking. The health directorate has made it clear that potential victims of trafficking have access to free healthcare, which means that we do not have a resource issue. However, the difficulty for staff is in understanding the measures that they can take without jeopardising victims' safety or protection. There is probably less comfort and confidence about that than there is about the distinctions between smuggling, immigration and trafficking.

Margaret Mitchell: In your submission, you rightly pointed out that section 8 does not apply to victims of trafficking who have not been through the national referral mechanism process.

Katie Cosgrove: One of our concerns about the language of section 8 is that it very much evokes the national referral mechanism. In the health service, we encourage staff to see potential victims of trafficking as people who need immediate care, assistance and assessment, and as a result, we would like some of the potential ambiguity in the section to be removed, to make it clear to staff that potential victims of trafficking can access support and assistance immediately. I also support previous witnesses' comments about strengthening the requirement for psychological assistance and support, because the existing provisions on counselling are fairly weak.

The Convener: When you talk about staff, do you include general practitioners? After all, they are not really NHS staff.

Katie Cosgrove: No, but GPs are part of the healthcare system. I was referring to healthcare professionals across the NHS, whether or not they are independent contractors.

The Convener: Thank you.

Jenny Marra (North East Scotland) (Lab): My question leads on from the point that the convener raised. I am co-convener of the Parliament's cross-party group on human trafficking, and just a few months ago, a GP from Newcastle came to a group meeting to tell us about the victims of human trafficking who had come to her surgery. I think that this point fits in with the bill's strategy element, as the bill has been constructed in such a

way that the Scottish Government will be able to present a three-year strategy to provide it with a programme of work that will help with awareness raising and training.

Katie Cosgrove said that NHS training is available to all staff. I certainly understand her point that staff cannot be released willy-nilly, given the jobs that they have to do, so is that training targeted at areas of the health service such as general practices and genito-urinary clinics that will most likely, but not exclusively, come across trafficking victims?

Katie Cosgrove: We have taken exactly that approach in the gender-based violence programme and we are targeting areas of primary care such as GPs and health visitors. We have also identified maternity, mental health and sexual health services as being of primary importance for awareness raising about and training in human trafficking.

A number of measures—for example, the on-going attempts to improve the situation of women who are involved in indoor prostitution—dovetail with measures that we are taking on human trafficking. The training for staff in that area would also encompass awareness of human trafficking.

Jenny Marra: Convener, can I ask Lorraine Cook some questions, or do you want to come back to me?

The Convener: I will let others in first and come back to you.

I want to clarify something. The gender-based violence programme is about only women and girls. What happens to young men in such circumstances? What does the national health service have for them?

Katie Cosgrove: Gender-based violence measures do not encompass only provision for women and girls. The descriptor is used across the national health service to identify the very gendered nature of the different forms of abuse, but provision is also made available for boys and men who experience such difficulties.

The Convener: That is helpful. You talked about women and I was concerned that we were missing others out.

Christian Allard: I have read COSLA's submission and I want to know a bit more about the services that COSLA provides for child victims of trafficking. It agrees with the Scottish Government that existing support services for children are sufficient and do not need to be enhanced through the bill. Will you talk more about that?

Lorraine Cook: There is a plethora of child protection legislation, and it is crucial that support

is embedded in the child protection system. Our fear is that, although so much is entwined, there would somehow be a separate system with separate needs for children who have been trafficked that was not embedded in the child protection system. The issue is not just that a child has been trafficked; it could be about child sexual exploitation. Many needs that relate to children are best dealt with in the child protection system and the legislation that builds on that system.

Christian Allard: Do you think that existing legislation is strong enough and that putting anything in the bill could weaken a bit what we already have?

Lorraine Cook: For us, there is strong legislation. In respect of the child protection system, there needs to be roll-out of training and awareness raising on all the elements of the legislation and how it fits with children who have been trafficked, and that is for the strategy.

Christian Allard: Trafficking services come only second or third in the list of the services that you provide for children who have been trafficked. Trafficking is not the most important issue.

Lorraine Cook: That depends on the case. It is a matter of looking at the child in a holistic way rather than ranking what is most important. The child is in the centre.

Christian Allard: That is what I am trying to say. I am sorry; I did not express myself properly. If a provision was put in the bill, the matter could end up at the top of the agenda when maybe it is not there in your services—it is only part of them.

Lorraine Cook: Yes. If you like, that would take away from the matter being embedded in the child protection system; the system would somehow be separate.

Christian Allard: What is your view on the proposal for guardianship as a statutory requirement in the bill?

Lorraine Cook: The current guardianship model does incredibly good work. For us, the service should be put into the strategy, as it does not cover all children who have been trafficked. Unaccompanied children are one part of the group of victims of trafficking. If we are looking at children who have been trafficked internally and suffered child sexual exploitation, the guardianship model is more for unaccompanied children. I think that the named person provisions in the Children and Young People (Scotland) Act 2014 cover all potential child victims of trafficking.

Christian Allard: Do we already have such a guardianship system?

Lorraine Cook: No. The guardianship model plays an important role for particular child victims of trafficking.

Christian Allard: But you would prefer not to see it in the bill.

Lorraine Cook: I would say that it is more a matter to be defined in the strategy.

Christian Allard: I know that the position differs between COSLA and the NHS, so perhaps Ms Cosgrove wants to say something.

Katie Cosgrove: We did not make particular reference to children in our submission. We focus very much on adult services in relation to human trafficking. We have engaged very much with local child protection systems to support identification of and assistance for children.

Christian Allard: You stated that the bill would benefit from providing guardians with legal powers, in line with legislation in Northern Ireland.

Katie Cosgrove: I think that the evidence would support that provision.

Christian Allard: You would not be against COSLA's proposal to have such a provision in guidance and the strategy rather than in the bill.

Katie Cosgrove: We would probably need to look more at the evidence on whether the benefits would outweigh the difficulties. We certainly need to strengthen the provisions on child guardianship to support child victims of trafficking.

Christian Allard: You would say that the jury is out on whether the matter should be in the bill.

Katie Cosgrove: There are certainly merits in including it, and the evidence supports it. Perhaps COSLA is focusing much more on local implementation.

The Convener: Will you remind me of the age limit for having a named person?

Lorraine Cook: I would have to go back and look.

The Convener: I have a feeling that it is not in the age range of 16 to 18, but I might be wrong. We looked at the presumption that a child is someone who is 18 or under. Can you help me out?

John Finnie: Is it not the case that a child is someone up to 16 or between 16 and 18—

The Convener: That is what I think. We have that gap. When you refer to the named person fulfilling it—

John Finnie: No, my understanding is—

The Convener: I beg your pardon—I am getting evidence from John Finnie.

John Finnie: My understanding is that it certainly used to be up to 16 or between 16 and 18 if the child was the subject of compulsory measures.

The Convener: Yes, but the question was about the use of the named person. We should maybe check that. Lorraine Cook took the role of the named person as being a guardian to an extent, but I do not know whether that covers the group that we are discussing, particularly when we have difficulties over age with people who perhaps cannot speak English or communicate in English and have no documentation.

I will move on to Elaine Murray, then Alison McInnes, then—sorry, who is that? It is Roderick Campbell. I am sorry; I am not picking on him—I just cannot read my handwriting. It is Elaine Murray, Alison McInnes, Roderick Campbell and then Jenny Marra.

Elaine Murray: I want to expand on those issues a bit more, because there seems to be a divergence between the submissions.

NHS Health Scotland says in its submission that it might be useful to at least signpost the legislation that covers and provides support to children—although you do not necessarily say that that has to be defined in great detail in the bill.

Katie Cosgrove: In reading the bill, we felt that although it ostensibly covers children and adults, there is very little mention of children in it. You should ensure that that cross-reference is made if there is not the will to include stronger provisions in the bill itself.

Elaine Murray: Would COSLA have a problem with signposting? Would that cause you problems?

Lorraine Cook: No. All that legislation is mentioned in the policy memorandum anyway.

Elaine Murray: I suppose that the Government may argue that it is not necessary to include it in the bill because it is already there in law. On balance, do you think it would be helpful to have that cross-referencing in the bill?

Lorraine Cook: Yes. For us, it is really the strategy that would pick that apart and look at each piece of legislation and its relevance in terms of children and trafficking.

Elaine Murray: I want to ask about the non-prosecution of victims. NHS Health Scotland suggests that section 7 ought to be strengthened—it refers to some of the wording in Jenny Marra's proposed member's bill, which it feels would strengthen that section. Does Katie Cosgrove want to say anything more about why NHS Health Scotland thinks that the bill should be

more explicit, rather than leaving the matter to guidance from the Lord Advocate?

11:45

Katie Cosgrove: It is all about clarifying some of the means by which people are trafficked. There is a sense that identifying the areas that have already been outlined would give a clearer indication of the circumstances in which there would be non-prosecution.

Elaine Murray: You feel that the bill might benefit from the example of the Northern Ireland legislation on independent guardians, particularly with regard to separated children. However, that is not necessarily the same thing as the named-person approach; instead, it is about the requirements of children who have no support in this country.

Katie Cosgrove: Indeed. Again, we thought that the bill could be strengthened by including that provision.

Elaine Murray: I do not really see how the named-person concept will cover children who come into the country and have no one to assist them. Do we need to be more specific about the support that they require?

Katie Cosgrove: Yes.

Alison McInnes (North East Scotland) (LD): Returning to the adequacy of the bill's provisions with regard to support and recovery services, I note your suggestion that counselling might not be the most appropriate term to use in the bill. Can you elaborate on the need for the psychological assessment and treatment of victims?

Katie Cosgrove: There is an already quite considerable and growing body of evidence about the adverse health consequences of human trafficking not just at the point of destination but throughout all of trafficking's different cycles. A number of individuals who have come into the country have experienced adversity and hardship in their country of origin; for example, a recent European study showed that around 60 per cent of women who had been trafficked for sexual exploitation had experienced physical or sexual harm in their own country. As a result, people arriving here might have pre-existing health conditions or might have already experienced trauma, and they will also have been exposed to further harm in the process of being trafficked. We felt that the point was not adequately reflected in the bill's provisions and that the term "counselling" did not adequately cover what people in such circumstances, who might have complex post-traumatic stress disorder, extremely high levels of depression and anxiety and high levels of somatic difficulties, might actually need. As far as best

practice advice is concerned, we would be looking for a much more thorough psychological assessment.

Alison McInnes: That was very helpful. Is it also important that the support and recovery service is not time limited?

Katie Cosgrove: Absolutely. I am sure that you have already heard about this in relation to the NRM, but one of the difficulties in the process and one of the impediments for people who are entering it is the fact that they have already experienced extreme levels of psychological distress and harm. That makes it very difficult for them to give informed consent. When you look at the litany of abuse that people have suffered, their exposure to hazardous working and living conditions, their exposure to infectious disease and the potential existence of chronic or acute medical conditions, you will appreciate how difficult it will be for them to enter freely into a time-limited process. In view of their health and social welfare, we support the proposal for a needs-led process that is outlined in the bill's policy memorandum.

Alison McInnes: Thank you very much.

Roderick Campbell: Paragraph 9 of the COSLA submission refers to "vulnerability", which I took to mean the bill's fairly limited description of vulnerability in section 4. You then mention article 2 of the EU directive, which says:

"A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved."

You suggest that

"Work requires to be undertaken to ensure all services are fully aware of this additional definition."

What form would such work take, and should the bill itself contain a clearer definition of vulnerability?

Lorraine Cook: When we sent information out about the issue to all our local authorities, that particular point was raised by Dundee. I know that it has done a huge amount of work on the matter, particularly in its violence against women partnership, and it was especially concerned about the need for front-line services to have a better understanding of vulnerability; indeed, it was also concerned about the need for a wider definition of vulnerability.

Roderick Campbell: Am I right in assuming that you believe that the bill should contain a definition of vulnerability?

Lorraine Cook: I can come back to you on that. I know who sent us the response from Dundee, and I can get much more detail from them.

The Convener: You could just write to the committee.

Lorraine Cook: That would be no problem. We got a wide response.

Gil Paterson: Some of the points that I was going to raise have been adequately covered already.

COSLA has raised concerns about reserved matters in relation to the commissioner that is proposed in the UK bill and asked the Scottish Government to ensure that the jurisdiction in Scotland is covered by that commissioner. Since we have different laws in Scotland, is it possible that a Scottish commissioner might be the answer? We have heard evidence that people are concerned that the commissioner might concentrate too much on England.

Lorraine Cook: We have not argued for a specific Scottish commissioner. I can see that the proposal in the bill has benefits in terms of information sharing and best practice sharing, and I can see the cost benefits, too, but it is crucial that there is a Scottish perspective within that commissioner's remit and a clear Scottish perspective that reflects our concerns and issues. Maybe I am saying that we will see what it is like when it is rolled out.

Gil Paterson: Might there be a benefit in the commissioner having an office in Scotland, so that they are well connected to issues here? We know that the people who are involved in the area are well kitted out and, collectively, have more resources than we have. It seems that all sorts of money is going to be thrown at the issue. Would that proposal answer your concerns?

Lorraine Cook: I do not think that we would argue against that.

The Convener: Before Jenny Marra asks her question, I inform the committee that the named person stays with the young person up to the age of 18, it appears. The elves have told me so.

Jenny Marra: I was not absolutely clear about the guardianship stuff that Lorraine Cook talked about earlier. She spoke about the excellent work that the Scottish guardianship service does. Why would COSLA not want that to be available in law to child victims of trafficking?

Lorraine Cook: When we are talking about guardianship, are we talking about all child victims of trafficking? Is there a need for guardians for everyone who is involved in, for example, internal trafficking?

We do not have a strong view on the issue. It is more of a question for the strategy. There is a need to define which children would come under that system. We do not—

Jenny Marra: You do not—?

Lorraine Cook: No. We thought that it would be preferable for the issue to be dealt with in the strategy, as it concerns a particular group of vulnerable, unaccompanied trafficked children.

Jenny Marra: My instinct is that, if a child who is on Scottish soil is identified as having been trafficked and has no one to look after them, our local authorities should give them the legal protection that should be afforded to them by our Scottish guardianship service. That is why I am a wee bit confused about why COSLA seems resistant to that being put into law.

Lorraine Cook: It is not that we are resistant to that, and local authorities work well with the guardianship model that is there at the moment. There is no resistance to the idea; we just thought that the issue should be dealt with in the strategy because it involves a very particular set of children—unless we are looking at it in terms of all children.

Jenny Marra: Would you be warmer to the proposal to put the policy into law if we were specific about which groups of children it would apply to?

Lorraine Cook: Yes. The issue becomes a lot more complex if we are talking about a guardianship model for all children who have been trafficked, so if we are talking about—

The Convener: We are talking about unaccompanied children whom we can identify as having no one to represent them. I think that that is the point that you are making.

Lorraine Cook: Yes.

Jenny Marra: Is it possible that COSLA would change its position if there were more clarity in the bill about who the guardianship proposal would apply to?

Lorraine Cook: I can take that back to our protection network and get feedback on that as well.

The Convener: That ends this part of our meeting. I think that the minister is not yet available—he will be here in a few minutes. I will briefly clear the public gallery so that I can have a little chat to the committee.

11:55

Meeting suspended.

12:02

On resuming—

Subordinate Legislation

Courts Reform (Scotland) Act 2014 (Consequential Provisions) Order 2015 [Draft]

The Convener: We are back in business. Item 2 is subordinate legislation. First, we will consider an affirmative instrument. I welcome to the meeting Paul Wheelhouse, the Minister for Community Safety and Legal Affairs, and his Scottish Government officials: Hazel Dalgard, and Alastair Smith from the directorate for legal services. Good afternoon.

This is an evidence session, but I understand—these are wonderful words—that the minister does not need to make an opening statement. [*Laughter.*] That is very welcome. You have made friends immediately. We will move straight to questions from members.

As members are still rattling through their papers, I will ask a question. Interestingly, the draft order follows from the Counter-Terrorism and Security Act 2015. [*Interruption.*] Oh—that is the next instrument. I am on the wrong one. You see, I am too fast.

Do members have any questions on the courts reform order? As there are none, we move to item 3 and I invite the minister to move motion S4M-12522.

Motion moved,

That the Justice Committee recommends that the Courts Reform (Scotland) Act 2014 (Consequential Provisions) Order 2015 [draft] be approved.—[*Paul Wheelhouse.*]

Motion agreed to.

12:04

Meeting suspended.

12:04

On resuming—

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No 2) Regulations 2015 [Draft]

The Convener: We move to agenda item 4. We have the minister and the same officials. [*Interruption.*] I am told that we have Catriona Mackenzie, but she has the nameplate for Hazel Dalgard in front of her. That is unfair. I can confuse myself without the assistance of labels.

We will take evidence on the regulations. This is quickly falling apart, but I now know that we are on to the instrument that is interesting and which I wanted to ask you about earlier, minister. The Counter-Terrorism and Security Act 2015, which received royal assent just last month, is quite draconian in some respects, although I am not saying that that is a bad thing or a good thing. The act aims to prevent people from travelling overseas to fight for terrorist organisations or to engage in terrorism-related activity. Under the act, people's travel documents can be taken away and temporary exclusion orders can be made. Why do we require assistance by way of representation in those circumstances?

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): That is a fair question, convener. From United Kingdom Government sources, we know that 550 UK citizens have travelled to Syria potentially to participate in the war that is going on there, of whom about half have returned. Until now, there has been no provision to prevent those individuals from travelling or returning to the UK. Under the 2015 act, where there is a suspicion that someone is involved in such activity, their passport can be taken from them temporarily, so that they cannot travel again.

The provisions that we are discussing today ensure that, in circumstances in which someone's passport or travel documents may be removed, they will have access to legal support more quickly than if they had to wait to apply through the normal legal aid process. The regulations will enable such people, through their solicitor, to have relatively quick support in addressing the issue.

The Convener: Is it a kind of appeal procedure?

Paul Wheelhouse: If there is potential for a retention of travel documents for an initial period of 14 days—it can be extended to 30 days—or a temporary exclusion order, which prevents an individual from returning to the UK, the regulations will allow the individual involved to access legal support far more quickly than would otherwise be the case. Under the provisions, people would be entitled to apply for legal aid in a criminal case or in a civil process, but it would take time to get that into place. The regulations will allow people to access legal aid far more quickly.

John Finnie: I think that the UK Government is guilty of rank hypocrisy on the issue, as it initially probably commended some of the people who went to fight. I for one do not want anyone to go abroad to fight for anyone. As the convener says, the 2015 act is seen as draconian, and I welcome the fact that a mechanism has been put in place to assist people. My concern, once again, relates to the issue of consultation. We are told that the

turnaround and speed of the process did not facilitate that. The UK Government has got itself confused as to who the goodies and baddies are—it has switched its mind a few times on issues in the middle east—but, whatever the issue, it is never good to make legislation with such speed that there cannot be due consideration. Do you agree, minister?

Paul Wheelhouse: There is always a risk associated with a speedy process. We recognise that the UK Government and Ministry of Justice saw the need for urgent legislation, and we are doing our best to support that process and ensure that it is done as smoothly as possible. Obviously, in an ideal world, we would have liked to have had more time to consult stakeholders. We made the Scottish Legal Aid Board aware of what we were doing and the Law Society of Scotland was made aware of the draft provisions that were being laid before Parliament. They obviously had the ability to bring anything that they were concerned about to the committee's attention. We have done the best that we can in the circumstances. However, I appreciate that, ideally, we would want to have time to allow Parliament proper scrutiny and to go through the normal process. Unfortunately, on this occasion, it was not possible.

John Finnie: For the avoidance of doubt, I was not being critical of you or your officials. However, once again, we are being reactive rather than having any say on what we would ultimately react to.

Paul Wheelhouse: As I said, in an ideal world, we would have liked to have had more time, but we feel that we have done the best that we can in the circumstances. I appreciate that Mr Finnie's point is not addressed to the Scottish Government. Equally, I appreciate that the UK Government is in a difficult position, as it wanted to put in place measures quickly to deal with what it sees as a risky situation. We are just doing our best to ensure that the process is as smooth as possible.

John Finnie: That is a welcome response from the Scottish Government. Thank you.

Roderick Campbell: Good afternoon, minister. Without wishing to be too difficult, I will ask about the financial effect of the regulations and the estimate of less than £10,000 per annum. Is there any magic to that figure? Is it something that has been considered, given the time constraints?

Paul Wheelhouse: My colleagues may wish to come in on this issue. I looked at the numbers, because they are relatively modest and I wanted to be sure that I understood where they came from. Of the 550 people who have left the country to go to Syria, we believe that about half have returned to the UK already. The UK Government Ministry of Justice has taken into account a

number of factors in building its estimate, which it has informed us of. It believes that the proportion of cases in Scotland will work out at about 4 per cent of the total, although there might be civil proceedings involved. We have based our costing on four cases per annum.

We have looked at what the consequences would be if the figure were higher. We believe that even if the figure doubled—if the proportion in Scotland matched the UK proportion of 8.5 per cent or thereabouts—we would be looking at an estimated cost to the legal aid fund of around £12,000 to £16,000. We do not anticipate a huge expense, but clearly we will keep the matters under observation. If there were to be an issue, we would raise it with colleagues in Parliament.

Catriona Mackenzie (Scottish Government): I clarify that the figures that are given with the instrument are in relation to the costs of the changes that we are making specifically. The figures are specifically in relation to the two types of proceedings.

Roderick Campbell: So there is some magic to it.

Paul Wheelhouse: I am not sure whether I would describe it as magic, but certainly there is some thinking behind the figures.

The Convener: Is it hocus pocus?

Elaine Murray: My question relates to the costs. Which court do you imagine will hear the proceedings?

The Convener: It would be helpful if you could tell us how the application is made to take away travel documents, if people are trying to leave, or, if people are coming back in, to have an exclusion order. Where would that take place? What is the process and timescale?

Alastair Smith (Scottish Government): I do not have in front of me the relevant papers on the detail of the process, but from what I recall it is a question of travel documents being retained at the port of exit, by an official and a senior police officer who can authorise that, for up to 14 days. The authorities have the possibility of applying for an extension of the period for which the documents are retained. There might be proceedings in connection with that application that would attract ABWOR under the instrument. In Scotland that would be an application to the sheriff.

Elaine Murray: That is helpful.

The Convener: I was looking at the £10,000 figure. Some of these cases could be quite challenging, especially when you think about the cost of having a couple of Queen's counsels arguing. [Interruption.] These are serious issues about not letting people back into the country or

taking their travel documents from them. The issue is not just about Syria; it is about terrorist organisations. The instrument is not just for tomorrow or this year, but for a long time.

I am sorry if I have upset somebody from the faculty—well, I am not really. There could be serious challenges here under the Human Rights Act 1998.

Paul Wheelhouse: I agree, convener; it is certainly a serious matter. The board expects the cost of a hearing to be between £750 and £1,000. However, as you rightly say, in a more complicated case each applicant may have a number of hearings and on occasion counsel may be required. If we assume that each case might require two hearings, the annual cost to the legal aid fund would be between £6,000 and £8,000, based on the 4 per cent figure that the Ministry of Justice assumed for us in its costings.

If the figure were higher—if we matched the UK's population share of cases—the costs may be up to £16,000. It would be in that sort of ball park, but we will keep the matter under review and if it presents any particular difficulties we can raise them with Parliament.

The Convener: Are there any further questions? Having upset the faculty, I had better not need its help at any time.

Motion moved,

That the Justice Committee recommends that the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No. 2) Regulations 2015 [draft] be approved.—[*Paul Wheelhouse.*]

Motion agreed to.

The Convener: I thank the minister and his officials. As members are aware, we are required to report to Parliament on all affirmative instruments. Are members content to delegate to me authority to sign off this week's report?

Members *indicated agreement.*

The Convener: Thank you very much.

Our next meeting will take place on 17 March, when we will take further evidence at stage 1 of the Human Trafficking and Exploitation (Scotland) Bill and consider a draft stage 1 report on the Prisoners (Control of Release) (Scotland) Bill.

Before members leave their seats and pack their schoolbags, I should tell you that evidence next week will come from the Scottish Trades Union Congress, the Gangmasters Licensing Authority, immigration enforcement and the UK human trafficking centre.

Thank you very much; you are dismissed.

Meeting closed at 12:15.

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