



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# JUSTICE COMMITTEE

Tuesday 24 March 2015

Session 4

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**Tuesday 24 March 2015**

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**JUSTICE COMMITTEE**  
**10<sup>th</sup> 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:**

Catriona Dalrymple (Crown Office and Procurator Fiscal Service)

Assistant Chief Constable Malcolm Graham (Police Scotland)

Kathleen Harper (Crown Office and Procurator Fiscal Service)

Moira McKinnon (Scottish Child Protection Committee Chairs Forum)

James Mulgrew (Law Society of Scotland)

Frank Mulholland QC (The Lord Advocate)

Euan Page (Equality and Human Rights Commission)

Siobhan Reardon (Amnesty International Scotland)

Kirsty Thomson (Legal Services Agency)

James Wolffe QC (Faculty of Advocates)

**CLERK TO THE COMMITTEE**

Tracey White

**LOCATION**

The Robert Burns Room (CR1)



## Scottish Parliament Justice Committee

*Tuesday 24 March 2015*

*[The Convener opened the meeting at 10:18]*

### Decision on Taking Business in Private

**The Convener (Christine Grahame):** Welcome to the 10th 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. No apologies have been received.

Agenda item 1 is a decision on taking business in private. Do members agree to take in private item 3, which is our approach to stage 1 consideration of the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill, and item 4, which is consideration of our work programme?

**Members** *indicated agreement.*

## Human Trafficking and Exploitation (Scotland) Bill: Stage 1

10:19

**The Convener:** Agenda item 2 is the fourth set of evidence-taking sessions on the Human Trafficking and Exploitation (Scotland) Bill. Before I start, I believe that a couple of members want to declare an interest.

**John Finnie (Highlands and Islands) (Ind):** I refer members to my entry in the register of members' interests as a member of Amnesty International, which is giving evidence this morning.

**Roderick Campbell (North East Fife) (SNP):** I, too, refer members to my entry in the register of members' interests as a member of Amnesty International.

**The Convener:** Thank you very much.

I welcome to the meeting our first panel of witnesses: Siobhan Reardon, programme director, Amnesty International Scotland; Euan Page, parliamentary affairs manager, Equality and Human Rights Commission; and Kirsty Thomson, Legal Services Agency. I thank all of you for your written submissions.

First of all, I should explain to those of you who have not given evidence before that if you want to answer a question that has not been directed at you by a committee member, you should indicate to me and I will call you. Your microphone will come on automatically—things are very efficient in here.

We move straight to questions. I call John Finnie.

**John Finnie:** Good morning, panel. The Lord Advocate's guidelines on non-prosecution are mentioned in Amnesty International's submission, but I would also like the other panel members' views on them, please.

**Siobhan Reardon (Amnesty International Scotland):** We very much welcome the intentions in the proposed legislation to ensure that all offences that constitute human trafficking are contained in one act and to fully support victims of human trafficking. However, our submission raises the issue of placing a duty on the Lord Advocate to publish guidance relating to the prosecution of credible trafficking victims who have committed offences. We do not think that guidance is strong enough and call for a statutory defence in the bill. A non-prosecution principle and a statutory defence should be included on the face of the bill.

**Euan Page (Equality and Human Rights Commission):** I agree with Amnesty International's comments. I welcome the provisions in section 7 on the Lord Advocate's guidelines, but guidelines do not offer the same security as a statutory defence. We know that there are still problems with victims of human trafficking being prosecuted for offences that formed part of the exploitation that they experienced.

**Kirsty Thomson (Legal Services Agency):** I do not think that the two are necessarily mutually exclusive. My team has worked with victims of human trafficking who have, unfortunately, been caught up in the criminal justice process. The most effective way to protect them is undoubtedly to get in early and ensure that the non-prosecution principle applies.

The current Lord Advocate has been clear that there is a strong presumption against the prosecution of credible victims of human trafficking, but that does not always necessarily filter down to the front line. There is current guidance, and the bill as it currently stands refers to "guidelines on prosecution". I would like to see more clearly in the bill what is stated in the European Union trafficking directive about the principle of non-prosecution and the non-application of penalties.

I have raised with the Lord Advocate in another public forum the status of the guidelines and what it means in practice if they are not followed. I understand that he has taken some of those points on board.

There is no statutory defence in the bill, which is inconsistent with the position in other jurisdictions in the United Kingdom. My understanding of the statutory defence as it is worded in the other jurisdictions is that it would be quite hard to implement in practice. There are quite a lot of exceptions to it, and it puts the burden on the victim of human trafficking to establish X, Y and Z. That said, including a statutory defence in the bill would be another level of protection. However, in practice, the most effective means of protection in our experience is getting in early and not prosecuting.

**The Convener:** But if we do not get in early, something is needed.

**Kirsty Thomson:** Absolutely.

**The Convener:** Does John Finnie want to come back on that?

**John Finnie:** I was going to move on to a different topic.

**The Convener:** I have forgotten about my A and B lists. Does Alison McInnes have a supplementary question?

**Alison McInnes (North East Scotland) (LD):** Yes.

**The Convener:** Right.

**Alison McInnes:** Paragraph 56 of the bill's policy memorandum notes that the introduction of a statutory defence in the area was rejected because it

"would place a burden on victims to prove their connection between their offending behaviour and trafficked status, which would run contrary to the Scottish Government's victim-centred approach to the issue."

Would the panel members like to respond to that?

**Kirsty Thomson:** As I said, it would probably be difficult to implement in practice, and it would put a burden on the victim. That said, however, it is an additional protection for a vulnerable group of individuals. I do not see why we cannot have both approaches; I guess that it is a question of how we would word such a provision for Scotland.

**Siobhan Reardon:** International law makes it clear that our legal system must take adequate steps to ensure that the criminalisation of victims of trafficking does not occur. The individuals concerned have been victims of heinous human rights abuses and their lives have been ruined. To put them into a situation where they are criminalised, or deemed guilty of criminal behaviour until they can prove otherwise, adds horrific insult to horrific injury.

The intention of the proposed legislation is to have a victim-centred approach that ensures effective and adequate support. A statutory defence and a presumption of innocence need to form part of the framework.

**Alison McInnes:** Would you anticipate a need for a time limit on the statutory defence?

**Siobhan Reardon:** As Kirsty Thomson said, there is a lot of work to be done on that. We can take into account the Modern Slavery Bill and what is being done in Northern Ireland, and we can consider the amendments and suggestions that have been made. We do not agree entirely with what is happening with proposed amendments to the Modern Slavery Bill, but we need to start by taking a human rights approach from the victim's point of view. From there, we can consider how the provision is worded, how it is contextualised and what guidance and policy platforms emanate from that. We have to start with a human rights approach from the victim's perspective.

**Kirsty Thomson:** I am not a criminal defence lawyer, but I want to add two points from the perspective of front-line practice in this area. In trying to implement the non-prosecution principle in practice, using the current guidance, we note that among criminal defence solicitors there has been, first, a lack of awareness and, secondly, a

lack of clarity: what is the legal status of the guidance, how do we raise the non-prosecution principle, and what does it matter?

In terms of liaising with criminal defence solicitors, something that is a statutory defence or which has equivalence with a statutory defence would raise awareness so as to ensure better application in practice.

**Margaret Mitchell (Central Scotland) (Con):** Police Scotland raised a point about future proofing and criminality. Would it be better to have such a provision in the bill, so that there would be a catch-all, rather than trying to establish under guidelines the current position, which might not cover what happens in future?

**Euan Page:** It is interesting that you mention the police. As we mention in our written submission, one of the legacy forces that gave evidence to the Equality and Human Rights Commission's 2011 inquiry stated:

"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".

The real nub of the matter, as my colleagues have mentioned, is that we are dealing with a complex, hidden problem. There is a systemic problem of lack of awareness, even on the part of well-meaning professionals, in identifying and dealing appropriately with people who have experienced what is a profound human rights abuse.

There does not need to be an either/or approach; it can be both/and. If there is a way of wording a statutory definition that assists with the overall process of trying to disentangle human trafficking victims from the criminal justice system in the first place—as others have described—and if additional safeguards are put in place, that can only be a good thing for raising awareness among professionals.

**Margaret Mitchell:** Ms Thomson—

**The Convener:** Sorry, but Christian Allard is pulling a face at me, which I think means that he wants to ask a supplementary on the same point. Before that, I invite further comments from our witnesses.

**Kirsty Thomson:** I agree with Margaret Mitchell. I do not know whether section 7, as worded, is future proof.

**Christian Allard (North East Scotland) (SNP):** I want to clarify something. Alison McInnes asked a good question about paragraph 56 of the policy memorandum. Are you happy that the burden will be on the victim to prove the connection between the offending behaviour and their trafficked status,

or do you not believe that there will be a burden on the victim?

10:30

**Kirsty Thomson:** As I said, I am not a criminal defence lawyer—colleagues will be giving evidence later—but if we rely on a statutory defence, the burden will be on the victim to show that they fall within that defence. The principle of non-prosecution takes away that burden and ensures that all competent authorities, working with victims, have an obligation to ensure that victims are identified as such and are not prosecuted or subject to penalties.

**The Convener:** Just to clarify, a statutory defence is not absolute; it is a presumption that the person has been trafficked. Am I correct? It is not an absolute defence. Surely it is a presumption that the person has been trafficked, which the Crown has to rebut.

**Kirsty Thomson:** Again, I would say that you should ask my colleagues later.

**The Convener:** Perhaps we should ask Roderick Campbell, but we will ask the Crown—

**Roderick Campbell:** I am not giving evidence. [Laughter.]

**The Convener:** I know. You have chastised me. I will get that checked out.

Does John Finnie want to come back in?

**John Finnie:** Yes—thank you, convener. I have a question for Siobhan Reardon about the evidence that we have received from Amnesty. The submission mentions, as a heading,

"Sexual Exploitation and Prostitution—The criminalisation of the purchase of sexual services as a human trafficking reduction measure".

The committee has received a great number of submissions—I might say that they are in a pro forma style—and a number of them make strong representations one way in relation to that matter. You conclude by stating:

"There is an insufficient evidential basis for how this"—

the criminalisation of the purchasing of sex—

"would reduce the demand for human trafficking for sexual exploitation in Scotland."

Will you expand on that?

**Siobhan Reardon:** Absolutely. Human trafficking and prostitution are two separate and complex issues. We are commenting on something that is not in the bill, but we are commenting on it because many other organisations have mooted its inclusion.

Human trafficking via sexual exploitation happens within the gamut of the crime of prostitution. We do not deny that. However, prostitution does not always equal human trafficking. Our concern is that, by conflating the two within the bill, we will not address either of those complex issues adequately. The bill is about human trafficking. We would urge the committee, if there is a need or a desire to look into the reduction of sexual exploitation and prostitution, that that be done on a separate platform with a separate legislative and policy framework that addresses the separate issue of prostitution rather than conflating it within a bill on human trafficking.

The Convention on Action against Trafficking in Human Beings and the EU trafficking directive expressly provide measures to be taken to discourage and reduce the demand for trafficking victims, and the criminalisation of the purchase of sexual services is not one of the measures that they recommend.

Furthermore, we are specific in our wording when we talk about the lack of an evidence base. There has been much discussion of the Swedish model or the Nordic model. That is a specific legislative response to reduce prostitution in those countries. We need to ensure that we have a clear evidence base that links prostitution and the criminalisation of the purchase of sex within a Scottish—a regional—context, and fundamental to that is listening to the rights holders within prostitution and the organisations that fully represent those voices.

We have seen the model being used in other countries in Europe, and it is quite attractive to take a model that some say has worked and implement it in a different context in the hope that it will achieve the same ends there. We are saying that the two issues are different, and they need to be addressed through adequate and effective legislative and policy frameworks. We do not believe that we would do a service to either victims of human trafficking or victims of sexual exploitation and prostitution if we conflated the issues in one piece of legislation.

**The Convener:** I have requests for supplementaries, but I just want to check with Jayne Baxter that her question is on a different issue—she indicates that it is. Gil Paterson and Elaine Murray have supplementaries on this line of questioning.

**Gil Paterson (Clydebank and Milngavie) (SNP):** Amnesty International has concerns about the prospect, if we were to succumb to the pressure to criminalise the purchase of sexual services, of people who provide those services being driven underground because they would not be protected. Will you comment on that?

**Siobhan Reardon:** I will reflect on comments on the issue in the general report by the Council of Europe's group of experts on action against trafficking in human beings, or GRETA. The report says that if criminalisation of the purchase of sexual services is to be seen as a measure for reducing the demand for sex and therefore reducing sexual exploitation and human trafficking, there is a need to ensure that, as you rightly pointed out, any measures do not drive the victims of trafficking underground and therefore make them much more vulnerable to further exploitation.

Looking at the criminalisation of the purchase of sexual services on its own without looking at the country and regional context, listening to the rights holders or looking at a huge number of welfare responses would be incredibly detrimental and not appropriate for the bill. Amnesty strongly advocates, as we did in the context of the Northern Ireland bill, that if the criminalisation of the purchase of sexual services is to be taken forward, the Justice Committee takes on research to find out what the Scotland-specific context is for the issue.

**Gil Paterson:** Information has been passed to me—I do not have any evidence on this, but I have been told about it through my work in other areas—that in some ethnic groups in the Scottish community that are difficult to engage with prostitution is taking place in what is a very closed society. Does Amnesty International—or do others on the panel—have any evidence about that? Further, is there any evidence that can be brought to the table about people being driven underground because of the fear that we have described?

**Siobhan Reardon:** I do not have any evidence that I can share with the committee at this time. However, the assumptions that you have communicated in relation to the adoption of a legislative response to the purchasing of sex have been communicated anecdotally by non-governmental organisations, campaigning organisations and rights holders in Europe. Certainly, GRETA has raised questions about the issue. Although I cannot provide evidence, I can say that we have heard anecdotally the same thing that you have described.

**Elaine Murray (Dumfriesshire) (Lab):** An article on the *Holyrood* magazine website this morning quotes the Scottish Government as saying:

“We are speaking with a range of different interested parties and will consider carefully any amendments brought forward relating to the criminalisation of the purchase of sex.”

It sounds as though the Scottish Government is giving consideration to representations that are being made to it. Have you talked to the Scottish



Government about the issue? What is your response to the trafficking awareness-raising alliance's view that, if the criminalisation of the purchase of sex happens in other parts of the United Kingdom but not here, Scotland will become a soft touch for criminals who exploit women in that way?

**Siobhan Reardon:** We have not been in contact with the Scottish Government specifically on that issue, because we wanted to raise it in this forum first.

**The Convener:** You have got your priorities right.

**Siobhan Reardon:** We like to think so.

As was said earlier, a criminal justice model that criminalises the purchase of sex has been discussed and used in other countries. A number of countries including Sweden, Norway and Finland have implemented something along those lines, but it is a misnomer to talk about a Swedish or Nordic model, because there have been variations in that approach. Canada and the UK, too, are talking about such measures. However, we feel that the introduction of the criminalisation of the purchase of sexual services as a stand-alone measure in order to reduce human trafficking via sexual exploitation is neither adequate nor appropriate.

**Elaine Murray:** Would you prefer to see that in stand-alone legislation, if it is considered at all?

**Siobhan Reardon:** We are talking about two very serious issues that deserve stand-alone legislative scrutiny and stand-alone policy platforms.

**The Convener:** You have made that absolutely clear.

**Jayne Baxter (Mid Scotland and Fife) (Lab):** Are the provisions of the Children and Young People (Scotland) Act 2014 sufficient to protect and support child trafficking victims, or should the bill make the issue more explicit? If the latter, in what ways should the bill be more explicit?

**Kirsty Thomson:** The bill should be explicit about the protection of child victims of human trafficking. The key European standards, as set out in the European Union directive, make it very clear that children are particularly vulnerable and have particular characteristics that require particular protection measures. The EU directive saw fit to make that clear, and I think that the bill should do so, too, by using the overarching principles in the directive on the protection of and provision of assistance to child victims of human trafficking. The detail of that could be made clear in a strategy, but as far as I am concerned this is a stark omission from the bill. Given that our service represents child victims of human trafficking

across Scotland, we know that there are difficulties with implementation but using the clear statutory principles in the EU directive would greatly assist matters.

**Siobhan Reardon:** We agree completely. I think—*[Interruption.]*

**The Convener:** If you agree with everything that has been said and you do not feel the need to elaborate, you do not need to say anything else. However, do not let me stop you, because you have already complimented the committee.

**Siobhan Reardon:** There is one specific issue that we could elaborate on, but the key point is that we completely agree with what Kirsty Thomson said.

**The Convener:** Mr Page, did you indicate that you wished to comment?

**Euan Page:** No, convener. I agree with the general point.

**The Convener:** There you are—they all agree.

**Jayne Baxter:** I want to inquire about the role of child guardians or advocates. When I visited the project in Glasgow, it seemed to me that those people played a very important role. However, the bill is not very specific about that, either, and I wonder whether the witnesses have any comments on the matter.

**Kirsty Thomson:** We work with the Scottish guardianship service almost every day; it undoubtedly plays an important role in identifying child victims of human trafficking and ensuring that they access support and assistance, and its role would be strengthened by being set out in statute. At the moment, it plays a part in proceedings by virtue of personalities, in effect, rather than by virtue of its having a right to be notified of certain proceedings and the right to attend. Moreover, there is no automatic referral to the service.

The EU directive is very clear about the requirement for a guardian. At the moment, the Scottish guardianship service works only with separated children, not with all children. For us to be able to say that the EU directive has been transposed, we must be clear about who a guardian is and who the guardian for all children is. I am not sure that the named person provision in the Children and Young People (Scotland) Act 2014 does that.

**Jayne Baxter:** That was very helpful.

**The Convener:** Do you all agree with that?

**Siobhan Reardon:** Yes.

**Euan Page:** Yes.

**The Convener:** That is lovely, is it not? I will take Margaret Mitchell next, as she has not yet asked a question on this topic.

10:45

**Margaret Mitchell:** I wonder whether the panel, particularly Ms Thomson and Mr Page, will comment on their concerns about the current definition in the bill of trafficking and exploitation.

**Euan Page:** At the risk of repeating points that have already been made, I think that there is a virtue in looking again at the requirements of the EU directive and seeing how effective the proposed transposition of the directive into the bill actually is.

**Margaret Mitchell:** But what about the specific travel issue?

**Euan Page:** The point about the inclusion of travel in the definition has been well made in previous evidence sessions, and we cover the issue in our submission. However, to make it absolutely clear and to reiterate my earlier comment, I think that, given the crime's complex hidden nature and the very real problem of low awareness among the general public and professionals who might come into contact with trafficked people, getting the primary legislation as clear as possible about what constitutes trafficking and exploitation can only be a good thing. I know that worries have been voiced that having a comprehensive definition in law might have the unintended consequence of its being too rigid and therefore not being applicable to every situation, but I think that there can be a non-exhaustive but nevertheless wide-ranging definition in the bill that better reflects the wording in the directive.

**Margaret Mitchell:** Would you contend that the current definition does not actually comply with the EU directive?

**Euan Page:** There is a wide margin of applicability with regard to the ways in which states transpose directives into domestic law. It is less of a compliance issue and more a matter of best practice and getting the best possible legislative framework in Scotland.

**The Convener:** I see you nodding at that, Ms Reardon.

**Siobhan Reardon:** It is absolutely about best practice rather than compliance, but I note that the directive itself stipulates that when states transpose legislation into a domestic context they should apply the widest possible definition of human trafficking to ensure best practice.

**Kirsty Thomson:** I echo my colleagues' comments. I do not like the use of the term "travel" in the definition, because I think that it makes

things too narrow. Given the British and non-British cases of human trafficking that I have seen, I am worried that the definition would not apply to all of them. For a start, it makes us focus on the movement first rather than the exploitation and working back from that.

**Margaret Mitchell:** I believe that your submission goes a bit further and says that the definition does not comply with the EU directive.

**Kirsty Thomson:** I would argue that it does not comply. It is too narrow, and I am worried about the consequences of that in practice.

**The Convener:** You need to be careful—the members read your submissions closely.

**Margaret Mitchell:** That variation in the views of panel members must be of concern to the committee, and I thank them for their responses.

**The Convener:** I will now call Roderick Campbell, who has not yet asked a question.

**Roderick Campbell:** Good morning, panel. Do you think that section 8, which relates to the duty to secure support and assistance, is adequate, or could it be improved?

**The Convener:** Who wants to pitch in? Ms Thomson, you look as if you are on the starting blocks.

**Kirsty Thomson:** First of all, I think that it is excellent that a criminal justice bill has taken on board the recognition in the EU directive and by others that the rights of victims must be protected and support and assistance provided. My second point, however, is that we must ensure that the bill does that in the best possible way. The current regime in Scotland works on a funding arrangement for adults—of course, the fact that children are not referred to is a gap—and, unlike in England and Wales, that arrangement has operated quite flexibly and is not tied too closely to the operation of the national referral mechanism. I am very much of the view that, if someone fits the definition of a victim of human trafficking as designated in the EU directive, there is a requirement to provide them with support in the system, regardless of whether they have been referred into or have agreed to be referred into a formal process of identification by the national referral mechanism.

I would be concerned that putting the duty to secure support and assistance on a statutory footing would make the current, flexible practice a bit more rigid and aligned to the NRM. In addition, the provision does not refer to children.

**Euan Page:** The provisions in section 8 must be read against the policy rather than the legislative work that will be done with the development of the national human trafficking strategy. There will be a

lot of work on that to ensure that we do not end up with an overly rigid, NRM-focused understanding of the needs of human trafficking victims. We need a clear sense of how trafficking networks will be disrupted by the national strategy and how the care, support and assistance that the national strategy provisions refer to will be best aligned to existing devolved, national and local structures and systems.

That goes back to the fact that we need to ensure that social workers and professionals in criminal justice agencies right across the public sector in Scotland have the confidence and training to identify human trafficking victims, regardless of whether they have been through the NRM process.

**Siobhan Reardon:** I agree.

**Roderick Campbell:** Should there be some kind of minimum standard of support and assistance, in regulation or otherwise?

**Euan Page:** There has been discussion on the trafficking care standard and it would be useful to explore what kinds of things that would cover. As I work in human rights and equality law and policy, I know that it is an enormous challenge to transform the debate and move it beyond bare compliance to best practice. Ensuring that human rights principles are enacted in practical, meaningful ways is about more than compliance to minimal standards. Wording such provisions correctly would be a challenge.

**Roderick Campbell:** Does anyone have any comments on the requirement in section 31 to prepare a trafficking and exploitation strategy?

**Euan Page:** We welcome the fact that the requirement will be in statute, but the proof will be in the pudding and we will have to see what comes out of the strategy. The Scottish strategy must be properly aligned with existing structures on adult and child protection, different provisions in criminal law, and national outcomes and indicators. The policy and legislative environment in Scotland is distinctive, so a national strategy cannot be a stand-alone, free-floating entity. For it to have purchase with agencies, particularly at the local level, how the strategy is aligned with other policy and legislative drivers to which local authorities, the police, health boards and others are working will have to be made explicit.

**The Convener:** John Finnie, Gil Paterson and Christian Allard want to ask questions. Can you give me an idea of your questions, so that I can put them together if they are similar?

**John Finnie:** My question is on an independent specialist human trafficking commissioner, which Amnesty International mentioned in its evidence.

**Gil Paterson:** My question is on a commissioner, too.

**Christian Allard:** My question is on the national referral mechanism.

**The Convener:** Let us go back to the national referral mechanism first, before we take questions on a commissioner. Roddy Campbell's question was partly about the NRM, so you ask your question first, Christian.

**Christian Allard:** Both my questions are quite similar. In the evidence that we took on the NRM, people talked about having a Scottish model, and I note that Amnesty's written evidence talked about that. If we need a Scottish model, should it be in the bill or in the strategy? Where should it sit? How should we go about it?

**Siobhan Reardon:** As we set out in our submission, we believe that there are many failings in the current national referral mechanism. We are not the first to say that; there is probably commonality in what the committee has heard. We have called on the Scottish Government to commit to an examination of the potential of the Scottish model in order to truly address the bill's intention that there be a properly victim-centred approach to trafficking, for the reasons that Euan Page has outlined. There is a very distinct context in Scotland. We have many different drivers, policy platforms and stakeholders. The environment is different, and we believe that that needs to be taken into account.

Simply for reasons of geographical closeness to support services, we believe that having a multi-agency and multidisciplinary model for the identification and support of victims of trafficking—both adults and children—would and could be delivered very well in Scotland. Therefore, we are very supportive of an examination of that model.

Where the model should sit has to be looked at in the strategy and in considering what we want to deliver, how far it should go, whether it needs to be put on a statutory footing, whether it needs to be in guidance, and whether it needs to be progressed to. That needs to be part of the strategy and the action plan. There is further discussion to be had on that, but we are very supportive of the principle and the provision of a Scottish model to identify and support victims of trafficking.

**The Convener:** Mr Page, you are waving your pen. Is that an indication of intention to speak?

**Euan Page:** Yes.

**The Convener:** Right.

**Euan Page:** Rather than asking whether there should be a separate Scottish NRM, the commission would approach the issue by asking

what a model of excellence of how an NRM should operate would be and whether we are currently anywhere near that. I think that the answer to that question would be a resounding no.

To its credit, the Home Office review of November last year recognised the many failings of the current arrangements. Many of those were picked up in the commission's 2011 inquiry, particularly the obvious and glaring conflict of interests where an organisation investigates somebody's status as a trafficked human being at the same time as considering their immigration status.

At the very least, once the dust has settled on the UK election in May and the gears have started to turn again, we will look at pilots to test some of the Home Office review's recommendations. My understanding is that none of those pilots will be Scotland based. An obvious modest first step would be to look again at whether that is adequate for our purpose.

The Home Office review of the NRM explicitly excluded Scotland from its recommendations on trafficked children because it recognised that the system in Scotland is too distinctive to allow it to make broad recommendations that will work here. I think that Mr Allard made a point last week about what would happen in the case of a person with mental health problems or learning disabilities who may be a victim of human trafficking. In general in Scotland, it is highly likely that a person with mental health problems or a learning disability who was in a situation of enhanced vulnerability would be treated as an adult at risk of harm and would immediately be brought into the multi-agency framework that was introduced by the Adult Support and Protection (Scotland) Act 2007. That is not the same policy framework that is being proposed even under the new requirements for trafficked adults in the Home Office review.

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

11:00

**Kirsty Thomson:** I would like to see a more general duty in section 8 regarding early identification and appropriate access, taking the

principles from the EU directive and the Council of Europe convention. I would perhaps even strip out some of the detail that is already there. I would put more of the detail about how we ensure early identification and access to support on the ground in a strategy or other documentation.

To confirm what Euan Page has said, there is still a lack of understanding on the ground about what the NRM is and how it operates. There is also still a lack of understanding about how responsibility to identify and protect remains with each public authority in Scotland, and about how our obligations to victims of human trafficking fit within the existing child and adult protection frameworks. Where do 16 and 17-year-olds fit in? There is still a requirement for clarity, not only on how we early identify but on how we provide support within our existing frameworks.

**The Convener:** We will move on. John Finnie had a question. It was the same as Gil Paterson's, think.

**John Finnie:** I believe that it has been covered.

**The Convener:** It has been covered, has it?

**Christian Allard:** I also wanted to ask a question on the same point, about the proposed UK anti-slavery commissioner. We have the answer: it will be a law enforcement commissioner, not a victim-centred measure. Are we thinking the same thing? Should it be in this bill? Should it be in the guidance? Should it be in the strategy? Are we thinking of having a distinct Scottish anti-slavery commissioner?

**Euan Page:** The point is well made that the anti-slavery commissioner's focus will be on the criminal justice elements and the disruption of trafficking networks. That is all to the good—that is one of the fundamental recommendations that we made through our inquiry.

You are right that that post will not cover everything that we want to be covered in the Scottish legislation. On the issue of being clear about roles, speaking as an employee of a cross-border commission, I would say that such arrangements can work. It is essential to ensure that, even with the tighter focus on criminal justice, the commissioner is properly cognisant of the different legal and policy drivers and the different provisions in the criminal law.

**Siobhan Reardon:** To that end, and as has been expressed in a number of submissions, we believe that the bill should explicitly state the legal duties and obligations of the commissioner's role as it pertains to Scotland. One of the problems comes from a misunderstanding or ignorance of different aspects of devolved Administrations and institutions. If we can state that clearly, at least

everybody will be on the same page as to what the different roles and responsibilities are.

One concern was about the absolute absence of any reference to the proposed UK anti-slavery commissioner in this bill. How does the interface work? How does any integration work? If the legal duties and obligations are stated explicitly in the bill, at least there will be some common understanding.

**The Convener:** Thank you very much for giving us your evidence.

11:04

*Meeting suspended.*

11:08

*On resuming—*

**The Convener:** We are all back, so let us continue. We have a long meeting, with another panel after this one and other work to do this morning.

I welcome our second panel of witnesses. With us are James Wolffe QC, dean of the Faculty of Advocates; James Mulgrew, member of the criminal law committee of the Law Society of Scotland; Assistant Chief Constable Malcolm Graham from Police Scotland; and Moira McKinnon, chair of the Scottish Child Protection Committee Chairs Forum.

Before we proceed, Roddy Campbell wants to declare an interest.

**Roderick Campbell:** I refer to my entry in the register of members' interests as a member of the Faculty of Advocates.

**The Convener:** Thank you. I thank all the witnesses for their written submissions. We will go straight to questions.

**Margaret Mitchell:** Do the witnesses have any concerns about the definition? If so, what are they?

**The Convener:** I think that you have all been here before, so you will know that if you indicate to me that you wish to speak, you will be called, and your microphone will come on automatically.

**James Mulgrew (Law Society of Scotland):** Some concern has been expressed about whether the definition complies with the definition in the EU directive. The committee heard from the previous panel that it is perhaps not a question of compliance but more a question of best practice. In previous evidence sessions, the committee has heard that there are concerns about the use of the word "travel" in section 1. Perhaps the provisions on the exploitation of victims could be expanded to

include other activities. Reference has been made to a catch-all provision. The Law Society of Scotland takes on board the fact that the bill is an opportunity to implement the EU directive in the widest sense and to future proof the matter for as long as we can.

**Margaret Mitchell:** You did not raise any concerns about the matter in your written submission and you have talked about the interpretation quite widely. However, I think that there is a specific concern about the use of the word "travel", which does not include travel within a country, such as in a rural area or from city to city.

**James Mulgrew:** Yes. The information that we have obtained, particularly from Ms Thomson, who gave evidence earlier, is that solicitors who deal with victims of human trafficking often encounter situations where the trafficking is not intercountry but within a single country. It can even be from one part of a city to another. It would be better if that situation was covered in the offence.

**James Wolffe QC (Faculty of Advocates):** The Faculty of Advocates has picked up one or two specific issues in relation to the definition. I have read the previous evidence to the committee and I note the points that have been made about the primary definition.

It is perhaps worth keeping in mind that one of the purposes of the bill is to meet the obligation to bring the EU directive into effect in our domestic law, so it will be useful to go to the directive as the legislation that is to be implemented in our law. Previous witnesses have noted the difference between the basic definition in article 2(1) of the directive and the basic definition in the bill. I note the reasons that the Scottish Government gives in the policy document for the approach that it has taken. I confess that, at this point, I do not have a view on whether the differences between the directive and the bill are material and significant or what the significances might be, but it is worth noticing that there are differences, which always presents at least a risk that we will not fully implement our obligations.

There are two respects in which the bill could be better aligned with the directive. The first relates to the question of consent. Article 2(4) of the directive tells us:

"The consent of a victim ... to the exploitation ... shall be irrelevant".

In the bill, consent is dealt with only by reference to the arrangement or facilitation of travel, so there seems to be a failure to reflect accurately the directive there. Article 2(5) of the directive tells us specifically:

"When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human

beings even if none of the means set forth in paragraph 1 has been used.”

Those means are

“the threat or use of force or other forms of coercion”.

The attempt to reflect that in section 3(8) of the bill is—if I can put it in this way—perhaps not the most obvious way to give effect specifically to the requirements of article 2(5).

**Moira McKinnon (Scottish Child Protection Committee Chairs Forum):** I want to reiterate the importance of the term “travel” with regard to ensuring that we have a clear definition of trafficking. There are children who are regularly being moved from city to city or from one area to another, and the bill must take account of that and emphasise it strongly.

11:15

**Assistant Chief Constable Malcolm Graham (Police Scotland):** I agree, although I think that the definition of “travel” is quite adequate and has deliberately been made broad. Mr Wolffe referred to the policy intention of having a broad definition of “trafficking”, which we would support without feeling qualified to comment on whether it is consistent with the EU directive and EU legislation.

This might go slightly beyond the primary definition but, as we make clear in our written submission, we are keen to ensure that, as far as the issues of forced labour and servitude set out in section 4 are concerned, consent should not necessarily be an issue. People might well have given consent to being in such situations, but the bill should make it explicit that that should not be an issue and we have raised the fact that it does not do so at the moment.

We have also pointed out in our written submission that it would be helpful to specifically define circumstances relating to forced criminality, which is an issue that has attracted a certain amount of consideration and debate in relation to the statutory defence. We might discuss that later, but highlighting as specific forms of exploitation forced criminality or exploitation for the purpose of committing criminal acts would assist us in dealing with what is a live issue.

**The Convener:** Would that be highlighted in section 4?

**Assistant Chief Constable Graham:** It would be section 3, I think.

**The Convener:** Right. I call John Finnie.

**John Finnie:** ACC Graham has touched on the area that I wanted to ask about, and Police Scotland must be facing challenges in this respect. If police officers come upon, say, drugs being

cultivated in a house, they initially and quite appropriately treat that as a crime scene, but how at the moment is the individual concerned identified as a victim of human trafficking? Who do the police engage with, and is there anything in the legislation that will make things easier in future? I noted the previous comment about the need to define such matters in the bill.

**Assistant Chief Constable Graham:** To cut to the chase, I do not think that there is anything in the legislation that will make things easier if we feel that the people involved are at a fairly low level in an organised crime group and have been coerced or exploited into committing that sort of crime—in other words, the kind of people who would normally look after a cannabis cultivation. I should add that there are myriad other circumstances in which people who have been trafficked are forced or coerced into criminality, but in the specific example that you have highlighted, everything relies on what the police do at the point at which the offence is identified. Usually, there will be a report, or we will proactively identify a cannabis cultivation; when we find it, we will also find a number of indicators or signals that suggest that the individuals involved might have been subjected to trafficking.

In the vast majority of cases, however, the individuals are not present when we arrive at the premises in question; after all, people quite often do not live or spend long periods of time in such places, and we might do something proactive to try to identify them. If we manage to identify them, again, in the vast majority of cases, the individuals will not identify themselves as having been exploited or forced to do the work that they are doing, even though we might have gathered evidence that that is the case. As I have said, it would be helpful if the bill specified such circumstances, as that would allow us to demonstrate our belief that the person was forced to commit the crime as a specific form of exploitation.

**John Finnie:** There are two other issues around that. One of them concerns the identification of age, the challenges around that, what difference it would make and how it would affect the way in which you would treat an individual. The other concerns the influence of immigration law, because we hear that that takes precedence, and we heard from the previous panel that the person who makes a decision about the wellbeing of an individual also has some responsibility—there are competing tensions in that regard.

At what stage would you become aware of the immigration authorities expressing an interest? Are you obliged to tell them?

**Assistant Chief Constable Graham:** If there was a question around someone’s immigration

status, we would be obliged to tell immigration authorities about it, so that they could fulfil their role in that regard. We would do everything that we could to work with an individual who had been the victim of a crime to ensure that they were adequately supported within the current regime and the services that are available, which are different in different parts of the country. As I think that you are probably suggesting through your question about the difference that the age of the victim makes, that will vary from place to place, too.

**John Finnie:** Even within Scotland?

**Assistant Chief Constable Graham:** Yes.

**John Finnie:** Is that in relation to the support mechanisms?

**Assistant Chief Constable Graham:** Yes. Different services are available in different places, and there are sometimes different views taken and different arrangements available in different local authority areas. That is a particular issue in relation to children—including, under the terms of the bill, those who are 16 or 17 years old. We have found some of those people being put into supported accommodation in which the circumstances are not always entirely suitable. Anything that could strengthen the arrangements around support would be extremely helpful.

It might also be helpful to strengthen some of the arrangements around presumption of age. At the moment, there is a proposal that the presumption should be the age that is asserted by the victim. My view is that, if the victim is believed to be a child, the presumption should be that they are a child as opposed to being the age that they assert, because, in our experience, they can assert that they are older than they are. We would not want to go with a presumption that they were not a child just because they said that they were not. That could be included specifically in the legislation, too.

**The Convener:** Ms McKinnon, do you want to say anything about that issue?

**Moira McKinnon:** We have a well-recognised child protection process for children under 16. ACC Graham's point is important in respect of the age group of children between 16 and 18 because, at times, our processes and those of children's services and adult services can come into conflict with regard to where those young people sit within the realm of service provision and support.

As I say, for children under 16, we have robust child protection processes that are mirrored across Scotland; they do not differ. Across Scotland, our processes are similar with regard to managing

young people who we believe to have been at risk—

**The Convener:** But you would have to know their age. You are saying that everything is hunky-dory if someone is under 16, but there has to be a—

**Moira McKinnon:** There has to be a presumption, yes. Some of the young people with whom we work will tell us that they are older than we believe them to be. There are a number of reasons for that, some of which relate to a desire to protect themselves and a fear of speaking out about their age. There is a real need to ensure that we are working with young people to understand the age-appropriateness of what they are saying. At the moment, where we believe a child to be under 16, we take the appropriate measures in terms of securing them in appropriate accommodation, if that is necessary. However, we have a difficulty in supporting and finding accommodation for young people between 16 and 18. Support and accommodation can vary significantly across Scotland and will not always be appropriate to the needs of the young person.

**The Convener:** Do we need to do something about that in this bill?

**Moira McKinnon:** The bill needs to be clear about how we define a child. We need to ensure that people of 18 years of age and under, who can be extremely vulnerable, are properly identified and supported and that the appropriate service provision is put in place for them.

**James Wolffe:** I go back to article 13.2 of the EU directive, which says:

"Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 14 and 15."

As a jurisdiction, we have an obligation to ensure that that presumption is applied. I note that clause 51 of the UK bill contains a presumption of age.

**The Convener:** For the avoidance of doubt, a child is someone who is 18 and under.

**James Wolffe:** Under the directive. That is correct.

**Elaine Murray:** To follow up that line of questioning, I note that we have heard evidence that there should be cross-references to the legislation that already applies specifically to children in Scotland. Would that assist things?

**Moira McKinnon:** Yes. The fact that the bill contains no specific references to children and young people is clearly an issue. We already have

legislative processes for protecting children, and the bill would be enhanced if it located that existing legislation within the process and allowed us to define clearly how we might use the current processes for protecting children and vulnerable children.

**James Wolfe:** I note that the directive contains a series of provisions in relation to children, including provisions on the appointment of a guardian and the treatment of children in the course of investigating and prosecuting trafficking offences. All the obligations under the directive might be met by our existing legislative regime and administrative practices but, by way of good order, the committee might wish to invite the Scottish Government to identify precisely where the various obligations are met in the existing regime. One of the potential problems in implementing a directive is that one is entitled to rely on the country's general legislative regime, but if one is relying on administrative practice, that might or might not be sufficient.

This is a fairly obvious gap when one considers the bill against the directive. The directive contains a series of detailed provisions about child victims that do not appear anywhere in the bill, and the committee might need to be confident that the Scottish Government has ticked the boxes to ensure that all those provisions will be in force in our system. The presumption about age is a good example of a potential gap with regard to enforcement.

**Assistant Chief Constable Graham:** As has been recognised in previous evidence and written submissions, the measures that are in place in Scotland probably extend beyond what is required by current statute in some places. However, we should take the opportunity of putting all that into statute—that is, after all, the bill's intention—to ensure that the safeguard is put in place. I do not think that the rationale should be, "Well, it's currently happening, so we don't need to legislate for it," because the bill's premise is to focus attention on trafficking in a way that has not taken place hitherto through some of the disparate legislation and practices that are in place.

As we have pointed out, we feel that the duty to secure support and assistance could be strengthened, even in relation to adults. I certainly support the point that children should be specified in that respect, but I note that section 8(3) says:

"The Scottish Ministers may also secure the provision of ... support and assistance"

while the competent authorities are assessing whether there are reasonable grounds to believe that the individual is a victim of trafficking. We recommend that the word "may" should be replaced by "must", because as currently drafted

that safeguard of providing support and assistance does not seem to be particularly strong. I do not want to beg the committee's indulgence by talking about the benefits of that—I suspect that they have been well portrayed already—but, from a law enforcement perspective, support and assistance are critical to maintaining people's presence in and assistance to the criminal justice process. If that safeguard, more than anything else, is not in place, it will be a substantial barrier to our getting more people through the court process.

**The Convener:** People must feel protected.

**Assistant Chief Constable Graham:** Exactly.

11:30

**Elaine Murray:** Should part 2 include a statutory defence for victims of trafficking or a presumption of non-prosecution? Some evidence has suggested that that could mean that the victim would have to prove the link between the offence and the fact that they were trafficked. What are your views on that?

**James Wolfe:** The starting point is article 8 of the EU directive, which requires member states to ensure that national authorities are entitled not to prosecute. The background to that provision is that, in some EU member states, prosecutors are in effect obliged to prosecute if they find a crime. That is the reason for the form of the article. I accept immediately that the English courts, at least, have held that that article does not impose an obligation on us to introduce a statutory defence.

The principle of non-prosecution is well recognised. The concern is that, without a statutory defence, the protection for victims in this jurisdiction might be less than that in the other parts of the UK. The UK bill and the Northern Irish act both contain statutory defences. I do not see those defences as being a substitute for sound prosecutorial discretion. The starting point must be the exercise of good judgment by the Lord Advocate and prosecutors, and I have great faith in the integrity of the Lord Advocate and his staff in how they go about their tasks. However, no one is infallible, and if the Lord Advocate or prosecutors decided to prosecute but the victim of trafficking could satisfy the criteria—which would have to be defined, if one defined a statutory defence—the defence would be a fail-safe for the accused.

It is fair to say that the starting point, if one is looking at a statutory defence, is a recognition that the victim of trafficking has committed a crime. One has to apply one's mind to the relationship with the trafficking conduct that would justify a defence. It was found to be possible to do that in the act in Northern Ireland and the bill in England. One advantage of the statutory defence, as I read



it, is that an accused person could invoke it in circumstances when one could not rely on a common-law defence of necessity or coercion. A statutory defence could go beyond that and therefore provide additional protection to the victim.

Another respect in which the victim is at present less well protected in Scotland than in other parts of the UK is that, in England and Wales, the court has the power to exercise its own judgment as to whether the prosecutorial decision was properly made. There have been cases in which an English court has ultimately quashed a conviction because it took the view that, in circumstances involving trafficking, the prosecution should not have been brought.

In Scotland, we have traditionally placed enormous faith in the prosecutor's judgment, and the courts have historically been slow to step in unless there is a very clear case of oppression. We are already in a position where, under the formal structures in place, the victim in Scotland may be less well protected against the possibility that the prosecutor might make a misjudgment.

**The Convener:** The intervention of the court is not covered in the bill south of the border.

**James Wolffe:** No—that is to do with a difference in the general structure of the law in England and Wales, where—

**The Convener:** Yes, but it is not in any trafficking bill.

**James Wolffe:** It is not in any trafficking bill.

**The Convener:** That is what I was getting at.

**James Wolffe:** Clause 45 of the Modern Slavery Bill contains a specific defence. In the English bill and in the Northern Irish act, care has been taken not to apply the defence to every crime. It is recognised that to apply the defence across the board would be going too far. In the Northern Irish act, it applies only to crimes that are punishable by sentences of less than five years—with some exceptions. The English bill approaches that slightly differently. In the act and the bill, a way has been found to define a defence appropriately.

**James Mulgrew:** Mr Wolffe made a point about the abuse of process plea that may be taken in England and Wales. The equivalent in Scotland would be a plea in bar of trial, which can be taken when an accused person can assert that the prosecution against them would be oppressive.

There may be an opportunity in the bill to encapsulate this, as well as enshrining prosecutorial discretion and the guidance that the Lord Advocate will publish. That would mean enshrining a statutory defence and a plea in bar of

trial on the basis that the person accused is a trafficking victim who has been compelled to commit the crime because he or she is a trafficking victim. That is a further point that the committee may wish to consider, as a third—

**The Convener:** A belt-and-braces sort of thing.

**James Mulgrew:** Yes. The elements are not all mutually exclusive: the Lord Advocate's discretion, a statutory defence and the plea in bar would afford the victim extra rights.

**The Convener:** If there was a plea in bar of trial in addition, that might concentrate minds.

**James Mulgrew:** Yes. I do not question—neither does Mr Wolffe—the integrity of the Lord Advocate and his team, but there are occasions when additional information arises, as the committee has heard. Sometimes, the national referral mechanism can make mistakes. First responders, such as the TARA project, can go back and say that a mistake has been made in not identifying a person as a victim. Extra pleas or defences might need to be available to victims to protect their rights.

**The Convener:** Might something come out in evidence in the course of a trial that would not be there if we had a statutory defence?

**James Mulgrew:** Yes.

**The Convener:** Something might come out during the course of the trial, and it would be useful to have that.

**James Mulgrew:** Yes.

**Assistant Chief Constable Graham:** I echo the principle that we would want to put everything in place that we could to avoid somebody being prosecuted for a crime that they had been forced to commit through being trafficked. We all agree about that.

Some problems have been highlighted with the statutory defence. Mr Wolffe said that there are some exceptions in the Modern Slavery Bill. I think that 130 offences have been exempted from the defence. The question of what those are is problematic, as is that of how they could play out in investigations and prosecutions.

From a police perspective, and considering the investigation process, I return to the question from John Finnie about what happens when people are identified. We do everything possible to gather as much information as we can at the earliest opportunity and to report it to the Crown, so that a decision can be taken.

In the early stages, before we have gathered all that information, we might identify that a crime has been committed, but we are careful about how we deal with the person, whether they are an accused

person or a victim. Based on our discussions with the Crown, I expect the Lord Advocate to issue clear instructions on that issue—more so than with the current position.

The practical experience of the past two years in particular, since Police Scotland has been in existence—and as we were concerned about the issue—caused us to do a fairly comprehensive exercise, given what we know now, with our victim-centred approach to such issues and given the learning that has emerged about victims of trafficking being forced into criminality. We considered whether there were any cases where we had criminalised people and they had been convicted, but we could not find any such cases through that exercise, which we carried out jointly with the Crown. There was no evidence to suggest that a statutory defence would be required in the future.

The bill's focus is on removing from victims the onus of responsibility to self-identify or self-declare, because we understand that vulnerability can be incurred in structures and systems if the legal basis for any prosecution or action is founded on a victim self-asserting that their circumstances are exploitative or that they have been trafficked. However, a statutory defence would rely on that almost exclusively.

For a number of reasons, I think that measures should be in place to ensure that individuals who have been coerced are not criminalised. However, I am not sure that the statutory defence is the best means of doing that. Robust instructions from the Lord Advocate to the police would adequately deal with the circumstances.

**James Mulgrew:** ACC Graham mentioned clause 45 of the Modern Slavery Bill, as well as schedule 4, which identifies a number of exceptions to the statutory defence. Section 22 of the Northern Ireland act takes a slightly different approach and puts it more succinctly, which shows that the aim can be achieved in shorter terms.

Another point was that no examples have been identified in Scotland in which trafficking victims have been convicted when a defence would have been available to them. The difficulty that we as practitioners experience is that some trafficking victims do not identify to their solicitor that they have been trafficked, for a variety of reasons. If the support measures that are referred to in section 8 of the bill and the EU directive are fully implemented, that might have the benefit of encouraging victims to come forward and assisting the police in relation to other prosecutions.

**The Convener:** I think that we are all aware that, at the last gasp, some people who we would identify as having been trafficked do not say that they have been trafficked because the criteria by

which they have measured their lives previously are so different from what we would expect in our society.

**Margaret Mitchell:** ACC Graham, are you in favour of having a provision for future proofing in the bill so that other forms of criminality and exploitation that might not have been considered up to now are covered?

**Assistant Chief Constable Graham:** We said in our submission that we thought that that would be helpful. We thought that it might be useful to outline some of the ways in which people can be exploited, but we understand that such a list would not be exhaustive and that there will be means by which people will be exploited that we have perhaps not yet thought of.

**Margaret Mitchell:** Should such a provision be included in the bill?

**Assistant Chief Constable Graham:** It would be helpful if the bill were broad enough to ensure that future means of exploitation could be included in the various offences.

**Alison McInnes:** I think that we have comprehensively dealt with the issue of a statutory defence.

In its submission, the Law Society queries the need to increase the maximum penalty from 14 years to life imprisonment. It draws on evidence that the custodial sentences of the four people who were convicted in Scotland in 2013 were of just under two years. Will James Mulgrew elaborate on the concerns?

**James Mulgrew:** A provision for a sentence of life imprisonment gives a court the widest sentencing powers available. However, in light of the prosecutions that there have been and the penalty of 14 years that is available, the Law Society's view was that traffickers would not see the Scottish criminal justice system as a soft touch. A sentence of 14 years is quite a significant penalty and is not often imposed by the courts for even the gravest of offences that we deal with currently.

**Alison McInnes:** Do any other members of the panel have any views on that? No?

**The Convener:** Apparently not.

11:45

**Roderick Campbell:** I will, if I may, move the discussion on to section 8 and the provisions regarding support and assistance.

The submission from the Faculty of Advocates states that the provision does not go quite as far as various provisions in the consultation. Would you like to expand on that view, Mr Wolfe?

**James Wolffe:** Yes. A prior point struck me when I looked at section 8. It imposes a duty on the Scottish ministers to secure, for an adult who falls within that section's scope,

"the provision of such support and assistance as they consider necessary given the adult's needs."

That provision invites the question of how it will be implemented in practice. On the face of it, the provision imposes a duty on Scottish ministers to apply their minds to the support and assistance that the adult needs, and then to secure provision of that support and assistance. I wonder whether that is really what it is intended will happen on the ground. Is it intended that there will be an agency or group of officials in the Scottish Government that will assess needs and determine the appropriate level of support and assistance, then ensure that it is provided? That is what the provision says.

If that is not what is intended, one will need a different provision that would place the appropriate responsibilities on local authorities and other agencies. If one is going to do that, one might wish to put in the bill a mechanism to ensure that those other agencies apply a consistent approach in terms of the nature of the support and assistance that they provide, across the piece.

**Roderick Campbell:** Thank you. Can I move on to a completely different subject, convener?

**The Convener:** Of course you can. I am in a very good mood today.

**Roderick Campbell:** I want to raise an issue that has not been raised so far in this evidence session, and to which the written submission from the Faculty of Advocates refers: confiscation of property. I take it from reading the faculty's submission that it feels that the provisions do not go far enough to protect a potentially innocent party whose property might become forfeit. Would you care to expand on that, Mr Wolffe?

**James Wolffe:** The provisions in relation to detention and forfeiture are in sections 9 and 10. There are two points of concern. First, in the context of detention, there is a power for the sheriff to

"release the vehicle, ship or aircraft"

on certain conditions, but only

"if satisfactory security is tendered".

The provision of security itself may be financially burdensome, and there may be circumstances in which, looking at the provisions in section 10, forfeiture would never arise. The concern is that, at that stage, an owner would either have had the vehicle, ship or aircraft detained or, if it is to be released, it would be released only on the provision of security. It would be better if the

sheriff were given a rather broader power to release those items at that interim stage.

Secondly, there is potential, on forfeiture, for an innocent owner of, let us say, a ship or a small aircraft that has been chartered to a trafficker, to find that their ship or aircraft is, in effect, confiscated or forfeited. There is concern that the provision goes further than would be appropriate.

**Roderick Campbell:** Are you concerned that that might have implications with regard to the European convention on human rights, or would that be taking it too far?

**James Wolffe:** One could readily see how an innocent owner could bring an ECHR challenge in a situation in which their property had been taken away from them without good reason.

**The Convener:** Are there implications for the police in that regard? Would you like to comment on that, ACC Graham?

**Assistant Chief Constable Graham:** Perhaps not surprisingly, we broadly support the intention behind sections 9 and 10. The legislation comprehensively outlines the requirement to justify the circumstances in which something would be confiscated and retained, so I do not see that there is a risk that something would be wrongly taken or retained in circumstances in which somebody was innocent. The legislation is designed to prevent that from happening.

That takes us back to the earlier question about sentencing. I make no specific comment on individual sentences but, again, the legislative intention is to provide a focus and to demonstrate Scotland's intention, as a nation, to make our country a difficult place for traffickers to operate in.

It has in the past been suggested, with regard to some of our current legislation and practice, that Scotland could be a soft touch. In line with the question on sentencing, we are, by explicitly stating that a life sentence is the maximum penalty, sending a very clear message about how seriously we, as a nation, take the issue of trafficking.

Likewise, with confiscation of property, it is essential that we have a range of options by which we are able to tackle, prevent and disrupt the operations of traffickers. Confiscation is a well-recognised tool, in an armoury of disruption and prevention measures, that is able to prevent people from continuing to operate by taking away property, which will in some respects cause them most concern.

It is essential that those elements be retained in the bill in a way that works. We already face significant challenges with regard to existing means by which we can take assets and confiscate property from people. We have to work

very hard—rightly so—to demonstrate that a thing constitutes the proceeds of crime. The provisions in sections 9 and 10 are entirely consistent with previous legislation, and I support their inclusion in the bill.

**Gil Paterson:** I have a question on the proposed UK anti-slavery commissioner. In the evidence that we have received, a lot of people have asked why there is no reference in the bill to that proposed post.

My question is direct, and is for the lawyers. I am not sure whether it is lawful for this Parliament or the Scottish Government to enact anything in the bill in that respect, given that the matter is reserved. What is your opinion on that?

**James Wolffe:** I have to confess that I have no view on the particular issue of a proposed anti-slavery commissioner; it is not something to which I have applied my mind.

If a matter is reserved, this Parliament does not have the power to pass legislation that relates to it. That does not prevent this Parliament from passing legislation that is incidental to non-reserved matters but which affects reserved matters. The line can sometimes not be an easy one to draw with precision. I am afraid that I have not looked at the specific question of an anti-slavery commissioner.

**Gil Paterson:** Could the issue be addressed not in the bill but perhaps in guidance? Would that be competent?

**James Wolffe:** The prior question is whether a proposal for an anti-slavery commissioner is a reserved matter, and that is not something that I have applied my mind to.

**Gil Paterson:** I see. Thank you.

**The Convener:** We will leave it at that. I thank the witnesses for their evidence. I suspend the meeting for a couple of minutes to allow the witnesses to change over. It is a long haul.

11:54

*Meeting suspended.*

11:57

*On resuming—*

**The Convener:** I welcome our third panel of witnesses: the Rt Hon Frank Mulholland QC, the Lord Advocate; Kathleen Harper, national sexual crimes unit, Crown Office and Procurator Fiscal Service; and Catriona Dalrymple, head of policy division, COPFS. I think that you have all been here before.

**Kathleen Harper (Crown Office and Procurator Fiscal Service):** I have not, no.

**The Convener:** You have not? It is exciting. We are very gentle. Your microphone will come on automatically if I call you or if you have anything to say.

I will go straight to questions. Let me see who did not get in first last time. Elaine Murray will have the first question this time.

**Elaine Murray:** I want to go back to part 2 and whether there should be a statutory defence or a presumption of non-prosecution on the face of the bill, or whether the matter should be left to guidance from the Lord Advocate.

We heard contradictory evidence from the Faculty of Advocates, the Law Society and Police Scotland, which were represented on the previous panel. I do not know whether the Lord Advocate managed to catch that evidence session, but basically the Faculty of Advocates and the Law Society are in favour of including a statutory defence in the bill, and the police are less keen on the idea. I invite your views on that.

**The Lord Advocate (Frank Mulholland QC):** I think that if you put a statutory defence on the face of the bill, it would lead to more injustices than if I, as Lord Advocate, were to issue instructions.

We would take our lead from Parliament as to the extent of any defence that was placed on the face of the bill. You know about the dynamics of human trafficking—I am sure that you have received a lot of evidence and read a lot of information on that. Victims of human trafficking often do not know that they are victims of human trafficking. It may be that they have a fear of authority from their experience in their own country, which can include a fear of solicitors.

12:00

A statutory defence places the onus on the accused to raise the defence. In order for that defence to be considered by a jury, it must have an evidential basis. There is no burden of proof on an accused person, but the onus is on them to raise the defence, and the defence must be rooted in evidence before it can be considered by the jury.

The Northern Irish legislation, the English and Welsh legislation and, indeed, the directive, talk about compulsion. We have the common-law offence of coercion, which is very narrow and is not appropriate for the territory that we are in. I said that the defence must have an evidential basis in order for it to be considered by the jury, but I repeat that victims of human trafficking often do not know that they are victims of human

trafficking. They can have social and economic bonds with the trafficker.

It seems to me that the instructions that I will issue to prosecutors and the police will capture a lot more than would be captured if the bill were to include a statutory defence. Let me explain. In the approach that we currently take to victims of human trafficking, we can deal with intelligence or information from organisations that support victims in the field, such as TARA. I know of one case involving cannabis farms in which information that was based primarily on intelligence came to us in the middle of a trial.

Our procedure to ensure a consistent approach is to investigate when someone claims that they are a victim of human trafficking, because it is important that victims of human trafficking have credibility. It is easy for someone who is charged with a serious offence to say that they are a victim of human trafficking, so such claims must be properly investigated. If there is credible evidence or intelligence, it will go to Kathleen Harper, who is the head of the national sexual crimes unit, for a decision on what to do. We have abandoned prosecutions on the basis of intelligence, and we will continue to do that.

There are problems with statutory defences, including statutory defences that are based on the principle of fair notice. The Crown has to receive notice of what the defence is. In criminal procedure, that usually has to be given a certain number of days before the trial commences—the range is from 10 days to two days, depending on what the defence is. There are exceptional circumstances in which the court can admit a defence during the trial. The point that I am making is that a statutory defence would apply to criminal proceedings and, in general terms, it would have to be lodged before the trial commenced.

Human trafficking does not necessarily follow that kind of rigid procedural structure. I will not go into the details, but we are currently considering a case in which three persons have been convicted of shoplifting. The intelligence on those people only came in after conviction and sentencing. A statutory defence would not cover such circumstances. If the information is credible, we have the necessary means to apply to the court, and the court can set aside the conviction.

We need a much more flexible approach, in which the Lord Advocate issues not guidance but instructions to our prosecutors and to the police, and which allows agencies and NGOs that work with victims in the field to have a channel of communication with the Crown. That will be far more productive and lead to fewer injustices than a rigid statutory defence in the bill would. In my view, it is much better to do this by Lord

Advocate's instructions, which prosecutors and the chief constable are obliged to follow.

**Elaine Murray:** Section 7 requires “guidelines” rather than instructions. Should that be amended?

**The Lord Advocate:** That is a good point. The three of us gave evidence to the cross-party group on human trafficking, where a point was made—by Kirsty Thomson of the LSA, I think—about the distinction between guidelines and instructions. I have reflected on that, and my view is that instructions would be much better than guidelines. The point was made that guidelines are guidelines; they are not instructions that somebody has to do something. It seems to me that, in this field, it would be much better to have instructions.

Where a bill requires me, as Lord Advocate, to issue guidelines or instructions, my practice has been to publish draft guidelines during the passage of the bill. In this case, I signed them off yesterday. I can send them to you, convener, and I will have them published in the Scottish Parliament information centre. We have also sent them to many of the groups that work with victims and deal with human trafficking in the field, including the UK anti-slavery commissioner, the head of Europol, TARA and various other organisations.

If you have any concerns about the issue or any suggestions on making the instructions more focused, please let me know before I finally sign them off and issue them to prosecutors and the chief constable.

**Elaine Murray:** In the evidence from the previous panel, it was suggested that, in the rest of the UK and in Northern Ireland, there is a process by which the court can quash a prosecution if certain things come to light. The implication of what James Wolffe said is that such a process does not exist in the Scottish system.

**The Lord Advocate:** I do not think that that is right. Under the Scotland Act 1998, the Lord Advocate is required to comply with EU law and the Human Rights Act 1998. I cannot act in a way that is ultra vires in that regard. If it was said that I was prosecuting a victim of human trafficking, it would be open to the defence to raise what is called a compatibility issue—it could say that I was acting in a way that was incompatible with EU law. There is also the common-law plea in bar of trial on the ground of oppression. There are plenty of avenues of challenge within criminal procedure in Scotland that allow the matter to be raised. Of course, there is also judicial review of decision making.

I will make a public statement, as I did at the cross-party group and at the human trafficking summit that was held in October last year: I will

not prosecute a victim of human trafficking. That is not what we are about. However, I am sure you are all aware of and understand the dynamics of human trafficking between the trafficker and the person who is trafficked. In many cases, the issue is not black and white.

**The Convener:** I think that we have accepted that, Lord Advocate. The change in someone's status from not being trafficked to being trafficked might be something that they do not even recognise themselves, so I think that we understand the complexities. It is useful that you have gone through the wide range of discretion that you use as the public prosecutor in Scotland. I do not think that we have reached a view, but it has certainly been helpful to have that explanation.

**Elaine Murray:** Lord Advocate, you have stated that you would never do that, but the bill has to be strong enough for a situation in which a future Lord Advocate took a different view.

**The Lord Advocate:** I have thought about that point and reflected on previous Lord Advocates and on my time as Lord Advocate. There is continuity: I cannot think of any occasion when I have rescinded a previous Lord Advocate's guidance or instructions, although I might strengthen or finesse them. Would a future Lord Advocate issue instructions that victims of human trafficking should be prosecuted? That would be ultra vires in relation to the EU directive, and I do not think that they would act in such an unethical way.

**Elaine Murray:** I was just thinking about what would happen in circumstances that none of us here particularly wants, if we were to come out of the European convention on human rights and have British human rights law instead. Would that affect the situation?

**The Lord Advocate:** That would be different because that is about the Human Rights Act 1998.

**The Convener:** I think we are going into other arenas.

Margaret Mitchell, Roderick Campbell and John Finnie all have supplementary questions, but Alison McInnes is first.

**Alison McInnes:** Lord Advocate, I appreciate the commitment that you have made this morning on issuing instructions. In our first evidence session today, the LSA made it quite clear that it does not think that the non-prosecution requirement and the statutory defence are mutually exclusive. They are extra safeguards for people who slip through the net. What is your reaction to that?

**The Lord Advocate:** I go back to my initial point. I take my lead from Parliament. If Parliament

says that the EU directive has to be implemented through having a statutory defence, that is Parliament's choice and I will implement it in that way.

Should my guidelines go wider than that? If they did, would I be taking a different view from Parliament because members have said that the statutory defence is the way in which we should discharge our EU obligations? There is a possible tension there.

**Alison McInnes:** Are you saying that they are exclusive and that we could not have a non-prosecution requirement and a statutory defence? Are they contradictory?

**The Lord Advocate:** In essence, yes, they are. I take my lead from Parliament and Parliament will have considered the issue and decided how to discharge our EU directive obligation.

**Alison McInnes:** The statutory defence is in the English bill and the Northern Ireland act. Are there any guidelines on non-prosecution in either of those jurisdictions?

**The Lord Advocate:** I am not aware of any yet, although prosecutors in England and Wales and Northern Ireland might issue some. However, there is a huge carve-out in relation to the statutory defence in Northern Ireland and England and Wales, because it does not apply to many offences—ACC Graham mentioned 130 offences—but my guidelines will apply across the board.

We are talking about a statutory defence but we often find out that people are victims of human trafficking only at the end of or beyond the criminal justice process. That does not fit with a statutory defence.

**Roderick Campbell:** At the risk of misrepresenting the representative from the Law Society who was on the previous panel, I note that he talked about a plea in bar of trial as a common-law defence. I am not sure whether he was suggesting that that should be put in the statutory framework. Would you like to comment on that?

**The Lord Advocate:** If it exists in common law, you would not need to put it in a statutory framework—it exists in any event. A plea in bar of trial on the ground of oppression has to meet very high tests if it is to be established. Such a plea has to be rooted in evidence before it can be made to the court. My point is that Lord Advocate's instructions can take account of information and intelligence that we would not be able to evidence, and it might not be in the interests of the victim of human trafficking to give law enforcement that evidence.

Therefore, it is much better for me to issue instructions and to have in place a framework in

which we can take account of intelligence and information from a wide range of bodies. That will allow us to do justice. To go back to my principal point, we are not about prosecuting the victims of human trafficking.

12:15

**Margaret Mitchell:** I totally take on board what you say about flexibility, which sounds good, but the point that was made was that a statutory defence might be another useful tool in the box, albeit in a small set of circumstances.

**The Lord Advocate:** I have heard the argument, but I do not think that it would be a useful tool, because it would be far too narrow. A much more flexible, holistic and inclusive approach, working with all the agencies and people who are involved in combating human trafficking, is a much more important and productive way of delivering justice, which is what we are about. That is my view on that. Kathleen Harper is a senior Crown counsel and, as head of the national sexual crimes unit, she has been taking such decisions. She might want to comment on the work that goes into those decisions.

**Kathleen Harper:** From my perspective, the Lord Advocate's instructions will be effective and flexible, as the Lord Advocate has said. As head of the national sexual crimes unit, I am the lead prosecutor for human trafficking. The fact that cases come to me, as a single point of contact, perhaps gives confidence, both externally and internally, that a consistent approach will be taken to cases. That is married with the raising of awareness within the department of the factors and signs to look for. Those in COPFS who deal with potential cases are aware of the need to read the signs. The cases all come to me as one point of contact, which allows for an effective approach.

The instructions will be flexible because, as the Lord Advocate has said, we will look at all manner of information and intelligence and all sorts of advice from the UK human trafficking centre, Migrant Help and other organisations. That wide-ranging and flexible approach can last throughout the life of a case and beyond. Even if there is a conviction, we can look at that and apply to the courts retrospectively to have the conviction set aside. The Lord Advocate's instructions are a very flexible and effective tool.

**Margaret Mitchell:** I suppose that a lot of awareness raising will be involved. What happens if someone realises that they are not considered to be a victim of trafficking and they have no defence? If a statutory defence option is open to them, that will be easily understood. Otherwise, they will have to go back to the same people who did not consider them to be a victim of trafficking.

Are there not problems with that? We accept your point that it is not in your interest to prosecute and that you want to be open, but you will still be seen as the body that thought that a person was not a victim of trafficking. Is that not problematic?

**Kathleen Harper:** The fact that a person does not realise that they are a victim of trafficking will be a problem for anybody who deals with this sort of issue. It will be the same for defence counsel, for instance.

**Margaret Mitchell:** My point is that if you do not recognise them as a victim of trafficking, they will then have nowhere to go to say that their behaviour was not criminal, because you will have been complicit.

**Kathleen Harper:** We will take into account all the information that is available. There will be a strong presumption against prosecuting someone who is seen as a credible or possible credible victim of human trafficking. A wide-ranging approach will be taken.

**The Lord Advocate:** I think that the point is about what happens if we get it wrong or do not read the signs properly. First, they are instructions. Secondly, I cannot act in contravention of EU law. The directive comes from the European Union, and it leaves me wide open to a compatibility issue that could be raised before the court. Thirdly, I am subject to judicial review for my decisions—when I say “my decisions”, I refer also to those of prosecutors acting on my behalf and on my instructions.

There are locks and there are avenues by which, if I am wilfully blind on the issue, I can be challenged through the courts, which have superintendence of my decision making.

**Margaret Mitchell:** I do not think that wilful blindness is the point; the intelligence might not have reached you.

**The Lord Advocate:** I take the point. Intelligence might not reach me, and it might not reach the defence at all. It may be that there is no statutory defence, yet someone is a victim of human trafficking.

One of the issues with a statutory defence is that it places the focus on the victim to raise it with their lawyer and to lodge the defence with the court.

I understand the underlying ethos for the European Union directive, which is that we are taking a holistic approach to the matter. It is not just the victim who requires to be able to raise the issue with law enforcement; they might not want to do that. However, there are other avenues—and my instructions—whereby the issue may be raised aside from by the victim or alleged victim themselves.

**Catriona Dalrymple (Crown Office and Procurator Fiscal Service):** In the examples where proceedings have been discontinued, the information about the victim being human trafficked did not come from the victim themselves. In one situation, it came from the LSA; it and other agencies provided the information to the Crown, which undertook further investigations, and that was reported to the head of the NSCU.

**The Lord Advocate:** Without revealing too much detail in public, we are currently considering persons who have been convicted of shoplifting and whether, as part of being victims of human trafficking, they were required to shoplift on behalf of the traffickers. That information, which we are checking out, only came post conviction and sentence. In fact, some of the persons who were convicted and sentenced for shoplifting have returned to their country of origin.

Notwithstanding that, we feel that we have a duty to consider the issue objectively. At the end of the process, there may be credible evidence or information—it should not be restricted to evidence—that the persons involved are victims of human trafficking. Notwithstanding the point that some of those persons do not live in the country, we will apply to the court to set aside the convictions.

**Catriona Dalrymple:** I suppose that the benefit of that is that there are no time limits for the Lord Advocate's instructions, which will apply throughout the whole life of a case.

**The Convener:** A couple of members want to come in. I ask you to enjoin your questions. This is a very important debate. John Finnie and Alison McInnes are both wanting to ask about the issue of a statutory defence, I take it.

Do you have anything new to ask, John?

**John Finnie:** I have been trying to frame a question for the Lord Advocate, who has made a very compelling case for his instructions. I suppose that my question is: when do you stop being a victim of human trafficking? I am thinking of someone who remains in the UK. There must come a tipping point. The person was a victim, and they are now a resident of the UK. The provision is not a get-out-of-jail-free card for life. I would have thought that you would want to put the onus back on to the individual, to prove their position. When does someone stop being a victim? That is perhaps the question that I wish to ask.

**The Lord Advocate:** In relation to the European Union directive, we would consider whether the person was a victim of human trafficking at the time of the commission of the offence. That is the important point. It may be that the world has moved on, and that the person has been

integrated into society and is no longer a victim of human trafficking. If, at that stage, he or she committed an offence, they would not have the victim-of-human-trafficking defence open to them, because they would not be a victim of human trafficking at the time when they committed the crime.

**John Finnie:** I know that you were restricted in what you could say about the shoplifting example, but human trafficking is a very pernicious crime and the influences can be long-lasting. Are you able to give an assurance that consideration will always be given to whether there has been an element of coercion when someone has been involved in a crime if they have previously been a victim of human trafficking?

**The Lord Advocate:** The instruction will persist for all time. For example, if we get credible information 10 years on that the person who was convicted was a victim of human trafficking, we will still look at the case, so the instruction will persist in the future.

**John Finnie:** Thank you.

**Alison McInnes:** If a case is set aside following further information, would the assistance and support that a victim of trafficking would have expected had they been identified earlier be applied at that later point in the process?

**The Lord Advocate:** It is probably best to direct that question to the agencies involved but I would be astonished if that assistance and support were not offered.

**Alison McInnes:** Would you have a referral mechanism to make sure that that happened?

**The Lord Advocate:** Yes.

**Alison McInnes:** Ms Dalrymple, are you able to tell us—if it is appropriate for you to do so—how many cases in the last year have not been prosecuted? That information might help us.

**Catriona Dalrymple:** I am sure that we have six individuals—is that right, Kathleen?

**Kathleen Harper:** Yes.

**Catriona Dalrymple:** In the cases of six individuals, we have taken the decision not to prosecute or to discontinue or to set aside a conviction. One individual was referred to Kathleen but, once all the investigation was done with all the different agencies, it became apparent that the individual was not what we would deem to be a credible victim of human trafficking and that prosecution continued. That shows that the test is applied.

**Alison McInnes:** That is helpful.



**The Lord Advocate:** There is very good information out there from the International Labour Organization and the EU anti-trafficking co-ordinator on the signs of human trafficking and on what should be considered when you are reaching your judgment. Prosecutors are being trained in that area. For example, Bronagh Andrew of TARA spoke on human trafficking at the Crown counsel annual weekend conference and was very well received. It is very important that there is an ongoing commitment to train our prosecutors on any developments or changes in the dynamic of human trafficking so that they have the most up-to-date information available.

**Christian Allard:** I want to see a move away from prosecuting victims and a move towards prosecuting people who are trafficking—people who are offenders. Where are we on that? In the past, we have had difficulties around prosecuting such people. Will the provisions in the bill help to increase the number of prosecutions?

**The Lord Advocate:** The bill will certainly help because it consolidates the field, which is currently very disparate in relation to the legislation that applies. It will also strengthen our hand in relation to proceeds of crime, making trafficking a lifestyle offence. The bill provides for prevention orders and for aggravation in relation to human trafficking.

I make the obvious point that we may not be able to prosecute on the evidence available for a human trafficking offence, but we can prosecute for ancillary offences relating to fraud, immigration and keeping or running a brothel. We have used such offences in the past. To put it in the proper context, the bill includes the recommendation that was made by Baroness Kennedy, I think, on behalf of the Equality and Human Rights Commission, that there should be an aggravation that can be applied to the non-trafficking offences that are part of the human trafficking landscape.

I think that the bill will strengthen the hand of law enforcement in the prosecution of human trafficking. There are challenges in prosecuting human trafficking—there is no point in hiding that. Availability of witnesses is a huge issue in the prosecution of these cases. Often, we find that key witnesses just disappear and go elsewhere. We are well aware of that.

12:30

We have had successes in convictions for human trafficking. We have had convictions for economic exploitation in human trafficking—for example, in the case of Craig and Beukan, where there was sexual exploitation—and we have had confiscation orders applied, as in the case involving a man called Nemburt, who was

convicted of trafficking and prostitution. All three of those individuals received pretty significant sentences of imprisonment.

We have strengthened the links with Europol and the UK anti-trafficking commissioner, and we have very good links with the European Union anti-trafficking commissioner, whom I met when she visited the Parliament. Commonwealth heads of prosecution met two years ago to discuss human trafficking. Of course, and very importantly, there was the human trafficking summit.

I see this as not just as a Scottish problem; I think that we all agree on that. There is no point in our driving human trafficking south. We all have an interest in dealing with it across the UK and beyond. That is why at the summit we had Jim Wallace, the UK Advocate General, the Director of Public Prosecutions for England and Wales, the DPP for Northern Ireland and the DPP for the Republic of Ireland, together with a European Union input. We are working from the commitment that was made at the summit that in a year's time we will drill down into what we are committed to do in working together. I hope that that will make the United Kingdom and Ireland a bad place to do this type of business.

**Christian Allard:** We have received a lot of evidence about the inability of the NRM to address many of the issues. Do you think that the bill is very much limited to identifying that trafficking offences have taken place, and is the NRM not helping? Should the strategy behind the bill's provisions address a lot more of the problems and therefore increase the number of prosecutions, which is what we would all like to see?

**The Lord Advocate:** The NRM is a valuable tool for identifying the victims of human trafficking. However, as I pointed out, the issues are often not black and white. For example, in a recent prosecution in Scotland—the Kulova case—we had victims who had come here for a better life economically. They had been promised a job and contacted the traffickers through the internet. They arrived at Glasgow airport believing that they were going to a job. However, what happens in such cases is that a kind of grooming dependency is built up with the traffickers, then the victims are introduced to men whom they might want to meet and get to know better. They find themselves in a very difficult situation because the trafficker takes all their documents for safekeeping. That is what the victims in that case were told.

We need a huge matrix of many organisations in the field, which I think that we have got. We are not saying that it is perfect, because we can always improve things. However, to go back to my instructions, we need to be able to take information from all the players in the field and act on that. That would be the best way in which to

combat human trafficking in Scotland and the United Kingdom.

**Christian Allard:** All the players in the field who have come in front of this committee have said that they want some provision for children in the bill. What do you think about that?

**The Lord Advocate:** I can see the arguments in favour of that. I am here as the Lord Advocate and I was not involved in the drafting of the bill. However, I think that the approach that was taken was to have an offence that applies across the board, regardless of age.

The one aspect that I gave some consideration to is the presumption of age. On balance, it might be helpful to have that in the bill, because we know that on occasion there is some dubiety about the age of the victim or victims. There is a general requirement that if there is a suspicion that a victim of human trafficking is a child, they should be treated as a child until there is definitive confirmation of the position. That is common sense; we would all want to do that.

If such a measure is not in the bill, I can include it in the instructions, as we have already discussed. That would be another means of dealing with the issue. I do not know whether that answers your question. I would not be upset if you were to decide that the measure should not be in the bill, but in that case I would certainly include it in the instructions.

**Christian Allard:** On the same principle, will you add to your instructions people with learning difficulties or people with disabilities?

**The Lord Advocate:** I will need to look at that. There comes a point at which perhaps there are too many classes of victim, which could be a bad thing. It depends on whether there is an issue regarding persons with learning difficulties.

This is not an answer to your question, but consent is not a defence in section 1 and I notice that it is not mentioned in section 4. I would like it to be in section 4. On the principles of statutory construction and interpretation, the danger is that the courts would say, "Well, Parliament has taken the view that it should be provided for in section 1, and Parliament has taken the view that it should not be provided for in section 4." Therefore, consent is required in relation to section 4.

I hope that that is helpful.

**Margaret Mitchell:** There has been widespread concern about the use of the word "travel". Would the bill benefit from further clarification, to ensure that travel within as well as between countries was included?

**The Lord Advocate:** That is the international issue that has been raised. I do not think that there

is a problem with the definition in the bill. Last night, I checked the definition of the word "travel" in the "Oxford Short Dictionary". It means to move from one place to another, so there is no injection of internationalism in that definition.

**The Convener:** However, someone does not have to be moved. We have heard evidence that somebody could be held in a flat and trafficked within it, with no travel involved.

**The Lord Advocate:** The drafting in section 1 is clear. It says:

"A person commits an offence if the person ... arranges or facilitates another person's travel".

What does that mean? The courts will interpret that by looking at the rest of the section.

**The Convener:** And that includes the phrase "exchanging control".

**The Lord Advocate:** Yes. Section 1(1)(a) continues:

"including in particular by ... recruiting the person with a view to transporting or transferring the person".

That could include someone in a flat. It refers to

"transporting or transferring the person ... transferring or exchanging control of the person".

That goes back to your point, convener—a person in a flat would also be covered by that. It then refers to

"harbouring or receiving the person".

To my mind, the definition of travel does not mean that someone must have moved from country to country.

**The Convener:** Perhaps the issue is just where the word "travel" appears. The first words that hit us are:

"arranges or facilitates another person's travel".

The issue is one of emphasis rather than substance, given all the other subsections.

**The Lord Advocate:** Section 1(1)(a) uses the words "including in particular by", which are followed by four examples. The court will interpret the section. To answer the question of what travel means, it will look at what Parliament meant. In sections 1(1)(a)(i) to 1(1)(a)(iv), we can see that Parliament's clear intention is that human trafficking is not restricted to movement from one country to another or one place to another, but is much more expansive than that.

**Margaret Mitchell:** Since so many witnesses have raised concerns, would it not be better to take a belt-and-braces approach and clarify that the word "travel" includes movement within countries? Would that not give us better legislation?

**The Lord Advocate:** I see that argument, but my view is that strict canons of statutory construction are unnecessary.

**The Convener:** You have given me examples from section 1(1)(a) and the four subparagraphs following that. However, subsection 1(1) goes on to say:

“and ... arranges or facilitates that travel”.

Is that not a bit unclear?

**The Lord Advocate:** That is a matter for Parliament. You could take the view that the word “and” is unnecessary there. You would need to hear from the parliamentary draftsman or the sponsoring Government minister what is meant by that.

**The Convener:** We will ask, but you can see why it seems to link in all ways to guided travel.

**Margaret Mitchell:** As you are the prosecuting body, that might be of concern to you.

**The Lord Advocate:** I have had very little time to look at it and reach a view, but if I was defending the bill in a court I would not think that it was in any way flawed. The Parliament’s intention is clear.

**The Convener:** We will finish there. Thank you very much. You have given us food for thought about the statutory defence. If I am ever in trouble and you are not the Lord Advocate, will you defend me, please? You made some good arguments.

We move into private session.

12:41

*Meeting continued in private until 12:51.*



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