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Our ref SUB/1533/2013

**FROM:** TIM LOGAN, DALO  
**DATE:** 29 OCTOBER 2013  
**TO:** CHRISTINE DARRAH

### SUMMARY

**Business Area:** Protection and Organised Crime Division and Criminal Justice Policy and Legislation Division.

**Issue:** Response to the Committee's call for written evidence on the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill.

**Restrictions:** None.

**Action Required:** To inform the Committee's consideration of the Bill during Committee Stage.

### Background

The Justice Committee has written to the Department of Justice (DOJ) inviting written evidence and views on the contents of Lord Morrow's Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill by close of play on 1 November. The DOJ has provided the Committee with a written paper on 5 September welcoming the focus on human trafficking and the sentiment behind the Bill, but also outlining some of the Minister's concerns about the Bill and providing a detailed clause by clause analysis.



### ***Overview***

2. This paper focuses exclusively on those elements of the Bill which would impact on the DOJ and does not consider provisions which would fall to the Department of Health, Social Services and Public Safety (DHSSPS) to implement. The paper provides an overview of DOJ's response to the Bill, building on information that the Department has previously provided and on points made during the Second Stage debate. It is supportive of the Bill's intent, whilst highlighting key areas of concern which the Minister believes need to be addressed.

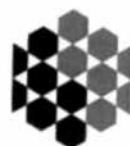
3. Appendix 1 provides more detail, on a clause by clause basis, of where we believe the Bill may *benefit* from amendment, or where we consider amendment is *required* and sets out the purpose of amendment.

### ***Response to the Bill***

4. The Justice Minister is committed to ensuring that the arrangements in Northern Ireland for eradicating this dreadful crime, punishing its perpetrators and protecting its victims - whether statutory or administrative - are as robust and effective as possible. The Minister has made clear that he is wholly supportive of the motivation and sentiment behind the Bill and that he welcomes the positive impact that the Bill has already had in terms of raising public awareness. Although some provisions replicate existing arrangements, the Minister has acknowledged that may help to reinforce the message that human trafficking will not be tolerated in Northern Ireland and its perpetrators will be dealt with robustly. As such, the Minister has asked me to focus on areas of concern.

#### ***Clause 3 – aggravating factors***

5. Clause 3 would set in statute a range of aggravating factors that courts must consider when sentencing for human trafficking and slavery offences. The Department has a concern that setting aggravating factors in statute would limit flexibility in responding to emerging case law and would fetter the discretion of judges. Our view is that sentencing guidance provides a better vehicle with which



to respond flexibly to case law as it emerges. Nonetheless we will not oppose Clause 3 if it is the will of the Assembly, although we believe it will require some minor amendment, as highlighted in Appendix 1.

*Supporting and protecting victims (Clauses 10, 13 and 14)*

6. The Minister welcomes the Bill's focus on supporting and protecting victims of human trafficking. The Minister is committed to ensuring that victims are afforded the protections and interventions that they need and that they are entitled to under the EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims (the EU Directive). As Committee Members will be aware, the Minister had already signalled that he intended to bring forward secondary legislation in respect of supporting and protecting victims and he is content that this can be achieved through Clause 10. We believe, however, that some further amendment will be needed, included to clarify the respective functions of the Departments Of Justice and Health in order to mitigate against the possibility of any future litigation. We are seeking to work with Lord Morrow on this provision, who has indicated his willingness to engage.

7. Clause 13 would place a statutory duty on the police to prevent secondary victimisation during police interviews by avoiding unnecessary repetition of interviews, visual contact between the victim and the accused and unnecessary questioning concerning the victim's private life. More extensive requirements would also apply in respect of victims who were also children. This is another area where the Minister had intended to legislate and so the Minister is supportive of the Clause 13 proposal. Minor, technical amendments have been suggested as set out in Appendix 1.

8. Clause 14 would amend the Criminal Evidence (Northern Ireland) Order 1999 to ensure that victims of human trafficking are automatically entitled to be considered for special measures assistance in court. This is another area where the Minister had intended to bring forward draft legislation. Instead the Minister



supports the Bill's proposal. Again, minor, technical amendments have been suggested in Appendix 1.

### *Areas of concern*

9. The Minister has more significant concerns about the potential negative impact of some provisions in the Bill. These were set out in detail in the Department's paper to the Committee of 5 September 2013, and highlighted in the course of oral briefing to the Committee by DOJ officials on 12 September. The Minister believes that the concerns can be addressed, in the main, by *amendment*. The Minister met Lord Morrow to discuss his concerns and they have agreed to work constructively to explore solutions.

11. The Minister's concerns are set out below. Suggested amendments have been highlighted in Appendix 1.

### *Clause 4 – Minimum sentence for human trafficking and slavery offences*

12. Clause 4 would introduce a compulsory minimum custodial sentence of at least two years for human trafficking or slavery offences, unless the court were of the opinion that there were exceptional circumstances to justify its not doing so.

13. The Minister supports Lord Morrow's view that those who have been convicted of human trafficking offences should receive robust sentences which reflect the seriousness of the crime and its impact on victims. Indeed, Committee Members will recall that one effect of the human trafficking provisions set out in the Criminal Justice (Northern Ireland) Act 2013 is that the Director of Public Prosecutions has the power to ask the Court of Appeal to review any sentence imposed by the Crown Court in respect of human trafficking offences, where he considers it to be unduly lenient. The Minister has also removed the option of the case being tried summarily (it must now be tried in the Crown Court).

14. The Minister, however, has concerns about the Clause 4 proposal for minimum sentences. Compulsory minimum sentences are rarely specified in law,



reflecting the principle that judges should normally be free to take account of all available evidence and the unique circumstances in a particular case, allowing them to reach a decision on sentencing which fits the crime. Judicial discretion is particularly important in the context of human trafficking cases, where supply chains can be complex and a number of different individuals involved, to varying degrees and with varying culpability, throughout the trafficking process. Furthermore, the existing sentencing guidance already indicates that a custodial sentence should be the norm for involvement in the human trafficking process. DOJ believes that the Bill should be amended to remove Clause 4.

15. If the Clause is supported by the Committee/Assembly then the Minister's most serious concern is that the minimum sentence it proposes would apply in respect of children as well as adults. The Minister considers this to be inappropriate and in breach of the "best interests of the child" principle set out in Article 3 of the United Nations Convention on the Rights of the Child. As a minimum, therefore, the Minister's strong view is that an amendment is required to Clause 4 to clarify that the provision should not apply in respect of children.

*Clause 6 – Paying for sexual services of a person*

16. Clause 6 would criminalise any person who entered into a financial transaction in return for any sort of sexual service. This would include the purchase of sexual services between two fully consenting adults. It is the Minister's view that such a change to the criminal law extends beyond the scope of a Bill aimed specifically at alleviating the crime of human trafficking. The Department does not argue with the fact that demand for sexual services is a factor in the supply of trafficked victims into prostitution. However, it does argue that there are additional important factors outside of this one area which take this proposed provision beyond the remit of the Bill's objectives, and which could leave vulnerable individuals at greater risk of harm.

17. The details of the argument have already been presented to the Committee and to the Assembly. The basis for advocating that this Clause should be removed



from the Bill is clear and straightforward. In essence, there is insufficient information on what negative impacts there might be on those vulnerable women, and men, who use prostitution as a way of earning a living. We do not know what may happen in terms of their safety and wellbeing if their client base is criminalised. We do not know what may happen to their willingness to come forward and provide the police with information about abusers and traffickers. We do not know whether criminalisation will have the desired effect of reducing the incidence of trafficking into prostitution. There is no evidence base available in Northern Ireland to back up this change.

18. The Department recognises that Lord Morrow and others use the example of the Swedish legislation as evidence of the success criminalisation has on reducing demand for prostitution. The Department also recognises the strength of the presentation provided by the Swedish proponents. However, there is also a strong body of opinion that would question some of the claims made, and others who would point to the many diverse ways in which prostitution and sexual services manifest themselves in different jurisdictions, suggesting that what is right for one is not necessarily the best way for another.

19. There are also many questions posed by key stakeholders here, both in the statutory sector and from NGOs. Concerns of a practical nature are expressed by the PSNI and the PPS (including, if we were looking at the construction of the clause, the lack of clarity as to what “sexual services” means). These concerns largely relate to possible difficulties in evidence collection and the related, and serious, resource implications. Purchasing sex is not an open and visible transaction. Questions arise over the allocation of resources into evidencing offences, many of which will not involve trafficked victims, at the possible expense of pursuing the current offence of paying for the services of a prostitute subjected to force. The Minister has already announced his intention to seek a legislative change to extend the statute time bar for investigating such offences. There has also been little consideration, or evaluation, of ways to reduce demand outside of

criminalisation and, as previously stated, many concerns centre on the impact of criminalisation on those who are already vulnerable.

20. The Department is also aware that Lord Morrow and others have been looking to the Republic of Ireland for signs of a move to change the law on prostitution, particularly given the Oireachtas Joint Committee report to the Government which recommended criminalisation. Although relevant to the debate on human trafficking, it needs to be recognised that the conclusion reached by the Committee comes after policy consultation concerning the law on regulating prostitution, not just on the single issue of ways to reduce trafficking. The Minister has already made clear that future policy decisions would of course need to take into account legislation in our neighbouring jurisdiction. For now, however, the Irish Government has not made any response to the Oireachtas report, but we understand that it has asked for more information on some of the Committee's conclusions and recommendations.

21. As a result of these various factors, the Minister has concluded that he cannot support Clause 6 as part of this Bill. Instead he has made clear that he is prepared to consider the law on prostitution separately, not just as a measure to control trafficking, and with the benefit of specially commissioned research to provide an evidence base for future decisions. The Department has drawn up an outline specification for this research, and a worked up version will be forwarded to the Committee as soon as possible and, certainly, during its scrutiny of the Bill.

*Clause 7 – Requirements and resources for investigation or prosecution*

22. The Department has previously highlighted our concerns to the Committee that Clause 7(1) would place a duty on the DOJ that it cannot deliver. Responsibility for training investigators and prosecutors and for equipping them with appropriate tools does not rest with DOJ, but with the relevant law enforcement agencies, including the Police Service of Northern Ireland (PSNI), Gangmasters Licensing Authority (GLA), Home Office, the National Crime Agency (NCA) and the Public Prosecution Service for Northern Ireland (PPSNI).



23. We recognise the intent behind this provision and share Lord Morrow's assessment of the importance of appropriate training in effectively responding to human trafficking. The Department's paper to the Committee of 5 September outlined a number of steps that have already been put in train across the criminal justice system and other relevant frontline professions in order to train and raise awareness of this issue. The Minister will work with Lord Morrow to explore alternative options. The Department's preference is amend Clause 15 to ensure that matters relating to training, investigation and prosecution are covered in the annual strategy which that Clause provides for. The Department's view is that this would provide a more strategic response which would allow training and resources to be considered under a more comprehensive multi-agency approach.

*Clause 8 – Non prosecution of victims of human trafficking*

24. Clause 8 would provide blanket immunity from prosecution for victims of human trafficking *where they have been compelled to commit other offences as a result of having been trafficked*. The Minister has indicated that he has serious concerns about the impact of this Clause. Our assessment is that it goes too far; that it runs counter to the statutory obligations placed on the Director of Public Prosecutions under the Justice (Northern Ireland) Act 2002; that it could have a negative impact on the rights and interests of some victims; and that, ultimately, it could lead to inappropriate outcomes in difficult cases.

25. The EU Directive requires us to ensure that prosecutors are *entitled* not to prosecute or impose penalties on victims in cases where they have been compelled to commit other offences. This is already the case in Northern Ireland. It does not require Member States to *ensure* immunity from prosecution in all cases. Within Northern Ireland Public Prosecutors must apply the Test for Prosecution, including whether prosecution would be in the public interest. In doing so they are able to consider the specific circumstances of each case, including whether any mitigating factors exist – such as the fact that an individual has been compelled to commit the offence as a result of having been trafficked. DOJ understands that PPSNI has



exercised this prosecutorial discretion already in a number of cases, including cases of cannabis cultivation and brothel keeping. The PPSNI's recently published Policy on Prosecuting Cases of Human Trafficking<sup>1</sup> also covers this issue and provides further guidance.

26. The Minister is opposed to the introduction of the blanket immunity from prosecution that Clause 8 would provide and is of the view that the Clause should not stand part of the Bill. While he recognises, and shares, Lord Morrow's concern that victims of human trafficking be afforded appropriate protections under the law he is satisfied that those protections already exist. The Department's view is that, instead of providing for blanket immunity from prosecution in these circumstances, we need to ensure that there is greater awareness of human trafficking across the criminal justice system and an understanding of the system's responsibilities in protecting victims. DOJ has already begun to address this through the Organised Crime Task Force (OCTF). We have written to stakeholders across the justice system, including the Law Society, the Bar Council and the Judicial Studies Board to highlight the issue.

27. We suggest that there is scope to amend Clause 15 of the Bill to ensure that the annual strategy will include actions to raise awareness and to highlight the rights and entitlements of victims across the justice system. We will talk to Lord Morrow about that, but would hope the Committee would support our approach.

#### *Clause 16 – Northern Ireland Rapporteur*

28. Clause 16 would place a requirement on the DOJ to establish an independent body to act as a Northern Ireland Rapporteur and to report to the Assembly on the performance of the Act and related matters. The Minister agrees that effective monitoring and accountability arrangements should be in place in respect of our response to human trafficking. He has indicated that he wants to identify the best solution for Northern Ireland. The Minister has concerns, however, that the model

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<sup>1</sup><http://www.ppsni.gov.uk/Prosecution-Policy-and-Guidance---5084.html>



proposed under this Bill may not be the most effective way to deliver this, and he is particularly concerned that we do not lose sight of our international obligations, under the EU Directive, in respect of a *national rapporteur* for the whole Member State

29. The Inter-Departmental Ministerial Group on Human Trafficking<sup>2</sup> has been discussing a proposal to establish a UK-wide Anti-Slavery Commissioner who would perform the functions of this national rapporteur for the UK Member State. Clearly the arguments for a commissioner need further consideration and consultation. The Minister's assessment is that a broader-based, UK-wide Commissioner would bring a wider perspective, which should add more value than a regional rapporteur, particularly given the global nature of trafficking. In addition, a UK-wide Commissioner would be able to look comprehensively at the actions of all of the organisations and agencies operating here, including those for whom responsibility has not been devolved – such as Home Office, NCA, the UK Human Trafficking Centre, and GLA. A Northern Ireland Rapporteur could not have statutory power to consider these organisations, which we believe would limit its value, particularly given the joined-up, multi-agency response to human trafficking that is provided under the OCTF.

30. The Minister would note that we already have local accountability arrangements to monitor the justice system's anti-trafficking efforts and arrangements through Criminal Justice Inspection Northern Ireland (CJINI).

31. The Minister would propose to consult on this issue before the end of the year when the detail of the UK-wide Commissioner has been worked up. His current view, however, is that a broader commissioner would be preferable both in terms of the establishment of effective accountability arrangements and value for money.

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<sup>2</sup> Home Office chaired, which David Ford attends.



*Developments in other jurisdictions*

32. There have been a number of recent developments in neighbouring jurisdictions relating to human trafficking, which may have a bearing on this Bill, most notably, the Home Secretary's plans for a Modern Slavery Bill and, in Scotland, the introduction of the Criminal Justice (Scotland) Bill. In particular, this paper has already noted that the proposal for an Anti Slavery Commissioner in the proposed Modern Slavery Bill should have a direct read across to consideration of the proposal for a Northern Ireland Rapporteur under Clause 16 of Lord Morrow's Bill.

33. The Minister has made clear that he will consider any proposals which might reinforce or enhance our response to human trafficking in Northern Ireland. We will want to consider whether it would be beneficial to extend or replicate any of these provisions here and DOJ officials are working with other jurisdictions as policy proposals are being developed and finalised. We hope to be in a position to share a draft consultation paper on further policy proposals for Northern Ireland with the Committee before the end of this calendar year. Appendix 2 includes further detail on the relevant proposals being taken forward in the Modern Slavery Bill and the Criminal Justice (Scotland) Bill.

*Financial impact of the Bill*

34. Lord Morrow has estimated that the financial impact of the Bill, if enacted, would result in approximately £1.5 million of new costs, some of which would be annually recurring costs although we have not yet had sight of the detail of how the estimated costs have been calculated. Some costs (e.g., provision of Child Trafficking Guardians and potential new costs in relation to support for victims) would fall to DHSSPS but we anticipate that the majority would fall to DOJ.

35. Any costs associated with the new proposals arising from the implementation of the Bill will result in an unfunded pressure for DOJ which already has budget pressures. For these new activities to be funded, other lower priority activities



would need to be identified and cut. We believe this is an important, relevant factor to take into account in considering the Bill.

**Recommendation**

36. The Committee is invited to note:
- the Department's comments in respect of Lord Morrow's Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill;
  - the list of suggested amendments attached at Appendix 1;
  - that the Minister will continue to engage with Lord Morrow about amendments; and
  - that DOJ officials are working with other jurisdictions on a range of other policy proposals, with a view to putting a draft consultation paper to the Committee by the end of the year.

*D. Logan*

RP  
TIM LOGAN  
DALO

*Encl. - Appendix 1.*

**Appendix 1**

<b>Clause</b>	<b>Amendment</b>
Clause 1 – Definition of human trafficking and slavery offences	This clause specifies the relevant human trafficking and slavery offences. However, in order for it be comprehensive, DOJ recommends that Clause 1(b) should be amended to include other relevant offences under sections 12 and 13 of the Gangmasters (Licensing) Act 2004.
Clause 2 – Consent irrelevant for victim of human trafficking or slavery offences	No amendments proposed.
Clause 3 – Aggravating factors	DOJ has set out its concerns in respect of this clause suggests that the Bill be amended so that it does not include Clause 3. If included, we believe that an amendment may be needed in respect of the definition of “position of trust” to broaden it.
Clause 4 – Minimum sentence for human trafficking and slavery offences	DOJ has set out its concerns in respect of Clause 4 and suggests that the Bill be amended to remove it. If included it would be important that it be amended to clarify that the provision does not apply in respect of children.
Clause 5 – Amendments to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004	We believe that an amendment may be needed in respect of the definition of “position of trust” to broaden it.

<b>Clause</b>	<b>Amendment</b>
Clause 6 – Paying for the sexual services of a person	DOJ is of the view that this Clause should not stand part of the Bill.
Clause 7 – Requirements and resources for investigations and prosecution	<p>Clause 7(1) places an obligation on the Department which it cannot deliver. DOJ will work with Lord Morrow to identify an alternative solution. One possible option may be to amend Clause 15 of the Bill to ensure that matters relating to training, investigation and prosecution are covered in the annual strategy which that Clause provides for.</p> <p>DOJ considers that 7(2) and 7(3) are unnecessary as these principles are already made clear in existing legislation. The new October 2013 PPS guidance, "Policy for Prosecuting Cases of Human Trafficking", also covers prosecution practice under subsections (2) and (3). However we are not concerned about their impact and will not seek to oppose their inclusion.</p>
Clause 8 – Non prosecution of victims of trafficking in human beings	DOJ believes the Bill should be amended to remove this clause. The Department will seek to work with Lord Morrow to identify alternative ways to address the issue. One possible option may be to amend Clause 15 to ensure that the strategy will include actions to raise awareness and to highlight the rights and entitlements of victims across the justice system.
Clause 9 – Victim of trafficking in human beings	Clear definitions of human trafficking victims already exist derived from the UN's Palermo Protocol and the EU Directive and UK jurisdictions are bound by these. DOJ has no concerns about the Clause and will not seek to oppose or amend it. However, subject to the DOJ's proposed amendments to Clauses 13 and 14, we believe Clause 9 would require a minor consequential amendment to define "complainant".

Clause	Amendment
Clause 10 – Requirements for assistance and support	DOJ is supportive of the policy intent but believes that the Clause may need some amendment, including to clarify the respective functions of the two Departments in order to mitigate against the possibility of future litigation. DOJ will work with Lord Morrow to address these points.
Clause 11 -	Compensation arrangements are already set out under the Criminal Injuries Compensation (Northern Ireland) Order 2002. Victims of human trafficking can seek compensation under the statutory scheme provided for by this Order and there is no requirement for the applicant to be resident in Northern Ireland. Clause 11 would need to be amended to reflect this. However, DOJ will work with Lord Morrow to address these points. One option may be a statutory requirement for the Department to produce guidance on accessing compensation.
Clause 12 – Child trafficking guardian	Responsibility for the provisions under this clause would fall to DHSSPS.
Clause 13 – Protection of victims in criminal investigations	DOJ believes that the clause might benefit from an amendment to change all references to “victims”, to the correct criminal law terminology of “the complainant”. The Department understands the sympathetic approach of referring to “the victim” but, in order to maintain consistency with the regular use of the terminology of “the complainant” in criminal law, there would be merit in maintaining this consistent use in Clause 13. This would then require a consequential amendment to Clause 9 of this Bill, which does not currently include a definition of “complainant”.
Clause 14 – Amendments to the Criminal Evidence (Northern Ireland)	As with Clause 13, Clause 14 refers to “victims”, rather than “complainants”. This terminology does not align with existing “special measures” legislation under the 1999 Order and to maintain consistency with the regular use of the terminology of “the complainant” in criminal law, there would be merit in maintaining this consistent use in Clause 14. This would then also require a consequential amendment

<b>Clause</b>	<b>Amendment</b>
Order 1999	to Clause 9 of this Bill, which does not currently include a definition of "complainant".
Clause 15 - Prevention	DOJ has already undertaken to produce an annual human trafficking action plan, and as such does not intend to oppose this clause. As noted there may also be scope to amend the clause to address concerns about the current provisions in Clauses 7 and 8.
Clause 16 – Northern Ireland Rapporteur	DOJ recognises the need for further consideration of the issue of a rapporteur, particularly in light of the Home Secretary's proposal for an Anti-Slavery Commissioner, which we believe may provide a more effective model.
Clause 17 – General Interpretation	DOJ suggests that 17(3) be amended to make clear that a person of uncertain age is deemed a child pending verification of his or her age.
Clause 18 – Orders	No amendments proposed.
Clause 19 – Short Title and Commencement	No amendments proposed.