



**AUTHOR(S):**

**TITLE:**

**YEAR:**

**Publisher citation:**

**OpenAIR citation:**

**Publisher copyright statement:**

This is the \_\_\_\_\_ version of an article originally published by \_\_\_\_\_  
in \_\_\_\_\_  
(ISSN \_\_\_\_\_; eISSN \_\_\_\_\_).

**OpenAIR takedown statement:**

Section 6 of the "Repository policy for OpenAIR @ RGU" (available from <http://www.rgu.ac.uk/staff-and-current-students/library/library-policies/repository-policies>) provides guidance on the criteria under which RGU will consider withdrawing material from OpenAIR. If you believe that this item is subject to any of these criteria, or for any other reason should not be held on OpenAIR, then please contact [openair-help@rgu.ac.uk](mailto:openair-help@rgu.ac.uk) with the details of the item and the nature of your complaint.

This publication is distributed under a CC \_\_\_\_\_ license.

\_\_\_\_\_

# Human Trafficking in Scotland: The Legislative Response

Paul Arnell\* and Tracy Ogilvie\*\*

Human trafficking in Scotland has entered the realms of political rhetoric, governmental consciousness and academic debate. Following a summit on human trafficking in October 2012 in Edinburgh Justice Minister Kenny MacAskill said "We want to send out the message that Scotland is closed for business to traffickers". The Scottish Government notes on its website that "Trafficking in human beings is an abhorrent evil practice which has no place in a civilised society". The non-departmental Equalities and Human Rights Commission (EHRC) has published a thorough report on the subject, in November 2011, following its Inquiry into Human Trafficking in Scotland (EHRC Report 2011). The Report describes in considerable detail human trafficking in Scotland and set out ten findings with accompanying recommendations.<sup>1</sup> A Follow-on Report was recently published, in March 2013. In it the progress made on the recommendations in the period since publication is adjudged. Academically, a body of work focusing on human trafficking in Scotland is beginning to emerge.<sup>2</sup> Through this research a clearer picture of the insidious and complex nature of human trafficking is being demonstrated. There is no doubt that a serious problem exists and that governmental bodies and commentators have started to campaign and research in the area. A specific question arising, from a legal perspective, concerns the nature and adequacy of the legislative response.

## Human Trafficking Defined

The first point to make is that there is no one single definition of human trafficking in Scots law. The definition adopted by the EHRC for the purposes of its Inquiry was that found in the Council of Europe Convention on Action against the Trafficking of Human Beings 2005. Article 4(a) *inter alia* provides:

"Trafficking in human beings shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".

This iteration is particularly useful for at least two reasons. Firstly, it sheds light on the breadth of human trafficking. From covering all stages of the movement of persons, to the various means by which those persons are forced or induced into being relocated and to the usage of 'exploitation', a term that can encompass the various ways in which individuals can be victimised during and subsequent to being trafficked. This latter point is germane in part because, as we will see, the law in Scotland does not consistently, or perhaps adequately, refer to the word.

## Legislative Response in Scotland

Human trafficking is a complex and multi-dimensional problem. It is complex in that it straddles a number of distinct aspects of law and society. These include forced labour and slavery, immigration and asylum, prostitution, cultural differences and stigmas arising from victimisation, employment law, licensing, human rights and others, all in a context where those subjected to trafficking are especially vulnerable. It is multi-dimensional – from a legal perspective – as it is subject to regulation by Scots law, UK law, EU law and public international law generally. These factors give rise to considerable difficulties

in comprehending, and attempting to address, human trafficking. They are, to an extent, seen in the diffuse legislative response to the issue in Scotland.

There are several statutory crimes related to human trafficking in Scots law. The most long-standing is found in section 22 of the Criminal Justice (Scotland) Act 2003. It criminalises the trafficking in persons for the purposes of prostitution and the production of obscene material, *inter alia* providing:

"(1) A person commits an offence who arranges or facilitates (a) the arrival in the United Kingdom of, or travel there (whether or not following such arrival) by, an individual and (i) intends to exercise control over prostitution by the individual or to involve the individual in the making or production of obscene or indecent material; or (ii) believes that another person is likely to exercise such control or so to involve the individual, there or elsewhere..."

As will be noted below, the first convictions in Scotland for human trafficking were under this section.

The second main offence relating to human trafficking is found in section 4 of the Asylum and Immigration (Treatment of Claimants) Act 2004. Section 4(1) *inter alia* provides "(1) A person commits an offence if he arranges or facilitates the arrival in or the entry into the United Kingdom of an individual (the "passenger") and – (a) he intends to exploit the passenger in the United Kingdom or elsewhere...". The circumstances whereby a person is exploited for the purposes of this section are detailed in section 4(4). These include if, and only if, he is the victim of behaviour in violation of the right to be free from slavery and forced labour, he is encouraged, required or expected to do anything in contravention of a crime within Part 1 of the Human Tissue (Scotland) Act 2006, and he is subjected to force, threats or deception designed to induce him to, *inter alia*, provide services of any kind. Both human trafficking crimes have extraterritorial application.

Further 'trafficking-related' offences include those under section 47 of the Criminal Justice and Licensing (Scotland) Act 2010 criminalising slavery, servitude and forced or compulsory labour, sections 10-12 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 relating to the arranging or facilitating the provision by a child of sexual services or child pornography in any part of the world and section 10 of the Slave Trade Act 1824 making criminal certain activities surrounding the dealing in slaves, or exporting or importing slaves. Similar to the crime under section 4 of the Asylum and Immigration (Treatment of Claimants) Act 2004, in that it employs the term 'exploitation', is section 40A of the Antisocial Behaviour etc. (Scotland) Act 2004. The Act *inter alia* gives the police powers to close down premises found to be involved in 'exploitation offences', including human trafficking. Section 40A *inter alia* includes as exploitation offences fraud in relation to travel or identity documentation enabling the trafficking of people, the falsification of documentation under section 26(1)(d) of the Immigration Act 1971, and the two explicit trafficking-related offences mentioned above.

## Analysis of Legislation

Human trafficking-related law in Scotland has been criticised. This generally centres upon the fact that more than one statute addresses the subject and that it is referred to in an inconsistent

way. The EHRC Report 2011 notes that the law is diffuse and singles out elements of the phenomenon in different statutes. More specifically the two main offences, the Report highlights, employ different terminology for fundamentally the same act. This, it said, was "... wrong in principle, undermines legal clarity and certainty, and is problematic in practice".<sup>3</sup> As a result of these factors, the Report states "Human trafficking legislation in Scotland and in the UK has developed in a piecemeal fashion and is not based on a thorough consideration of how legislation should best deal with the problem. This has left human trafficking legislation in Scotland and the UK inconsistent, both internally and in comparison with international law, and has served to limit its scope and impact".<sup>4</sup> In the current law's stead the EHRC Report 2011 recommended the introduction of a comprehensive Human Trafficking Bill based on a review of all existing legislation relating to human trafficking.<sup>5</sup>

The Scottish Government, in its formal response to the EHRC Report 2011, has stated in regard to possible amendment that whilst "sympathetic to the motivation behind the recommendation and [it] did not rule out the possibility of bringing together all aspects of human trafficking legislation into one Act... this would need to be considered within the context of wider demands on the legislative timetable".<sup>6</sup> In response to an evaluation of the UK's implementation of the Council of Europe Convention on Action against Trafficking in Human Beings the Scottish Government, and whilst again accepting the desirability of bringing together the various enactments, stated "There is no evidence that current human trafficking legislation is inadequate in Scotland".<sup>7</sup>

Distinct from the issue of the objective sufficiency or adequacy of human trafficking legislation in Scotland is the obligation upon the UK and Scotland to give effect to the EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting Victims. The Scottish Government is of the view that Scotland is broadly compliant with the Directive, as a result of the changes to the law affected by the Criminal Justice and Licensing (Scotland) Act 2010. These *inter alia* gave the offences extraterritorial effect and expanded the definition of exploitation within the Asylum and Immigration (Treatment of Claimants) Act 2004, to cover, amongst other things, the use or attempted use of a person for the provision of services. It is worth noting, though, that in England and Wales the law has been explicitly amended to affect compliance with the Directive, in the form of two new offences in section 59A of the Sexual Offences Act 2003 and section 4(1A) of the Asylum and Immigration (Treatment of Claimants) Act 2004 – in force 6 April 2013 – and the Trafficking People for Exploitation Regulations<sup>8</sup> and the Electronic Commerce Directive (Trafficking People for Exploitation) Regulations.<sup>9</sup> It appears that a case could be made that Scots law in this regard is lacking – both in comparison with England and Wales and in regard to the Directive itself.

### The Way Ahead

The EHRC Report 2011 contained ten recommendations. The third specifically addressed the legislation criminalising aspects of human trafficking. The other nine centred upon distinct aspects of the issue, including victims, awareness and prosecution. Clearly the nature and extent of human trafficking legislation is only one – albeit an important one – prong of the fight against it. It could be argued that, for example, greater awareness and understanding, the application of non-criminal regulation (employment, licensing and housing law for example), and heightened investigation and prosecution activity within and under the existing law would have a greater and more tangible effect than the amendment of extant legislation.<sup>10</sup> That noted, a legislative development could have a considerable impact and one that appears imminent is the introduction of a new statutory aggravation for human trafficking offences. This was announced

at the 2012 Summit, mentioned above. The consequences of an offence being aggravated is that, on conviction, the court must state the offence was aggravated on a specified basis, record the conviction in such a way that shows that the offence was so aggravated, and take the aggravation into account in determining the appropriate sentence. Accordingly, the change in the law would lead to convictions of offences aggravated by human trafficking possibly attracting a heavier penalty than they would otherwise. This development would go some considerable way in addressing human trafficking in its differing guises and complexity – offences committed in trafficking-related circumstances but not recognised as such would now be, and punished accordingly. "Aggravation" also publicly recognises the egregious nature of human trafficking.

### Conclusion

Recent research has firmly established that the trafficking in human beings occurs within Scotland. It must be addressed. Statutory human trafficking-related offences are an important aspect of this. They must be a part of an overall strategy, adopted and implemented. The EHRC 2011 Report recommends the development of just such a plan.<sup>11</sup> Notably, Northern Ireland has recently adopted its first Human Trafficking Action Plan, for 2013/2014. The Scottish Government should do the same. The Anti-trafficking Progress Group (ATPG) created following the 2012 Summit will almost certainly argue for such a development. The ATPG is scheduled to report in April 2014. As noted above, the Justice Secretary has said that the Government wants to send the message that Scotland is closed for business to traffickers. Of course it remains to be seen whether the legislative enactments described above, as part of a wider and strategic approach, will have such an effect.

\*Dr Paul Arnell is a Reader in Law at Robert Gordon University. An occasional contributor to *SCOLAG Legal Journal* as well as many other Scots and international law journals, his research interests are within public international law, particularly in international criminal law, extradition, jurisdiction and human rights

\*\*Ms Tracy Ogilvie is a qualified solicitor and PhD candidate at Robert Gordon University. Her research centres upon human rights and terrorism, both in the UK and internationally

1. Equality and Human Rights Commission, *Inquiry Into Human Trafficking in Scotland*, August 2011, and the Follow-on Report are found via <http://bit.ly/ehrc-htis>.
2. Including Wallace, R.M.M., and Wylie, K., "Child trafficking: a Scottish perspective", (2011) 19(1) *Commonwealth Judicial Journal* 8; Bennett, C., "Human trafficking: is the system responding?" (2013) 57(10) *Journal of the Law Society of Scotland* 30; Lebov, K., "Human Trafficking in Scotland", (2010) 7(1) *European Journal of Criminology* 77; and, from an EU perspective O'Neill, M., "The EU Legal Framework on Trafficking in Human Beings: Where to from here – the UK Perspective", (2011) 7(4) *Journal of Contemporary European Research* 452.
3. *Supra* note 1 at page 26.
4. *Ibid* page 25.
5. *Ibid* at page 26.
6. Follow-on Report, *supra* note 1, at page 26.
7. Cited in the Follow-on Report, *ibid*, at page 28. The evaluation was carried out by the Group of Experts on Action Against Trafficking in Human Beings.
8. SI 2013/554, in force 6 April 2013
9. SI 2013/817, in force 10 April 2013.
10. In regard to prosecution, there have been two cases where individuals have been convicted of human trafficking-related offences in Scotland. The first, of Steven Craig and Sarah Beukar, in September 2011 and the second, of Helena Kulova, Renata Kulova and Ivan Balog, in December 2012.
11. *Supra* note 1 at page 24.