



Law Society  
of Scotland

**70**  
Years  
1949-2019

# Consultation Response

Consultation on Section 38 of the Human Trafficking and Exploitation (Scotland) Act 2015: Duty to notify and provide information about victims

6 September 2019



## Introduction

---

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee and Privacy Sub-committee welcome the opportunity to consider and respond to the Scottish Government: Consultation on section 38 of the Human Trafficking and Exploitation (Scotland) Act 2015 (2015 Act): Duty to notify and provide information about victims (the consultation).

From our members' perspective, they may be involved in providing advice in-house to public organisations about their compliance with any provisions to be brought forward by Section 38 of the 2015 Act. Our members would not be involved in making referrals themselves as they are not a public authority. Our members' work is subject to client confidentiality which is a factor that we suspect may also affect other organisations. It could be added to the list of issues on page 6 of the consultation which require to be considered.

We understand the motivation for the policy outlined in section 38. However, we have noted some concerns including data implications and the use of information for other purposes as well as any unintended consequences for those who are trafficked or involved in trafficking and who require help in coming forward.

## General comments

---

The original policy intent underpinning section 38 of the 2015 Act is to allow for the collation and processing of wider information about trafficking activity in Scotland. We understand that this information is being collected currently through the UK National Referral Mechanism (NRM). When the UK NRM was formed, as well as meeting the UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings, it was envisioned that this would provide an accurate picture of the scale and extent of trafficking taking place in Scotland. That was then to enable a more effective targeting of enforcement activity and provision of support services.

We understand that as the UK NRM is currently the only significant mechanism for accruing and processing data on trafficking and exploitation. Where victims do not consent to their personal data being shared, an issue of under-reporting of statistics may arise regarding the extent of the problem. That will continue without other means of obtaining information which appears to be the motivation for taking forward the consultation in respect of section 38 of the 2015 Act.<sup>1</sup> If enacted, it will require specific Scottish authorities to provide information to Police Scotland about a person who is or appears to be victim of an offence of human trafficking<sup>2</sup> or a section 4<sup>3</sup> of the 2015 Act offence. We can understand that this may provide a more accurate scale and extent of the trafficking in Scotland.

Currently, we understand that there may be a lack of reporting of trafficking. The 2015 Act has been in place for a relatively short time to have allowed many successful prosecutions to have taken place. Convictions in the recent case involving James McPhee, Robert McPhee<sup>4</sup> and John Miller do much to raise public awareness of the incidence of the offence and to highlight the serious nature of the offence with the high sentences imposed on conviction. That case involved a conviction under the 2015 Act among other charges and involved serious criminal conduct that was clearly unacceptable where:

“The men preyed on vulnerable young adults, including those living in homeless accommodation, and lured them into working for them with the promise of a much better life. They then carried out sickening acts of violence on them and continued to exploit them, forcing them to carry out heavy manual labour work with absolutely no return.”<sup>5</sup>

From the press reporting of that case, it seems to have resulted from one person coming forward with a complaint. What lessons can be learnt from the circumstances of that case would have been interesting to ascertain. That might have helped in informing and illustrating how information on trafficking can be collected to have allowed that case to have come to the attention of the authorities at an earlier stage.

We would suggest that there may be much to be gained from looking at the issues which have arisen in connection with the operation in England and Wales where the similar section is already in force. We understand from the Anti-Trafficking Monitoring Group “*Class Acts: Examining modern slavery legislation across the UK*”<sup>6</sup> raised significant concerns about the misuse of the duty to notify provision. That included lack of awareness and understanding around the indicators of trafficking and pathways for the support and assistance of trafficked persons who did not consent to the sharing of their information.

<sup>1</sup> Duty to notify and provide information about victims

<sup>2</sup> Section 1 of the 2015 Act

<sup>3</sup> Slavery, servitude and forced or compulsory labour

<sup>4</sup> *McPhee v HMA* [2019] HCJAC 8 <http://www.scotcourts.gov.uk/docs/default-source/default-document-library/2019hcjac8.pdf?sfvrsn=0>

<sup>5</sup> <https://www.facebook.com/LanarkshirePoliceDivision/posts/903892966482372>

<sup>6</sup> Anti-Trafficking Monitoring Group, *Class Acts? Examining Modern Slavery Legislation Across the UK*, October 2016. See: [http://www.antislavery.org/wp-content/uploads/2017/01/atmg\\_class\\_acts\\_report\\_web\\_final.pdf](http://www.antislavery.org/wp-content/uploads/2017/01/atmg_class_acts_report_web_final.pdf)

## Data Concerns

The “duty” to notify under these provisions will only arise where the victim consents, otherwise the only return to be made would be an anonymised one. The Information Commissioner may well suggest that as this involves consent to processing personal data, there is a need to ensure that the consent is GDPR-compliant. GDPR guidance indicates that a public authority (as all the relevant bodies covered by the legislation would be) would not be able to request consent due to the imbalance of power which is also a point which we emphasise in relation to the issue of informed consent. The circumstances here would tend to illustrate quite graphically how such an imbalance of power may arise. Following that argument would indicate that there can never be a valid consent to such information being obtained. That would mean that the only returns being made will be anonymised returns. Certainly, these may provide some additional statistics which should be considered in the light of our comments to Question 5 below.

## Consequences of the duty to notify

We would also query the intended effect of bringing forward this legislation. We would assume that any public body encountering suspected trafficking would be able to notify the police of the suspected crime being in progress. That does not need any formal reporting process, nor does it raise concerns about obtaining consent.

We would also be concerned about any suggestion that the victims of trafficking might understand that they could veto any public bodies with whom they come into contact from notifying the police about their situation. That would not be correct as in practice the organisations can report to the police in cases of suspected crimes.

There is also a need to provide assurance to those who may be victims of trafficking that, in seeking assistance, that they will not be subject to prosecution or deportation as a result. There is a “strong presumption”<sup>7</sup> against the prosecution of individuals where credible and reliable evidence of their trafficked status is available. That was the defence was discussed in the case of *Van Phan*.<sup>8</sup> If the duty to notify results in a police investigation that leads to the finding of any criminality, the circumstances of that case may be highly relevant when considering how best to obtain information regarding trafficking. However, concerns about how such information is to be handled may reduce the numbers identified as being the victims of trafficking.

<sup>7</sup> Section 8 of the 2015 Act

<sup>8</sup> *Van Phan v HMA* [2018] HCJAC 7

## Monitoring and Evaluation

There seems to be no provisions for monitoring or evaluation. If this duty to notify provision comes in, there should be continued monitoring to understand how effective it is.

## Consultation questions

---

### **Question 1: Do you agree that these bodies should be named in regulations under section 38(1) of the Act?**

We are not able to comment on the identity of the various organisations that should be included within the list of organisations who it is proposed would be subject to this duty to report. The Scottish Government is proposing to name local authorities, Scottish Geographical NHS Boards, NHS 24, and others in respect of this duty. We assume that the Scottish Government has and will be engaging in consultation with each of the organisations directly affected as to their individual appropriateness for inclusion within this list.

The advantage of naming the organisations upon whom there should be a duty to report is clarity, which we welcome in connection with the operation of the trafficking legislation. It will make it clear to each of these organisations that they have a duty so that it should enhance and promote transparency. Each of the organisations named in the list would understand that there is to be a consistency of approach across Scotland in requiring them all to comply equally with this duty.

How to achieve consistency within each of the organisations is perhaps more problematic.

Exactly how to ensure and secure that there is compliance with the duty may well be challenging. Each of the organisations named in the consultation will have very different tiers and structures and indeed cover different geographical locations. There needs to be join up so that one organisation does not leave the reporting to another organisation or jurisdiction.

What seems important is how to embed that duty to report within each organisation and identifying clearly upon whom this duty lies within each organisation. There needs to be clear reference points and identified personnel within each organisation responsible for undertaking and implementing this duty. The same point applies to the method and location for reporting from the various organisations to Police Scotland though, as that is one centralised organisation, that may be easier to achieve.

The need for training and guidance on how to fulfill the duty has not been included within the consultation. That needs to go along with any proposed implementation of section 38 of the 2015 Act.

We understand even if this duty to report is understood and undertaken, those being trafficked may have significant concerns about the implications arising from information being shared. This may inadvertently discourage them from accessing appropriate health care and other services. That risk needs to be assessed, quantified and considered before the advantages of putting in place these reporting mechanisms can be established. What safeguards are going to be put in place to overcome that problem? Common standards set out in regulations may improve our understanding of the extent of the trafficking issues.

Imposing this duty on these organisations will inevitably cause increased demands on staff time and resources to comply with this duty over and above their current role and primary responsibilities. Although it is intended that there is a common reporting requirement, this will vary and impact differently across organisations depending exactly where trafficking arises across Scotland. We would surmise that the extent of the problem is very different depending where in Scotland it occurs. This is a concern as it appears that the intention is for anonymised information to be used if an adult does not consent to providing information.

Unless safeguards are very stringent in anonymising information this may well disclose their identity. There would also need to be transparency about who and how reporting is to be made as there are significant concerns about the victims and in ensuring their current and ongoing safety.

Though there may be a duty to notify being imposed, nothing has been said about what happens when these duties are not complied with. How effective will this duty be without any meaningful consequences is questionable.

## **Question 2: Do you agree that those listed below should be encouraged to submit voluntary notifications?**

Question 2 of the consultation details various organisations who should be encouraged to submit voluntary notifications. We understand that there may be other organisations which should perhaps be considered such as Healthcare Improvement Scotland, the Department of Work and Pensions given their minimum wage obligations and COSLA regarding the local authorities.

The same points arise over compulsion if this is only to be a voluntary duty and how that is intended to differ from the mandatory reporting in the sense that there are no proposed sanctions for non-compliance by organisations named in either Question 1 or 2 of the consultation.

The requirements for awareness raising of the voluntary obligation, the need for education and training and resource requirements are also relevant.

### **Question 3: Are there any other Scottish public authorities that you think should be subject to the Duty to Notify?**

We have no comment to make.

### **Question 4: Do you agree that bodies named in Regulations should establish their own processes for complying with the duty?**

Each body will be best placed to know their own organisation and how best to put in place the obligations to report.

However, we refer to our answer to Question 1 of the consultation and the challenges of ensuring that the duty is consistently complied with across all organisations. There is presumably a need for guidance to be issued to help the organisations understand what compliance with their duty would require.

### **Question 5: Do you agree that the anonymised information below should be included in a notification (if it is available) from a specified Scottish public authority to the police if the adult does not consent to provide information that may identify them?**

The information that has been suggested to be included seems very specific, raising concerns that it may identify the victim when they have not expressly consented to such information being released. We also wonder in some organisations just how accurate the information would be as those making the notification might well be unaware or have knowledge of the difference between the various types of exploitation that have been suggested are included.

We also query the use of the term “reported” since any reports may well infer criminal reporting which would be normally be from Police Scotland to the Crown Office Procurator Fiscal Service to consider prosecution.

Providing justification for the information included in any referral is important. That would show on balance that the information should be disclosed. As we have suggested, we suspect that this practice of including information on referral may well adversely affect those who are prepared to come forward to seek assistance. They may well fear that their identity will become known, especially as giving location (which in a small country such as Scotland) must risk disclosure of their identity.

Another question may arise in relation to the categories of additional information as to how secure that information may be when it involves the transfer of information from one place or organisation to another.

The consultation seeks views on the proposal that additional information should be included in a notification (if available) if the adult consents to the inclusion of identifiable information. This seems to raise issues over informed consent and though we refer to adult we wonder about the status of a child who would not be the one consenting to the information. What consideration requires to be given to them?

During the passage of the Human Trafficking and Exploitation (Scotland) Bill, concerns were raised by the Information Commissioner's Office about the provision that an adult victim might consent to being identifiable (it had recommended this provision should be removed). It raised the question of whether victims who are likely to be vulnerable and may face language barriers would be able to give fully informed and freely given consent.

If the plan to include additional information where there is consent is to proceed, we think that these issues regarding the state of vulnerability and language barriers of the victim remain a concern and have not been fully considered. What steps will be taken to ensure that there is full understanding by the victim? Again, in considering consistency of practice across Scotland, this may benefit from the adoption of a common approach or the production of guidance. This would also cover what assistance would be available to the victim as part of ascertaining consent.

**Question 6: Do you agree that the additional information listed below should be included in a notification from a specified Scottish public authority to the police if the adult consents to the inclusion of that additional identical information?**

We refer to our answer to Question 6. Consent to disclosure of information would normally be adequate. However, we would have concerns about a uniform standard and practice being adopted across all organisations as to how best to obtain informed consent.

**Question 7: Is there any other information that you think should be included in a notification under section 38(1) of the Act?**

We have no comment to make.

**Question 8: Do you agree that the bodies listed below should receive a report from Police Scotland about individuals who are or appear to be victims of a section 1 or section 4 offence?**

We have no comment to make. We assume that the intention would be for any Report to be at a very high level. That would require any data and information on which the Report is to be based is suitably anonymised.

**Question 9: Are there any other bodies that you think Police Scotland should notify under section 38(4) of the Act?**

We have no comment to make.

**Question 10: Do you agree that the anonymised information should be included in a notification from Police Scotland to a third party if the adult does not consent to provide information that may identify them?**

No

It will depend on the type of information to be shared and how successful the anonymisation of such information that is being passed on. We also refer to our answer at Question 5 as this may well be much too specific and would potentially allow for identification of a victim who has not consented to the sharing of information. This would appear to be in breach of their privacy and Article 8 of the European Convention on Human Rights.

**Question 11: Is there any other information that you think should be included in a notification under section 38(5) of the act?**

We have no comment to make.

**Question 12: How frequently do you think the Police Scotland should pass information to a third party?**

We have no comment to make.

**Question 13: Do you agree that the Scottish Government should work with these bodies to establish a system whereby information can be shared with the police in a**

### **similar way to the statutory duty under section 38 of the Act?**

We refer to general comments regarding concerns over the data implications which arise in relation to this proposed duty to notify.

There is always benefit in attempting to streamline the transfer of information. However, there is a need to ensure that there are no breaches of GDPR and other privacy requirements.

### **Question 14 Do you think that there are any bodies that operate in Scotland that the Scottish Government should encourage to notify the police about a person who is or appears to be a victim of a section 1 or section 4 offence?**

We have no comment to make.

**For further information, please contact:**

Gillian Mawdsley  
Policy Executive  
Law Society of Scotland  
DD: 0131476 8206  
[gillianmawdsley@lawscot.org.uk](mailto:gillianmawdsley@lawscot.org.uk)