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Date: 6 December 2013 – Ms. Marra MSP - The Scottish Parliament

Human Trafficking (Scotland) Bill

Consultation response on behalf of the Scottish Council on Human Bioethics:

The **Scottish Council on Human Bioethics** (SCHB) is an independent, non-partisan, non-religious registered Scottish charity composed of doctors, lawyers, biomedical scientists, ethicists and other professionals from disciplines associated with medical ethics.

The principles to which the Scottish Council on Human Bioethics subscribe are set out in the **United Nations Universal Declaration of Human Rights** which was adopted and proclaimed by the UN General Assembly resolution 217A (III) on the 10th of December 1948.

The name and address of the SCHB can be made available to the public.

The SCHB is very grateful to the Ms. Jenny Marra MSP for this opportunity to respond to the consultation on the **Human Trafficking (Scotland) Bill**. It welcomes Ms. Marra's intention to promote public consultation, understanding and discussion on this topic.

Note: The SCHB will only address the human trafficking consultation with respect to **organ trafficking** since this is the only issue within its remit of medical ethics.

Concern about organ trafficking:

With respect to organ transplant tourism, the Transplantation Society Policy and Ethics statement defines, "Transplant tourism is a recently described phenomenon that may entail exploitive practices of organ transplantation for recipients who travel outside their country of residence to purchase an organ from a vendor. A practice of transplant tourism that has no transparency or professional oversight violates ethical principles of care. The Transplantation Society is opposed to practices of transplant tourism that exploit donors and recipients."

The World Health Organization, in an Assembly in May 2010 endorsed Guiding Principles on Human Cell, Tissue and Organ Transplantation that include a statement on traceability and transparency. Traceability requires coding to identify tissues and cells used in transplantation. Transparency requires public access to data on processes, in particular allocation, transplant activities and outcomes for both recipients and living donors, as well as data on organization, budgets and funding. The objectives are to maximize the availability of data for scholarly study and governmental oversight and to identify risks and facilitate their correction.

British patients are reportedly being offered illegally trafficked kidneys by international organ dealers. For example, according to *The Times* newspaper in November 2013¹, a Bangalore-based dealer was reported to have recommended a hospital in Sri Lanka as a suitable place to receive an organ purchased for tens of thousands of pounds on the black market.

International organ trafficking is a growing trade. According to the World Health Organisation, around one in ten

¹Robinn Pagnamenta and John Simpson, Cash for kidneys offer lures Britons, *The Times*, 12 November 2013

organ transplants involves a trafficked human organ, which amounts to around 10,000 each year. Kidneys are the most commonly traded organ.

Donor countries include impoverished nations in South America, Africa, Asia and Eastern Europe, according to a Harvard College study², while recipient countries include the US, Canada, Australia, the UK and Japan. Trafficking involves a whole host of offenders, from recruiters who identify the victims to transporters and hospital or clinic staff.

Legislation as it stands:

The United Nations defines human trafficking in the 'Palermo Protocol'³:

(a) "Trafficking in persons" 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.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude **or the removal of organs**;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) "Child" shall mean any person under eighteen years of age.

Council of Europe Convention on Action against Trafficking in Human Beings CETS No.: 197

Article 4 – Definitions

For the purposes of this Convention:

"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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

Article 31 – Jurisdiction

Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed:

- a in its territory; or
- b on board a ship flying the flag of that Party; or
- c on board an aircraft registered under the laws of that Party; or

² James Dotimas, Innovations in Stem Cell Research: The Solution to Organ Trafficking?, 27 April 2013, <http://www.hcs.harvard.edu/hghr/online/innovations-in-stem-cell-research-the-solution-to-organ-trafficking/>

³ "United Nations Convention Against Transnational Organized Crime and the Protocols Thereto"

- d by one of its nationals or by a stateless person who has his or her habitual residence in its territory, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State;
- e against one of its nationals.

Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

Article 2 - Offences concerning trafficking in human beings

1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those 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.

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

3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

Article 10 - Jurisdiction

1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 2 and 3 where:

- (a) the offence is committed in whole or in part within their territory; or
- (b) the offender is one of their nationals.

2. A Member State shall inform the Commission where it decides to establish further jurisdiction over the offences referred to in Articles 2 and 3 committed outside its territory, inter alia, where:

- (a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;
- (b) the offence is committed for the benefit of a legal person established in its territory; or
- (c) the offender is an habitual resident in its territory.

3. For the prosecution of the offences referred to in Articles 2 and 3 committed outside the territory of the Member State concerned, each Member State shall, in those cases referred to in point (b) of paragraph 1, and may, in those cases referred to in paragraph 2, take the necessary measures to ensure that its jurisdiction is not subject to either of the following conditions:

- (a) the acts are a criminal offence at the place where they were performed; or
- (b) the prosecution can be initiated only following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed.

Conclusion:

There is now a coherent body of international law on human trafficking. The UK and Scotland are fortunate to benefit from the world's two exemplar international legal instruments, namely the Council of Europe's (CoE) Human Trafficking Convention, and the European Union's (EU) Human Trafficking Directive, which came into force in April 2013.

Together they categorise obligations and commitments under three heads: (a) preventing human trafficking; (b) criminalising, investigating, and prosecuting human trafficking, and (c) identifying and assisting victims. Importantly, these standards are underpinned by positive anti-trafficking duties from the European Convention on Human Rights (the ECHR) particularly through its Article 4 case law on human trafficking.

However, the UK and Scotland did not adopt the criminal definition of human trafficking - the 'Palermo Protocol' - which has been rigorously debated, refined, and adopted by the UN, the Council of Europe and the EU. The approach taken to criminalisation to date in Scotland has mirrored that in the UK, with section 22 of the *Criminal Justice Act 2003* introducing the criminal offence of trafficking into prostitution or for producing obscene or indecent material, which, problematically, is significantly narrower in scope.

Scottish Council on Human Bioethics (SCHB) Response

Note: Not all questions will be answered.

Question 1: Do you agree with the aims and summary objectives of the proposed Bill? Please indicate "yes/no/undecided", with reasons for your position.

The SCHB agrees with the aims and summary objectives of the proposed Bill since it seeks to address the trafficking of persons.

Question 2: Do you agree with the proposal for a legal duty on Scottish ministers for a Strategy for Scotland against Human Trafficking? Please indicate "yes/no/undecided", with reasons for your position.

The SCHB agrees with the proposal for a legal duty on Scottish ministers for a Strategy for Scotland against Human Trafficking since there is a real need in this area.

Question 3: Do you agree with the approach to criminalising human trafficking in Scotland as proposed above? Please indicate "yes/no/undecided", specifying any elements you support or disagree with, with reasons for your position.

The SCHB agrees that there should be:

- (a) a single, comprehensive, and clear criminal offence reflecting best standards in international law;
- (b) a new, associated offence of aiding, abetting, or attempting to commit human trafficking;
- (c) a section dedicated to prosecute individuals for these new core offences of human trafficking; and
- (d) an enhanced regime of sanctions for individuals that explicitly includes statutory aggravating factors to be considered, where relevant, in sentencing.

Question 8: Is the proposed Bill likely to have any substantial positive or negative implications for equality? If it is likely to have a substantial negative implication, how might this be minimised or avoided?

The SCHB is of the opinion that the proposed Bill is likely to have a substantial positive implications for equality.

Question 10: Do you have any other comments on or suggestions that would prevent trafficking in Scotland?

Extra-territorial Provisions

The SCHB notes that international law enables offence to be established, in certain circumstance, when the offense is committed abroad by an habitual resident in its territory.

In the same manner as Article 4 of the United Nations' *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*⁴, the SCHB agrees that extra-territorial

⁴ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, <http://www.unhcr.ch/html/menu2/dopchild.htm>

provisions should be included in the proposed **Human Trafficking (Scotland) Bill** making it an offence for habitual residents in Scotland going abroad to undertake transplantation procedures which are prohibited in Scotland and considered as organ trafficking.

Legal precedent for such extra-territorial provisions has already been enacted in Scotland with the **Prohibition of Female Genital Mutilation (Scotland) Act 2005**. It makes it illegal for any person in Scotland or any UK national overseas to aid the mutilation of a girl, regardless of her status or what country she is in.

Observing international legislation

In drafting new legislation relating to organ trafficking, the SCHB is of the view that the Scottish Parliament should ensure that it complies to the following **Council of Europe** legislation which addresses organ trafficking inside a country:

- **Convention on Human Rights and Biomedicine CETS No.: 164⁵,**
- **Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin CETS No.: 186⁶.**

Moreover, as with the Hague Convention on the International Protection of Adults⁷, the SCHB would like to see the United Kingdom ratify, as soon as possible, the above Council of Europe legal instruments on behalf of Scotland.

⁵ Convention on Human Rights and Biomedicine, <http://conventions.coe.int/Treaty/en/Treaties/Word/164.doc> - Entered into force on 1 December 1999 - Legally binding if ratified by a country - The United Kingdom has not signed nor ratified this Convention

⁶ Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, <http://conventions.coe.int/Treaty/en/Treaties/Word/186.doc> - Adopted on 24 January 2002 but has not yet entered into force - Legally binding if ratified by a country - The United Kingdom has not signed nor ratified this additional Protocol

⁷ Convention on the International Protection of Adults, http://www.hcch.net/index_en.php?act=conventions.text&cid=71 - Legally binding if ratified by a country - Adopted on 13 January 2000 but has not yet entered into force - The United Kingdom has ratified the Convention on 5 November 2003 (but for Scotland only) - <http://www.scotland.gov.uk/health/mentalhealthlaw/millan/Report/rnhs-37.asp>