

## INDEPENDENT REVIEW OF THE MODERN SLAVERY ACT 2015

Response to potential line of enquiry on child victims of modern slavery

### Written follow up to oral evidence session on 22 November 2018 on Scottish practice

#### 1. The ICTA (Guardianship) model

The Scottish Guardianship Service (SGS) supports children from outside the European Union who have been separated from their parents or care-givers. Children who have no parent or caregiver in the UK and who have been identified as trafficked or are considered vulnerable to such, will be eligible to receive a guardian once s.11 of the Human Trafficking and Exploitation (Scotland) Act 2015 has come into force.

The service has been operational since September 2010. SGS was independently evaluated and the model showed evidence of the guardian's role in protection and care for unaccompanied asylum seeking and trafficked children.<sup>1</sup>

Experiences of trauma, abuse and violence are often involved in children being displaced from their home, alone in arduous migration routes and exploited or trafficked. These are profound and adverse impacts on relationships and mental health. But recovery can be helped through repeated experiences of safe, trustworthy and supportive relationships. The guardian aims to be a trusted, reliable and informative individual in a child's life and the service has demonstrated that the guardian can help unaccompanied children feel comfortable to share experiences, which helps to lead them to receiving the support they need to recover.

International standards state that *all unaccompanied and trafficked children* should be entitled to an independent guardian to act in their best interests and support their needs. International evidence confirms the likelihood that an unaccompanied child in Europe will have been exploited or trafficked at some stage from point of forced displacement in the migratory journeys, or once in Europe or the UK.

The Scottish system recognises these vulnerabilities and risk factors and therefore does not rely on a Reasonable Grounds decision via the National Referral Mechanism (NRM) before a referral to the service can be made. All separated children are entitled to special protection, and effective guardianship systems are key to preventing abuse, neglect and exploitation. They provide additional protection for unaccompanied asylum-seeking children and child victims of trafficking.

<sup>1</sup> [http://www.scottishrefugeecouncil.org.uk/assets/6798/Final\\_Report\\_2108.pdf](http://www.scottishrefugeecouncil.org.uk/assets/6798/Final_Report_2108.pdf)

## 2. Children's wellbeing and best interests

The overarching role of the guardian is to help children and young people to understand what is happening and to help them participate and have their voices heard in the welfare, trafficking, asylum, justice and age assessment processes.

The service has developed modules of work to ensure that children receive the advice and information they need at the time when they need it, and this helps children to apply this knowledge whilst they travel through the various processes.

The practice model consists of 14 individual modules. Young people will proceed through most of these modules, however there are some which focus on specific issues such as trafficking and age assessment. These will only be delivered to young people if they are relevant to their circumstances, for example, if they have been identified as a potential victim of trafficking.

The guardian's effectiveness in relation to these will in large part depend upon how well they have been able to develop a comprehensive picture of the young person's life. It follows that an important part of their work will be to collate information that is relevant to understanding the young person's personal and family history, experiences (particularly as these relate to their asylum/trafficking claim or care and protection needs), strengths and capacities and preferences and views.

The information gathered may be used for a variety of purposes, including: contributing to assessments of age; contributing to asylum claims; contributing to assessments of need; influencing how processes are managed and arranged; identifying trafficking concerns and identifying rights issues. The centrality of the guardian to the child's life is in the new s.11 entitlement. There is a requirement on those exercising public functions in respect of such a child to share information to enable the guardian to carry out their functions effectively. We understand that a full Scottish Government consultation on the guardian's functions and how best to implement s.11 will be launched in 2019.

### **'Best Interests' Case Study**

The Scottish Guardianship Service serves as a focal point for expertise for other professionals who may be working with trafficked children for the first time. Through this role the Guardians can promote the best interests of the children.

One recent example (November 2018) involves a vulnerable young person who had recently escaped a cannabis farm. He was taken into the care of social work services and the Police wished to interview him imminently. The social worker liaised with the Guardianship Service to seek advice on procedure and next steps for the young person. The Guardianship Service and others in the sector have long advocated that children should be able to receive legal advice prior to any police interview, to ensure their understanding of why they are being interviewed and what will happen with the information they provide. This also serves to avoid prejudice down the line in the National Referral Mechanism. The guardian was able to give this advice to the social worker, who then was able to request a delay of the police interview. The guardian made an emergency referral to a legal representative for the young person, meaning that he could receive full advice prior to the police interview. Without the guardian's role this would not have been possible.

### 3. Regulation of ICTAs

*Q. What qualifications should an ICTA (Guardian) have when appointed to the role?*

The role of the guardian is unique. They are at the intersection of child welfare and immigration law working with a traumatised population, with significant language support needs. The guardian needs a set of experience, skills and personal qualities given this cross-cutting role over several domains of welfare, asylum/trafficking and social networks. See appendices 2, 3 and 4 of the Scottish Guardianship Service Practice Manual for the current qualifications, job description, person specification and knowledge framework for the role of guardian.

*Q. What training should an ICTA (Guardian) have? Who should provide the training?*

It would be beneficial if the role of the guardian was accredited. This would provide a recognised qualification which is reviewed and monitored by a regulatory body such as Scottish Qualifications Authority (SQA) using the Scottish Credit and Qualifications Framework. This would help define the level of knowledge and skills needed to achieve a qualification and would ensure that the role meets specific criteria and quality standards. It would also reflect the distinctiveness of this professional role.

*Q. The title 'Advocate' is used in England and Wales and 'Guardian' in Northern Ireland and Scotland. Which of these more accurately describes the role and tasks undertaken by ICTAs?*

Whilst we appreciate that the Modern Slavery Act has enacted provisions for Independent Child Trafficking Advocates and this is the statutory nomenclature now in force, it is worth pausing to reflect on the different terminology now in force across the UK given the use of the title “guardian” in Scotland and Northern Ireland.

The reference to a “guardian” is accepted terminology found within the European and UN legal framework and guidance. One of the roles of a guardian in this context is of course advocacy but it also encompasses other functions such as expert assistance, safeguarding, ensuring the best interests of a child and a durable solution as well as to act as a bridge and focal point for the child’s interaction with other relevant authorities.

In our submission, the term “guardian” better encompasses this broader set of functions and duties which are set out in the Modern Slavery Act. Our submission on this is informed by the practical experience of the Scottish Guardianship Service as well as from the international legal framework, guidance and practice in this area.

We do appreciate that emphasis should be placed on the functions rather than the title. However, clarity and consistency is also important in this area and it is not absolutely clear to us why there are now 2 different titles in operation across the UK for roles which broadly speaking cover the same functions.

#### 4. Due regard

The responsibility to have “due regard” to the functions of the advocate (s.48(6)(i) of the Modern Slavery Act 2015) is contained within the Human Trafficking and Exploitation (Scotland) Act 2015 (s.11(6)(a)) in the same terms. As noted above, this section is still to come into force within Scotland.

This principle ensures that the functions of the guardian are embedded within the decision-making process relating to a child. It is an obligation relating to procedure which respects the position of the guardian and the role they play. However, it is our position that this obligation benefits from further formal delineation outside of the legislative framework in order to ensure its effective implementation.

From our perspective, the responsibility to have “due regard” to a guardian’s functions will be discharged where the:-

- Viewpoint/attendance of the guardian in any decision making process relating to the child has been clearly and timeously requested;
- The guardian is enabled to provide their viewpoint in any formal setting or meeting relating to a child;
- The viewpoint of the guardian is clearly noted; and
- Clear reasons are formally documented, and conveyed, regardless of whether the viewpoint is followed/accepted.

#### 5. Presumption about age

*Q. How is the presumption of age working in practice? How should this work in practice?*

The presumption of age is set out in s.12 of the Human Trafficking and Exploitation (Scotland) Act 2015. In response to this section, the Scottish Government convened a multi-agency Working Group of professionals working with unaccompanied asylum seeking and trafficked children in order to produce [new practice guidance on age assessment](#). Both JustRight Scotland and the Scottish Guardianship Service sat on this Working Group. The guidance aimed to harmonise and improve age assessment practice across Scotland, and in our submission it is a robust document which sets out best practice and current legal standards.

In our experience, practice is improving in this area but work requires to be done to improve the practice of age assessment in Scotland. The guidance was effective at raising some awareness in the short-term and the presumption of age appears to be working well. Local authorities appear to be treating young people as their stated age – and providing them with their statutory rights, including accommodation and care – until a conclusion as to their age is reached. This conclusion can either be to accept the young person’s age without the need for an age assessment, or to confirm that there is doubt as to whether they are an adult or a child and so conduct an age assessment. This particular juncture of decision-making – i.e. whether to conduct an age assessment – has been positively impacted since the guidance was produced. Age assessments are no longer viewed as a routine procedural requirement for the care of unaccompanied asylum seeking and trafficked young

people. Guardians have been instrumental in advising local authorities and referring to the guidance in this regard.

That said, we still observe a wide variation in quality in the conduct of local authority age assessments. It is apparent that the production of guidance is not in itself sufficient, and that comprehensive training is required for workers on the ground.

*Q. What are your views about trafficking children transitioning from the Service once they are aged 18?*

In Scotland there is no such transition under the current arrangement. In our submission this would not be a practice that is consistent with the identified role of a guardian across Europe. The focus needs to be on the preparedness, not age, of a young person to move towards more independence.

There is no “bright line” when it comes to the needs, risks and vulnerability of young people aged 17 and 18. To enforce a transition based purely upon turning 18 is arbitrary and is in fact contrary to the direction that child law in Scotland is taking. The Children and Young People (Scotland) Act 2014 represents a statutory recognition that children and young people, particularly those in care, require assistance and guidance beyond 18 years old.<sup>2</sup>

The legal processes in which trafficked children and young people are engaged are more often than not continuing well beyond their 18<sup>th</sup> birthday. Our experiences of the asylum process and the NRM for children show that claims can remain outstanding for several years, during which time children and young people cannot resolve their immigration status and, in many cases, cannot effectively recover from their experiences. To lose the support of their guardian during such a critical time would, in our view, be prejudicial to them and could expose them to further risk of re-trafficking or exploitation.

The EU Trafficking Directive and the Council of Europe Trafficking Convention make clear that there exists a positive obligation on states to find a “durable solution” for trafficked children. We submit that limiting a guardian’s involvement by temporal scope would damage the ability to ensure a “durable solution”.

## **6. Statutory defence**

S.8 of the Human Trafficking and Exploitation (Scotland) Act 2015 provides that “*the Lord Advocate must issue and publish instructions about the prosecution of a person who is, or appears to be, the victim*” of trafficking or exploitation. Therefore, in Scotland we do not have the statutory defence as articulated in s.45 of the Modern Slavery Act.

Whilst the operation of the non-prosecution principle in Scotland has been commended in Scotland,<sup>3</sup> it is our view that the best way to give effect to the non-prosecution/non-punishment principle enshrined in European and international law is to have the instructions operating alongside an accessible defence in the same terms.

<sup>2</sup> The Act introduced the concept of ‘continuing care’ until aged 21, as well as extending the eligibility of young people to Throughcare/Aftercare until their 26<sup>th</sup> birthday.

<sup>3</sup> See ATMG, ‘Class Acts?’, October 2016, [http://www.kalayaan.org.uk/wp-content/uploads/2014/09/atmg\\_class\\_acts\\_report\\_web\\_final.pdf](http://www.kalayaan.org.uk/wp-content/uploads/2014/09/atmg_class_acts_report_web_final.pdf)

## 7. Appointing and instructing legal representatives

The Scottish Guardianship Service currently assists a child to find a solicitor. They also assist with the child's interaction with the solicitor and will advocate on their behalf. However, a guardian in Scotland does not formally appoint or instruct a legal representative and this duty is also not expressly contained within the Human Trafficking and Exploitation (Scotland) Act 2015.

This difference arises simply because of the different historical and legal context in Scotland which has different rules and systems relating to the capacity of a child and transfer of parental rights and responsibilities and adhering to the underlying principle of a guardianship system complementing and being mainstreamed within existing frameworks.

## 8. ICTA access to information

It is important that the guardian has access to relevant information in order to promote, support and safeguard the wellbeing and best interests of the child.

Appropriate information sharing is a vital part of the early intervention approach when a guardian is supporting a child. Having relevant information at the early stages helps the guardian to take a trauma-informed approach. Information can assist the guardian to consider the impact of trauma and make adjustments to fit with the child's needs, to minimise distress and re-traumatisation and maximise building trusting relationships. This can help minimise the child having to re-tell their story and can assist the guardian to tailor their work with the child and other professionals.

Current information sharing practices are inconsistent across Scotland with some Local Authorities sharing relevant information, including NRM referrals and information from the Home Office and Police. Other Local Authorities share limited information which results in the child's legal representatives having to submit subject access requests to get information, which causes delays and often impacts on the child's credibility in asylum and trafficking claims. This can have serious consequences and can impact on a child's future safety and right to international protection. When s.11(6)(b) of the Human Trafficking and Exploitation (Scotland) Act 2015 comes into force, the guardian will have access to relevant information relating to the child and will enable them to carry out their functions effectively.

### **Case Study**

A 15-year-old male from Vietnam presented at a police station after escaping from a house where he was held captive and forced to cultivate cannabis plants. He was accommodated in a children's unit and video interviewed by the police Family Protection Unit and Social Work Services the following day. The guardian met with him and supported him to engage with a legal representative and start understanding and negotiating the trafficking and asylum process. The NRM referral and the Joint Investigative interview (JII) were not shared with SGS or the child.

His case was considered by the Competent Authority and he was issued with a 15-page negative conclusive grounds decision which relied upon information recorded in the transcript of the video recorded police interview (in addition to information he had provided during the asylum process). He was found not to be a victim of trafficking largely due to inconsistencies between information shared with the Competent Authority by the police and the information provided by the young person to the Home Office throughout the course of the asylum process. The negative Conclusive Grounds Decision was shortly followed by a 13-page asylum refusal which also relied upon these inconsistencies which were considered to have damaged his credibility.

His guardian spent time supporting the young person to understand these lengthy and complex decisions and to articulate his responses to the negative credibility findings against him. It became clear that the young person believed that he had been seriously misunderstood when the police interviewed him and, with support from his guardian, he instructed his legal representative to request a copy of the audio-visual recording of his police interview, but there were significant delays in receiving this information.

The recording confirmed that there had been significant interpreting mistakes during the police interview which had led to poor quality information being used to make the negative Conclusive Grounds Decision. The case was reconsidered by the Competent Authority based on the new information and a positive Conclusive Grounds Decision was made.