



JustRight Scotland's Response to the Consultation on the Implementation of Section 11 of the Human Trafficking and Exploitation (Scotland) Act 2015: Independent Child Trafficking Guardians

JustRight Scotland (JRS) is Scotland's legal centre for justice and human rights. We use the law to defend and extend people's rights. We have expertise in refugee and immigration law, gender-based violence, and a particular specialism in anti-trafficking and exploitation. You can find out more about us here: www.justrightscotland.org.uk.

Introduction

We are responding to this consultation by drawing on our lawyers' longstanding practical experience and expertise in providing legal information, advice and representation to children and young people who are survivors of trafficking. In recognition of the complexities around trafficking and exploitation, when working with this group of children we provide a holistic legal service which cuts across a number of other areas of UK and Scots law, including immigration and asylum, compensation, rights and entitlements in care, and education law.

In particular, we are drawing on our experience of our formal collaboration with the Scottish Guardianship Service (SGS), operated by Aberlour and the Scottish Refugee Council. Our lawyers in our Scottish Refugee & Migrant Centre (SRMC) are specifically funded to streamline their legal advice service with the independent advocacy service of SGS, with the child placed at the centre. For instance, we see all of our clients we share with the SGS in the safe space offered by the SGS offices, and we provide the SGS guardians with a second-tier advice service.

We are also responding with the benefit of our Scottish Anti-Trafficking & Exploitation Centre (SATEC). This is a dedicated legal centre within JustRight Scotland (JRS) which works with survivors of exploitation and trafficking. Our lawyers in SATEC have been intimately involved with the creation and journey of the Human Trafficking & Exploitation (Scotland) Act 2015 from a bill into law, and with the establishment and development of the existing SGS since 2010.

We welcome the opportunity to contribute to this consultation, particularly at a time when the Scottish Government has committed to incorporating the United Nations

Convention on the Rights of the Child (UNCRC) into Scots law. Child trafficking is a human rights issue. Placing Independent Child Trafficking Guardians (ICTGs) on a statutory footing in the Human Trafficking and Exploitation (Scotland) Act 2015 was a significant development in protecting children and young people who have been trafficked. There is no doubt that ICTGs are a critical part of the children's rights landscape in Scotland and will help trafficked children and young people realise their rights set out in the soon-to-be incorporated UNCRC.

As such, our response is framed with reference to the rights enshrined within the UNCRC, and to the duties and responsibilities set out in the Scottish Government policy framework 'Getting it Right for Every Child' (GIRFEC). We are aligned with the consultation document in our belief that child trafficking is a form of child abuse. Accordingly, we refer to existing frameworks for procuring services in the child protection context, and draw on good practice from multi-agency working to protect children and vulnerable adults in our response below.

Finally, we also recognise that the current model of guardianship in Scotland, the SGS, is recognised at an EU and international level as a model of best practice with significant experience in providing this specialist form of support. The overarching role of the guardian in Scotland is to promote the best interests of the child, aimed at the protection and development of the children they work with. The guardian helps children and young people understand, participate and have their voices heard in the various processes through which they engage, including welfare, trafficking, asylum, justice and age assessment processes. We have been working closely with, and now in formal collaboration with, the SGS and we commend the service.

PART ONE: SECTION 11(7) – APPOINTMENT OF INDEPENDENT CHILD TRAFFICKING GUARDIANS

Question 1: The appointment of an independent child trafficking guardian

We agree with the statement in the consultation document. Given the importance of the role of an Independent Child Trafficking Guardian (ICTG) and the significant risks and protection needs of the children in question, it is critical that the organisation(s) providing the service is/are appropriately vetted, qualified and accountable. We would refer to the existing rules and regulations around procurement in the sphere of child protection in this regard.

Naturally, it is critical for that organisation to be responsible for employing independent child trafficking guardians and appointing them to individual cases.

Question 2: The termination of that appointment

Yes, if necessary, the appointment of an ICTG should be terminated using the normal procedures of the service provider. We would therefore suggest that the procurement process ensures that the organisation has robust employment-related policies and procedures, including child safeguarding policies.

Question 3: The conditions (including training, qualifications and experience) to be satisfied by a person to be eligible for that appointment

- (a) We agree with the spirit of the statement in the consultation document, with the proviso that the specific OISC Level 2 qualification should not be a requirement at the outset of the employment, but rather should be worked towards by the ICTG and the organisation. At the outset of the employment, we would recommend a demonstration of an equivalent knowledge acquired by other means. The role of the ICTG is unique. They are at the intersection of child welfare and immigration law working with a traumatised population, with significant language support needs. The ICTG needs a set of experience, skills and personal qualities given this cross-cutting role over several domains of welfare, asylum/trafficking and social networks. The evidence of the SGS since its inception in 2010 shows that there are professionals who are eminently capable, talented and qualified to be ICTGs, however, we believe that it would be too onerous and challenging from a recruitment perspective to install a strict requirement of OISC Level 2 from the outset.

OISC Level 2 is a demanding qualification to provide advanced immigration advice. We believe that it is appropriate that ICTGs demonstrate that they have the ability to provide this advice and commit to receiving OISC training and passing the Level 2 examination within a prescribed period of time. We would be concerned that the imposition of the OISC Level 2 requirement would disproportionately limit the pool of potential recruits and therefore make recruiting ICTGs with the full suite of requisite skills (including those other than OISC Level 2) more challenging.

- (b) We agree with the statement in the consultation document as regards experience objectives. Furthermore, in the future, it would be beneficial if the role of the ICTG 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.
- (c) We agree with the statement in the consultation document and would add no further comment.

Question 4: The payments to be made to, or in respect to the role of, an independent child trafficking guardian

We agree with the proposal made in the consultation document. We would add, however, that the policy should recognise the highly sensitive and specialised role that ICTGs play in safeguarding and promoting the best interests of the child across a range of critical areas. We are strongly of the view that this specialism should be recognised with a commensurate salary, set against other professionals working with children and young people who hold similar roles. For the avoidance of doubt, we believe that the organisation delivering the ICTG service must at a minimum offer the Living Wage.

Question 5: The functions of an independent child trafficking guardian

We largely agree with the functions set out in the consultation document. Our comments in this answer are made with reference to the consultation response of the Scottish Refugee Council. As a partner organisation of the SGS working in collaboration with the existing service, we have first-hand professional experience of seeing the working model in action. We endorse their model of guardianship which sets an ICTG's core function as acting in the best interests of the child at all times. The model also has an ICTG as an equal partner in a multi-agency approach to supporting children and young people who are survivors of trafficking. As such, an ICTG's statutory functions should be framed in a way which reflects this fundamental role.

We would urge caution when using the terminology "*Act in accordance with and assist local authorities as part of their plan for the support of the child or young person...*" in the consultation document. A fundamental feature of an ICTG – and in our view a principal reason for the success of the existing SGS – is independence. In discharging their core function to promoting the best interests of the child, an ICTG will use their expertise and knowledge to provide support where necessary to local authority workers. This is particularly the case where the local authority worker in question will have limited experience in working with this group of children and their unique needs. In practice, our experience is that this is conducted broadly successfully in Scotland and the ICTG is seen as a valuable multi-agency partner. However, promoting the best interests of the child at all times also demands independence from the local authority and therefore, by definition, not necessarily "*acting in accordance*" with local authorities. The integrity of the role as an equal part of multi-agency protection approach would be compromised were this otherwise.

With respect to the function in the consultation document pertaining to age assessments, we note that no formal role is specifically assigned to an ICTG in the

Scottish Government’s practice guidance on age assessment (2018)¹. Our strong view is that an ICTG should be kept fully informed of any age assessment process and reasoning behind the initiation of an age assessment. The views of the young person should be sought and afforded significant weight as to the role of the ICTG in the age assessment process.

We believe that an important function of an ICTG is obtaining the views of the child around their education needs and aspirations, and assisting the child to communicating those to the statutory authorities with responsibility for his area.

We would also refer to the responsibility to have “due regard” to the functions of the ICTG contained within the Human Trafficking and Exploitation (Scotland) Act 2015 at s.11(6)(a)). 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 ICTG and the role they play. However, it is our position that this obligation would benefit 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 and ICTG’s functions will be discharged where the:

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

Question 6: Record Keeping

We have no specific comment to make on this question. The existing requirements of the Data Protection Act 2018 and other related instruments require to be strictly enforced.

Question 7: Vulnerable young people over 18

Yes, we strongly agree with the proposal in the consultation document and we welcome its inclusion. In our submission, restricting an ICTG’s role to young people under 18 would not be a practice that is consistent with the identified role of a guardian

¹ Scottish Government, “Age Assessment: Practice Guidance” (2018)
<https://www.gov.scot/publications/age-assessment-practice-guidance-scotland-good-practice-guidance-support-social/>

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 spirit of child law in Scotland and the GIRFEC framework. For example, 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 turning 18 years old. The introduction of Continuing Care to 21-year-olds and the extension of the eligibility of young people to Throughcare/Aftercare until their 26th birthday are significant indicators of this. We would endorse the view set out by the Scottish Refugee Council that the support provided by an ICTG runs in line with this framework. We would also encourage the formal recognition that risks around re-trafficking may continue for many years after Continuing Care or Throughcare/Aftercare obligations have ended.

Furthermore, the legal processes in which trafficked children and young people are engaged are more often than not continuing well beyond their 18th birthday. Our experiences of the asylum process and the National Referral Mechanism (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 ICTG 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. For these reasons, we would advocate a needs-led approach to providing services, guaranteeing access to support in line with Continuing Care or Throughcare/Aftercare services, but not automatically terminating if such services are later withdrawn.

The EU Anti-Trafficking Directive 2011/36/EU 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 an ICTG’s involvement by temporal scope, without allowing a needs-led assessment, would damage the ability to ensure a “durable solution”.

PART TWO: GUIDANCE

Question 8: Support for victims of child trafficking

In addition to the practical supports noted in the consultation document, we would add the following as further, specific examples based upon our experience of working closely with the SGS:

- *Support to legal case:* Our collaboration with the existing SGS has shown us the critical role that an ICTG plays in ensuring that trafficked children and young

people in Scotland can access specialist, child-friendly legal advice. We work together to ensure that highly vulnerable children with particular legal or factual complexities obtain comprehensive legal advice and independent advocacy.

Further to their role in ensuring access to legal advice, the ICTG are also integral to helping the child understand the legal advice given to them. They represent a trusted, independent figure with whom the child can speak and help come to informed decisions in giving their lawyer instructions. Moreover, the ICTG can help with practical aspects of a child's legal case, for instance, logistical help in obtaining documentation or other information from their home country. Lastly, the ICTG can, if appropriate, provide anecdotal, observational and professional insight into a child's presentation which can form part of the evidence in the NRM or asylum process.

- *Family tracing:* The Home Office has legal duties and obligations to assist a child with tracing lost family members. The British Red Cross also has a specialist family tracing service. This can be an emotional, complex, traumatic and sometimes dangerous process for an unaccompanied child. A child may have suffered abuse or exploitation at the hands of their family members, or they may be worried about the safety of their family were tracing to be initiated. Whether or not family tracing is conducted may have implications on their legal processes, particularly the NRM and asylum process. The ICTG can assist the child to navigate this decision-making and can facilitate the British Red Cross to assist or advocate for the Home Office to conduct or cease their family tracing.
- Finally, we would make reference to the response of the Scottish Refugee Council with respect to the additional support projects that the SGS has put in place for the children and young people with whom they work. This includes specialist projects on mental health, befriending, and social activities through their participation group, including residential weekends. Through our engagement with our clients it is very clear to us to the value and importance these projects have in the lives of the young people.

Question 9: Support to prevent re-trafficking

This is an extremely difficult and complex question. A critical aspect of the challenges around preventing re-trafficking is that there is still so much we do not know about the organised crime networks exploiting children in Scotland. For certain, we believe that responsible and lawful data sharing, and intelligence sharing, between agencies is essential to combat child trafficking (see below). That said, confidentiality is vital to ensure the continued trust of the child and the integrity of the role.

Our view is that ensuring a broad and well supported ICTG model, which is staffed and operated by experienced practitioners, is essential. In a sense, if the ICTG model is well-funded and is needs-led then the role itself will be a significant force in preventing re-trafficking. As highlighted above, integral in this is ensuring that it has flexibility and it can continue to support young people to respond to the continuing risks beyond 18 years old and beyond any decisions made in the NRM

Question 10: Appeal Rights Exhausted

We would refer to our answers above detailing the functions and supports provided by an ICTG. Our answers to questions 7 and 9 are particularly relevant in this regard as most appeal rights exhausted (ARE) children without leave to remain will be over 18 years old.

As stated above, the overriding objective to act in the best interests of the child applies regardless of whether a child or young person is ARE. We refer again to the duty of other professionals to have “due regard” to the ICTG’s functions and role in supporting the child or young person. The practical supports that ICTGs can provide to a child’s legal case, and the linking function between a child, their lawyer and the local authority is an essential feature for ARE children. Once an ARE young person reaches a certain age, their support needs are determined by human rights assessments by local authorities. The stage, prospects and possible actions in a child’s legal case are intimately relevant to this assessment. An ICTG would therefore be of significant assistance in helping a child access both effective legal assistance to progress their case but also ensuring a fair result is obtained in terms of their support from the local authority; the overriding aim of which is to avoid destitution.

Question 11: Data Sharing

We have commented already on the “due regard” requirement in our response to question 5 above and elsewhere in this document.

The ICTG’s effectiveness 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. Fundamentally, it is important that the ICTG 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 an ICTG is supporting a child. Having relevant information at the early stages helps the ICTG to take a trauma-informed approach. Information can assist the ICTG 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 ICTG 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, causing delays and often impacting on the child's credibility in asylum and trafficking claims. This can have serious consequences for a child's future safety and right to international protection. In our view, it is of the utmost important to ensure that data sharing arrangements are pragmatic, legitimate, appropriate and in accordance with the Data Protection Act 2018. We look forward to seeing the data impact assessment.

Question 12: Conduct

We have nothing specific to add to this question and would refer to the response from the Scottish Refugee Council.

Should you require any further information in respect of this response, please do not hesitate to contact JustRight Scotland on 0141 406 5350 or at info@justrightscotland.org.uk.

END