

LUMOS

**CYCLES OF
EXPLOITATION:
THE LINKS BETWEEN
CHILDREN'S
INSTITUTIONS AND
HUMAN TRAFFICKING**

THE MODEL LAW





ABOUT LUMOS

Lumos is fighting for every child's right to a family by transforming care systems around the world. We are an international charity striving for a future where every child is raised in a safe, loving home, supported by family to help them thrive.

80% of children in orphanages have living parents or relatives, and research proves that these institutions can harm a child's growth and development. Yet there are still over 5.4 million children trapped in institutions globally.

Lumos sheds light on the root causes of family separation – poverty, conflict and discrimination – and demonstrates that children can safely be united with families. By pressing governments to reform care systems, and by building global expertise and capacity with partners, we ensure no child is forgotten.

Founded by author J.K. Rowling, we are lighting a path to a brighter future where all children can grow up in a safe and loving family. We are Lumos.

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FOREWORD

BY PROFESSOR PAROSHA CHANDRAN

I suspect that many people will be shocked by this report. They may recognise themselves as a well-intentioned orphanage volunteer, or as a generous donor who has supported children left vulnerable after a humanitarian disaster. Reading what follows may be the first time that they realise that they'd unwittingly played a part in propping up a harmful ecosystem in which children, most of whom have at least one living parent, act as commodities in an industry of profit-making orphanages.

As a human rights barrister working in the field of human trafficking and modern slavery, I have been fighting for the protection of victims for nearly 25 years and I am acutely aware of the plethora of factors that render children more susceptible than anyone else to exploitation, abuse and human trafficking.

It was 2018 when I first came across Lumos' ground-breaking work to shine light on the disturbing spectre of cases where criminals recruit and use vulnerable children in orphanages and other residential institutions with the primary aim of exploiting the child's presence there to obtain personal profits from unsuspecting donors, funders and volunteers. In particular, one of Lumos' reports – *Orphanage Entrepreneurs: The Trafficking of Haiti's Invisible Children* – opened my eyes clearly to this form of child abuse. Later, in my discussions with Lumos, I was staggered to learn that 'orphanage trafficking' was taking place in many countries across the world. It made me wonder why the perpetrators of these grave crimes against children were able to get away with it. After investigating the issue further, including through discussions with the brilliant Australian lawyer Dr Kate Van Doore, who had first published possible legal responses to 'orphanage trafficking' in 2016,¹ I came to see that there were no laws in any of the affected countries which had or have enacted criminal legislation to directly combat this form of vice.

I was therefore honoured when Lumos asked me to lead its legal work on this issue and to draft a Model Law to assist States in criminalising and combating the trafficking of children into orphanages and other residential childcare institutions.

Simultaneously, Lumos raised a global call for evidence, inviting case examples and country profiles evidencing cases of orphanage trafficking worldwide.

This Global Thematic Review represents ground-breaking new research from Lumos and is a vital addition to the evidence base and to our collective understanding of how children's institutions can act as a central component in a web of child trafficking and abuse. In particular, it highlights four findings or ways in which child trafficking can be linked to institutional care. Lumos' research, which supports each one of these findings, makes for stark reading.

...ASPECTS OF INSTITUTION-RELATED TRAFFICKING ARE DRIVEN BY THOSE WITH GOOD INTENTIONS, WHO ARE UNAWARE OR MISINFORMED ABOUT THE DEVASTATING RELATIONSHIP BETWEEN THEIR FINANCIAL OR OTHER DONATION AND CHILD TRAFFICKING...

This report explores the complexity and significance of the relationship between institutional care for children and child trafficking. It highlights a cycle of trafficking that is currently not adequately recognised or responded to by legislation and child protection systems globally. The new evidence in this report, alongside a review of decades of research on the harms of institutional care for children and the increased risk of exploitation and abuse for children within these systems, calls for urgent action.

The Model Law that Lumos asked me to draft is published for the first time in this report. It aims to firmly capture under the criminal laws of any affected State the type of criminality that is perpetrated in this form of child trafficking. The Model Law is thus suggested as a blueprint that can assist States to review their legislation and enable a targeted response to combatting these crimes, whether the country is directly affected by child trafficking taking place in its orphanages and other residential institutions or is the country where the perpetrators of such crimes live, whether they are nationals or habitual residents. A careful assessment of the Model Law provisions by any State will highlight where their laws may need to be amended or improved, so as to both provide effective sanctions towards perpetrators and robust protection – as well as justice – for victims.

Through my work with Lumos, I have come to realise that children who are subjected to institutionalised care are extremely vulnerable to human trafficking, exploitation and abuse in a multitude of ways, all of which risk subjecting a child who is in need of care to grave, enduring harm. This special category of highly vulnerable children ultimately and urgently needs focused and intensified protection and it is the duty of all States the world over to sharply recognise the risks faced by such children and improve their legal responses, including by expressly criminalising the trafficking of children into institutionalised care.

The fact that many aspects of institution-related trafficking are driven by those with good intentions, who are unaware or misinformed about the devastating relationship between their financial or other donation and child trafficking, illuminates hope and possibility for change. This report provides valuable recommendations on how to address the specific vulnerability of children in, or at risk of, institutional care, for a range of stakeholders who can play a role in bringing about the change that is so vitally needed.

I implore coordinated action to be taken globally to prevent the exploitation and trafficking of some of the most vulnerable children in our world and to protect such children from abuse. Once we understand the spectre of all the four forms of institution-related trafficking that are described in this ground-breaking report by Lumos – and once we accept these lead to grave harm and abuse for vulnerable children in our societies – we surely have a moral imperative to act definitely and protectively. This means implementing concrete solutions that will ultimately enable children to be safe – and to feel safe – and which will support them in fulfilling their inherent and fundamental rights to a safe and protected upbringing, hopefully leading to the possibility of a nurturing childhood and the chance of a wonderful future.

¹ See Van Doore, K. (2016). *Op. cit.*

THE MODEL LAW

ARTICLE 1: CHILD TRAFFICKING OFFENCE

1. It shall be a criminal offence to recruit, transfer, transport, harbour or receive a child into an orphanage or other residential childcare institution for the purpose of financial exploitation.
2. A person guilty of this child trafficking offence is liable on conviction to:
 - (a) imprisonment for a period of at least [10] years; and
 - (b) compulsory payment of compensation to the victim; and
 - (c) confiscation of assets and disqualification from being involved in any current or future business involving children.
3. A judge must give reasons for deciding not to award compensation to a victim.

COMMENTARY:

The criminal offence: Model Law Section 1(1) creates the offence of trafficking a child for the purpose of financial exploitation. It reflects the internationally agreed UN definition of child trafficking, by specifying that it may comprise any one of five acts – the recruitment, transfer, transportation, harbouring or receipt of a child – which is done for the purpose of exploiting the child.

Under Section 1(1) the specific type of exploitation that underpins the criminality being addressed by this Model Law is however particularised, namely being the 'financial exploitation' of a child. This is to clarify that the Model Law is directed at criminalising the conduct of those who intend to exploit a child for monetary purposes by bringing them into, and maintaining them in, an institutional residential childcare setting. The criminal intention, or in other words purpose or aim, of financially exploiting the child underpins the crime and contrasts with the non-criminal intentions of those who arrange and bring a child into a residential child care institution with the primary intention of providing for the child's appropriate care and needs as an orphan, a separated child or any other kind of vulnerable child who is in need of shelter, care and assistance.

Hence, it is the dominant motivation of monetary criminal profits, benefit or gain at the expense of the welfare of the child that is the very essence of the specific exploitation that underpins the financial exploitation crimes created under this Model Law.

The provision does not therefore criminalise the actions of those who run orphanages or other residential childcare institutions that are legitimately seeking to provide care, support and protection for vulnerable children.

However, individuals who act in one of the five specified ways (the recruitment, transfer, transportation, receipt and harbouring of a child) to intentionally bring any child into an orphanage or residential childcare institution with the aim of financially exploiting the child's presence there will be directly caught by the Model Law's criminal provisions and such persons will be committing a criminal offence.

It will be a matter of fact and evidence-gathering by the relevant law enforcement authorities, and to be proven by State prosecutors, as to whether a person possessed the requisite criminal intention of financial exploitation in order to establish whether the commission of this type of child trafficking has taken place.

Duration of penalty: Model Article 1(2)(a) suggests a minimum penalty for the crime as being of at least ten years. A high-level starting point of a period of imprisonment in the case of any form of child trafficking is necessary in order to deter those intent on being involved in the commission of the crime. A high starting point also reflects the seriousness of the offence, the extreme vulnerability of children to being trafficked and the severe forms of harm they are at risk of suffering as victims of exploitation, intended or actual. The ten years' imprisonment that is suggested here as the starting point for a State's criminal laws addressing the crime in question is comparable, in my research, to the starting point for imprisonment that already exists in many of the countries where the phenomenon of orphanage or other residential care trafficking takes place. Where a State already has a higher starting point for human trafficking or for child trafficking that should be applied instead of the ten years

proposed here. Where a State has a lower minimum period of imprisonment in its domestic laws that can be applied, instead of the ten years proposed.

Compensation as a Form of Penalty: Model Law Article 1(2)(b) introduces a novel, compulsory award of compensation. I consider it is necessary for victims to be compensated by the perpetrator of the trafficking offence whenever this is possible, but this important aspect of justice is frequently overlooked by States when drafting or applying their criminal laws. Prioritising compensation for the victim upon the offender's conviction in this Model Law is therefore necessary to ensure that the dual aims of any fair criminal justice system are met, namely achieving justice for the victim and accountability for the offender. Justice in the form of compensation is very important when the victim is a child who has been subjected to the serious criminality and abusive behaviour that this Model Law targets against. Model Law Article 1(3) is a provision designed to bring directly to a judge's attention, before and at the time of sentencing the offender, the importance of ordering compulsory compensation payable to a victim: where no compensation is ordered the judge is required to give reasons. A similar provision can be found in the UK's Modern Slavery Act 2015, section

8(7)(b).⁽⁴⁾ The level of compensation to be ordered should ordinarily take into account the material loss and non-material loss (pain and suffering) that a child has suffered. Compensation may be used in a multitude of possibilities, such as to support a child's upbringing back in their family and community if the family is a safe environment for the child, or it may support alternative care by a relative or to assist in the child's medical needs and primary or secondary education. The compensation could support them in their later lives, to go to college or university or to establish themselves in a trade. There is no limit to the possibilities.

To that end, in addition to a sentence of imprisonment, a novel inclusion is suggested in this Model Law, namely that upon his or her conviction for the crime the offender is required to pay compensation to the victim.

Bringing or seeking compensation for the victim in separate proceedings may be legally complex or perhaps impossible. The exact procedure by which the payment of compensation may become possible in a State will need to be addressed by a State's individual criminal laws, as these will need to ensure that a range of procedures are possible under the law. These will include:

- Having or introducing necessary laws to ensure that the competent authorities, such as the law enforcement bodies and the courts, are entitled to seize and confiscate the perpetrator's assets and proceeds of crime and having the power to order the additional payment of a substantial fine where an order for compensation is not met
- Having or introducing a State Fund for trafficking compensation to pay victims compensation in cases where the assets of the offender cannot be located and seized (the

- fund could be a central fund that is financed by any confiscated assets obtained by the State and also funded, for example, by donations from international or civil society organisations and private benefactors).
- Necessary policies to enable the appointment of a child guardian or a child victim advocate who can assist the child and the court by obtaining any necessary medical reports, statements and other relevant evidence to establish the harm and ill-treatment that the child has endured, as such reports will be necessary to assist a judge in quantifying the sum that the court should award to the child victim.
- Confiscation of assets and disqualification from conducting any business relating to children: these are also very serious forms of punishment for an offender which are necessary to complement the criminal justice aims of the Model Law. Each, again, has obvious deterrent features as well as being preventative of further harm. The power of a judge to confiscate assets will necessarily also focus law enforcement efforts on identifying, investigating and freezing assets at the time of arrest.

No fine in lieu of imprisonment: It is notable that the penalty of imprisonment suggested under Model Article 1(2) does not include reference to "...or a fine".

It is advisable that there should never be any possibility of the payment of a fine by a criminal offender as an alternative form of punishment to a term of imprisonment for a crime of such gravity as child trafficking. To that end, it is advised that in States where the alternative of a fine to a custodial sentence presently exists under their domestic trafficking laws, serious consideration is given to amending their laws to remove this possibility. Many traffickers and perpetrators of modern slavery offences will have built the payment of fines in lieu of imprisonment for their crimes into their business models, on the basis that if their criminal activities are detected they will be able to avoid any lasting adverse impact to their business enterprises, and to their substantial profits, through a law's alternative possibility of paying a fine.

However, strict criminal laws, that always require the imprisonment of offenders where a conviction for a trafficking or modern slavery offence ensues, are much more likely to deter offenders from committing their crimes than laws which permit the penalty of a fine. Going to prison has deep personal and reputational impact on a person. The penalty of punishment by way of a fine alone should never be acceptable for child trafficking, or indeed for any form of trafficking, and will never act as a sufficient deterrent to prevent offenders from re-offending and re-trafficking.

ARTICLE 2: ADDITIONAL OFFENCES RELATING TO THE FINANCIAL EXPLOITATION OF A CHILD

It shall be a criminal offence to do any of the following acts when done for the purpose of the financial exploitation of a child, namely to:

1. Establish, direct, operate, control or manage an orphanage or other residential childcare institution; or
2. Solicit or receive funds, donations or gifts, including in-kind donations and the voluntary work of volunteers, for an orphanage or other residential care institution.

A person guilty under this section is liable on conviction to imprisonment for a period of at least [10] years.

COMMENTARY:

Model Article 2(1)(a) and (b) introduces additional criminal offences that concern the chain of events that is usually undertaken by perpetrators to enable them to financially exploit children in an orphanage or other residential childcare institution. Again, the offenders' purpose of financially exploiting the child underpins the criminal offence, namely in this case the setting-up or running of the orphanage or childcare residential institution or the soliciting or receipt of donations, funds and volunteer work and of which is done for the purpose of the financial exploitation of the child. It is imperative to note that the offence does not directly criminalise the volunteers themselves, or the donors or funders, but rather those who intentionally or knowingly solicit or receive the donations or funds or voluntary work for the purpose of the financial exploitation of the child. The provision does not criminalise the actions of those who run orphanages or other residential childcare institutions that are legitimately seeking to provide care, support and protection for vulnerable children.

Penalty for the commission of the crimes: As with Article 1(2)(a), the Article 2 offences under this Model Law are to be subjected under Article 2(2) to a term of imprisonment. There is no possibility of a fine in lieu of imprisonment. A minimum term of ten years is suggested here and the commentary under Article 1(2)(a) is also relevant, concerning the duration of the penalty and domestic practices regarding minimum and maximum sentences.

ARTICLE 3: AGGRAVATING OFFENCES

The following shall be aggravating circumstances for purposes of this section, namely where:

1. the child was bought or sold in order to be placed in the orphanage or other residential care institution;
2. the child was intentionally transferred across an international border in order to be placed in the orphanage or other residential care institution;
3. the child was intentionally misrepresented to another person, including to an actual or potential donor, funder or volunteer, or to another orphanage or other residential childcare institution, as being an orphan when the child was not an orphan;
4. the child was instructed to tell another person that they were an orphan, when the child was not an orphan or was otherwise told to lie about their family or care situation;
5. the child's name was changed, formally or informally, by those receiving or having any control of the child in the orphanage or other residential childcare institution, including if the child was told to give a false name;
6. a false birth certificate or other identification document for the child or a false death certificate for the child's parent or parents has been acquired, used or maintained;
7. the child has been denied access to their natural parents, custodians or guardians, or such persons have been denied access to their child;
8. the child has been denied access to adequate food, sleeping arrangements, clean water, sanitation, medical care or education;
9. the child has been subjected to conditions hazardous to his/her/their physical or mental health or emotional well-being;
10. the child has been subjected to harmful exploitation, including forced or compulsory labour, debt bondage, slavery, servitude, sexual exploitation including pornography, forced marriage, sexual or physical abuse, sacrificial or harmful rituals, the removal of organs or tissues, or has been recruited, used or offered for forced begging, or for any unlawful or criminal activities, including for the manufacture or movement of drugs, used in armed conflict or as a child soldier;
11. the child was required to perform in shows or in performances by way of singing, dancing, playing music, acting, or in any other way, to attract donations or funding for the orphanage or other residential childcare institution;
12. the child has been moved out of the orphanage or residential childcare institution for the purpose of any form of exploitation;
13. the child has been confined to the orphanage or other residential childcare institution by the use of threats, force or any physical, psychological or coercive means of pressure, control or circumstances;
14. a child has been subjected to violence, intoxication or drugs or personal or mental injury;
15. a child has developed any mental health condition, including an attachment disorder, as a consequence of being required to spend time with a volunteer or donor, in person or through correspondence;
16. the offence involved the deliberate harming of children to maximise profits;
17. the offence was committed against a large number of children or over a long period of time;
18. the child has been discriminated against, including on the basis of their race, colour, religion, culture, language, national or social origin, gender, ethnic group, disability, birth or any other status;
19. the offence has been committed by an organised criminal network of three or more persons;
20. a public official has committed, or has been complicit in, the offence; or
21. the orphanage or residential childcare institution has been operating without a valid licence in a country where a licence is required.

A person who commits an offence under Articles 1 and 2 in any of the circumstances referred to in Article 3(1) shall be charged with an aggravating offence and shall be liable on conviction to a term of between [10 years and life imprisonment], in addition to the payment of compensation to the victim.

COMMENTARY:

The offences listed under Article 3 are not free-standing offences but are aggravating forms – which could be described as ‘extreme forms’ – of the criminal offences listed at Articles 1 and 2. Where, therefore, an individual has committed a criminal offence under Article 1 or Article 2 and the features of the particular offence also fall into one of the categories listed under Article 3, the offence will be prosecuted as an aggravated form of the Article 1 or 2 offence. This will enable, upon conviction, the imposition of the higher penalty of imprisonment, as contained under Article 3(2).

All of the circumstances above are considered to aggravate the offence.

Experts at the two expert group meetings hosted at King's College London in 2020 discussed in depth the many circumstances and examples of child exploitation for financial purposes that occur in residential childcare institutions and how so many of these constitute extremely grave forms of often lasting harm towards children. To that end this Model Law contains an extensive list of these aggravating forms of criminality, which are suggested for inclusion in the domestic law of any States where the trafficking of children into childcare institutions for the purpose of financial exploitation occurs.

Included within this list is also the buying or selling of a child which is tantamount to slavery itself and should be included as a criminal offence in its own right in every State's criminal laws, but it is included here to link the chain of criminal events that is specifically geared towards identifying and prosecuting perpetrators involved in intending the financial exploitation of a child in a residential childcare institution.

Many of the circumstances described may lead to the grave risk of increased harm to a child.

There are additional risks of abuse and ill-treatment for any child living in a criminal establishment run by traffickers who have the intention of financially exploiting the child there and, according to expert evidence obtained, the risk of ill-treatment is very high. Once the child is under the trafficker's control the criminals running the institutions may falsely declare the child to be orphaned, displaced or separated, may change the child's names by false documents to remove their identities, may refuse to allow them access to their families or to freely leave the institution and may beat, threaten or otherwise harm them into submission. In some cases traffickers may require children to form friendships or attachments with volunteers or funders to elicit more funding, through letter-writing or through in-person visits, exposing the child to the risk of suffering from emotional attachment disorders or other mental health conditions. Traffickers often also, for example, require children to give false names to visitors, to lie and say they are orphans

when they are not, to dance or sing in shows or performances for potential or existing funders sometimes for hours at a time. In other cases the children may be subjected to additional forms of exploitation at the institution itself, aside from the traffickers' financial exploitation of the children's presence there to gain funds, or may be taken out of the institution for exploitation, such as for their forced labour to build premises or for the purpose of sexual exploitation, or where they are taken into towns or cities and forced to beg. The traffickers may also often maintain the children in impoverished living or healthcare conditions in the residential childcare institutions themselves to attract greater sympathy and thereby funds from potential donors. Each of these circumstances engage severe child abuse. The Model Law therefore identifies all these incidences as constituting additionally serious crimes, namely ‘aggravated offences’, which warrant higher penalties, and it lists them as such.

In addition, some features of human trafficking are recognised under international trafficking treaties under UN, Council of Europe and EU laws, for example, as being aggravating offences. These include trafficking cases involving a public official in the crime or the involvement of an organised criminal network, which under international law is three or more people acting in concert with the aim of committing a crime.

A novel addition suggested in the list of aggravated crimes is where the residential childcare institution was unlicensed in a country where they require to be licensed. This has been added to additionally have a deterrent aim.

It is recalled that this list of offences does not exist on its own as forms of crimes, but are aggravated forms of the criminal offences listed under Articles 1 and 2 of this Model Law.

In terms of the aggravated offences involving any physical or mental health illnesses the expert evidence of a medical practitioner or possibly a qualified social worker in the mental health arena may be required by the prosecutor to assist a court. Penalty: The suggested bracket of imprisonment for the aggravated crime penalty under Article 3(2) may be raised or lowered depending on a State's existing laws for child trafficking and aggravated offences, but as with Articles 1 and 2 it should never be an alternative to a fine, which is not a commensurate punishment for the crime of child trafficking and would never have a deterrent effect.

ARTICLE 4: IRRELEVANCE OF THE CHILD'S CONSENT

The consent of a child to their recruitment, transfer, transportation, harbouring, receipt or exploitation under Model Law Article 1, or to any of the circumstances set out as being aggravated offences under Model Law Article 3, shall be irrelevant.

COMMENTARY:

It is well-established and internationally recognised that in line with the human trafficking definition a child cannot consent to their trafficking or exploitation. This is because a child is vulnerable to being trafficked and exploited by virtue of age alone and so it must never be required under law to evidence that a child was subjected to any one of the ‘means’⁽⁴⁾ that are needed for human trafficking of an adult to be established. Model Law Article 4 therefore reflects the international position and therefore also logically extends the irrelevance of a child's consent to any of the acts constituting the aggravated offences under this Model Law Article 3. Children are extremely vulnerable to being trafficked on account of their age. The irrelevance of consent under Model Law Article 4 therefore has a dual role as it both confirms that an offender cannot escape liability by claiming that the child agreed to any conduct that is criminalised under this Model Law and it also confirms that when a child is being assessed by the relevant authorities in an identification procedure as a potential victim of trafficking, the child's consent to what befell them in terms of the crimes under this Model Law is to play no negative role in the identification assessment.

ARTICLE 5: NON-PUNISHMENT OF CHILD VICTIMS OF TRAFFICKING

No child shall be prosecuted or punished for unlawful acts related to their trafficking or exploitation

COMMENTARY:

It is crucial to protect child victims of trafficking from re-victimisation and secondary trauma and the application of non-punishment provision is an essential protective feature of this. Under the United Nations Principles and Guidelines on Human Rights and Human Trafficking 2002, a child is entitled to protection before the law, not prosecution, for any unlawful act which they may have committed which is related to their trafficking. This may involve an act committed during the recruitment stage, the exploitation stage or the post-exploitation stage, such as during an escape from their trafficker. For example, in countries where street begging is a crime, a child who was trafficked by a residential childcare institution for forced begging in a city or town must not be prosecuted for that unlawful act. The application of the non-punishment provision is an essential feature of a human rights approach that States must apply in order to protect child victims of trafficking from punishment upon their detection.⁽⁵⁾

ARTICLE 6: DEFINITIONS

1. The “financial exploitation of a child”, for the purposes of Articles 1 and 2, above, means having as the dominant purpose the use of a child for profit or other economic or material benefit or gain, as opposed to the dominant purpose of acting in the child’s best interests with the intention of providing the child with a good standard of welfare, healthcare, food, shelter and education.

COMMENTARY:

Whether an individual or business entity had a dominant purpose of financially exploiting the child will be evidenced by way of a financial investigation.

This will elicit – ideally – what funds were received, from whom, where they were received and how the funds were spent or invested.

It is imperative for States to have in their law enforcement/police teams financial investigators who are trained in investigating financial flows in human trafficking cases. Their investigations and questions will involve assessing what money (or payment in kind) was obtained from parents, relatives, funders, donors and volunteers and how it was spent. Was it invested or spent on the welfare of the children residing in the institution and if so, how much of it was used for the benefit of the children? If the money wasn’t spent for the purpose for which it was obtained – ie, in line with what donors were told when they gave the money, etc – it will have been spent for an improper purpose and this will be evidence that a crime under this Model Law may have been committed.

However, it is important to note that orphanages and other residential childcare institutions which provide children with some welfare, food and healthcare, etc. and which are able to evidence this could still be perpetrators of crimes under Articles 1 and 2 involving the financial exploitation of a child if the dominant purpose of bringing the child into the institution was to exploit the child in order to run the institution or pay its directors or staff. Again, the careful work of law enforcement’s financial investigators will be able to elicit this.

There have been examples of this seen in Lumos’ work and that of other experts in the field overseas.

Again, the investigatory authorities would need to carefully consider all the available evidence pertaining to what was the dominant purpose of the child being in the institution and calculate the sum of donations received against the investments made in favour of the welfare of the child.

1. “Child” shall mean a person under the age of 18.
2. “Natural person” shall mean a human being.
3. “Legal person” shall mean a business entity, organisation or body corporate and for the purposes of this Model Law shall include an orphanage or other residential childcare institution.
4. “Orphan” shall mean a child who has lost both of their natural parents through death.
5. “Orphanage or other residential childcare institution” shall include any residential childcare institution including orphanages and children’s homes, whether licenced or unlicenced, whether State-run or privately administered, regardless as to whether children residing there are actually orphans or not.

ARTICLE 7: PRESUMPTION OF AGE

Where the age of the child is uncertain but there is reason to believe that he or she may be a child they shall be treated as child, pending full verification of their age.

COMMENTARY:

This is a well-established legal protective provision for vulnerable children, requiring that if there is any doubt about the child’s age they are to be treated as a child pending confirmation of their age.

ARTICLE 8: LIABILITY – GENERAL RULE

This Model Law shall apply whether the offence was committed by a natural or legal person.

COMMENTARY:

The Model Law introduces liability both for natural persons (human beings) and for legal persons (business entities, including childcare institutions and orphanages) in order to create a comprehensive platform of liability and punishment and also to enable robust sources of compensation for the victim.

ARTICLE 9: LIABILITY OF LEGAL PERSONS

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| <p>1. A legal person, such an orphanage or other residential childcare institution, commits an offence under this Law if the offence was:</p> <p>a) committed for the benefit of the legal person; by</p> <p>b) an owner, director, manager, employee, shareholder, officer or any other natural person who has authority to take decisions or exercise control for or on behalf of the legal person.</p> <p>2. A legal person who has committed an offence under Article 1 or 2 of this Model Law shall be ordered to pay compensation to the victims.</p> <p>3. The liability of a legal person shall not exclude criminal proceedings being brought against a natural person who commits or participates in the commission of an offence.</p> <p>4. Where an offence under this Model Law is committed by a legal person, the Court shall, in addition to ordering the legal person to pay compensation to the victim or victims of the offences, order one or more</p> | <p>of the following penalties to be imposed on the legal person, namely that the orphanage or other residential childcare institution be subjected to:</p> <p>a) The closure of the legal person's establishment where the offence was committed, together with its other offices;</p> <p>b) The disqualification of the legal person from carrying out commercial activity relating to childcare;</p> <p>c) The cancellation of the registration or licence of the legal person;</p> <p>d) The confiscation of all of the criminal assets of the legal person;</p> <p>e) The imposition of a substantial financial penalty on the legal person by way of a fine.</p> |
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COMMENTARY:

Many States have not introduced corporate criminal liability for human trafficking offences and as such, when individuals are convicted of human trafficking and modern slavery crimes, the businesses or establishments that were being used in and for the commission of the crime remain unaffected and can continue to be used for criminal purposes including trafficking in persons.

Model Law Articles 8 and 9 seek to address this by introducing criminal liability for the orphanage or other residential childcare institution itself and by suggesting a number of relevant penalties for the business itself upon its criminal conviction. This is because the deterrent sentence of imprisonment under Articles 1 and 2 are for natural persons, ie, human beings, and are not directed at businesses.

Taking some influence from regional and international human trafficking treaties, but building specific provisions that go much further, the penalties under Article 9(4) are therefore designed to firstly enable the criminal liability and robust punishment of legal persons that have committed the offences under this Model Law and secondly to also act as a deterrent so that businesses will no longer be able to escape the reach of criminal laws against trafficking which have been too often directed at targeting the human perpetrators of crime alone.

A novel feature that I have introduced is, similarly to under Model Law Articles 1 and 3, to make the payment of compensation to the victims compulsory in all cases involving the commission of an offence by a legal person. Such business entities often make significant if not huge profits from trafficking children for the purpose of financial exploitation and I consider it necessary under this Model Law to draw attention to this, to remove the impunity of businesses that traffic children, deprive them of their criminal profits, close them down and above all require them to pay compensation to their victims.

ARTICLE 10: JURISDICTION

This Law shall apply whether the offence was committed:

1. in the territory of the State, irrespective of the nationality, habitual residence or statelessness of the victim or of the perpetrator;
2. in whole or in part within the State; or
3. in another State, where:
 - the victim is a national or a habitual resident of this State;
 - the perpetrator is a national or a habitual resident of this State; or
 - the offence was committed for the benefit of a natural or legal person established or living in the territory of this State.

COMMENTARY:

This Model Law provision has been drafted to create the optimum conditions for the prosecution of offences. It applies whether the offence was committed in the State where the Model Law is implemented or was committed abroad. It will also be possible to prosecute for a crime committed abroad where the victim of the offence is a national or habitual resident (that is someone ordinarily resident) in the State which has implemented the law or where the offence was committed abroad but was done for the benefit of the individual or business entity that is based in the State which has passed the law. Again, this is an important provision for establishing liability for offences committed abroad.

ARTICLE 11: PARTICIPATION OFFENCES

Inciting, aiding, abetting or attempting to commit any of the offences under this Law are criminal offences and carry a punishment of a minimum of [5 years imprisonment].

COMMENTARY:

The purpose of this provision is to criminalise those who intentionally seek to assist a person or persons in the commission of one of the criminal offences under Articles 1 and 2 of the Model Law.

This Model Law provision is required to ensure that all those who knowingly participate in the offences in this Model Law can be held criminally liable for their conduct. This would not, for example, criminalise the parents of institutionalised children who were unaware that the orphanage or residential care institution that was recruiting or receiving their child was intending to financially exploit the child. Nor would it criminalise donors who provide funds or volunteers who provide their services pro bono to institutions which they believe are legitimately caring for the welfare and best interests of the children living there. The suggestion of five years can be replaced with a higher or lower period of punishment depending on the State's range of existing laws for participation offences, but it must not be replaced with a fine in lieu of imprisonment: this is no commensurate penalty and would have no deterrent effect.

POSTSCRIPT ON THE SUPPLY CHAIN OF DONATIONS:

An interesting consequence of focus being placed on these Model Law provisions by interested organisations and those seeking to lobby and discuss ways to have them introduced in one way or another into States' laws will be to starkly highlight the vulnerability of donors and volunteers to being investigated for investing in criminal enterprises involved in exploiting children, as such donations may unwittingly but ultimately comprise, if provided to traffickers of children in institutional care, the proceeds of crime.

This awareness would be in addition to the Model Law highlighting the risk of children in orphanages and childcare institutions to being intentionally financially exploited by those who own, manage or run the institutions and to being at risk of any one of the gravely serious aggravated offences.

The Model Law is therefore very likely to influence donors, funders and volunteers to exercise careful due diligence and detailed investigations into the management and running of any proposed childcare institution before deciding whether to fund or donate towards it or volunteer in it. The real and very probable impact of this on the "supply chain" of funds and donations and voluntary work to childcare institutions that are involved in trafficking children with the aim of using them for financial exploitation cannot be underestimated.

Duty on Governments

Light has been shone on the spectre of institutional childcare trafficking by this Model Law and Commentary. It is firmly suggested that States are under a positive obligation to protect the human rights of affected children in their territories through an urgent review of their criminal legislation to ensure that it is fit for purpose and if not, to amend accordingly with the advice I have given herein. Governments are also under a duty to protect children through the formal regulation of residential childcare businesses including through licencing, inspection, the establishment of minimum standards and robust monitoring to ensure protective standards are introduced, met and sustained with the aim of ensuring – above all – that all such vulnerable children are safe and kept safe.

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1 August 2021

^[1] Lumos. (2017). Funding Haitian Orphanages at the Cost of Children's Rights. <https://www.wearelumos.org/resources/funding-haitian-orphanages-cost-childrens-rights/> [accessed 1 September 2021].

^[2] The phenomenon known as orphanage trafficking was first identified by non-governmental organisations working in child protection and where links among child exploitation, institutionalism and profit were detailed in fieldwork and research in Nepal in 2005 and 2014. Subsequently, in 2016 the eminent Australian lawyer Kathryn ("Kate") E. van Doore wrote a landmark paper drawing attention to the plight of children forced to pose as orphans in orphanages for the purpose of exploitation and profit, "Paper orphans: Exploring child trafficking for the purpose of orphanages". The following year, and following extensive work by the expert Martin Punaks and others, the United States Trafficking in Persons Report 2017 documented the incidence of children being recruited into orphanages in Nepal and being required to falsely declare they were orphans "to garner donations from tourists and volunteers: some of the children are also forced to beg on the street".

^[3] United Nations General Assembly Resolution 64/142, of 24 February 2010.

^[4] <https://www.legislation.gov.uk/ukpga/2015/30/section/8/enacted>

^[5] The 'means' of trafficking are listed in the UN Palermo Protocol, Article 3(a) as being, "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".

^[6] See: landmark judgment of the European Court of Human Rights on the non-punishment of child victims of trafficking in the case of V.C.L. and A.N. v UK, Judgment of 16 February 2021, <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2274603/12%22%2C%22itemid%22:%5B%22001-207927%22%5D%7D>; UN Special Rapporteur on Trafficking in Persons' Report to the Human Rights Council on the implementation of the non-punishment principle, June 2021 <https://reliefweb.int/report/world/implementation-non-punishment-principle-report-special-rapporteur-trafficking-persons>; UN Special Rapporteur on Trafficking in Person's position paper on non-punishment, July 2020 "The importance of implementing the non-punishment provision: the obligation to protect victims" <https://www.ohchr.org/EN/Issues/Trafficking/Pages/non-punishment.aspx> and see the OSCE "Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking", June 2013 <https://www.osce.org/secretariat/101002>



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