

The Human Trafficking And Exploitation (Scotland) Act 2015 – A Guide



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This is a guide to the Human Trafficking and Exploitation (Scotland) Act 2015 (the Act); its purpose is to set out clearly what the Act does.

The Act is split into six parts with this guide taking each part in order.

This guide is not designed to be fully comprehensive, nor a substitute to the Act and should not be relied upon as legal advice.

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Part One - Criminal offences

1. This part of the Act sets out two new criminal offences:
 - a) human trafficking, and
 - b) slavery, servitude and forced or compulsory labour.
2. While the behaviour which is covered by these offences was already illegal, the Act sets these offences out in more straightforward terms, which are easier to understand. In addition to the new offences, the Act also sets out “aggravations” linked to human trafficking. Where an aggravation is proved to the Court, it can lead to an increased sentence.

Human Trafficking

3. Section 1 sets out the offence of human trafficking. There are two parts to the offence: the relevant action and an intention to exploit or knowledge of likely exploitation; both are needed for an offence to be committed.

Relevant Action

4. The first part of the offence is carrying out a relevant action with regard to another person. It does not matter whether that other person consents to that action being taken. A relevant action is any of the following:

- Recruiting another person;
- Transporting or transferring another person;
- Harboursing or receiving another person;
- Exchanging control over, or transferring control over another person;
- Arranging or facilitating (without necessarily doing), any of the actions above.

5. Travel from one place to another is not a required action for there to be an offence of human trafficking in Scotland.

Exploitation

6. The second part of the offence relates to exploitation. The person doing the relevant action must either be doing so with the intention of exploiting the other person or, in the knowledge that the person is likely to be exploited. The word “exploitation” is given a defined meaning in section 3 of the Act. The exploitation must fall within that meaning for there to be a criminal offence.

7. There are four types of exploitation defined in section 3, they are:
 - a) Slavery, servitude and forced or compulsory labour;
 - b) Prostitution or sexual exploitation;
 - c) Removal of organs;
 - d) Securing services and benefits.

a) Slavery, servitude and forced or compulsory labour

8. This is where a person is a victim of conduct, which is an offence under section 4 of the Act. That offence is described in more detail below at paragraphs 11 to 13.

b) Prostitution or sexual exploitation

9. The exercise of control, direction or influence over prostitution by another person, which shows that the person is aiding, abetting or compelling the prostitution, falls within the meaning of exploitation. Involving a person in the making or production of materials which are classified as obscene under the Civic Government (Scotland) Act 1982 is also exploitation. Finally, where the person has been the victim of certain sexual offences listed in section 3(5) then that is exploitation.

c) Removal of organs

10. Where a person is encouraged, required or expected to do anything which would be an offence related to the removal of organs or human tissue. This includes things done outside Scotland which would amount to such an offence if they happened inside Scotland.

d) Securing benefits and services

11. This is a general category, and brings two sets of circumstances within "exploitation". First are cases where any person is subjected to force, threats or deception designed to induce that person to provide services of any kind, provide another person with benefits of any kind, or to enable another person to acquire benefits of any kind. Second are cases where a child or vulnerable adult is used to provide services of any kind, provide another person with benefits of any kind or to enable another person to acquire benefits of any kind without the use of force, threats or deception, but in circumstances where a person who was not a child or vulnerable adult would be likely to refuse to be used for that purpose. "Benefits" in this section is a general word and has a meaning wider than social security benefits.

Does the trafficking have to happen in a particular place?

12. This depends on who is alleged to have committed the offence. A person who is a UK national, who is habitually resident in Scotland or which is a body (for example a company or partnership) incorporated in the UK commits the offence no matter where in the world the relevant action takes place. For any other person to commit the offence, either the relevant action has to occur in the UK, or that action has to be taken with a view to the victim arriving in or entering into, departing from or travelling within the UK.

The offence of slavery, servitude and forced and compulsory labour

13. This is set out in section 4 of the Act. A person commits an offence where they know or ought to know that they are holding another person in slavery or servitude. A person also commits an offence where the person knows or ought to know that they are requiring another person to perform forced or compulsory labour.

14. The meaning of “slavery, servitude and forced or compulsory labour” is not set out directly in the Act. Instead, the Act provides that the phrase is to be construed in accordance with Article 4 of the ECHR, which prohibits a person being held in slavery or servitude or being required to perform forced or compulsory labour. Accordingly, where the treatment of a person would not be allowed under Article 4 of the ECHR then that treatment will fall within the scope of the offence.

15. Section 4 goes on to make clear that when deciding whether the offence has been committed, then the personal circumstances of a person which may make them more vulnerable, are to be taken into account. It also provides that the fact that a person consents to being treated in this way does not mean that the offence has not been committed.

Differences between the offences

16. Slavery, servitude and forced or compulsory labour is included as a form of “exploitation” in section 3 of the Act. Where a person carries out a “relevant action” as defined in section 1, together with an intention to exploit in a way which would – if the exploitation occurred – amount to an offence under section 4, then an offence of “human trafficking” has been committed. That is the case even if the exploitation does not in fact occur.

17. Accordingly, where slavery, servitude and forced and compulsory labour occurs without the presence of a “relevant action”, then it is only the offence of slavery, servitude and forced or compulsory labour which has been committed.

Penalties

18. When tried without a jury the maximum penalty for either human trafficking or slavery servitude or forced and compulsory labour is 12 months in prison, or the statutory maximum fine (currently £10,000) or both. When tried before a jury in the sheriff court, the maximum penalty is 5 years imprisonment, or a fine or both. In the High Court, the maximum penalty is life in prison, or a fine or both.

Aggravations

19. Where it has been shown that another criminal offence had a connection with human trafficking, then section 5 of the Act requires a court to take that into account in sentencing and explain what part that consideration played in sentencing. It allows the court to increase the sentence it would have given in respect of that offence, because of the connection with human trafficking. It also requires the conviction to be recorded in a way which highlights the connection with human trafficking.

20. Where a person has committed the offence of human trafficking against a child, then section 6 of the Act requires a court to take that into account in sentencing and explain what part that consideration played in sentencing. It allows the court to increase the sentence it would have given in respect of the human trafficking, because it was committed against a child. It also requires the conviction to be recorded in a way which highlights the fact that it was committed against a child. In this Act, a child is a person under the age of 18.

21. Where the person who has committed the offence of human trafficking is a public official and did so while acting as a public official or purporting to act as a public official, then section 7 of the Act requires a court to take that into account in sentencing and explain what part that consideration played in sentencing. It allows the court to increase the sentence it would have given in respect of the human trafficking, because it was committed by a public official in these circumstances. It also requires the conviction to be recorded in a way which highlights the fact that it was committed by a public official. Section 7 goes on to define what is included in the phrase “public official”.

Part Two – Supporting victims

Victims who have also carried out an act which constitutes an offence

22. Section 8 of the Act requires the head of the prosecution system (the Lord Advocate) to publish instructions which have to be followed by all prosecutors when deciding whether to prosecute either:

- a) an adult for something they have been forced to do, due to them being a victim of either human trafficking or slavery, servitude or forced or compulsory labour; or,
- b) a child, aged 12 -17 (a child under 12 cannot be prosecuted) who has done something as a consequence of being a victim of either human trafficking or slavery, servitude or forced or compulsory labour.

23. These instructions have been published and set out that there is a strong presumption against prosecution in such cases.

Victims of human trafficking: general support and assistance

Requirement to provide support and assistance

24. Section 9 of the Act requires the Scottish Ministers to secure support and assistance to adult victims of human trafficking in certain circumstances.

25. Where there are “reasonable grounds” to believe an adult is a victim of human trafficking then Scottish Ministers have to provide support and assistance from the date when the reasonable grounds are established until either; there is a “conclusive determination” that the person is such a victim or the expiry of a set time period, whichever comes first.

26. The set time period can be set out by Scottish Ministers in a further piece of legislation (regulations) which must be approved by Parliament.

27. The terms “reasonable grounds” and “conclusive determination” are defined in the Act by reference to Council of Europe Convention on Action Against Trafficking in Human Beings (the “Convention”). Reasonable grounds are therefore established if a competent authority has decided that there are such grounds for the purposes of article 10 of that convention. A conclusive determination is a determination by a competent authority under article 10 of the convention that an adult is or is not a victim of human trafficking.

Ability to support and assist

28. In addition to the requirement to provide support and assistance, section 9 also allows Scottish Ministers to secure support and assistance to adults in certain other circumstances. Accordingly, Ministers are able to secure support prior to reasonable grounds being established to believe an adult is a victim. Where a set

time period has been set out in regulations, the Scottish Ministers are also able to secure support after the expiry of that set time period and up to when there is a conclusive determination. Ministers may also secure support for the adult after there has been a conclusive determination.

Definition of support and assistance

29. The support and assistance secured by the Scottish Ministers is anything necessary given the adult's needs. Section 9(4) of the Act gives an illustrative (but not exhaustive) list of the types of support and assistance which may be given.

Conditions on support and assistance

30. No support and assistance can be provided unless the adult consents. Ministers are not allowed to make access to support and assistance conditional on the adult helping in any criminal investigation.

Method of providing support and assistance

31. Currently adults receive support and assistance through something known as the National Referral Mechanism. The Act is however silent on the method of providing support and assistance and in how article 10 of the Convention is to be followed. This allows Scottish Ministers flexibility in how they choose to meet their obligations and in how they choose to otherwise support under this section.

Victims of slavery, servitude and forced or compulsory labour: general support and assistance

32. Section 10 of the Act allows Scottish Ministers to make a further piece of legislation (regulations) which must be approved by Parliament. These regulations can make provision about providing support and assistance to a person who is or appears to be a victim of the offence of slavery, servitude and forced or compulsory labour.

33. These regulations can include rules on: how a victim is identified as being able to receive support, how long support and assistance must or may be provided, the type of support and assistance, and the way in which support and assistance can be provided.

Child victims of human trafficking: specific support

34. Any vulnerable child (including a victim or presumed victim of human trafficking or slavery, servitude and forced or compulsory labour) will be supported by the existing child protection system in Scotland. The Act goes further however and section 11 requires the Scottish Ministers to make arrangements to enable the appointment of an Independent Child Trafficking Guardian (ICTG) to support and represent a child in certain circumstances, acting at all times in the best interests of the child.

35. Those arrangements must provide for an ICTG to be appointed where a “relevant authority” decides that:

- a) there are reasonable grounds to believe that a child is, may be, or is vulnerable to becoming a victim of human trafficking; and,
- b) no person in the UK has “parental rights and responsibilities” towards that child.

36. The section goes on to put duties on any person carrying out statutory functions in relation to that child to have regard to the functions of the ICTG and allow the ICTG necessary access to information about the child that they need in order to carry out their functions.

37. The section sets out in greater detail what “parental rights and responsibilities” means and who a “reasonable authority” is, as well as empowering the Scottish Ministers to make a further law (regulations) which will be scrutinised by Parliament, setting out further detail about the ICTG appointment process and functions.

Child victims of human trafficking: presumption of age in order to access support

38. Section 12 of the Act applies where a Health Board or Local authority has reasonable grounds to believe that a person is a victim of human trafficking and, while not certain of their age, think the persons may be under 18. In these circumstances, the Board or Authority has to treat that person as a child in relation to certain statutory powers and obligations. They are required to do so unless the person is proven or assessed to be 18 or over. The statutory powers and obligations are listed in section 12(3). The Scottish Ministers have the power to make a further law (regulations) which is scrutinised by Parliament, and can use this to change the list of statutory powers.

Part Three – Targeting offenders - confiscating property

39. This part of the Act contains powers for police constables and courts to detain or order forfeiture of a vehicle, ship or aircraft when there has been an arrest or conviction of human trafficking (section 13 and 14). It also classifies offences of human trafficking and slavery, servitude and forced or compulsory labour as “lifestyle offences”, under the Proceeds of Crime Act 2002 (section 15). This allows further action to be taken against perpetrators to target their assets.

Part Four – Targeting offenders and protecting the public – restricting the activities of perpetrators and suspected perpetrators

40. This part of the Act provides the courts with power to issue two new types of preventative orders to assist both in preventing and disrupting trafficking and protecting the public:

- a) trafficking and exploitation prevention order (TEPO) (sections 17 - 25) and
- b) trafficking and exploitation risk order (TERO) (sections 26 – 31).

41. Section 34 of the Act also contains a glossary of terms used in this part.

TEPO

42. Where an individual has been convicted of a trafficking or exploitation offence or an offence with a statutory trafficking aggravator, a TEPO may be imposed by a court where there is a risk that that individual may commit a further human trafficking offence, and it is necessary to make the order to protect people from the physical or psychological harm which might occur if such an offence were committed. A TEPO, despite being able to be imposed in some cases immediately after conviction, is a civil law (not criminal law) order.

43. A list of “trafficking and exploitation offences” is set out in section 16 of the Act. Scottish Ministers can make a further law, (regulations), which can add or remove the offences listed there (these regulations will be scrutinised by Parliament). The list is much wider than just the two new offences set out in the Act, and it includes trafficking offences as they are set out in other UK jurisdictions and convictions for attempting to commit such offences.

When can a TEPO be imposed?

44. A TEPO can be imposed at the time of sentencing by the Scottish court which is sentencing in respect of a criminal case which has resulted in a conviction for a trafficking and exploitation offence. It can also be imposed by a Scottish civil court after any criminal court process has concluded, on the application of the Chief Constable of Police Scotland. The power of the Chief Constable to apply for such an order means that a TEPO may be imposed with regard to a conviction for a trafficking or exploitation offence which occurred before Part 4 of the Act came into force, or against an offender whose behaviour, at some time after conviction, causes enough concern to meet the test both of risk that the individual may commit a further human trafficking offence and of necessity to make the order to protect people.

45. The Chief Constable can also apply for a TEPO where the person has been convicted of an offence under the law of a country outwith the United Kingdom and where the conduct which constituted that offence would have constituted a relevant trafficking or exploitation offence had it been committed in Scotland.

What does a TEPO do?

46. A TEPO can prevent a person engaging in particular activities described in the order. This might include the employment of staff, making travel arrangements for other people, travelling overseas, having contact with children, etc. It can also impose requirements to do certain things, such as the requirement to report to a police station at a prescribed time and place; require the individual to inform the police of a change of address, vehicle usage, mobile telephone number(s) etc. An interim TEPO can also be imposed by the court whilst it is considering the application for a full TEPO. TEPOs and the prohibitions and requirements in them have to apply for a clear fixed period. The period must be at least 5 years, unless it relates to prohibiting foreign travel, in which case it cannot be for more than 5 years.

TEPO – general administration

47. Where a court imposes a TEPO in addition to a sentence after conviction then the individual who is subject to it, or the prosecutor, can apply to the court for that TEPO to be varied, renewed or discharged. The individual can also appeal against it being made and any variation of it and that appeal will be dealt with by the criminal courts.

48. Where the court imposes a TEPO after an application by the Chief Constable then the individual who is subject to it, or the Chief Constable, can apply to the court for that TEPO to be varied, renewed or discharged. The individual can also appeal against it being made and both the individual and the Chief Constable can appeal against any variation of it; such appeals are dealt with by the civil courts.

TERO

49. A Scottish court can impose a TERO on a person who has not been convicted of a trafficking or exploitation offence, but where it is considered that the person has acted in such a way which means:

- a) that there is a risk that the person might commit such an offence; and,
- b) some prohibition or requirement is necessary to protect people from the physical and psychological harm which would be likely to occur as a result of that offence being committed.

When can a TERO be imposed?

50. A TERO can only be imposed on an application to the court by the Chief Constable of Police Scotland.

What does a TERO do?

51. A TERO can prevent a person engaging in particular activities described in the order. This might include the employment of staff, making travel arrangements for other people, travelling overseas, having contact with children, etc. It can also impose requirements to do certain things such as the requirement to report to a police station at a prescribed time and place; require the individual to inform the

police of a change of address, vehicle usage, mobile telephone number(s) etc. An interim TERO can also be imposed by the court whilst it is considering the application for a full TERO. TEROs and the prohibitions and requirements in them have to apply for a clear fixed period. The period must be at least 2 years (note the difference from a TEPO which requires 5 years), unless it relates to prohibiting foreign travel, in which case it cannot be for more than 5 years.

TERO – general administration

52. Where a court imposes a TERO then the individual who is subject to it or the Chief Constable can apply to the court for that TERO to be varied, renewed or discharged. The individual can also appeal against it being made and both the individual and the Chief Constable can appeal against any variation of it; such appeals are dealt with by the civil courts.

Criminal offences

53. It is a criminal offence under section 32 of the Act to do something prohibited by a TEPO or TERO, or to fail to do something required by them. Other parts of the UK have introduced court orders which are broadly equivalent to Scottish TEPOs and TEROs. Scottish Ministers have the power to make a further law (regulations) under section 33, which can have the effect of making it a criminal offence in Scotland to do something prohibited by these other UK orders or to fail to do something required by them. These regulations require the approval of Parliament.

Part Five - Strategy and reporting

The Trafficking and Exploitation Strategy

54. The Act at section 35 requires the Scottish Ministers to produce a strategy which sets out appropriate actions, arrangements and outcomes in relation to conduct which constitutes the new offences of trafficking and of slavery, servitude and forced or compulsory labour. The Act suggests that the strategy cover actions to raise awareness of the offences, arrangements to facilitate the detection and prevention of the offences, and the support and assistance available to victims of the offences.

55. Scottish Ministers must consult before publishing the strategy and must also review and if necessary revise the strategy at least every three years (section 36).

56. Scottish Ministers may make further law (regulations) requiring named public bodies to help Ministers in that task by providing information and assistance. These regulations require to be scrutinised by Parliament (section 37).

Duty to notify

57. The Act provides at section 38 that certain Scottish public bodies must notify the Chief Constable of Police Scotland if they become aware of a person who is or appears to be a victim of an offence of trafficking or a victim of an offence of slavery, servitude or forced and compulsory labour. It provides a power for Scottish Ministers to make a further law (regulations), which require to be scrutinised by Parliament, which identifies which particular Scottish Public bodies are caught by this duty and the type of information to be included in that notification. The Act makes clear that the notification given to the police must not enable the victim to be identified where the victim is an adult and has not consented to being identified.

58. The Act also sets out that the police, after they receive this information, must notify another specified person or persons with information about the victim. Again it gives a power to Scottish Ministers to make a further law (regulations), which requires to be scrutinised by Parliament, which identifies the other specified person or persons which the police are to notify and the type of information to be included in that notification.

Part Six & The schedule – Technical rules and glossary of words

59. This part of the Act makes clear that the offences set out in the Act can be committed by corporate persons such as companies and partnerships as well as individuals (section 39). It also sets out the meaning of certain words used throughout the Act (section 40) and the rules under which Scottish Ministers can make further laws (regulations) (section 41) the remainder of the Act (sections 42 – 46) sets out technical rules and matters which include rules on changes which can be made to allow the Act to sit within the existing body of Scottish law and to bring it into force in a controlled and planned way.

The schedule

60. The schedule to the Act makes changes to certain other laws which require to be updated because of the changes made by the Act.



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