



EXPLANATORY NOTES

Human Trafficking and Exploitation (Scotland) Act 2015 (asp 12)

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HUMAN TRAFFICKING AND EXPLOITATION (SCOTLAND) ACT 2015

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT

3. The Act's overarching objective is to consolidate and strengthen the existing criminal law against human trafficking and exploitation and enhance the status of and support for its victims. The Act will also give Ministers power, by regulations, to specify relevant authorities to work with the Scottish Government to develop and implement a Scottish trafficking and exploitation strategy.
4. The Act will consolidate and clarify existing trafficking offences into one single offence. Current domestic criminal law against human trafficking in Scotland sits in a number of different Acts—
 - Section 22 of the Criminal Justice (Scotland) Act 2003¹ (“2003 Act”) criminalises arranging or facilitating a person’s travel for the purposes of prostitution and involvement in the making or production of indecent materials;
 - Section 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004² (“2004 Act”) criminalises arranging or facilitating a person’s travel for the purposes of other forms of exploitation;
 - Section 46 of the Criminal Justice and Licensing (Scotland) Act 2010³ (“2010 Act”) amends the provisions in the 2003 and 2004 Acts, for example to create an offence under both for someone who arranges or facilitates travel into, within or out of a country other than the UK.
5. A more detailed explanation of the Act’s purpose can be found in the Policy Memorandum, which also explains the thinking and policy intentions that underpin it.

¹ <http://www.legislation.gov.uk/asp/2003/7>

² <http://www.legislation.gov.uk/ukpga/2004/19>

³ <http://www.legislation.gov.uk/asp/2010/13>

THE STRUCTURE AND A SUMMARY OF THE ACT

6. The Act is in six parts.

7. Part 1 (Offences) includes provision on the creation of a single offence of human trafficking for all types of exploitation of both adults and children; establishes statutory aggravators of human trafficking for use with other crimes; and reframes the current standalone offence of slavery, servitude and forced or compulsory labour.

8. Part 2 (Protection of victims) includes provision on prosecutorial instructions for the prosecution of victims and provision about the support and assistance to which adult and child victims are entitled.

9. Part 3 (Confiscation of property) includes provision on detention and forfeiture of property and proceeds of crime.

10. Part 4 (Trafficking and exploitation prevention and risk orders) includes provision on two new preventive orders, the trafficking and exploitation prevention order and the trafficking and exploitation risk order.

11. Part 5 (Strategy and reporting) includes provision on the trafficking and exploitation strategy and the duty on specified Scottish public authorities to notify and provide information about victims.

12. Part 6 contains general and ancillary provisions.

PART ONE – OFFENCES

Human trafficking

Section 1: Offence of human trafficking

13. Section 1 provides for a single offence of human trafficking for the purpose of all forms of exploitation of adults and children. See paragraph 5 above for existing offence legislation.

14. Subsection (1) defines the conduct which constitutes the offence of human trafficking. A person commits an offence if the person takes a relevant action with a view to the other person being exploited. It is irrelevant whether that other person consents to any part of the relevant action (subsection (2)). Subsection (2) defines “relevant action” as meaning—

- recruiting another person;
- transporting or transferring another person;
- harbouring or receiving another person
- exchanging or transferring control of another person;
- arranging or facilitating of any of those actions.

15. Subsection (4) provides that the person takes a relevant action with a view to the other person being exploited only if the person intends to exploit the other person or the person knows or ought to know the other person is likely to be exploited (in any part of the world) during or after the relevant action.

16. Subsection (6)(a) provides that on summary conviction of the offence, the maximum penalty is imprisonment for a term not exceeding 12 months, a fine not exceeding the statutory maximum or both. Subsection (6)(b) provides that on conviction of the offence on indictment, the maximum penalty is imprisonment for life, or a fine, or both.

Section 2: Application of offence to conduct in United Kingdom and elsewhere

17. Section 2 provides for the application of the human trafficking offence to conduct in the United Kingdom and elsewhere, reflecting the fact that human trafficking activity may involve activity that is completely or partly outwith Scotland. This measure implements the terms of Article 10(2)(c) (jurisdiction) of the Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, replacing Framework Decision 2002/629/JHA (“EU Directive”).⁴

18. Subsections (1) and (2) provide that a UK national, a person who at the time of the offence was habitually resident in Scotland or a body incorporated under the law of a part of the UK, commits an offence of human trafficking regardless of where the relevant action takes place. Whether or not a person is “habitually resident” in Scotland will be determined in the light of all the facts and circumstances of the case.

19. Subsection (3) provides that any other person commits the offence of human trafficking only if any part of the relevant action takes place in the UK, or the relevant action is taken with a view to a person arriving in or entering into, departing from, or travelling within, the UK.

Section 3: Exploitation for purposes of offence of human trafficking

20. Section 3 describes what constitutes exploitation for the purposes of the offence of human trafficking. By virtue of subsection (1), only exploitation of a type mentioned in subsections (2) to (8) is to be regarded as exploitation in this context.

21. Subsection (2) provides that a person is exploited if the person is the victim of conduct which involves the commission of an offence under section 4 of the Act (slavery, servitude and forced or compulsory labour) or would be if the conduct occurred in Scotland.

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

22. Subsections (3) to (5) deal with prostitution and sexual exploitation and provide that a person is exploited if—

- another person exercises control, direction or influence over the first person's prostitution in a way which shows that the other person is aiding, abetting or compelling the prostitution;
- another person involves the first person in the making or production of obscene or indecent material; or
- the person is the victim of conduct constituting one of a number of listed sexual offences (or which would constitute such an offence if that conduct occurred in Scotland).

23. The categories of exploitation related to prostitution and the making of indecent material are drawn from the existing offence in section 22 of the 2003 Act. The category related to other forms of exploitation in connection with sexual offences is a new development in Scots law, though has some precedent under the Sexual Offences Act 2003 in England and Wales.

24. Subsection (6) deals with exploitation relating to the removal of organs etc. It provides that a person is exploited in that context if they are encouraged, required or expected to do anything which involves the commission by any person of an offence under Part 1 of the Human Tissue (Scotland) Act 2006 which deals principally with removal of organs for transplantation. It also provides that a person is exploited if they are encouraged, required or expected to do anything in connection with the removal of a part of the human body as a result of which an offence under the law of Scotland is committed by any person. This latter category ensures that actions in connection with the removal of organs or tissue for purposes other than transplantation is caught by the trafficking offences. This covers the removal of body parts for research, sacrificial rites, consumption, etc. For these purposes, a part of the body comprises all parts of the body, including blood. Finally, subsection (6)(c) provides that a person is exploited if they are encouraged, required or expected to do anything which would constitute an offence mentioned above if it were done in Scotland.

25. Subsections (7) and (8) make more general provision. Subsection (7) establishes that a person is exploited if force, threats or deception are used to induce the person to provide services or benefits or to enable another person to acquire benefits. Subsection (8) provides that a person is exploited if another person takes advantage of the fact that the person is a child or of an adult's vulnerability to use or attempt to use the child or vulnerable adult to provide services or benefits (or to enable another person to acquire benefits). This will ensure the offence captures those cases where the role of the person being exploited is entirely passive, and where the person is being used as a tool by which others can gain a benefit of any kind.

26. The categories of exploitation in subsections (6) to (8) are derived from section 4 of the 2004 Act.

Slavery, servitude and forced or compulsory labour

Section 4: Slavery, servitude and forced or compulsory labour

27. Section 4 provides for an offence of slavery, servitude and forced or compulsory labour. Subsections (1) and (2) provide that a person is guilty of an offence if that person holds another person in slavery or servitude or requires that other person to perform forced or compulsory labour in circumstances which show that the first person knows or ought to know that the person is being so held. The offence must be interpreted in accordance with Article 4 of the European Convention on Human Rights. That Article prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour. This is currently an offence under section 47 of the 2010 Act, which was created in response to the case of *Siliadin v France*⁵ (where the European Court of Human Rights held that there had been a violation of Article 4 in relation to the holding of an individual in domestic servitude).

28. Subsection (3) provides that, in assessing whether a person has been the victim of the offence, the court is to have regard to any of the alleged victim's characteristics that make the person more vulnerable than other people. Examples of these characteristics include the person being a child, age, health or family relationships.

29. Subsection (4) provides that consent to any of the acts alleged to constitute holding the person in slavery or servitude or requiring the person to perform forced or compulsory labour does not preclude a prosecution. Consent or otherwise of a victim may still be relevant in establishing the offence however.

30. Subsection (5) sets out the maximum penalty available on conviction of the offence of slavery, servitude and forced or compulsory labour. This is an increase from the current maximum penalty for the offence under section 47 of the 2010 Act. Subsection (5)(a) provides that on summary conviction of the offence, the maximum penalty is imprisonment for a term not exceeding 12 months, a fine not exceeding the statutory maximum, or both. Subsection (5)(b) provides that on conviction of the offence on indictment, the maximum penalty is imprisonment for life, a fine, or both.

Aggravation as to human trafficking

Section 5: General aggravation of offence

31. Section 5 makes provision for a statutory aggravation which applies in cases where an accused commits any other offence and that offence has a connection with a human trafficking offence. Where an indictment or complaint labels or specifies that an offence is aggravated by a connection with human trafficking activity and it is subsequently proved that the offence is aggravated in that way, the court must state on conviction that the offence is so aggravated, record the conviction in a way which shows that the offence is so aggravated, take the aggravation into account when determining the appropriate sentence and state the extent of any difference in the sentence in light of the aggravation (or, if there is no difference, the reasons for that) (subsections (1) and (5)).

⁵ Application no. [73316/01](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69891) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69891>

32. Subsection (2) sets out the circumstances in which an offence can be regarded to have been aggravated by a connection with human trafficking. This relies on proof that the accused was motivated, in whole or in part, by the objective of committing or conspiring to commit the offence of human trafficking. In terms of subsection (3), it is not material to establishing the aggravation whether or not the offence of human trafficking was actually committed by the offender or another person.

33. Subsection (4) provides clarification that corroboration is not needed to prove that an offence is aggravated by a connection with human trafficking activity – evidence from a single source is sufficient. This is consistent with the existing law in relation to both corroboration and statutory aggravations. This position is under review pending further parliamentary scrutiny of the Criminal Justice (Scotland) Bill.

Section 6: Aggravation involving a child

34. Section 6 provides that the offence of human trafficking may be aggravated by being committed against a child (being a person under 18). It must be libelled in an indictment or specified in a complaint that the offence is aggravated in that way and the aggravation must be proved using a single source of evidence. Where the aggravation is established, the court is required to state on conviction that the offence was aggravated by being committed against a child, take into account the aggravation when determining the appropriate sentence and record the conviction in a way that shows the offence is aggravated by being committed against a child. If the sentence imposed is different to the one which would have been imposed had the offence not been aggravated, the court must state the extent of and reasons for that difference or give the reasons for there being no difference.

Section 7: Aggravation involving public official

35. Section 7 makes similar provision about a statutory aggravation which applies in cases where a public official, acting or purporting to act in the course of official duties, commits the offence of human trafficking.

36. Subsection (4) sets out the steps the court must take when it is libelled in an indictment or specified in a complaint that the offence of human trafficking is aggravated by an abuse of a public position and proved that the offence is so aggravated. These are similar to the steps which must be taken in relation to the general aggravation in section 5.

37. Subsection (5) defines those to be considered as a public official for the purposes of section 6, while subsection (6) defines the term “an international organisation” for the purposes of this section.

38. Subsection (7) enables the Scottish Ministers to modify by regulations the definition of who is a public official and the definition of an international organisation. Any such regulations will be subject to the affirmative procedure.

PART 2 – PROTECTION OF VICTIMS

Prosecution of victims

Section 8: Lord Advocate’s instructions on prosecution of victims of offences

39. Section 8 places a duty on the Lord Advocate to prepare and publish instructions for prosecutors about the prosecution of suspected or confirmed victims of the offence of human trafficking and the offence under section 4 of the Act.

40. Subsection (2) sets out that the instructions must include factors to be taken into account or steps to be taken when deciding whether to prosecute a person who does an act which constitutes an offence having been compelled to do so and that the compulsion is directly attributable to the person being, or appearing to be, a victim of an offence of human trafficking or, as the case may be, under section 4 of the Act.

41. Subsection (3) provides that the Lord Advocate may, from time to time, revise the instructions.

Support and assistance for adult victims

Section 9: Support and assistance: victims of offence of human trafficking

42. Article 12 of the Council of Europe Convention on Action against Trafficking in Human Beings⁶ (“COE Convention”) sets out the support and assistance which must be provided for trafficked victims. The UK Government ratified the COE Convention in December 2008 and Scotland became bound by its terms in April 2009. Currently there is no statutory basis for potential victims of trafficking to access support and information on the type of support that they are entitled to. Support is currently provided through support agencies with grant funding from the Scottish Ministers.

43. Section 9 places a duty on the Scottish Ministers to secure the provision of support and assistance for adult victims of human trafficking, on an assessment of needs, during a defined period. It also sets out a discretionary power for the Scottish Ministers to arrange the provision of support and assistance outwith the mandatory period.

44. Subsection (1) provides that where there are reasonable grounds to believe that an adult is a victim of human trafficking, the Scottish Ministers must secure the provision of such support and assistance as is necessary given the adult’s needs, for the relevant period.

45. Subsection (2) defines the relevant period. It begins on the day it is determined there are reasonable grounds to believe that the adult is a victim of human trafficking (paragraph (a)) and ends on the earlier of either the end of a period specified in regulations made by the Scottish Ministers (paragraph (b)(i)) or the date on which there is a conclusive determination that the adult is or is not a victim of a human trafficking offence (paragraph (b)(ii)).

⁶ <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>

46. Subsection (3) gives the Scottish Ministers discretion to provide support and assistance outwith the mandatory period under subsection (2). The support and assistance may be provided to the adult during the period when a competent authority is determining whether there are reasonable grounds to believe that the person is a victim of human trafficking (paragraph (a)). It may also be provided before the date on which there is a conclusive determination in relation to the adult, if the mandatory period has ended by then (paragraph (b)) or after that conclusive determination, for such period as Ministers think appropriate (paragraph (c)).

47. Subsection (4) provides a non-exhaustive list of the kind of support and assistance that may be provided under section 9. The list provides that support and assistance may be provided in connection with (but not limited to) the following—

- accommodation;
- day to day living;
- medical advice and treatment (including psychological assessment and treatment);
- language translation and interpretation;
- counselling;
- legal advice;
- information about other services available to the adult; and
- repatriation.

48. Subsection (5) provides that the Scottish Ministers must ensure that, in securing the provision of support and assistance, assistance is only provided where the adult consents (subsection (5)(a)) and that the provision of assistance is not made conditional on the adult assisting with a criminal prosecution or investigation (subsection (5)(b)).

49. Subsection (6)(a) describes when there are reasonable grounds to believe that an adult is a victim of a trafficking offence for the purposes of securing support and assistance. Subsection (6)(b) describes what is meant by a “conclusive determination that an adult is or is not a victim of an offence of human trafficking” for these purposes.

50. Subsection (7) defines what is meant by the terms “competent authority” and “the Trafficking Convention” for the purposes of this section.

51. Subsection (8) sets out a regulation-making power for Scottish Ministers to modify existing subsections (6) and (7) to make provision about the circumstances in which there are reasonable grounds and conclusive grounds to believe a person is a trafficking victim. Subsection (9) specifies that the regulation-making power can also make provision about any procedure to be followed by any person making a determination as to victim status, the criteria they must apply and the persons who may be involved in that process.

Section 10: Support and assistance: victims of an offence under section 4

52. Section 10 enables the Scottish Ministers to make regulations about providing support to adult victims of a section 4 offence. Those regulations may in particular make provision about how to determine whether an adult is a victim of a section 4 offence, the period during which support and assistance must be provided, the period during which it may be provided, what types of support can be provided and the way in which it is to be provided.

Support and assistance for child victims

Section 11: Independent child trafficking guardians

53. Section 11(1) places a duty on the Scottish Ministers to make such arrangements as they consider reasonable which enable a person to be appointed to assist, support and represent any child to whom the section applies. This appointed person is to be known as an independent child trafficking guardian.

54. Subsection (2) makes it clear that this provision applies to any child who is unaccompanied (in the sense that no person in the UK holds parental rights or responsibilities in relation to the child) and where it appears (based on reasonable grounds of belief) that the child is, or may be a victim of the offence of human trafficking; or that they are vulnerable to becoming a victim of that offence.

55. Subsection (3) provides that any “relevant authority” (as defined in subsection (8)) which determines that a child falls within the eligibility criteria set out in subsection (2), should take steps to bring the child to the attention of the guardian service as soon as reasonably practicable after making that determination. Subsection (4) then provides that the arrangements made by Ministers must provide for an independent child trafficking guardian to be appointed as soon as reasonably practicable after receiving such a referral. The arrangements must also ensure that the appointed guardian is independent of any other person exercising statutory functions in relation to the child.

56. Subsection (5) provides that an appointed guardian must, at all times, act in the best interests of the child. Subsection (6) provides that any person who is exercising other statutory functions in relation to the child must recognise, and pay due regard to, the guardian’s functions; and provide the guardian with access to information which will allow the guardian to exercise those functions effectively.

57. Subsection (7) gives the Scottish Ministers power to make further provision about independent child trafficking guardians via regulations. This includes power to make further provision about the appointment of independent child trafficking guardians (including the termination or, in certain circumstances, continuation of that appointment), the conditions which require to be satisfied before a person may be eligible to be appointed as a guardian, the functions of such guardians, and other administrative matters such a payment and record keeping.

58. Subsection (8) provides definitions of a “person with parental rights or responsibilities” and “relevant authority”, as mentioned in subsections (2) and (3) respectively. A “relevant authority” for this purpose is a local authority and any other person specified in regulations made by the Scottish Ministers.

Section 12: Presumption of age

59. Section 12 requires a relevant authority which is unsure as to the age of a person whom it has reasonable grounds to believe to be a victim of an offence of human trafficking to assume that person is a child where it has reasonable grounds to believe that is the case (subsection (1)). That assumption is to be made for the purposes of a number of statutory functions specified in subsection (3). The assumption is to continue to be made either until a local authority carries out an assessment of the potential victim’s age or that person’s age is determined by some other means (subsection (2)). Subsection (4) specifies that the relevant authorities to whom this duty applies are local authorities and health boards. Subsection (5) gives the Scottish Ministers the power to modify both the list of statutory functions and the relevant authorities to which the duty to make the assumption applies by regulations

PART 3 - CONFISCATION OF PROPERTY

Detention and forfeiture

Section 13: Detention of vehicle, ship or aircraft

60. Section 13 sets out the power of a constable to detain a vehicle, ship or aircraft if a person has been arrested for an offence of human trafficking.

61. Subsection (1) describes the circumstances where a police constable may detain a vehicle, ship or aircraft. Subsection (1)(a) provides that a constable may detain a vehicle, ship or aircraft if a person has been arrested for an offence of human trafficking and the constable has reasonable grounds to believe that a forfeiture order would be made if the person arrested were convicted of the offence (subsection (1)(b)).

62. Subsection (2) provides for the duration of the detention of the property. Subsection (2)(a) provides that the vehicle, ship or aircraft may be detained until a decision is taken as to whether or not to begin solemn proceedings against the person arrested for the offence. In circumstances where solemn proceedings have begun, the property may be detained until the person is acquitted (subsection (2)(b)(i)), the person is convicted and a decision is made whether or not to order forfeiture of the property under section 14 (subsection (2)(b)(ii)), or the proceedings are otherwise concluded (subsection (2)(b)(iii)).

63. Subsections (3) and (4) set out the circumstances in which solemn proceedings are to be taken to have commenced and concluded for the purposes of this section.

64. Subsection (5) lists the circumstances in which a person (including the accused) with a relevant interest in the detained property may apply to the sheriff for release of the vehicle, ship or aircraft. Subsection (6) sets out the sheriff's power to order release subject to satisfactory security being tendered.

65. Subsection (7) provides that the sheriff may impose such other conditions as to the release of the detained property as the sheriff thinks fit.

Section 14: Forfeiture of vehicle, ship or aircraft

66. Section 14 sets out the power of the court to order forfeiture of a vehicle, ship or aircraft used or intended to be used in connection with an offence of human trafficking.

67. Subsections (1) to (3) provides that forfeiture of a vehicle, ship or aircraft used or intended to be used in connection with the offence of human trafficking may be ordered if a person convicted on indictment of that offence, when the offence was committed—

- owned the vehicle, ship or aircraft,
- was a director, secretary or manager of a company which owned it,
- was in possession of it under a hire purchase agreement,
- was a director, secretary or manager of a company which was in possession of it under a hire purchase agreement,
- in relation to a vehicle, was driving it,
- in relation to a ship or aircraft, was the charterer of it or was acting as captain of it.

68. Subsection (4) makes special provision about cases where a ship or aircraft is to be forfeited, but the offender does not own it and was not a director, secretary or manager of a company which owns it. It provides that, in those circumstances, forfeiture of a ship or aircraft may only be ordered if any one of the tests listed in this subsection is satisfied. Subsection (4)(a) provides that if a person who, at the time the offence was committed, owned the ship or aircraft, or was a director, secretary or manager of a company which owned it, knew, or ought to have known of the intention to use it in the course of the commission of the offence of human trafficking, then forfeiture of a ship or aircraft may be ordered. Subsection (4)(b) provides that, in the case of a ship (other than a hovercraft), if its gross tonnage is less than 500, then forfeiture of that ship may be ordered. Subsection (4)(c) provides that, in the case of an aircraft, if the maximum weight at which it may take off in accordance with its certificate of airworthiness is less than 5,700 kilogrammes, then forfeiture of that aircraft may be ordered under this section. Protection is provided for particular categories of owner who, due to the size of the ship or aircraft in question or the circumstances in which it is used for trafficking, do not know or reasonably suspect, or are unlikely to know or reasonably suspect, that the ship or aircraft is being used in that way. There is a greater likelihood that an owner of a vehicle or smaller types of ships or aircraft will have actual or constructive knowledge that their property is being or intended to be used for the purposes of trafficking.

69. Subsection (5) provides that forfeiture cannot be ordered without giving any person claiming an interest in the relevant property the chance to make representations

Proceeds of crime

Section 15: Proceeds of Crime Act 2002: lifestyle offences

70. Section 15 amends Schedule 4 to the Proceeds of Crime Act 2002 (“2002 Act”) to categorise all trafficking and exploitation offences as lifestyle offences for the purposes of that Act. A conviction of a lifestyle offence triggers assumptions under the 2002 Act that the accused has a criminal lifestyle and that the accused’s property is recoverable as criminal proceeds.

71. Section 11(a) amends Schedule 4 to the 2002 Act, by substituting paragraph 4 thereof with a list of all offences related to trafficking and thus categorising all such offences as lifestyle offences for the purposes of the 2002 Act. Section 11(b) amends the same Schedule, by inserting a new paragraph 4A to provide that an offence under section 4 of the Act also constitutes a lifestyle offence.

PART 4 – TRAFFICKING AND EXPLOITATION PREVENTION AND RISK ORDERS

Trafficking and exploitation offences

Section 16: Relevant trafficking or exploitation offences

72. Section 16 provides a list of the relevant trafficking and exploitation offences for the purposes of trafficking and exploitation prevention and risk orders made under the Act. The list includes repealed provisions as orders (other than orders on sentencing) may still be made with reference to convictions under such provisions.

73. Subsection (2) provides that the Scottish Ministers may modify by regulations the offences contained in the list. Under section 37(2) any such regulations are subject to the affirmative procedure.

Trafficking and exploitation prevention orders

Section 17: Prevention orders on sentencing

74. Section 17 provides that a court may, instead of or in addition to dealing with the person in any other way, make a trafficking and exploitation prevention order (TEPO) on sentencing of an adult.

75. Subsection (1) sets out the three circumstances where the court may make a TEPO against a person on sentencing. The first is conviction of an adult of a relevant trafficking and exploitation offence. The second circumstance is acquittal of such an offence by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995 (which provides a defence where a person is unable by reason of mental disorder to appreciate the nature or wrongfulness of their conduct). The third circumstance is a finding of unfitness for trial in relation to such an offence under section 53F of that Act

(which provides that a person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in that trial). In relation to the third circumstance there must also be a finding that the adult has done the act constituting the offence.

76. Subsection (3) provides that the court may make a TEPO at its own instance or on the motion of the prosecutor.

77. Subsection (4) provides the test for making a TEPO on sentencing. The court must be satisfied that there is a risk that the person in respect of whom the order is to have effect may commit a relevant trafficking or exploitation offence and that it is necessary to make the prohibitions and requirements in the order for the purpose of protecting persons generally, or particular persons, from the physical or psychological harm which would be likely to occur if the person committed such an offence.

78. Subsection (5) provides a definition of “the court” for the purposes of this section.

Section 18: Prevention orders on application

79. Section 18 provides that the chief constable may apply to a sheriff for a TEPO against an adult.

80. Subsection (2) sets out the appropriate sheriff to whom such an application should be made.

81. Subsection (3) sets out the tests for making a TEPO on application. The sheriff must be satisfied that the person in respect of whom the order is sought is a “relevant offender” (subsection (3)(a)), that since the person first became a relevant offender, the person has acted in a way which means that there is a risk the person will commit a relevant trafficking or exploitation offence (subsection (3)(b)) and it is necessary to make the prohibitions or requirements in the order for the purpose of protecting persons generally, or particular persons, from the physical or psychological harm which would be likely to occur if the person committed such an offence (subsection (3)(c)).

82. Subsection (4) provides that conduct which occurred before this section came into force may be considered when determining whether there is a risk that a person may commit a relevant trafficking offence.

Section 19: Meaning of relevant offender

83. Section 19 defines what is meant by a “relevant offender” for the purposes of section 18.

84. Subsection (2) provides that a person is a relevant offender if any of the court disposals listed in the subsection have been made in the UK in relation to that person and in respect of a relevant trafficking or exploitation offence (as set out in section 16 of the Act).

85. Subsections (3) to (5) deal with findings of courts and tribunals outside the United Kingdom. Subsection (3) provides that a person is a relevant offender if, under the law of a country outside the United Kingdom, a listed disposal is made in respect of a person in relation to an offence which is equivalent to an offence listed in section 16. Subsections (4) and (5) set out tests for determining whether an offence is equivalent to a relevant offence. In particular, such offences are acts which constitute offences under the law of the country concerned and which would constitute a relevant trafficking or exploitation offence under the law of Scotland if done in the UK, by a UK national or person habitually resident in Scotland or as regards the UK (e.g. by virtue of the fact that travel was arranged into, out of or within the UK).

86. Subsection (6) establishes a mechanism for determining whether an act constituting an offence in a country outside the UK would constitute an offence under the law of Scotland.

87. Subsection (8) provides that, for the purposes of this section, convictions, acquittals, findings and cautions include those which took place before this section comes into force.

Section 20: Contents of prevention orders

88. Section 20 makes provision about the prohibitions or requirements (or both) that may be contained in a TEPO. Each prohibition and requirement in a TEPO is for a fixed period and the order itself is for a fixed period. The order and the prohibitions and requirements may all be for the same period. However, the Act allows some requirements and prohibitions in the order to be set for a period shorter than that of the order, if that is appropriate.

89. Subsection (2) provides that both the order and any prohibition or requirement in the order must have a specified fixed period of at least five years. The only exception to that requirement relates to a prohibition on foreign travel and an order containing only a prohibition on foreign travel (which is dealt with in section 21) and relates to a period of not more than five years. Subsection (4) provides that a TEPO may prohibit the person in respect of whom the order is made from doing things or require that person to do things. Different prohibitions and requirements may have effect for different periods.

90. Subsection (5) provides that, if the court makes a TEPO in respect of a person already subject to such an order, the earlier order will cease to have effect.

91. Subsection (6) defines what is meant by “the court” for the purposes of the section.

Section 21: Prohibitions on foreign travel

92. Section 21 makes provision about prohibitions on foreign travel in TEPOs.

93. Subsection (1) provides that a prohibition on foreign travel contained in a TEPO, and any TEPO which contains such a prohibition and no other prohibitions or requirements, must be for a fixed period of not more than five years.

94. Subsection (2) defines a prohibition on foreign travel as a prohibition on travelling to countries outside the UK (either by reference to particular countries or generally).

95. Subsection (3)(a) determines that a prohibition on foreign travel varied or renewed by application under section 22 or 23 may be varied or renewed for further fixed periods of no more than five years each time. Subsection (3)(b) requires that an order containing only a foreign travel restriction may be renewed for up to that fixed period.

96. Subsection (4) sets out the requirement on a person in respect of whom a TEPO containing a prohibition on foreign travel to all countries outwith the United Kingdom has been made to surrender at a police station each passport that the person has.

97. Subsection (5) provides that any passport surrendered must be returned as soon as is reasonably practicable after the person ceases to be subject to such a prohibition on foreign travel. Circumstances where this subsection would not apply are provided for at subsection (6); for example, where a passport has already been returned to the relevant authority.

Section 22: Orders on sentencing: variation, renewal and discharge

98. Section 22 makes provision about varying, renewing and discharging TEPOs made on sentencing.

99. Subsections (2) to (4) set out general powers in this context. The person in respect of whom the TEPO is made or the prosecutor may apply for variation, renewal or discharge of such a TEPO. That application is to be made to the High Court where that court made the order and to the sheriff otherwise. Subsection (4)(b) makes provision about shrieval jurisdiction in this connection. Where the relevant court receives such an application, it may vary, renew or discharge individual prohibitions or requirements or add new prohibitions or requirements, it may renew the whole order or it may discharge the whole order.

100. Subsection (5) provides that the court must, before making an order under this section, give an opportunity to make representations to the person in respect of whom the order is made, the prosecutor and the chief constable. Subsection (6) provides that, after taking into account any such representations, the court may then make such order as it thinks appropriate.

101. Subsection (7) sets out the tests the court must consider when deciding whether to vary, renew or discharge TEPOs made on sentencing (including by adding new prohibitions or requirements) or any prohibitions or requirements within them. Subsection (7)(a) applies the tests for the making of a TEPO to any variation (including an increase or a relaxation of a requirement or prohibition), renewal or addition. Subsection (7)(b) applies those tests to any discharge of a prohibition or requirement or of an order.

102. Subsection (8) makes it clear that an order varying or renewing a TEPO is subject to the requirements and prohibitions established by sections 20 and 21 in the same way as the original order.

103. Subsection (9) defines “prosecutor” for the purposes of this section.

Section 23: Orders on application: variation, renewal and discharge

104. Section 23 makes provision about the variation, renewal or discharge of TEPOs made on application.

105. Subsections (2) to (4) set out general powers in this context. The person in respect of whom the TEPO is made or the chief constable may apply to the sheriff for variation, renewal or discharge of a TEPO made on application. Subsection (4)(b) makes provision about shrieval jurisdiction in this connection. Where the sheriff receives such an application, the sheriff may vary, renew or discharge individual prohibitions or requirements or add new prohibitions or requirements, renew the order so that the period of the order itself is extended or discharge the whole order.

106. Subsection (5) provides that the sheriff must, before making an order under this section, give an opportunity to make representations to the person in respect of whom the order is made and the chief constable. Subsection (6) provides that after taking into account any such representations, the sheriff may then make such an order as the sheriff thinks appropriate.

107. Subsection (7) sets out the tests the sheriff must consider when deciding whether to vary, renew or discharge TEPOs on application (including by adding new prohibitions or requirements) or any prohibitions or requirements within them. Those tests reflect the tests for the making of a TEPO.

108. Subsection (8) provides that when determining an application under this section the sheriff may consider conduct which occurred before this section comes into force.

109. Subsection (9) makes it clear that an order varying or renewing a TEPO is subject to the requirements and prohibitions established by sections 20 and 21 in the same way as the original order.

Section 24: Interim prevention orders

110. Section 24 gives power to a sheriff to make an interim TEPO while the main application under section 18 is being determined. The sheriff may make such an order if the sheriff considers it just to do so (subsection (1)) and such an order may contain prohibitions or requirements (or both) in relation to the person in respect of whom the order is to have effect (subsection (2)). Those prohibitions or requirements may relate to things to be done or not done in any part of Scotland or anywhere outwith Scotland (subsection (3)).

111. Subsection (4) provides that an interim TEPO will only have effect for a fixed period, specified in the order, and will cease to have effect on the determination of an application for a TEPO under section 18 if that fixed period has not expired.

112. Subsection (5) allows for an application to a sheriff in the sheriffdom of the sheriff who made the interim TEPO for variation or discharge of that order. Such an application may be made by the person in respect of whom the order was made or the chief constable.

Section 25: Appeals: prevention orders

113. Section 25 provides for an appeals process in relation to TEPOs and interim TEPOs.

114. Subsection (1) makes provision about TEPOs made on sentencing and any variation or renewal of such a TEPO. These are to be treated as sentences for the purposes of any appeal.

115. Subsections (2), (3) and (4) make provision about appeals in relation to TEPOs made on application, any variation or renewal of such a TEPO and interim TEPOs. The person in respect of whom the order was made or the chief constable may appeal against any of these orders.

Trafficking and exploitation risk orders

Section 26: Risk orders

116. Section 26 provides that the chief constable may apply to a sheriff for a trafficking and exploitation risk order (TERO) against an adult. A TERO differs from a TEPO in that it may be made where a person has not previously been convicted of a trafficking or exploitation offence but the person's behaviour indicates a risk that others may be at harm as a result of that person committing such an offence and intervention at an early stage is necessary to prevent that harm. A TEPO can only be made where a relevant offence has already been committed.

117. Subsection (2) sets out the appropriate sheriff to whom an application for such an order may be made.

118. Subsection (3) sets out the tests for making a TERO. The sheriff may only make an order if satisfied that the person in respect of whom the order is sought has acted in a way which means that there is a risk the person may commit a relevant trafficking or exploitation offence (subsection (3)(a)) and it is necessary to make the prohibitions or requirements in the order for the purpose of protecting persons generally, or particular persons, from the physical or psychological harm which would be likely to occur if the person committed such an offence (subsection (3)(b)).

119. Subsection (4) provides that in assessing those tests the sheriff may consider conduct which occurred before this section comes into force.

Section 27: Contents of risk orders

120. Section 27 makes provision about the prohibitions or requirements (or both) that may be contained in a TERO. Each prohibition and requirement in a TERO is for a fixed period and the order itself is for a fixed period. The orders and the prohibitions or requirements may all be for the same period. However, the Act allows some requirements and prohibitions in the order to be set for a shorter period, if that is appropriate.

121. Subsection (2) provides that both the order and any prohibition or requirement in the order must have a specified fixed period of at least two years. However, this does not apply to a prohibition on foreign travel or to an order that contains a prohibition on foreign travel and no other prohibitions or requirements. Such a prohibition (or an order containing only such a prohibition) must be for a fixed period of no more than five years under section 28(1)).

122. Subsection (4) provides that a TERO may prohibit the person in respect of whom the order is made from doing things or require that person to do things. Different prohibitions and requirements may have effect for different periods.

123. Subsection (5) provides that if the sheriff makes a TERO in relation to a person already subject to such an order, the earlier order will cease to have effect.

Section 28: Prohibitions on foreign travel

124. Section 28 makes provision about prohibitions on foreign travel contained in a TERO.

125. As noted above, subsection (1) provides that a prohibition on foreign travel contained in a TERO, and any TERO which contains such a prohibition and no other prohibitions or requirements must be for a fixed period of not more than five years.

126. Subsection (2) defines a “prohibition on foreign travel” as a prohibition on travelling to countries outwith the UK (either by reference to particular countries or generally).

127. Subsection (3)(a) determines that a prohibition on foreign travel varied or renewed under section 29 may be varied or renewed for further fixed periods of no more than five years each time. Subsection (3)(b) requires that an order containing only a foreign travel restriction may be renewed for up to that fixed period.

128. Subsection (4) sets out the requirement on a person in respect of whom a TERO has been made containing a prohibition on foreign travel to all countries outwith the United Kingdom to surrender at a police station each passport that the person has. Subsection (5) provides that any passport surrendered must be returned as soon as is reasonably practicable after the person ceases to be subject to a prohibition on foreign travel to all countries outwith the United Kingdom. Circumstances where this subsection would not apply are provided for at subsection (6); for example, where a passport has already been returned to the relevant authority.

Section 29: Variation, renewal and discharge of risk orders

129. Section 29 makes provision about the variation, renewal or discharge of TEROs

130. Subsections (1) to (3) set out general powers in this context. The person in respect of whom the TERO is made or the chief constable may apply to the sheriff for variation, renewal or discharge of a TERO. Subsection (3) makes provision about shrieval jurisdiction in this connection. Where the sheriff receives such an application, the sheriff may vary, renew or discharge individual prohibitions or requirements or add new prohibitions or requirements, renew the whole order or discharge the whole order.

131. Subsection (4) provides that the sheriff must, before making an order under this section, give an opportunity to make representations to the person in respect of whom the order is made and the chief constable. Subsection (5) provides that after taking into account any such representations, the sheriff may then make any order the sheriff considers appropriate.

132. Subsection (6) sets out the tests the sheriff must consider when deciding whether to vary, renew or discharge TEROs (including by adding new prohibitions or requirements) or any prohibitions or requirements within them. Subsection (6)(a) applies the tests for the making of a TERO to any variation (including an increase or a relaxation of a requirement or prohibition), renewal or addition. Subsection (6)(b) applies those tests to any discharge of a prohibition or requirement or of an order.

Section 30: Interim risk orders

133. Section 30 provides that a sheriff may make an interim TERO while the main application under section 26 is being determined. The sheriff may make such an order if the sheriff considers it just to do so (subsection (1)) and such an order may contain prohibitions or requirements (or both) in relation to the person in respect of whom the order is to have effect (subsection (2)). Those prohibitions or requirements may relate to things to be done or not done in any part of Scotland or anywhere outwith Scotland (subsection (3)).

134. Subsection (4) provides that an interim TERO will only have effect for a fixed period, specified in the order, and will cease to have effect on the determination of the main application if that fixed period has not already expired.

135. Subsection (5) allows for an application for variation or discharge of an interim TERO (or a requirement or prohibition in the order) to be made to a sheriff in the sheriffdom of the sheriff who made the interim order by the person in respect of whom the order was made or the chief constable (subsection (6)).

Section 31: Appeals: risk orders

136. Section 31 provides for an appeals process in relation to TEROs and interim TEROs and any order varying or renewing such a TERO or interim TERO. The person in respect of whom the order was made or the chief constable may appeal against any of these orders.

Offences and supplementary provision

Section 32: Offences

137. Section 32 makes provision about breach of TEPOs and TEROs.

138. Subsections (1) and (2) provide that a person commits an offence if that person does anything which the person is prohibited from doing by an order or fails to do anything which the person is required to do by a TEPO or a TERO or an interim TEPO or TERO.

139. Subsection (3) makes provision about penalties in relation to these offences. A person who commits an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory minimum (or both). On conviction on indictment that person is liable to imprisonment for a term not exceeding five years or a fine (or both).

Section 33: Enforcement of other UK orders

140. Section 33 provides that the Scottish Ministers may modify, by regulations, the list of orders at section 32(2) so that a breach of those orders in Scotland constitutes an offence under section 32(1). The orders which may be added are “relevant UK orders”. Those are described in subsection (2) as orders under the law of England and Wales or Northern Ireland which appear to the Scottish Ministers to be equivalent or similar to TEPOs, TEROs or interim TEPOs or TEROs.

Section 34: Interpretation of Part 4

141. Section 34 defines certain terms used in Part 4.

PART 5 - STRATEGY AND REPORTING

Section 35: Trafficking and exploitation strategy

142. Section 35 places a duty on the Scottish Ministers to prepare a trafficking and exploitation strategy. The strategy under this section is a strategy which sets out such actions, arrangements and outcomes as the Scottish Ministers consider appropriate in relation to the conduct which constitutes an offence under this Act.

143. Subsection (3) lists some of the matters which may be set out in the strategy, though that list is not exhaustive. Those matters include, for example, awareness raising in relation to the conduct which constitutes an offence of human trafficking or an offence under section 4 and arrangements to facilitate the detection and prevention of that conduct.

Section 36: Review and publication of strategy

144. Subsection (1) of section 36 provides that the strategy prepared under section 35 must be reviewed by the Scottish Ministers every three years. Following a review, the Scottish Ministers are required by subsection (2) to prepare a report on the review, including an assessment of the extent to which the strategy has been complied with, and may prepare a revised strategy. If a decision is taken following such a review not to prepare a revised strategy, the Scottish Ministers must set out their reasons for that decision.

145. Subsection (4) places a duty on the Scottish Ministers to consult with those likely to have an interest in the strategy before preparing or reviewing the strategy. Those likely to have an interest include, but are not limited to, businesses, support agencies, faith based groups etc..

146. Subsection (5) requires the Scottish Ministers to publish the first strategy within 1 year of Section 1 coming into force and lay before the Scottish Parliament each strategy and report prepared under this section.

Section 37: Duty to co-operate on strategy

147. Section 37 provides that Scottish public authorities, as specified in regulations that may be made by the Scottish Ministers, must provide such information and assistance as the Scottish Ministers may reasonably require and otherwise co-operate with the Scottish Ministers in the preparation or review of the strategy. A specified public authority could include, for example, Police Scotland and local authorities.

Section 38: Duty to notify and provide information about victims

148. Section 38 places a duty on specified Scottish public authorities to notify the chief constable of the Police Service of Scotland about a person who is, or appears to be, a victim of an offence under section 1 or section 4. This duty would not affect any other general right to report information relating to crime.

149. Subsection (2) requires that a notification relating to an adult is anonymised and does not include any information that identifies the adult or enables the adult to be identified, unless the adult consents to that data being provided.

150. Subsection (3) provides that the Scottish Ministers may by regulations specify the Scottish public authorities who are to be subject to this duty and may make provision about the information to be included in the notification. The regulations will be subject to the negative procedure.

151. Subsection (4) places a duty on Police Scotland to notify any other person specified in regulations made by Ministers about a potential victim of trafficking about whom a notification has been received under section 38(1). Subsection (5) provides that such a notification cannot contain personal data about an adult victim unless the adult consents and subsection (6) permits regulations to otherwise specify what such a notification should contain.

PART 6 – FINAL PROVISIONS

Section 39: Offences by bodies corporate etc.

152. Section 39 provides that where an offence under the Act was committed by a body corporate or a Scottish partnership or other unincorporated association and it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of, a relevant individual or someone purporting to be acting in the capacity of a relevant individual, that individual, as well as the body corporate, partnership or unincorporated association, commits the offence and is liable to be proceeded against and punished accordingly.

153. Subsection (2) defines what is meant by a “relevant individual” for the purpose of this section.

Section 40: Interpretation

154. Section 40 defines certain terms for the purposes of the Act.

Section 41: Regulations

155. The Scottish Ministers are given various powers under this Act to make regulations. Section 41 provides for the parliamentary procedure which is to be applicable in relation to each of those powers.

Section 42: Ancillary provision

156. Section 42 provides that the Scottish Ministers may make regulations containing such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, the provisions of the Act.

Section 43: Minor and consequential amendments

157. Section 43 introduces the schedule, which makes minor amendments and amendments consequential on the provisions of the Act. Given their replacement in Part 1 of the Act, the schedule repeals the current offences in relation to human trafficking (section 22 of the 2003 Act and section 4 and 5 of the 2004 Act) and slavery, servitude and forced or compulsory labour (section 47 of the 2010 Act).

Section 44: Crown application

158. Section 44(1) provides that none of the provisions made by or under the Act are capable of making the Crown criminally liable. In accordance with subsection (2), enforcement of offences against the Crown is to be done by the Scottish Ministers or any other public body or office-holder with responsibility for enforcing the provision applying to the Court of Session for a civil declarator of non-compliance. This provision does not apply to persons in the public service of the Crown.

Section 45: Commencement

159. Section 45 provides that sections 40, 41, 42, 44, and 46 of the Act come into force on the day after Royal Assent. All other provisions are to come into force on a day appointed by regulations made by the Scottish Ministers.

Section 46: Short title

160. The short title of this Act is the Human Trafficking and Exploitation (Scotland) Act 2015.

Section 47: Parliamentary History

161. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, and the references to the official report of those proceedings.

Proceedings and Reports	References
Bill as Introduced – 12 December 2014	<u>SP Bill 57A (2014)</u>
Stage 1	
(a) Justice Committee	
1 st Meeting, 13 January 2015	<u>Official Report</u>
2 nd Meeting, 20 January 2015	<u>Official Report</u>
3 rd Meeting, 3 March 2015	<u>Official Report</u>
4 th Meeting, 10 March 2015 (Evidence)	<u>Official Report</u>
5 th Meeting, 17 March 2015 (Evidence)	<u>Official Report</u>

*These notes relate to the Human Trafficking and Exploitation (Scotland) Act 2015 (asp 12)
which received Royal Assent on 4 November 2015*

Proceedings and Reports	References
6 th Meeting, 24 March 2015 (Evidence)	<u>Official Report</u>
7 th Meeting, 21 April 2015	<u>Official Report</u>
Delegated Powers and Law Reform Committee	
27 January 2015	<u>Official Report</u>
17 February 2015	<u>Official Report</u>
Finance Committee	
18 March 2015	<u>Official Report</u>
24 April 2015, Justice Committee report published	<u>Justice Committee Report</u>
Consideration by Parliament	
Stage 1 Debate – 12 May 2015	<u>Official Report</u>
Stage 2	
Justice Committee Debate - 23 June 2015	<u>Official Report</u>
Stage 3	
Consideration by the Parliament	
Stage 3 Debate – 1 October 2015	<u>Official Report</u>
Bill as Passed – 2 October 2015	<u>Bill as Passed</u>
Royal Assent	
4 November 2015	<u>Royal Assent</u>

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