

# HUMAN TRAFFICKING AND EXPLOITATION (SCOTLAND) ACT 2015

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## EXPLANATORY NOTES

### THE STRUCTURE AND A SUMMARY OF THE ACT

#### 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 Beings<sup>1</sup> (“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.

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<sup>1</sup> <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>

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)).
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 as 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