

POLICY NOTE

THE HUMAN TRAFFICKING AND EXPLOITATION (SCOTLAND) ACT 2015 (COMMENCEMENT NO. 2 AND TRANSITIONAL PROVISIONS) REGULATIONS 2016

SSI 2016/385 (C.37)

1. The above instrument is made in exercise of the powers conferred by section 45(2) and (4) of the Human Trafficking and Exploitation (Scotland) Act 2015 (“the 2015 Act”). It is not subject to any parliamentary procedure.

Policy Objectives

2. These Regulations bring into force on 17 December 2016 paragraphs 2, 4 and 5 of the schedule of the 2015 Act. This will repeal existing Scottish offences under;
 - Section 22 of the Criminal Justice (Scotland) Act 2003 (traffic in prostitution, etc),
 - Sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation), and
 - Section 47 of the Criminal Justice and Licensing (Scotland) Act 2010 (slavery, servitude and forced or compulsory labour).
3. A coming into force date of 17 December 2016 was chosen deliberately to coincide with the coming into force date of the Human Trafficking and Exploitation (Scotland) Act 2015 (Consequential Provisions and Modifications) Order 2016¹.
4. That Order under section 104 of the Scotland Act 1998 was made on 27 October 2016 following its passage through the UK Parliament. It will update references to existing Scottish offences in relevant England and Wales or reserved UK legislation to the new Scottish offences of human trafficking and of slavery, servitude and forced or compulsory labour (section 1 and section 4 of the 2015 Act).

Transitional Provisions

5. Sections 1 and 4 of the Act create new trafficking and slavery offences (“the new offences”) which replace the existing trafficking and slavery offences (“the repealed offences”), listed above, in Scotland. These new offences were brought into force on 31 May 2016 and accordingly have been operating in parallel with the repealed offences in Scotland since that date. The new offences criminalise all of the conduct which currently constitutes an offence under the existing law as well as expanding on that conduct to some extent. It is also important to note that trafficking and slavery are offences which may involve a course of conduct occurring over a period of time, rather than one-off acts.
6. With the repeal of the old offences coming into effect by virtue of this instrument, provision is required to secure a smooth transition from the old to the new offences and, in particular, to ensure that convictions can still be obtained in cases where there is

¹ http://www.legislation.gov.uk/uksi/2016/1031/pdfs/uksi_20161031_en.pdf

uncertainty as to when criminal conduct occurred. As mentioned above, the old and new offences will have operated in parallel from 31 May 2016 to 16 December 2016. However, a conviction under the new offence is only possible if it is clear that all of the relevant conduct occurred after 31 May 2016; similarly, a conviction under the old offence is only possible if it is clear that all of that conduct occurred before 17 December 2016. Transitional provision is therefore considered necessary to ensure that cases involving uncertainty around the timing of criminal conduct can still be dealt with.

7. Regulation 3 makes the transitional provision necessary to deal with cases where uncertainty as to the dates on which conduct occurred could lead to acquittal by default. It applies in a case where the accused is charged in respect of the same conduct with a repealed offence and with one of the new offences replacing it. It requires three further conditions to be satisfied, namely:
 - the court or jury is not satisfied beyond a reasonable doubt that the conduct with which the accused was charged occurred on or after 31 May 2016,
 - the court or jury is not satisfied beyond a reasonable doubt that that conduct occurred before 17 December 2016, and
 - the court or jury is satisfied in every other respect that the accused committed the repealed offence.
8. Where all of these conditions are satisfied, the accused may be convicted of the repealed offence. This is the only offence of which the accused may be convicted in the circumstances covered by this regulation since there will require to be a reasonable doubt as to whether the accused's criminal conduct occurred at a time when the new offences were in force, ruling out a conviction for either of those offences.

Consultation

9. No public consultation was carried out in relation to these Regulations. However, we have consulted with the Crown Office and Procurator Fiscal Service (COPFS) during the preparation of these Regulations. COPFS were specifically consulted on the effectiveness of the transitional provisions in ensuring that prosecutions can still take place where the offending behaviour occurs before and after the time when the old offences will be repealed.

Impact Assessments

10. An Equality Impact Assessment and a Child Impact Assessment were carried out in relation to the Human Trafficking and Exploitation (Scotland) Act Bill. It was not considered necessary to carry out further impact assessments in relation to these Regulations.