



Law Society
of Scotland

UK Government Call for Evidence - Our Response

Modern Slavery Act 2015

13 September 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the UK Government Select Committee Call for Evidence on the Modern Slavery Act 2015¹. The committee has the following comments to put forward for consideration.

General

The Select Committee has invited evidence on a range of issues related to current scale and nature of modern slavery as well as the impact of the Modern Slavery Act 2015. As the 2017 UK Annual Report on Modern Slavery affirms, action against human trafficking and modern slavery continues to be a top priority for the UK Government. It is appropriate to put forward the Scottish position on what is an international problem.

Question: The impact of the Modern Slavery Act 2015

The Modern Slavery Act 2015 does not generally apply to Scotland. Section 60 of that Act sets out that it extends to England and Wales only, apart from clauses relating to the Independent Anti-Slavery Commissioner (which is a UK -based appointment), maritime powers and transparency in supply chains.

¹ <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>

Scottish Position

The relevant Scottish legislation is the Human Trafficking and Exploitation (Scotland) Act 2015 (2015 Act)². Sections of the 2015 Act have come into force on different dates depending on the relevant statutory provisions as follows:

- 31 May 2016 as far as the main provisions and creation of offences are concerned
- 29 June 2017 regarding sections 16 and 26 of the 2015 Act as far as Trafficking and Exploitation Prevention Orders and Trafficking and Exploitation Risk Orders are concerned
- 31 January 2018 regarding section 12 of the 2015 Act and presumption of age requirements
- 1 April 2018 regarding regulations in respect of section 9(2)(b)(i) and section 10(1) of the 2015 Act.

What that means is that any assessment of the impact of the Modern Slavery Act 2015 or the equivalent legislation in Scotland seems rather premature. Certainly, awareness of the problem has increased as has the provision of information. Though successful prosecution is not the only factor by which any impact may be assessed, given the limited timescales, there has been limited opportunity for many prosecutions to have been initiated and completed. It is therefore hard to judge what the effectiveness of the relevant legislation with its focus on modern slavery and trafficking has been as there is limited detailed evaluation that can be undertaken. Prosecutions under the 2015 Act or indeed the Modern Slavery Act 2015 will inevitably be serious, complex and evidentially involved which will require time for such cases to be reported by Police Scotland and considered and prosecuted by Crown Office and Procurator Fiscal Service (COPFS).

Key provisions of the 2015 Act

The 2015 Act makes provision for human trafficking and slavery, servitude and forced or compulsory labour and included provision about offences and sentencing, victim support and reduction of activities related to offences.

Creation of New Offences

- Section 1 of the 2015 Act defines human trafficking as the recruitment, transportation or transfer, harbouring or receiving or exchange or transfer of control of another person for the purposes of exploiting them. Arranging and facilitating are also offences. Coercive means such as threats or intimidation need not be present. The question of consent from the victim is irrelevant. Furthermore, the victim does not require to have been moved.
- Section 4 of the 2015 Act defines slavery, servitude and forced or compulsory labour. A person commits this offence when they hold another person in slavery or servitude. A person also commits

² <http://www.legislation.gov.uk/asp/2015/12/contents/enacted>

this offence when they know or ought to know that they are requiring another person to perform forced or compulsory labour.

One key difference between the respective Scottish and English legislation is that there is no statutory defence included in Scotland since section 45 of the Modern Slavery Act 2015 does not apply. That defence is invoked if:

- “(a) the person is aged 18 or over when the person does the act which constitutes the offence,
- (b) the person does that act because the person is compelled to do it,
- (c) the compulsion is attributable to slavery or to relevant exploitation, and
- (d) a reasonable person in the same situation as the person and having the person’s relevant characteristics would have no realistic alternative to doing that act”.

It is too early to ascertain if that has made any material difference to prosecutions being taken in Scotland or indeed, the respective conviction rates with regard to the implementation and enforcement of the relevant legislation.

The role of the COPFS and criminal justice agencies in Scotland

The Lord Advocate is the independent head of the prosecution service in Scotland and exercises his functions independently of government. Decisions as to evidential sufficiency, forum for prosecution and prosecution being justified in the public interest are his responsibility. Similarly, the Scottish courts operating under the Scottish Courts and Tribunal Service are independent. Cases arising in Scotland will be investigated and reported by Police Scotland. No sentencing guidelines for the judiciary exist in Scotland. However as with the Modern Slavery Act 2015, there is an increase in penalty to include life imprisonment for a section 1 offence (section 1(6)(b) of the 2015 Act).

The Lord Advocate’s Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation³ (Lord Advocate’s instructions) with the creation of a National Lead Prosecutor have been published as required under section 8 of the 2015 Act. There is a statutory duty on the Lord Advocate to issue and publish instructions about what factors must be taken into account when considering whether to prosecute a person who appears to be a victim of human trafficking or exploitation and may have committed a crime where (in the case of an adult) they appear to have been compelled to do so because of their victim status or (in the case of a child) they did so as a consequence of their victim status. A challenge in November 2017 to the compatibility of the Scottish approach to non-prosecution of victims with the EU Directive confirmed that the use of the Lord Advocate’s Guidelines was in accordance with its provisions⁴.

³ Section 9(2)(b)(i) of the 2015

http://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/HumanTrafficking/Lord%20Advocates%20Instructions%20for%20Prosecutors%20when%20considering%20Prosecution%20of%20Victims%20of%20Human%20Trafficking%20and%20Exploitation.pdf

⁴ <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018hcjac7.pdf?sfvrsn=0>

Support and assistance for adult victims

Section 9 of the 2015 Act refers to the support and assistance to victims of human trafficking. The UK is bound by the Council of Europe Convention on Action against Trafficking in Human Beings (COE Convention) which involves signing up to a minimum set of standards on the identification, protection and support of trafficking victims. This section creates an equivalent obligation in domestic law for Scottish Ministers to provide support and assistance to potential adult victims of human trafficking. Scottish Ministers have now defined that period as being 90 days during which they must secure the provision of support and assistance to adult victims as they consider necessary given the adult's needs, where there are reasonable grounds to believe that an adult is a victim of an offence of human trafficking under section 1 of the 2015 Act.

Enforcement in Scotland

Extent

There were 213 referrals of individuals Police Scotland in 2017, which represented a 42% increase from 2016. The greatest increase related to labour exploitation referrals. Over half of the reports received referred to a male victim which represented a rise of 64% from 2016 under the National Referral Mechanism,⁵ the UK-wide system that identifies whether an individual is subjected to human trafficking. In 2018, the statistics available identify roughly consistent rates as for 2017⁶:

Period (Quarter)	Total Number of referrals in Scotland	Female	Male
January – March 2018	55	24	31
April- June 2018	53	18	35

Prosecutions

The first successful prosecutions in Scotland included the conviction of Robert McPhee, James McPhee, Steven McPhee and John Miller⁷ who were sentenced to a total of 29 years imprisonment after they were found guilty of a contravention of section 4(1) of the 2015 Act. Trafficking and Exploitation Prevention Orders were made which was the first use of these orders in Scotland. This means that after their release

⁵ <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>

⁶ see <http://www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/2018-nrm-statistics/947-modern-slavery-and-human-trafficking-national-referral-mechanism-statistics-april-to-june-2018/file>

⁷ <http://www.scotland-judiciary.org.uk/8/1939/HMA-v-Robert-McPhee--James-McPhee--Steven-McPhee--John-Miller>

from imprisonment, they will be restricted as to who they can employ for five years. They are also restricted in the number of communication devices which they can hold.

More generally, between 1 May 2017 and 30 April 2018, twelve cases (involving fifteen accused persons) were reported for consideration of taking no proceedings or discontinuing proceedings based on the Lord Advocate's instructions. In four of these cases (involving five accused persons) enquiries are still are on-going.

Other examples have shown multi agency collaboration including immigration where no prosecutions have resulted. These examples have been included in the Scottish Government's Human Trafficking and Exploitation newsletter⁸ published in March 2018.

What is relevant is that a number of incidents are still under further consideration which emphasises the time lapse before such cases may result in any successful prosecution. That endorses our comments about detailed assessment of how the 2015 Act is contributing to the eradication of modern slavery. What has been apparent from the statistics is that trafficking is an international problem as well as referrals involving children:

"People are trafficked for a variety of purposes, including commercial sexual exploitation, labour exploitation, forced criminality and domestic servitude, and all for the profit or personal gain of the traffickers. They are often trafficked across international borders but also within Scotland. It is alarming that of the 213 referrals to Police Scotland last year, 61 of those involved children".⁹

Question: How to increase understanding and reporting of modern slavery offences

Section 35 of the 2015 Act requires Scottish Ministers to develop a Scottish trafficking and exploitation strategy. Such a strategy was published in May 2017¹⁰. That Strategy set out the Scottish Government's approach and commitment to tackling human trafficking by:

- supporting and protecting victims,
- disrupting the activities of perpetrators and
- addressing the conditions which foster trafficking, both in Scotland and elsewhere.

The Strategy covers identification of victims and support for them to ensure safety and recovery, identification of the perpetrators and disruption of their activities and addresses the conditions, both local

⁸ <https://beta.gov.scot/binaries/content/documents/govscot/publications/correspondence/2018/03/human-trafficking-exploitation-newsletters/documents/aae45116-f2ae-42ab-a516-c71deea388a0/aae45116-f2ae-42ab-a516-c71deea388a0/govscot:document/?inline=true>

⁹ Then Deputy and now Chief Constable Iain Livingstone of Police Scotland

¹⁰ <https://beta.gov.scot/publications/trafficking-exploitation-strategy/>

and global, that foster trafficking and exploitation. In developing the Strategy, a number of organisations that provide coherent, effective support for victims and act against the perpetrators were involved, including local authorities, Police Scotland, COPFS and NHS Scotland.

The 2017 UK Annual Report on Modern Slavery¹¹ refers to the UK, Scottish and Northern Ireland at a high level and illustrates the actions taken to combat modern slavery. The Scottish Government's first Annual Report on Human Trafficking and Exploitation Strategy published on 14 June 2018 (as required under section 36 of the 2015 Act¹²) provides greater detail about what has been achieved, identifies key priorities and indicates its intention to update the Strategy within three years.

The focus continues around:

- (1) improving level of support. These include the time for support to be provided since April 2018 is 90 days, which is more than the Council of Europe's minimum period.
- (2) Support and protection for child witnesses is provided under the Scottish child protection system. The National Guidance for Child Protection provides guidance on child trafficking¹³. The Inter-agency Guidance for Child Trafficking also provides guidance for professional working with children to identify trafficking victims and for making referrals¹⁴. Section 11 of the 2015 Act when enacted will provide for protection for child victims by ensuring guardians are available for all eligible children.
- (3) The 2015 Act makes it easier for prosecution and subsequent punishment of trafficking presenting a deterrent to trafficking. Funding has been provided by Scottish Government in 2017/2018 to support adult victims of human trafficking in Scotland which has increased the capacity and resilience to deal with both the increase in referrals and the greater care victims will receive. This includes:
 - Provision of specialist psychological trauma support such as the Glasgow Psychological Trauma Service that was opened to tackle mental health difficulties associated with experiences which include human trafficking. It is expected to see about 600 people annually¹⁵.
 - Specialist list organisations such as Migrant Help and the Trafficking Awareness Raising Alliance who support victims of human trafficking.

¹¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652366/2017_uk_annual_report_on_modern_slavery.pdf

¹² <https://beta.gov.scot/publications/human-trafficking-exploitation-strategy-first-annual-progress-report/>

¹³ <https://beta.gov.scot/publications/national-guidance-child-protection-scotland/>

¹⁴ <https://beta.gov.scot/publications/inter-agency-guidance-child-trafficking/>

¹⁵ <http://www.nhsggc.org.uk/about-us/media-centre/news/2017/01/new-glasgow-psychological-trauma-centre-officially-opened/>

Conclusion

Work is ongoing and includes:

1. The implementation of the 2015 Act. Sections 11¹⁶ and 38¹⁷ of the 2015 Act still require to be implemented.
2. Criminal Justice policy: This is being taken forward in Scotland to facilitate and assist victims who are involved generally in the criminal justice system and may be required to give evidence in court. This would potentially benefit those who are victims of trafficking. This includes:
 - The Vulnerable Witnesses (Scotland) (Criminal Evidence) Bill¹⁸ that has recently been introduced. It includes provisions about the use of special measures for taking the evidence of child witnesses and other vulnerable witnesses in criminal proceedings, the procedure relating to taking evidence by commissioner and the procedure for authorisation of standard special measures.
 - Use of Joint Investigative Interviews (JIIs). These interviews are jointly conducted by trained police and social workers for the purposes of obtaining a child's account of events which require investigation where there are welfare concerns. JIIs can be carried out with child victims of trafficking.

We hope that this insight into the work being carried out in Scotland is helpful in relation to the consideration of the Modern Slavery Act 2015.

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¹⁶ establishing independent child trafficking guardians

¹⁷ duty to notify and provide information about victims

¹⁸ <http://www.parliament.scot/parliamentarybusiness/Bills/108702.aspx>



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