

Justice Committee

Human Trafficking and Exploitation (Scotland) Bill

Letter from the Lord Advocate to the Convener

I would like to thank you for the opportunity to give evidence on the Human Trafficking and Exploitation (Scotland) Bill on the 24th March 2015. During the course of my evidence relating to section 7 of the Bill I highlighted that draft instructions had already been produced and circulated to key stakeholders for consultation on the 23rd March 2015. I have attached a copy of these draft instructions for you and these can be shared with the members of the Committee.

A wide range of stakeholders, including Myria Vassiliadou, the European Anti-Trafficking Coordinator, Kevin Hynland, the UK Anti-Slavery Commissioner, the UKBA, the Home Office, the Scottish Human Rights Commission, the Refugee Council, Migrant Help and TARA, amongst many others, have been asked to provide any feedback they have before the 23rd April 2015. Any comments you or the members of the Committee have would also be most welcome.

I am content that this document is published on the Justice Committee website along with the other documents in relation to the Bill.

I hope this is of assistance to the Committee.

The Rt Hon Frank Mulholland QC
30 March 2015

Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation Offences

Overview

1. These instructions cover the situation where any person is reported to the Crown Office and Procurator Fiscal Service (COPFS) alleging that they have committed an offence, and during the investigation of that offence or throughout the prosecution process either they state that they committed the offence due to being the victim of human trafficking or exploitation, or there is evidence to suggest that they committed the offence because they were the victim of human trafficking or exploitation.

2. These instructions apply throughout the lifetime of a case and even in the circumstances where a conviction has already been obtained or a non Court disposal has been applied. Where that is the case then an application under section 188 of the Criminal Procedure (Scotland) Act 1995 to set aside the conviction and/or sentence should be considered or steps taken to withdraw the non-Court disposal.

Background

3. Individuals who have been the victims of Human Trafficking or Exploitation offences are particularly vulnerable to finding themselves in a situation where they are forced to commit criminal acts. It is not in the public interest to proceed with prosecutions against such victims given the circumstances that they find themselves in.

4. Human Trafficking and Exploitation offences are defined in sections 1 and 4 of the Human Trafficking and Exploitation (Scotland) Act 2015.

5. Section 7 of the Human Trafficking and Exploitation (Scotland) Act 2015 (the Act) places an obligation on the Lord Advocate to make and publish guidelines about the prosecution of a person who is, or appears to be, the victim of an offence of human trafficking or under section 4 of the Act (covering slavery, servitude and forced or compulsory labour). The section further provides that the guidelines must in particular include factors to be taken into account or steps to be taken by the prosecutor when deciding whether to prosecute a person who has been compelled to commit an offence and the compulsion is directly attributable to the person being, or appearing to be a victim of trafficking or slavery servitude and forced or compulsory labour.

6. Examples of offences which victims of trafficking may often be compelled to commit include; production or being concerned in the sale and supply of controlled drugs, shoplifting, theft by housebreaking, possession of false identity documents and offences linked to commercial sexual exploitation.

7. Victims of trafficking include victims who have been trafficked internationally but also within the UK. Children who are being sexually exploited are often trafficked to and from the abusers and between properties. . It will not always be obvious that

they are victims of trafficking and Prosecutors must be alert to this when dealing with children who have potentially been trafficked and are offending.

Instructions by the Lord Advocate

8. If there is evidence available that a child aged 17 or under has committed an offence and that child is a credible victim of trafficking or exploitation then there is a strong presumption that the child aged 17 or under will not be prosecuted for that offence

9. If, on the basis of the evidence available, it is established that an individual who is aged 18 or over at the time of the offence:

- (a) is a credible victim of human trafficking or exploitation;
- (b) has been compelled to carry out the offence; and
- (c) the compulsion is directly attributable to being the victim of human trafficking or exploitation;

then there is a **strong presumption against prosecution** of that person for that offence.

Is the accused a credible victim of Human Trafficking or Exploitation?

10. It must be noted that the test for the presumption to arise in relation to a child victim of trafficking or exploitation and an adult victim is different. In relation to an adult there is a three part test described above. In relation to a child aged 17 or under the presumption will apply if the child is a credible victim of human trafficking or exploitation.

11. Prosecutors should be alert to the particular circumstances or situations where someone suspected of committing a criminal offence might also be a trafficked victim. Prosecutors should consider all information provided in a Police Report. The accused may themselves provide information in a police interview or to a solicitor which suggests that they are a credible victim of Human Trafficking or Exploitation. It is important that the veracity of any claim by an accused person is properly tested. However, an accused person may not always provide this information due to fear or misunderstanding of the circumstances in which they find themselves. Prosecutors must ensure that the Police have investigated the circumstances surrounding the accused and reported all relevant information where there are any grounds to suspect that the accused person is a credible victim of Human Trafficking or Exploitation. Where this has not happened Prosecutors should instruct the Police to carry out such investigations

12. In considering whether an accused person is a victim of trafficking or exploitation Prosecutors should consider the following factors. These may be indicative of an accused person being a credible victim of Human Trafficking or Exploitation. If these factors are not addressed in the Police report the Prosecutor should instruct further investigation by the Police;

- The accused has no official immigration status and/or there is no information available regarding their method of transport to Scotland or the length of time they have been in Scotland.

- The whereabouts of any identification documents relating to the accused are unknown or another individual is in possession of any identification documents relating to the accused.
- The accommodation in which the accused is living is of a poor standard and/or there is evidence to suggest that the accused has been prevented from leaving or does not have a key for any of the locks.
- There is no employment history available for the accused within Scotland or elsewhere.
- There are no official records relating to the accused in Scotland including e.g. benefits, housing, utilities, voter's roll, DVLA.
- The accused is not in possession of any bank cards or any other item allowing access to money at the time of arrest.

13. Prosecutors should also ensure that appropriate liaison has taken place between the Police and the United Kingdom Human Trafficking Centre (UKHTC). The UKHTC will carry out their own assessment as to whether the accused person is a credible victim of human trafficking or exploitation. The Police should provide the Prosecutor with information on this assessment by UKHTC. If it is not within the police report prosecutors should request it from Police Scotland. The assessment by the UKHTC is a factor to be taken into account in deciding whether the victim is a credible victim but should not be the deciding factor.

14. Children are not always assessed by UKHTC and information regarding the circumstances of a child may more properly be sought from the agencies involved in the protection of the child. If not provided the Police should be instructed to obtain information from those agencies.

15. Information from Migrant Help, TARA or any other public or private organisation involved with the accused should also be sought and considered in reaching the decision of whether or not the accused is a credible victim of trafficking or exploitation.

Was the accused compelled to commit the offence due to human trafficking or exploitation?

16. Again the accused may provide information either at interview or to a solicitor which suggests that they were compelled to commit the offence given their position as a victim of Human Trafficking or Exploitation. It is important that the veracity of any claim made by an accused person is properly tested. However, there may be reluctance on behalf of the accused to provide this information so it is important for the Police to explore the circumstances of the offence. As such Prosecutors must ensure that the Police investigate the circumstances surrounding the offence and report all relevant information.

17. In particular the following factors should be considered by the Prosecutor in making an assessment as to whether the accused was compelled to commit the offence:

- Whether the nature of the offence was such that it can clearly be linked to Human Trafficking or Exploitation. It should be noted that the presumption

against prosecution can be rebutted where the offending is serious and this may apply for example where the accused has committed a sexual offence, where the offences involve violence against an individual and/or where the offences involve the use of weapons;

- Whether the role played in the offending by the accused was one consistent with being a victim of Human Trafficking or Exploitation;
- Whether there is evidence that violence, threats or coercion were used towards the accused;
- Whether there is evidence that the accused was in a position of particular vulnerability or had shown considerable fear of individuals involved in Human Trafficking or Exploitation;
- Whether there have been offences committed in the same or similar circumstances which have already been established as being linked to Human Trafficking or Exploitation.

Decision Making

18. Only once these enquires have been carried out and the status of the accused has been thoroughly and carefully explored, can a decision be made on whether it is in the public interest to prosecute the accused or not. Steps should be taken to ensure that all outstanding or ongoing cases against the same accused are assessed at one time to ensure there is consistency.

19. All cases of this nature, whether or not the recommendation is to discontinue proceedings, should be reported to the National Lead Prosecutor for Human Trafficking and Exploitation for a final decision to be made. The report should cover the issues raised above and should come to a conclusion regarding whether the accused is a credible victim of Human Trafficking or Exploitation, whether there is evidence to suggest that they have been compelled to commit the offence in question, and ultimately whether proceedings should be commenced or if commenced then discontinued, giving reasons for this decision.

20. Where a case has already been marked and commenced and information comes to light which suggests that an accused person may be a victim of Human Trafficking it is important that steps are taken to adjourn on going proceedings for a suitable period until investigations can be completed. This applies to all cases both pre and post conviction.