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The Scottish Parliament
Edinburgh
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Dear Christina,

CRIMINALISATION AND DETENTION OF POTENTIAL VICTIMS OF HUMAN TRAFFICKING

I refer to your letter of 20 December 2012 to the Cabinet Secretary for Justice relating to the transposition of EU Directive 2011/36/EU on human trafficking into Scots law.

I understand that at its last meeting on 13 December 2012, the European and External Relations Committee (the EERC) considered written evidence from a group of organisations involved in supporting victims of human trafficking. In their letter of the 10 December, the group outlined a number of concerns in relation to current compliance with the Directive. One of those concerns related to the criminalisation and detention of potential victims of human trafficking. As this matter relates to the investigation and prosecution of crime in Scotland I am responding directly to the committee as the independent head of the system of prosecution in Scotland.

Under point 3 of the written evidence received by the EERC, it states that:-

"Scotland cannot be said to be acting in the spirit of Article 8...whilst people, many of them under the age of 25, continue to be detained for activities they undertook linked to trafficking and their exploitation."

I note that the authors have not referred to any individual case. They also "query whether the current Crown Office and Procurator Fiscal Service (COPFS) Guidance is enough to be compliant with Article 8 of the Directive."

Let me outline in the first place that I consider that the COPFS guidance to prosecutors is robust and sufficiently detailed to ensure that the prosecution service in Scotland adheres to both the terms and the spirit of Article 8 of the directive. There is full guidance to prosecutors, and a system has been put in place to ensure that a senior Crown Counsel with responsibility for human trafficking is involved in all cases where the accused is potentially a victim of human trafficking. I will outline however some of the practical difficulties in identifying the victims of trafficking which I am sure the Committee will appreciate.





Article 8 of EU Directive 2011/36/EU states that:

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.

Article 8 does not mandate that victims of trafficking *must not* be prosecuted but instead provides that Member States shall ensure that there is discretion in decision making over whether to prosecute victims of trafficking or not.

This discretion not to prosecute victims of trafficking exists in Scotland. As with any allegation of criminal conduct reported to COPFS, independent prosecutors consider not only whether there is a sufficiency of evidence to raise proceedings but also whether it is in the public interest to do so.

COPFS is committed to tackling human trafficking in Scotland and has a network of specialist prosecutors to deal with human trafficking cases.

As I am sure you will appreciate, in some cases there is initially no disclosure of the person's trafficked status. In other cases the person immediately discloses that they have been the victim of human trafficking but that fact, of course, requires investigation.

COPFS clearly understands its obligations to make proper enquiries in criminal prosecutions involving individuals who may be victims of trafficking.

Detailed guidance has been issued to prosecutors outlining the duties of the prosecutor, where there are concerns that an accused person might be the victim of trafficking. These duties include instructing further enquiries into the possibility that the person has been trafficked, reviewing the case in light of any fresh information or evidence and where the evidence obtained supports the claim that the accused person has been trafficked and committed the offence(s) while they were so coerced, the prosecutor should give consideration to discontinuing the prosecution.

It is important to remember that identifying genuine victims of trafficking is a complex task which must be carried out with diligence and care to ensure that those making false claims to have been the victim of human trafficking in an attempt to avoid prosecution are also identified. Operational experience shows that this can be more complicated than it might first appear. I am sure the Committee will appreciate that our experience is that not every allegation that an accused was compelled to commit an offence because of his or her trafficked status is genuine. It is not unknown for an accused person to claim to have been a victim of human trafficking, only for that allegation to be extensively investigated and found to be unsubstantiated. It is in the public interest to ensure that these cases are identified and that those prosecutions continue. Therefore, it is not only appropriate, but





necessary, for law enforcement to establish whether or not the individual is a genuine victim of human trafficking before a decision is taken about the appropriateness or otherwise of prosecution.

Once that fact has been investigated and established COPFS guidance is clear. There is a presumption against the prosecution of a credible trafficked victim for crimes that arise as a consequence of the accused being a credible trafficked victim. However, in certain circumstances, it will be in the public interest to rebut that presumption. All cases in which it is considered that the presumption should be rebutted will be referred to the senior Advocate Depute who is the national lead on human trafficking to ensure that such rebuttal is appropriate in all the circumstances.

The authors of the written evidence also draw attention to the Crown Prosecution Service's (CPS) guidance which states that: *"even where the circumstances do not meet the requirements for the defence of duress, prosecutors must consider whether the public interest is best served in continuing the prosecution in respect of the criminal offence"*.

This is but a short extract from a CPS document which provides guidance to prosecutors in England and Wales on the prosecution of defendants charged with offences who might be trafficked victims. When read as a whole, I am satisfied that the guidance for prosecutors in England and Wales is very similar to our own guidance. COPFS guidance reflects the same public interest test as the CPS and is fully compliant with the requirements under the Directive.

I hope that this information assures the Committee of the commitment of COPFS and the law officers to ensure that prosecutors in Scotland are aware of their duty to investigate information that a potential accused is a victim of human trafficking and that decisions in such cases to continue or discontinue cases are properly taken in the public interest.

If I can be of any further assistance please do not hesitate to contact me.

*Best wishes,
Frank*

FRANK MULHOLLAND



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