



The Committee Clerk
Room 242
Parliament Buildings
Ballymiscaw
Stormont
BT4 3XX

1 November 2013

Dear Ms Darrah

I refer to your letter to the Director, dated 3 October 2013, welcoming views/comments on the contents of the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill. The Director has asked me to respond on his behalf.

In responding it is recognised that legislative and sentencing policy is a matter for Ministers to determine and the implementation of sentencing policy in individual cases is for the Judiciary and therefore in considering the proposed Bill I am mindful that the proper role of the Public Prosecution Service (PPS) is to provide views from a prosecutorial perspective.

Clause 6

Clause 6 amends the Sexual Offences (Northern Ireland) Order 2008 by substituting Article 64A to create an offence of 'Paying for the sexual services of a person'.

The clause as currently drafted refers to ‘sexual services’ however there is no definition of sexual services contained within the Bill. If one looks to the Sexual Offences (Northern Ireland) Order 2008 ‘sexual’ is defined as;

‘penetration, touching or any other activity is sexual if a reasonable person would consider that—

(a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or

(b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both), it is sexual.

If the intention is that ‘sexual services’ would be defined with reference to the aforementioned definition contained in the 2008 Order then this could include acts such as, for example, paying for a lap dance, chat line or webcam.

It is opined that what constitutes ‘sexual services’ requires clarification.

Further, the fact that the proposed offence refers to sexual services of ‘a person’, whereas the existing offence at Article 64A refers to sexual services of ‘a prostitute’, widens the scope of the offence further and would therefore require clarification as to interpretation.

Clause 7

Clause 7(1)(a) requires ‘the Department’ to take necessary measures to ensure that services responsible for investigating or prosecuting a human trafficking offence or slavery offence are trained accordingly.

The clause does not define which Department is responsible, ie, is it the Department of Justice or the Department of Health, both of whom have responsibility for supporting victims of human trafficking. Nevertheless the clause places a responsibility on a Department to ensure that Public Prosecutors are trained accordingly which will require the Department to provide the PPS with legal training and resources.

Clauses 7(2) and 7(3) provide that “the investigation or prosecution of a human trafficking offence shall not be dependant on reporting or accusation by a victim wherever the offence takes place” and “any criminal proceedings may continue even if the victim has withdrawn his or her statement”.

The PPS will apply the Test for Prosecution in all cases referred to it by police regardless of whether the victim reports the offence, makes a statement or withdraws a statement.

The PPS Policy for Prosecuting Cases of Human Trafficking (the Policy), which was issued for public consultation this year, clarifies that the withdrawal of a complaint “does not necessarily mean that the case will be stopped. As a general rule the PPS will prosecute all cases where there is sufficient evidence and prosecution is required in the public interest”. The Policy also details the steps that will be taken by the PPS in such circumstances.

Clause 8

Clause 8 provides for the non prosecution of victims of human trafficking who may have committed a criminal offence as a direct consequence of the trafficking in human beings. The Public Prosecution Service cannot provide blanket immunity from prosecution. The statutory obligations placed on the Director of Public Prosecutions by the Justice (Northern Ireland) Act 2002 require Public Prosecutors to review each case received from investigators in accordance with the Code for Prosecutors to determine whether criminal proceedings should be instituted or continued. Every case must be considered on its own merits and having regard to the seriousness of the offence committed. However should evidence or information be available to the prosecutor to support the fact that the person has been trafficked and has committed the offence whilst in a coerced situation or as the direct consequence of the other factors contained in the clause, this will be considered a strong public interest factor mitigating against prosecution.

The PPS Policy for Prosecuting Cases of Human Trafficking, which was officially launched on 15 October 2013, includes a section (7) outlining this approach which will be taken in such cases.

In order to enable the prosecutor to consider such factors they must be provided with the information from police or other sources who suspect that the person may be a victim of trafficking. Further this is only relevant where the criminality is as a direct consequence of the trafficking situation. There must also be consideration of the extent to which the victim was compelled to undertake the unlawful activity.

Prosecutors will take into consideration all relevant information provided by police and other agencies, including any decision arising from the National Referral Mechanism when deciding where the public interest lies in relation to prosecution.

The Policy is compliant with Article 26 of the Council of Europe Convention on Action Against Trafficking in Human Beings 2005 and also includes reference to and complies with the Court of Appeal cases of R v O [2008] EWCA Crim 2835 and R v LM [2010] EWCA 2327. These cases highlight the need for prosecutors and defence practitioners to take all reasonable steps to identify victims of trafficking and to be pro-active in causing enquiries to be made and provide that prosecutors must consider the public interest in prosecution when the defendant is a trafficked victim and the crime has been committed when he or she was in some manner compelled to commit.

The type of offence committed is also a relevant consideration in determining whether duress can be a defence. Duress is not a defence to murder or attempted murder: R v Howe [1987] A.C. 417, HL. This also applies to a child of the age of criminal responsibility no matter how susceptible he might be to the duress: R v Wilson [2007] 2 Cr.App.R. 31, CA.

Further there should be recognition that the commission of an offence may have resulted in other victims of the offence who have the right to due process.

I hope this response is of assistance. Should you have any queries please do not hesitate to contact me.

Yours sincerely

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