



Northern Ireland  
Assembly

Committee for Justice

# OFFICIAL REPORT (Hansard)

Human Trafficking and Exploitation (Further  
Provisions and Support for Victims) Bill:  
Public Prosecution Service

28 November 2013

# NORTHERN IRELAND ASSEMBLY

## Committee for Justice

### Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill: Public Prosecution Service

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**Members present for all or part of the proceedings:**

Mr Paul Givan (Chairperson)  
Mr Raymond McCartney (Deputy Chairperson)  
Mr Sydney Anderson  
Mr Stewart Dickson  
Mr Tom Elliott  
Mr William Humphrey  
Mr Alban Maginness  
Ms Rosaleen McCorley  
Mr Patsy McGlone  
Mr Jim Wells

**Witnesses:**

Ms Mairead Lavery	Public Prosecution Service
Ms Marianne O'Kane	Public Prosecution Service

**The Chairperson:** I welcome Marianne O'Kane, assistant director, and Mairead Lavery, the principal private secretary, from the Public Prosecution Service (PPS). As before, the session will be recorded by Hansard and published in due course. We are grateful to you for taking the time to come to us. I now hand over to Marianne to brief us, and members will then ask some questions.

**Ms Marianne O'Kane (Public Prosecution Service):** Good afternoon, Chairman and members of the Committee. We are pleased to attend today, at your request, to provide you with whatever assistance we can to enable you to debate the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill. I am an assistant director in the Public Prosecution Service, and I currently have responsibility for the policy and information section. I oversaw the development of the PPS policy for prosecuting cases of human trafficking, and I also have experience of taking prosecutorial decisions in human trafficking cases.

Just to make a correction to the agenda, Ms Lavery is, in fact, a senior public prosecutor and the PPS policy lead on human trafficking. She developed the recently published PPS policy, and she represents us on the Organised Crime Task Force human trafficking and immigration subgroup. She has also provided training to partner agencies, voluntary and non-governmental organisations.

We have carefully considered the Bill proposed by Lord Morrow, and we share his aim that all legitimate steps are taken by the criminal justice system and beyond to end trafficking in human beings and to support victims of that heinous crime.

On 3 October 2013, the Committee wrote to the Director of Public Prosecutions inviting views or comments on the Bill. Ms Lavery provided a response on behalf of the director to the Committee Clerk on 1 November 2013. With regard to the response and also the proceedings today, it is important for me to restate that legislative and sentencing policy is a matter for Ministers to determine; the implementation of sentencing policy in individual cases is a matter for the judiciary; and we, as prosecutors, will apply the relevant law in force at the time. We are, however, very willing to assist the Committee by providing views on the Bill from a prosecutorial perspective, taking into consideration the statutory functions of the director and the role of the prosecutor.

With your permission, Chairman, I invite Ms Lavery to summarise the response that we submitted.

**The Chairperson:** Thank you.

**Ms Mairead Lavery (Public Prosecution Service):** As Ms O'Kane said, the Committee wrote to the director on 3 October, welcoming views or comments on the Bill. I provided a response on behalf of the director to the Committee Clerk on 1 November. In the response, I referred mainly to three clauses; namely, 6, 7 and 8. I begin with clause 6, which seeks to amend the Sexual Offences (Northern Ireland) Order 2008 by substituting article 64A to create an offence of:

*"Paying for sexual services of a person".*

That would extend the existing offence to include paying for sexual services where there is no reference to a person being subjected to force or exploitation. The proposed offence refers to "sexual services of a person", whereas the existing offence in article 64A refers to "sexual services of a prostitute". That would widen considerably the scope of the offence and would therefore require clarification around interpretation within the text of the Bill. That is because the clause, as currently drafted, refers to "sexual services"; however, there is no definition of sexual services in the Bill. If one looks at the Sexual Offences (Northern Ireland) Order 2008, one will see that "sexual" is defined thus:

*"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 in the 2008 order, that could include acts such as, for example, paying for a lap dance, chat lines or webcam viewing, which could result in prosecution in cases such as that of a teenager who may have viewed a webcam or used a chat line. There is a question, therefore, about whether that offence will also result in notification on the sex offenders register. It is expected that this type of activity was not intended to be criminalised, but, as the Bill is currently drafted, it would make it so.

Furthermore, the sentencing provisions in clause 6, as drafted, are not understood. For example, it is not clear in respect of which court tier the potential to imprison for a term not exceeding one year applies. It does not refer to prosecution on indictment in the clause. That requires clarification. It is opined that what constitutes sexual services requires clarification in relation to that offence, as does the sentencing provision and the question about whether it is intended that the offence will be added to the list of offences contained in schedule 3 to the Sexual Offences Act 2003 regarding notification.

As you are aware, investigation is a matter for police, not the Public Prosecution Service, although the PPS will provide prosecutorial or pre-charge advice to police when required. I can foresee difficulties in investigating and obtaining the required evidence to prosecute the offence in cases where the person providing the sexual services does so consensually and without being subject to force from a third party. Further, any potential prosecution in cases where both parties are consenting adults could give rise to issues of human rights, particularly the right to private life enshrined in article 8 of the European Convention on Human Rights but also potentially article 10 and article 17.

Clause 7(1)(a) requires the Department to take necessary measures to ensure that services responsible for the investigation or prosecution of human trafficking offences or slavery offences are trained accordingly. The clause does not define which Department has that responsibility. Is it the Department of Justice or the Department of Health, Social Services and Public Safety, both of which

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. It is not clear whether that places a responsibility on the undefined Department to provide actual training or resources to the particular service, such as the PPS, to enable us to deliver training to our staff. Presently, when a case involving potential offences of human trafficking is received in the PPS, it is brought to the attention of an assistant director or regional prosecutor, who will allocate the case to a senior public prosecutor of appropriate experience. Complex cases involving human trafficking are dealt with by specialist prosecutors in the PPS central casework section. Those experienced senior prosecutors have expertise in dealing with complex cases and cases that may involve intelligence or interjurisdictional issues. A programme of training will be provided to all prosecutors in due course.

I will move to clauses 7(2) and 7(3). Clause 7(2) provides:

*"The investigation or prosecution of a human trafficking offence ... shall not be dependent on reporting or accusation by a victim wherever the offence takes place."*

I ask whether this also includes offences committed outside Northern Ireland and that any criminal proceedings may continue even if the victim has withdrawn his or her statement. Regarding clause 7(2), 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 their statement. The test for prosecution, as you are aware, is a two-stage test: the evidential test and the public interest test. Both tests must be passed in order to prosecute. The evidential test must be passed before the public interest test can be considered. In order for the evidential test to be passed, the evidence that can be adduced at court must be sufficient to provide a reasonable prospect of a conviction. If and only if that test is met, the prosecutor will then consider the public interest test, which is about whether prosecution is required in the public interest. The PPS will always strive to maintain a prosecution unless there is either no or insufficient admissible evidence to afford a reasonable prospect of conviction or the public interest does not require prosecution.

The PPS policy for prosecuting cases of human trafficking clarifies that the withdrawal of a complaint does not necessarily mean that a 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 prosecutor in such circumstances. I remind the Committee that the policy was launched officially on 15 October. These considerations regarding instituting or continuing prosecution in the absence of a formal complaint or where a victim withdraws his or her support for prosecution are given a similar approach to other types of cases involving vulnerable victims, such as sexual offences and cases involving domestic violence.

Clause 8 provides for the non-prosecution of victims of human trafficking who may have committed a criminal offence as a direct result of their trafficking. 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 can be instituted or continued. Although the director can grant immunity from prosecution in certain circumstances, that is currently a matter for the director to determine in accordance with the provisions of the Serious Organised Crime and Police Act 2005. 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 that supports the fact that a person has been trafficked and has committed an offence as a result, that will be a strong public interest factor militating against prosecution. The PPS policy outlines the approach to be taken in such cases. To enable the prosecutor to consider such factors, they must be provided with information from police or other sources who suspect that the person may be a victim of trafficking. Further, that is only relevant where the criminality is a direct consequence of the trafficking situation. There must also be consideration of the extent to which a victim was compelled to undertake the unlawful activity.

Prosecutors currently give consideration to all information provided by police and any other agencies, including any decision arising from the national referral mechanism, when deciding where the public interest lies. The policy that has been issued by the PPS is compliant with article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings 2005. It also includes reference to and complies with the Court of Appeal cases of *R v O* and *R v LM*. Those cases highlight the need for prosecutors and defence practitioners to take all reasonable steps to identify victims and to be proactive 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 has been compelled to do so. Further, in the case of *R v LM*, the Court of Appeal

gave guidance on the application of article 26 of the convention. The Court of Appeal stated that article 26 does not say that no trafficked victim should be prosecuted, whatever offence has been committed. It does not say that no trafficked victim should be prosecuted when the offence is in some way connected with or arises out of trafficking, and it does not provide a defence that may be advanced before a jury. What it says is no more or no less than that careful consideration must be given to whether public policy calls for a prosecution and punishment when the defendant is a trafficked victim and the crime has been committed when he or she was in some manner compelled, in the broad sense, to commit it.

Article 26 does not require blanket immunity from prosecution for victims of trafficking. It follows that the application of article 26 is fact-sensitive in every case, which is the essence of the PPS policy for such cases. I can advise that I am aware of at least one case that has been considered by the Public Prosecution Service where the prosecutor and police made further enquiries to establish that a suspect was a potential victim of human trafficking and was being compelled to work in what was essentially a cannabis factory where they tended to plants. The prosecutor in that case applied the PPS policy and took the decision that prosecution was not in the public interest. So, the PPS policy has been applied and implemented in that regard.

The type of offence committed is also a relevant consideration in determining whether duress can be a defence. Duress is not a defence to all offences. It is not a defence to murder or attempted murder. That also applies in the case of children of the age of criminal responsibility, no matter how susceptible he or she may be to duress. There is case law on that. Further, there should be recognition that the commission of an offence may have resulted in other victims, who also have a right to due process and consideration.

That concludes our observations on the Bill as drafted. I hope that it assists from a prosecutorial point of view with the practical issues raised in the Bill.

**The Chairperson:** Mairead and Marianne, thank you very much. I will move to questions from members.

**Mr A Maginness:** Thank you very much. That was very instructive. First, in real terms, you say that, given the law as presently stated, clause 8 would not stand as being acceptable. The Public Prosecution Service has to look individually at the merits of every case. Then, having passed the evidential test that a case could be established against the person, the public interest factor kicks in. It is only then that a final decision could be made either for or against a prosecution. Is that really the summary of the situation?

**Ms Lavery:** Currently, the obligations on the director are to review every case and determination, to look at the evidence in every case and to apply the test for prosecution. That is a requirement under the Justice (Northern Ireland) Act 2002. If the Assembly were to legislate, that could, I suppose, change that. However, as things are, the director cannot give blanket immunity to prosecution in these cases but must look at every case on its individual circumstances and merits and apply the test for prosecution. The policy, as it is currently, is compliant with article 26. I think that article 26 of the convention gets quoted in respect of non-prosecution and non-penalties imposed on victims of human trafficking, but it does not provide, as the Court of Appeal has said, for a blanket no prosecution because someone has been a victim *[Inaudible.]*

**Mr A Maginness:** If we were to pass the clause as it is currently expressed in the Bill, it could well be non-compliant with current law and possibly article 26.

**Ms O'Kane:** With respect, I would not say that it follows that it is non-compliant. It would go further than the current legal position.

**Mr A Maginness:** Sorry, explain that to me. In straightforward terms, what does that mean?

**Ms O'Kane:** As I read it, clause 8 would create a provision that would effectively debar the director from taking a decision to prosecute in a case where the categories set out in the clause were met.

**Mr A Maginness:** Given what your colleague said, is it correct to say that that provision would not be compliant with the law as it stands?

**Ms O'Kane:** The law as it stands sets out the opportunity for the director. As you will probably know, the entitlement to grant immunity is set out in the Serious Organised Crime and Police Act 2005. That gives permission, if you like, to the director to grant immunity. This would effectively fetter that expression.

**Mr A Maginness:** In general terms, could it be regarded as being unlawful if we passed that provision?

**Ms O'Kane:** I am not a constitutional lawyer, so I do not want to comment on that particularly. We simply flag it to the Minister and his advisers as a potential consequence.

**Mr A Maginness:** There is a danger of there.

**Ms O'Kane:** We flag it as an issue for the Minister's attention.

**Mr A Maginness:** You are very circumspect about it.

As you illustrated in your submission, there are two problems with clause 6. One is that "sexual services" is not defined in the Bill. The definition of sexual services in the 2008 order, if we were to borrow that, is much wider and goes over and beyond prostitution. Is that a fair summary of what you are saying?

**Ms Lavery:** Yes, the 2008 order does not define "sexual services"; it defines the term "sexual".

**Mr A Maginness:** Is "sexual services" defined anywhere in statute?

**Ms Lavery:** Not that I am aware of.

**Mr A Maginness:** So, there is a problem of getting into statutory form "sexual services".

**Ms Lavery:** I do not mean this in any disrespectful way, but it is further complicated by the use of "person" as opposed to "prostitute".

**Mr A Maginness:** I was going to come to that. If, instead of "person", "prostitute" were put in, what difference would that make?

**Ms Lavery:** There would still be no definition of "sexual services".

**Mr A Maginness:** Leave the definition of "sexual services" aside for a moment.

**Ms Lavery:** I understand. There is a definition of "prostitute" in legislation, as far as I understand, which may well —

**Mr A Maginness:** If the Bill were to say "prostitute" instead of "person", that would be a clearer definition.

**Ms Lavery:** It could assist, but we would need to look at it again.

**Mr A Maginness:** It could assist. Let us assume that we do that. We still have a remaining problem of how to define "sexual services", is that right?

**Ms Lavery:** The clause would be as it is now except for the removal of "force" or "exploitation". It currently refers to:

*"sexual services from a person ... in exchange for payment".*

The word "person" could be replaced with "prostitute". The issue outlined in my submission would still remain, which concerns obtaining evidence in those types of cases in order to prosecute.

**Mr A Maginness:** I was going to come to the evidence part, but we are still dealing with the drafting of this clause. We have already discussed replacing "person" with "prostitute", and we must then look at the definition of "sexual services" and try to get a more appropriate definition.

**Ms Lavery:** I think that, if "person" is substituted with "prostitute", the issue of what "sexual services" are and the circumstances included will become clear.

**Mr A Maginness:** It will become much clearer because you are contextualising it, are you not?

My other point concerns evidence. This has always been a problem that occurred to me when dealing with this. Even if the draft is perfect in its definitions and so forth, in reality, where people avail themselves of the services of a prostitute, it might be difficult to prove that the sexual services were bought, might it not? The person buying the sexual services is not going to say, "Yes, I paid such-and-such amount for this sexual service". Does that amount to a real problem for you as a prosecutor?

**Ms Lavery:** Police are investigating in those matters. However, I can foresee that, if a prostitute is consenting without force to provide the services, there may be difficulties in obtaining evidence or a statement from the person whom they provided those sexual services to for financial gain.

**Mr A Maginness:** Is that because she is unlikely to say, "I received money in exchange for sex"?

**Ms Lavery:** Potentially. I am not sure that that person could continue in their line of work if it is known that they are providing information.

**Mr A Maginness:** Yes, so there is potentially an evidential problem in prosecuting the offence.

**Ms O'Kane:** I think that the problem comes before the gathering of evidence. There is a problem identifying the offence or finding out that the offence is likely to be occurring in order to trigger a police investigation. Who would the complainant be and how would the police even commence investigation? I think that that is the main barrier, and perhaps part of the reason that previous witnesses to the Committee are describing the number of witnesses that they have supported.

**Mr A Maginness:** I will finish here, Chair, and I am sorry for hogging this. Have you looked at other jurisdictions, such as Sweden, where there is a similar provision?

**Ms O'Kane:** Yes. I have read the research that initiated Lord Morrow's Bill, and I express a neutral view on that. It is one piece of research setting out one perspective. I know that there are competing views and that other academic research has been done.

**Mr A Maginness:** I am sure that the same problem with evidence-gathering arises in Sweden as would here if the provision were to be enacted.

**Ms O'Kane:** Yes, indeed.

**Mr A Maginness:** Have you come across any papers or documentation on how the Swedish police gather the evidence and get successful prosecutions?

**Ms O'Kane:** No, I have not gone so far as to look at the position in Sweden, I am afraid.

**Mr McGlone:** Thank you for being with us here today. We have heard the compelling evidence as to the why, and now we are into the nitty-gritty of the how. To go back to clause 6, you could wind up having reasonable legislation in theory but making a total mess of its interpretation when cases get to the courts. I want to get this clear in my mind: the clause concerns paying for the sexual services of a person, and thank you for clarifying where this could go. It could skew into all sorts of things, with all sorts of activities that are not intended to be made offences becoming offences. In your opinion, as the professionals to whom cases would come, if the offence were paying for the sexual services of a prostitute, would that narrow the definition and make it so legally specific as to mean what it is supposed to based on the intention of the Bill?

**Ms O'Kane:** Yes, in my mind that would make it more legally specific, and anything that makes the law clear assists prosecutors, defence practitioners, the judiciary and, indeed, the public. We are simply saying to the Minister that we take a neutral view on it, but we recommend that there be clarity around the provisions so that we know how to use them and do not face challenges in the courts.

**Mr McGlone:** There is a bit that I am unclear about, which my colleague was seeking to tease out. If the person who is procuring the sexual services is likely to wind up in court, he — it usually is a he — is certainly not going to make a complaint to police about it. If the person who is availing herself of the funding for those sexual services is not likely to make a complaint to police, how are convictions likely to be secured, unless the whole operation is being monitored in a sting by undercover police?

**Ms O'Kane:** I cannot say definitively. Obviously, it is case-specific. It is not an absolute requirement that we have live evidence from a victim or, indeed, an admission from a defendant. I can easily foresee the challenges in proving a case to the criminal standard beyond reasonable doubt. Yes, we might have surveillance, and so on, or there might be other information about the movements of persons, but we ultimately have to prove the case to that very high standard of proof. I think that one can see the difficulty.

**Mr Humphrey:** I wish to deal with clause 8. You will have heard the evidence from the two previous witnesses, who addressed the Committee on the protection of people who are being exploited, and in the worst possible way in many cases. We heard of the case of the Chinese ladies who had no rights, and no identity even. I think that what Lord Morrow is trying to do is ensure that the maximum protection is given to people who are the most vulnerable in our society and who have been brought here under false pretences.

Something strikes me about clause 8. I would like to take a moment to read something from the Crown Prosecution Service (CPS) policy for prosecuting cases of human trafficking, which applies in England and Wales. It seems to me to have stronger wording than that proposed by you. It states:

*"Where there is clear evidence that the suspect has a credible defence of duress, the case should be discontinued on evidential grounds."*

Why did the Public Prosecution Service for Northern Ireland not follow its counterparts in England and Wales in that respect?

**Ms O'Kane:** Will you refer us to the relevant part?

**Mr Humphrey:** It is effectively around clause 8.

**Ms Lavery:** It actually is there, in section 7:

*"Where there is clear evidence that the person has a credible defence of duress, the case should be discontinued on evidential grounds."*

It is in our policy as well.

**Mr Humphrey:** That does not seem to be as strong as it is in England and Wales. Are you saying that yours is exactly the same?

**Ms O'Kane:** Would you mind —

**Mr Humphrey:** I do not have the full document.

**Ms O'Kane:** Will you repeat the CPS section?

**Mr Humphrey:** It states:

*"Where there is clear evidence that the suspect has a credible defence of duress, the case should be discontinued on evidential grounds."*

Why is the PPS line not as strong as that of the Crown Prosecution Service across the water?



**Ms Lavery:** The PPS policy is identical, except that we use "person" rather than "suspect".

**Mr Humphrey:** Right.

**Ms Lavery:** It is the same line:

*"Where there is clear evidence that the person has a credible defence of duress, the case should be discontinued on evidential grounds."*

It is in section 7.

**Mr Humphrey:** Why the difference?

**Ms Lavery:** It was not in the initial consultation document. It was added to the final policy following representations and consideration of the CPS policy.

**Mr Humphrey:** You made that change.

**Ms Lavery:** It is in the final policy that was launched. It was not in the consultation document.

**Ms O'Kane:** By way of reassurance to the Committee, it is no different in substance to the CPS position.

**Mr Humphrey:** I am grateful for that clarification.

**The Chairperson:** Just following up on that, even with the guidance, victims are still being prosecuted. The Anti-Trafficking Monitoring Group report of 2013 states:

*"It remains the case in the UK that trafficked children are prosecuted for crimes they are forced to commit while being exploited and under the control of traffickers, while their traffickers go unpunished."*

Even with the guidance —

**Ms Lavery:** I am aware that there have been cases in England and Wales that have gone to the Court of Appeal. Those cases are quoted in the policy. Persons have been prosecuted, and it was subsequently discovered that they were victims of human trafficking. The cases went to the Court of Appeal, and guidance was issued from those cases. I am not aware of any case in Northern Ireland. I am not aware of it being brought to the attention of the PPS that someone has been prosecuted and said that they are a victim of human trafficking.

**The Chairperson:** Would this not be belt and braces?

**Ms Lavery:** Sorry? To enact —

**The Chairperson:** Clause 8 would be belt and braces. The CPS in England clearly got it wrong, and your guidance is exactly the same.

**Ms Lavery:** I presume that either the police investigating or us considering a case would still have to be provided with the information that the person is a victim of human trafficking and has been compelled. After an offence has been committed, I am not sure who decides that the person is a victim of human trafficking, and at what stage. I understand that there is the national referral mechanism, but I do not know whether police have already had to begin investigations because an offence has been committed and a complaint has been made. I am not sure, practically as well, about the stage at which a determination is made, who makes that determination about whether someone is a victim of human trafficking and who determines whether the offence was a direct consequence of being a victim of human trafficking. There are also practical issues, should the clause be agreed.

**The Chairperson:** It seems pretty perverse that a prosecution is taken that subsequently goes to the Court of Appeal. That victim, who has been traumatised and abused, is then persecuted by the prosecution service, in England in this case.

**Ms Lavery:** It was as a result —

**The Chairperson:** "Regrettable" is not a word that I would use to say that it had to go to the Court of Appeal.

**Ms Lavery:** It was as a result of the cases that went to the Court of Appeal that the CPS also revised its guidance to prosecutors and published its policy.

**Ms O'Kane:** The policy is to assist the public in understanding how we prosecute, but one of the more strategic aims is to ensure consistency among prosecutors. That kind of case ought not to happen in this jurisdiction.

**The Chairperson:** It seems that clause 8 shares the same objective, but it is, as I would term it, a belt-and-braces approach. I think that it is potentially open to some kind of refining, but the principle of it is meritorious.

**Ms Lavery:** Clause 8(a) refers to the criminal act being:

*"a direct consequence of being subjected to—*

*(i) threats, the use of force or other forms of coercion,*

*(ii) abduction,*

*(iii) fraud,*

*(iv) deception",*

and so on. Certain parts of that would have to be looked at, such as the giving or receiving of payments or benefits, under subparagraph (vi). That should perhaps be looked at in more depth to determine what it means and in what circumstances.

**The Chairperson:** OK. That is helpful.

**Ms McCorley:** Go raibh maith agat, a Chathaoirligh.

Thank you for the presentation. To go back to the issue about "person" and the problems with that, why do you think that "prostitute" was changed to "person"? What would have been the purpose in doing that?

**Ms O'Kane:** I am afraid that we were not involved in that part of the process.

**Ms McCorley:** Can you hazard a guess?

**Ms O'Kane:** Mairead, you were more closely involved.

**Ms Lavery:** No. I saw a draft of the Bill earlier when there was a consultation, and it highlighted the issue of the person selling the sexual services potentially being investigated for aiding and abetting or conspiring, but I was not involved in the change of terminology.

**Ms McCorley:** Could the way in which this is framed result in the person selling ending up being accused of aiding and abetting or being involved in a conspiracy?

**Ms Lavery:** In the initial draft, it did not. The Bill as it stands states:

*"For the avoidance of doubt, person B",*

who is the person providing the services,

*"is not guilty of aiding, abetting or counselling the commission of an offence under this article".*

In those circumstances, the person would not be guilty of aiding and abetting or commissioning the offence. However, there are other offences for which that person could still be considered, such as brothel-keeping, if they were working in a brothel, taking money or assisting. It does not mean that they will not be considered for other offences.

**Ms McCorley:** Given that there are problems and perhaps flaws with the clause — the lack of a definition of "sexual services" and the use of "person" — would it be your view that it should be taken out of the Bill and considered separately in more depth and more comprehensively?

**Ms O'Kane:** There are many examples in this jurisdiction of legislation that has different elements, some of them quite disconnected, so there is no bar to having different themes in legislation. We would not express a view on that as long as whatever provisions are commenced are clear and applicable.

**Mr Anderson:** Thank you, Marianne and Mairead, for your presentation. I think that you, Mairead, referred to clause 7(1), which states:

*"It shall be a requirement that the Department shall take the necessary measures to ensure—*

*(a) persons, units or services responsible for investigating or prosecuting a human trafficking offence or a slavery offence are trained accordingly".*

How do you suggest that the Bill set out responsibilities for training prosecutors?

**Ms Lavery:** I am not aware of any other legislation that imposes a legislative duty on training. I am aware that there are lots of action plans and strategies that people, Departments and organisations will sign up to and deliver training to their staff. We have delivered training to our staff on human trafficking, sexual offences, the legislation and special measures. We have also delivered evidential training, as well as awareness training on trafficking. I am just not aware of any legislation that imposes a duty in respect of training. My issue with this is that it is not clear which Department is involved: what exactly does it mean that it will ensure that Public Prosecution Service staff are trained? Is it that it will provide resources for training or advise on what training is required? I am just not sure.

**Mr Anderson:** Do you accept that training is required?

**Ms Lavery:** Absolutely.

**Mr Anderson:** You spoke of senior specialist prosecutors.

**Ms Lavery:** Absolutely. Training is essential and highly relevant for dealing with human trafficking offences and the issues that go with them, such as even identifying cases in which someone may be a trafficked victim when you are considering prosecuting them for an offence.

**Mr Anderson:** If you accept that, does your department have a vision of how that should be done?

**Ms Lavery:** We have now launched the policy, and we have a plan for further training for all prosecutors. We have also spoken to CPS about its training and how it trains its prosecutors.

**Mr Anderson:** Do you think that that will be sufficient to prosecute human trafficking and such like through this legislation? They will be trained to a level.

**Ms O'Kane:** That is the norm in all our business. We have, in the main, specialist prosecutors dealing with these cases, but we also need to have all other prosecutors trained to a level so that they are at least aware of the issues when a case comes to them. So, yes, we entirely accept the training need. To be candid, with or without this provision, the training would be happening.

**Mr Anderson:** It may be happening with or without the provision, but is there an area in which extra training will be required? Will more resource be needed?

**Ms O'Kane:** It is always a resource issue. Mairead is our policy lead —

**Mr Anderson:** She touched on that, yes.

**Ms O'Kane:** — and we have a staff of almost 570 people at any time. Mairead is also the policy lead in other important business areas, so the resource is stretched. Of course, we have the opportunity to call in assistance from third parties, other external providers. It is always an issue, but it is not a bar or an obstacle to ensuring that that training is delivered.

**Ms Lavery:** We try to work within the resources that we have, and we have been able to avail ourselves of training from other providers and to assist in providing training to others. It is essential. I do not have a view on whether it should be in the legislation. However, clarification is required on which Department will be responsible for ensuring that the Public Prosecution Service —

**Mr Anderson:** So either/or. You do not have a view, but you want to tie it down Department-wise.

**Ms Lavery:** Yes, and what exactly does it mean? Will they provide us with training, will they tell us what training to have or will they resource our training?

**Mr Anderson:** Clause 7(2) states:

*"The investigation or prosecution of a human trafficking offence ... shall not be dependent on reporting or accusation by a victim wherever the offence takes place."*

Clause 7(3) states:

*"Any criminal proceedings ... may continue even if the victim has withdrawn his or her statement."*

Is it not helpful to clarify that in statute? As I understand it, guidance may be ignored by the PPS, but something in statute cannot be ignored. Is that the case?

**Ms O'Kane:** Again, respectfully, I would say no. Frankly, with or without this explicit provision in the legislation, that would be our duty in taking a decision on prosecution or continuing a prosecution. It will depend on reporting — sorry, when I think about it, that may not necessarily be the case. However, something will have to initiate a police investigation, but we do not necessarily need the live evidence of a victim. We can proceed even when a victim has withdrawn his or her statement.

**Mr Anderson:** Is that a grey area?

**Ms Lavery:** In those circumstances, we have to look at whether the evidence is sufficient to proceed without the victim should he or she withdraw support for the prosecution. We also have to consider whether it is in the public interest to proceed against a victim's wishes. That has the potential to result in victims giving evidence against their wishes or, even if that were not the case, it might increase the risk to victims. This is similar to cases of domestic violence, and our policy reflects exactly that. In such cases, we often try to prosecute even when victims have made a withdrawal statement. Sometimes, when a case gets to court or progresses down the line, that becomes very difficult because the evidential test is not met. On occasion, we have to take difficult decisions to bring victims to court against their will, because the public interest requires us to prosecute given the background of previous incidents and the seriousness of the offence. The policy sets out what happens when the victim withdraws support for the prosecution, which is similar to when a victim does not make a statement or does not want to engage with the police or the prosecution in the first place.

**Mr Anderson:** So you would still try to take a case through on the evidence of the police or whatever.

**Ms Lavery:** We will look at the evidence and apply the test to determine whether the evidence that is available without the victim is sufficient to provide a reasonable prospect of a conviction. In quite a lot of cases, it may be difficult to proceed with a prosecution without the cooperation of a victim, but we can look at other things as well as a victim's evidence. In fact, when we deliver training to police in domestic violence, for example, we ask them also to look at other avenues as part of their investigation. That is not because we presume that a victim will withdraw support but because we know that it is highly likely. So it is about looking at how to investigate in a different way as well.

**Mr McCartney:** Thank you for the presentation. I want to ask about clause 8. The document supplied to us states:

*"The PPS highlights that it cannot provide blanket immunity from prosecution."*

Are you saying that the provisions of clause 8, as they stand now, amount to blanket immunity?

**Ms O'Kane:** I suppose that it is, perhaps, a conditional immunity. If the circumstances set out in clause 8(a) or 8(b) are met, immunity is mandatory. Clause 8(a) states:

*"no prosecution or imposition of penalties shall occur"*

if those circumstances are met.

**Mr McCartney:** Does that go against your existing code of practice?

**Ms O'Kane:** It does not run counter to any codes of practice, but it is quite a step change from the current legislation. It occurs to me that there are also potential issues — this is where, perhaps a constitutional lawyer might be able to assist — with the role of the director under the Justice (Northern Ireland) Act 2002. If he is barred, effectively, from pursuing prosecutions, that marks quite a change.

**Mr McCartney:** So he would have no role. Who would interpret whether a person falls within the confines of this?

**Ms Lavery:** That is what I mentioned earlier. At which stage would it be decided that a person was a victim of human trafficking and that they committed this offence? Will it be at the investigation stage and, therefore, the police will not submit a file to the Public Prosecution Service, or will such cases still come to the director even though we have no ability to make a prosecutorial decision on them? This needs to be thought about practically as well.

**Mr McCartney:** On immunity, there is provision in the current legislation that, where a victim of human trafficking commits a criminal offence, the Director of Public Prosecutions can rule that there should be no prosecution.

**Ms O'Kane:** Setting aside the legislation, according to our code, we could take a public interest decision. Although the evidence indicates that an offence has been committed and it is sufficient to prosecute, the public interest part of our test for prosecution would indicate that prosecution is not required in the public interest. Without going beyond that, there is a protection and safeguard there.

**Mr McCartney:** Would that be publicly stated or remain private?

**Ms O'Kane:** Not at all, no.

**Ms Lavery:** Our code, and our policy at section 7, explain how we consider these cases.

**Mr McCartney:** So the spirit of clause 8 is already in place.

**Ms O'Kane:** I contend that the safeguards that it aims to achieve already exist.

**Mr McCartney:** Except, perhaps at clause 8(b), "was a child." What is the legal definition of a child? Is it someone under 18?

**Ms Lavery:** Yes, a person under 18.

**Mr McCartney:** If a 17-year-old, irrespective of all the other clauses, is trafficked, is he or she immune in all circumstances from being prosecuted?

**Ms Lavery:** According to clause 8, yes.

**The Chairperson:** Mairead, you mentioned the Court of Appeal ruling, which dealt with CPS guidance and the reasons not to prosecute. That flowed from article 8 of the human trafficking directive, which seems to be what clause 8 is trying to address. I just want to be clear on whether you are saying that you feel that existing practice pretty much addresses that, as Mr McCartney touched on. Is your guidance reflective of that Court of Appeal decision?

**Ms Lavery:** Yes. The Court of Appeal decision is mentioned in the guidance and included in the policy.

**Mr Wells:** I have to say that I get the impression that your view is this, "The answer is no. Now, what is the question?" You seem to be putting up a series of obstacles to what many of us believe is very sensible and sound legislation. What is your relationship with the Minister and his staff on this? Were there any meetings with or briefings by him or his colleagues about your presentation to the Committee?

**Ms O'Kane:** I have had no direct briefings on this topic at all.

**Ms Lavery:** I am on the Organised Crime Task Force subgroup, and there are members of DOJ on that group.

**Mr Wells:** Is Mr Philip Marshall from the PSNI on that group?

**Ms Lavery:** Yes, he is.

**Mr Wells:** We all know his very publicly expressed views on the legislation. Has there been any discussion of the Bill in those meetings?

**Ms Lavery:** In any discussion, we would be asked, from a prosecutorial point of view, whether we foresee any issues. That is what I have addressed to the Committee.

**Mr Wells:** So you are not here as servants of the Department to put up obstacles to the legislation.

**Ms Lavery:** No, we are not part of the Department of Justice.

**Ms O'Kane:** I wish to state very clearly that the views that we have presented to the Committee in our evidence are entirely independent of influence or input from anybody. This is the PPS's position on behalf of the Director of Public Prosecutions.

**Mr Wells:** Even if those views totally contradicted those of the Minister, would you still make them known?

**Ms O'Kane:** We would have to do so, because we are here representing the views of the director and with his authority.

**Mr Wells:** That is good to know. Are Sweden, Norway and Iceland signatories to the European Convention on Human Rights?

**Ms O'Kane:** I have my papers here. It will take me a while to check.

**Mr Wells:** I can tell you that they are.

You stated that some of the provisions could be in contravention of various articles of the convention. Yet other countries that have been signatories for longer than us have had no difficulty whatsoever in transposing such legislation to their statute books while remaining within the terms of the convention. That has not been contested at the European Court of Human Rights.

**Ms Lavery:** I am not aware whether there have been any cases at the European Court of Human Rights that emanated from the law in Sweden. I merely raised the point that there is that potential.

**Mr Wells:** It has not happened, and this legislation is based on the Scandinavian experience.

**Ms O'Kane:** We can only flag and highlight the potential. We take no view on it. We are saying that we think that it is an issue for consideration. Perhaps the Minister and the Committee have considered it and, therefore, the point is redundant. If there is legislation to be passed, we want to make sure that it is effective and will achieve its aim.

**Mr Wells:** Are you saying that you are trying to be helpful to us and make the proposed legislation easier to implement —

**Ms O'Kane:** Absolutely.

**Mr Wells:** — rather than trying to make negative comments about it?

**Ms Lavery:** As we said at the outset, legislation is a matter for you. As prosecutors, we want to raise issues that we foresee arising when we are trying to implement whatever laws or legislation you pass.

**Ms O'Kane:** I am not au fait with the detail of legal practice in those other jurisdictions, but I think that it is fair to say that, in this jurisdiction, one would expect robust challenge from the defence in many cases. We want to ensure that there is in place legislation that equips us properly to meet those challenges and see prosecutions through to conclusion and, indeed, to conviction, where that is the outcome. It is simply stated and, we hope, of assistance to you.

**Mr Wells:** Right. You —

**The Chairperson:** I would like to follow up on that: did you speak to the Attorney General about human rights compliance? Ultimately, it is the Attorney General and Advocate General who decide whether legislation is compliant with human rights legislation.

**Ms O'Kane:** I have not consulted the Attorney General.

**Ms Lavery:** I did not consult the Attorney General when drafting the paper.

**Mr Wells:** I have to read from my notes because this is quite complicated. You raised concerns about the definition of sexual services. I catch your drift on that. The interpretation of the proposed new article 64A of the Sexual Offences (Northern Ireland) Order 2008 would be covered by article 58, which sets out the interpretation of that part of the order. Does that cover your concerns?

**Ms Lavery:** This is about whether using the term "person" or "prostitute" may clarify matters. I think that I mentioned that that would clarify what was meant by "sexual services".

**Mr Wells:** So you are saying that, with a bit of thought, it is possible for us to overcome your initial concerns about these definitions. That would just be a matter of tabling an appropriate amendment at Committee Stage or Consideration Stage, but it does not negate the thrust of the legislation.

**Ms Lavery:** No, and that is why I raised the issue. It is very unclear as it is, so, if the legislation can be clarified —

**Mr Wells:** This is certainly not aimed at lap dancing or chat lines. It is quite clear. All the debate has been about those who are trafficked or used and abused through prostitution.

**Ms O'Kane:** With respect, all of us in this room may understand the aim and object of the legislation, but when one is walking into a court to prosecute such a case or make a decision, that is where we face difficulty.

**Mr Wells:** Finally —

**Mr McCartney:** Your observation might strengthen the legislation.

**Ms Lavery:** We hope that our observations will help.

**Mr Wells:** We hope that that is indeed the case and the motivation.

**Mr Wells:** Finally —

**Ms O'Kane:** Again, I wish to make it very clear that the motivation is exclusively to assist the Committee and that the views expressed are entirely independent.

**Mr Wells:** That is good to hear. It just seems that the various facets of the DPP and the architecture around the Department of Justice all seem to be coming to quite a negative opinion on the Bill, whereas general society, women's groups and faith groups are coming to a totally different view. That is, perhaps, just a coincidence.

**Ms Lavery:** We are not saying anything negative about the legislation or whether it should be passed. We are just highlighting the issues that we see in enforcing whatever law is finally passed.

**Mr Wells:** Finally, have any of your staff looked at the outworkings of the Swedish model? This is fundamental: it is why we will go to Sweden in a few weeks and what the whole debate is about. Several times, representatives of the Department have told us that they do not know what is going on in Sweden or that they have not looked at it. I would have thought that it was self-evident that the Swedish model should have been looked at immediately after the Bill was published.

**Ms O'Kane:** In preparation and out of interest, I looked at the research, but I have not conducted any independent research. I refer back to our role: we will implement whatever legislation the Committee determines to pass, but we do not, I am afraid, have a research function to that extent.

**Mr Wells:** You said just one thing that you might want to correct. You said that it was for the Minister to devise legislation and you to implement it. Technically, it is for the Assembly to devise legislation.

**Ms O'Kane:** I paraphrased, and I stand corrected.

**Mr Wells:** The Assembly is the legislator, not the Minister. The Minister can certainly propose legislation, but it is this Committee and the Assembly that pass and amend it.

**Ms O'Kane:** I accept that correction.

**Mr Wells:** He is a powerful man, but he is not that powerful.

**The Chairperson:** One of the issues raised is that the existing legislation is ineffective. The point made is this: if we are serious about tackling the drivers behind human trafficking and sexual exploitation, we need to criminalise payment. We can refine and define that better to try to take on board those comments. Does the PPS share the view that the legislation could be strengthened to secure convictions or even to bring cases?

**Ms Lavery:** We are aware that, under article 64A, there have not been any prosecutions for paying for the sexual services of a prostitute subject to force, and, in that regard, we appeared before the all-party group on human trafficking. I told the group that, in a number of cases that I had considered, one reason for non-prosecution was the file was received by the Public Prosecution Service after the six-month time limit to prosecute had expired. That, in turn, was because of the nature of the police investigation, which was long and complex. We raised that as an issue with the all-party group and at various other venues. As a result, I am aware that the Minister will, potentially, legislate to extend the time limit from six months to three years. That may assist in prosecuting such cases and in how those cases are prosecuted: for example, if we have already secured a conviction for human trafficking, we may not need to call a victim to give evidence again. We think that some elements of the legislation could be amended to assist with prosecution.

**The Chairperson:** A point that I have made before is that there has not been a prosecution under the new offence of coercion. You are saying that that is not because the PPS has looked at the file and considered that the chances of getting a conviction are remote but because all the files that you received were outside the time limit,

**Ms Lavery:** We have received five cases involving nine suspects for that offence, which came in, I think, in April 2009.



**The Chairperson:** Yes. It came in through the Police and Crime Act 2009.

**Ms Lavery:** Of the nine suspects, two were not prosecuted because there was no evidence that the person was subject to force or coercion. For five suspects, the cases were statute-barred by the time that they came to the PPS. That is when the issue became obvious, and it was raised as soon as it was identified.

**The Chairperson:** I do not think that members have any further questions. The point that you made at the start, Marianne, was that, ultimately, it is for the Assembly to legislate. If we can properly define sexual services and address some of the other issues, I take it that the PPS could prosecute on the basis of the principle behind clause 6. The Assembly might decide that it wants to criminalise an action through creating a new offence of payment for sexual services. If the Assembly decides to enact that, it is compliant with human rights legislation and the Attorney General signs off on it, can the PPS prosecute?

**Ms O'Kane:** Absolutely. If the Assembly determines ultimately that there is to be a new offence in those terms and all the safeguards that we have set out are in place, it is our role and duty to prosecute those cases, subject to the test for prosecution, of course.

**The Chairperson:** I suspect that there will be a bit of toing and froing at Committee Stage.

**Ms O'Kane:** Whatever else might be thought, we are here to assist. If any clauses are redrafted following the evidence taken, we will, of course, be content to make any further observations that we can. So it is not a closed conversation.

**The Chairperson:** That will be very helpful. Thank you both very much.