

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

Background

1. Individuals who have been the victims of human trafficking or exploitation are particularly vulnerable to finding themselves in a situation where they commit criminal acts in the course of or as a consequence of having been trafficked or exploited. To commence or continue with a prosecution against someone who has committed a criminal act as a result of being trafficked or exploited would risk re-traumatising the individual, would in some circumstances be contrary to obligations imposed by European and national law and would not be in the public interest.
2. Section 8 of the Human Trafficking and Exploitation (Scotland) Act 2015 (the Act) places an obligation on the Lord Advocate to make and publish instructions about the prosecution of a person who is, or appears to be, the victim of a human trafficking offence or an offence under section 4 of the Act (covering slavery, servitude and forced or compulsory labour). The section further provides that the instructions 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.
3. These instructions cover the situation where any person is reported to the Crown Office and Procurator Fiscal Service (COPFS) for an allegation that they have committed any criminal offence, and during the investigation of that offence, throughout the prosecution process, or after the conclusion of any proceedings there is credible and reliable information provided from any source suggesting that the accused person committed the offence because they were the victim of human trafficking or exploitation.

4. The list of offences which victims of human trafficking or exploitation may commit is constantly evolving. The most common types of offences which victims commit in the *process* of trafficking or exploitation include immigration offences and possession of false identity documents. The offences which victims commonly commit as a *consequence* of the trafficking or exploitation include the production or being concerned in the sale and supply of controlled drugs, shoplifting, theft by housebreaking, benefit fraud and offences linked to commercial sexual exploitation. Prosecutors should also be alert to the fact that victims of human trafficking or exploitation may themselves commit human trafficking or exploitation offences in relation to other individuals.

5. For the purposes of this guidance the term ‘human trafficking or exploitation’ relates to any actions which would constitute offences committed under sections 1 and 4 of the Human Trafficking and Exploitation (Scotland) Act 2015 irrespective of where they have taken place and any actions which are covered by the terms of Article 2 of the EU Directive on preventing and combating trafficking in human beings and protecting its victims (2011/36/EU) (attached at Annex A) irrespective of where they have taken place.

6. Victims of human trafficking or exploitation will include individuals of any nationality, including those from the United Kingdom, wherever the human trafficking or exploitation has taken place. It should be noted that offences of human trafficking or exploitation can be committed in relation to children, i.e. those aged 17 or under, even where there is no evidence available that the children have been compelled or forced to carry out any specific act.

Lord Advocate’s Instructions

7. If there is sufficient evidence that a child aged 17 or under has committed an offence and there is credible and reliable information to support the fact that the child;

- (a) is a victim of human trafficking or exploitation and
- (b) the offending took place in the course of or as a consequence of being the victim of human trafficking or exploitation,

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

8. If there is sufficient evidence that a person aged 18 or over has committed an offence and there is credible and reliable information to support the fact that the person;

(a) is a 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 victim of human trafficking or exploitation?

9. For both children and adults the Prosecutor must be persuaded that on the balance of probabilities the accused was a victim of human trafficking or exploitation.

10. There is a duty on all public authorities to proactively identify any victim of human trafficking and exploitation. Prosecutors must be alert to the particular circumstances or situations where someone suspected of committing a criminal offence might also be a victim of human trafficking and exploitation. Prosecutors should consider all information provided in a Police Report and instruct further investigation where necessary.

11. The accused may have provided information to the police, a solicitor, a social worker, a representative of a Non-Governmental Organisation (NGO) or any other person who has met with them, suggesting that they are a victim of human trafficking or exploitation and prosecutors must carefully consider the information regardless of its source. It is however important that the veracity of any claim by an accused person is properly tested.

12. Prosecutors must be aware that the accused person will not always identify themselves as a victim and may not provide information relevant to this to those they come into contact with. There are a number of reasons for this, including (but not restricted to); cultural differences, fear of authority, threats made by those involved in the trafficking or exploitation towards the victim or their families and the significant impact of recalling traumatic events. This is particularly true of children. Where the accused has not mentioned or denies being a victim of human trafficking or exploitation proper investigation should still be made of the circumstances surrounding the accused.

13. In considering whether an accused person is a victim of human trafficking or exploitation Prosecutors should examine the factors listed by the United Nations Office on Drugs and Crime (attached at Annex B). A single factor or combination of these factors may be indicative of an accused person being a victim of human trafficking or exploitation. If deemed necessary the Prosecutor should instruct further investigation by the Police to help identify whether these factors exist in any given case. The lists at Annex B are not exhaustive and Prosecutors should be consider all of the circumstances in a case before reaching a conclusion on this point. It also important to note that it does not follow that the absence of these indicators means that a person is not a victim of human trafficking or exploitation.

14. Information should also be sought from the Police Scotland Human Trafficking Unit, Migrant Help, TARA, any other NGO and any other public or private organisation involved with the accused. For both children and adults where a referral is made through the National Referral Mechanism (NRM) the Police should provide (or should be instructed to provide) any information on the outcome of that referral. The absence of a referral to the NRM or a negative finding does not of itself mean that the accused is not a victim of human trafficking or exploitation. In relation to children the Police should always seek further information from the relevant child protection authorities.

Did the child commit the offence in the course of or as a consequence of human trafficking or exploitation?

15. The test for application of the presumption in relation to a child victim of trafficking or exploitation is different to an adult victim. In relation to a child aged 17 or under the presumption will apply if the child is a victim of human trafficking or exploitation and the offence is committed in the course of or as a consequence of human trafficking and exploitation. There is no need to consider whether the child was compelled in any way to commit the offence.

16. The Prosecutor must be satisfied on the balance of probabilities that the offence took place in the course of or as a consequence of human trafficking or exploitation.

17. Offences which take place during the course of the trafficking or exploitation are those which allow the process of human trafficking or exploitation to take place. For example child victims of trafficking or exploitation may commit immigration offences, in particular being in possession of false documents or entering a country illegally, in order for the trafficking or exploitation to take place.

18. Offences which are a consequence of the trafficking or exploitation will often include the offences which victims commit for the benefit of those trafficking or exploiting them and will include, for example, offences relating to commercial sexual exploitation, the production and supply of controlled drugs and theft by shoplifting.

19. There will also be offences committed as a consequence of the trafficking or exploitation which are not for the benefit of those trafficking or exploiting but are the result of the perception of the victim that there are no other alternatives to escape the trafficking or exploitation. These offences might include offences of violence or dishonesty committed in an attempt to escape the situation in which the victim finds themselves.

Was the adult compelled to commit the offence and was the compulsion directly attributable to human trafficking or exploitation?

20. In relation to an adult, the Prosecutor must be satisfied on the balance of probabilities, that the adult was compelled to commit the offence and the compulsion was directly attributable to human trafficking or exploitation.

21. The accused may provide information to the police, their solicitor, a social worker, a representative of an NGO or any other person who has met with them which suggests that they were compelled to commit the offence. 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 notwithstanding the absence of a claim from the accused that they had been so compelled to commit the offence. As such Prosecutors must ensure that the Police investigate the circumstances surrounding the offence and report all relevant information.

22. When considering whether a victim of human trafficking and exploitation has been compelled to commit an offence, it is important to note that the types of

compulsion which a victim of human trafficking or exploitation may experience are not necessarily all linked to the actions of a trafficker or exploiter. In addition to behaviour such as direct threats made by a trafficker or exploiter to the victims themselves or their families or friends, victims of human trafficking may also be compelled by the circumstances in which they find themselves or their own beliefs or culture. A broad approach should be taken when considering whether an adult victim of human trafficking and exploitation has been compelled to commit an offence.

23. The following factors should be considered by the Prosecutor in making an assessment as to whether the adult accused was compelled to commit the offence and whether that compulsion was directly attributable to human trafficking or exploitation;

- Whether the offence was such that it can clearly be linked to human trafficking or exploitation.
- 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 information supporting that violence, threats, abduction or coercion were used towards the accused.
- Whether there is information supporting that the accused was in a position of vulnerability and that those involved in the trafficking or exploitation had abused this position of vulnerability.
- Whether there is information that supports that the accused was in fear of the 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

24. 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.

25. All cases of this nature **must be reported to the National Lead Prosecutor for Human Trafficking and Exploitation** for a final decision to be made.
26. The report to the National Lead Prosecutor should cover the issues raised above and should make an assessment of whether, on the balance of probabilities, the accused is a victim of human trafficking or exploitation. For child victims the report should also outline whether, on the balance of probabilities, the offence took place in the course of or as a consequence of human trafficking or exploitation. For adult victims the report should outline whether, on the balance of probabilities, the accused was compelled to commit the offence in question and that the compulsion was directly attributable to human trafficking and exploitation. The report should conclude with a recommendation as to whether proceedings should be discontinued, giving reasons for this decision.
27. The final decision regarding the proceedings will be taken by the National Lead for Human Trafficking and Exploitation.
28. Where a case has already been commenced and information comes to light which suggests that an accused person may be a victim of human trafficking or exploitation steps should be 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.
29. Where information comes to light after there has been a conviction and the assessment is that the case should be discontinued then the Appeals unit should be contacted and an application should be made to the Court under section 188 of the Criminal Procedure (Scotland) Act 1995 for the conviction to be set aside.

Annex A

Directive 2011/36/EU of the European Parliament and of the Council on Preventing and combatting trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

Article 2

Offences concerning trafficking in human beings;

1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.

3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

4. The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used.

5. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.

6. For the purpose of this Directive, 'child' shall mean any person below 18 years of age.

Annex B

United Nations Office on Drugs and Crime: Indicators of Human Trafficking

General Indicators

People who have been trafficked may:

- Believe that they must work against their will
- Be unable to leave their work environment
- Show signs that their movements are being controlled
- Feel that they cannot leave
- Show fear or anxiety
- Be subjected to violence or threats of violence against themselves or against their family members and loved ones
- Suffer injuries that appear to be the result of an assault
- Suffer injuries or impairments typical of certain jobs or control measures
- Suffer injuries that appear to be the result of the application of control measures
- Be distrustful of the authorities
- Be threatened with being handed over to the authorities
- Be afraid of revealing their immigration status
- Not be in possession of their passports or other travel or identity documents, as those documents are being held by someone else
- Have false identity or travel documents
- Be found in or connected to a type of location likely to be used for exploiting people
- Be unfamiliar with the local language
- Not know their home or work address
- Allow others to speak for them when addressed directly
- Act as if they were instructed by someone else
- Be forced to work under certain conditions
- Be disciplined through punishment
- Be unable to negotiate working conditions
- Receive little or no payment
- Have no access to their earnings
- Work excessively long hours over long periods

- Not have any days off
- Live in poor or substandard accommodations
- Have no access to medical care
- Have limited or no social interaction
- Have limited contact with their families or with people outside of their immediate environment
- Be unable to communicate freely with others
- Be under the perception that they are bonded by debt
- Be in a situation of dependence
- Come from a place known to be a source of human trafficking
- Have had the fees for their transport to the country of destination paid for by facilitators, whom they must payback by working or providing services in the destination
- Have acted on the basis of false promises

Children

Children who have been trafficked may:

- Have no access to their parents or guardians
- Look intimidated and behave in a way that does not correspond with behaviour typical of children their age
- Have no friends of their own age outside of work
- Have no access to education
- Have no time for playing
- Live apart from other children and in substandard accommodation
- Eat apart from other members of the “family”
- Be given only leftovers to eat
- Be engaged in work that is not suitable for children
- Travel unaccompanied by adults
- Travel in groups with persons who are not relatives

The following might also indicate that children have been trafficked:

- The presence of child-sized clothing typically worn for doing manual or sex work
- The presence of toys, beds and children's clothing in inappropriate places such as brothels and factories
- The claim made by an adult that he or she has “found” an unaccompanied child
- The finding of unaccompanied children carrying telephone numbers for calling taxis
- The discovery of cases involving illegal adoption

Domestic Servitude

People who have been trafficked for the purpose of domestic servitude may:

- Live with a family
- Not eat with the rest of the family
- Have no private space
- Sleep in a shared or inappropriate space
- Be reported missing by their employer even though they are still living in their employer's house
- Never or rarely leave the house for social reasons
- Never leave the house without their employer
- Be given only leftovers to eat
- Be subjected to insults, abuse, threats or violence

Sexual Exploitation

People who have been trafficked for the purpose of sexual exploitation may:

- Be of any age, although the age may vary according to the location and the market
- Move from one brothel to the next or work in various locations
- Be escorted whenever they go to and return from work and other outside activities
- Have tattoos or other marks indicating “ownership” by their exploiters
- Work long hours or have few if any days off
- Sleep where they work
- Live or travel in a group, sometimes with other women who do not speak the same language
- Have very few items of clothing
- Have clothes that are mostly the kind typically worn for doing sex work
- Only know how to say sex-related words in the local language or in the language of the client group
- Have no cash of their own
- Be unable to show an identity document

The following might also indicate that children have been trafficked:

- There is evidence that suspected victims have had unprotected and/or violent sex.
- There is evidence that suspected victims cannot refuse unprotected and/or violent sex.
- There is evidence that a person has been bought and sold.
- There is evidence that groups of women are under the control of others.

- Advertisements are placed for brothels or similar places offering the services of women of a particular ethnicity or nationality.
- It is reported that sex workers provide services to a clientele of a particular ethnicity or nationality.
- It is reported by clients that sex workers do not smile.

Labour Exploitation

People who have been trafficked for the purpose of labour exploitation are typically made to work in sectors such as the following: agriculture, construction, entertainment, service industry and manufacturing (in sweatshops).

People who have been trafficked for labour exploitation may:

- Live in groups in the same place where they work and leave those premises infrequently, if at all
- Live in degraded, unsuitable places, such as in agricultural or industrial buildings
- Not be dressed adequately for the work they do: for example, they may lack protective equipment or warm clothing
- Be given only leftovers to eat
- Have no access to their earnings
- Have no labour contract
- Work excessively long hours
- Depend on their employer for a number of services, including work, transportation and accommodation
- Have no choice of accommodation
- Never leave the work premises without their employer
- Be unable to move freely
- Be subject to security measures designed to keep them on the work premises
- Be disciplined through fines
- Be subjected to insults, abuse, threats or violence
- Lack basic training and professional licences

The following might also indicate that people have been trafficked for labour exploitation:

- Notices have been posted in languages other than the local language.
- There are no health and safety notices.
- The employer or manager is unable to show the documents required for employing workers from other countries.
- The employer or manager is unable to show records of wages paid to workers.

- The health and safety equipment is of poor quality or is missing.
- Equipment is designed or has been modified so that it can be operated by children.
- There is evidence that labour laws are being breached.
- There is evidence that workers must pay for tools, food or accommodation or that those costs are being deducted from their wages.

Begging and Petty Crime

People who have been trafficked for the purpose of begging or committing petty crimes may:

- Be children, elderly persons or disabled migrants who tend to beg in public places and on public transport
- Be children carrying and/or selling illicit drugs
- Have physical impairments that appear to be the result of mutilation
- Be children of the same nationality or ethnicity who move in large groups with only a few adults
- Be unaccompanied minors who have been “found” by an adult of the same nationality or ethnicity
- Move in groups while travelling on public transport: for example, they may walk up and down the length of trains
- Participate in the activities of organized criminal gangs
- Be part of large groups of children who have the same adult guardian
- Be punished if they do not collect or steal enough
- Live with members of their gang
- Travel with members of their gang to the country of destination
- Live, as gang members, with adults who are not their parents
- Move daily in large groups and over considerable distances

The following might also indicate that people have been trafficked for begging or for committing petty crimes:

- New forms of gang-related crime appear.
- There is evidence that the group of suspected victims has moved, over a period of time, through a number of countries.
- There is evidence that suspected victims have been involved in begging or in committing petty crimes in another country