Christine Gravame MSP
Convener
Justice Committee
Scottish Parliament
Edinburgh
EH99 1SP

June 2015

Dear Christine,

I refer to the evidence that I gave to the Justice Committee on the 24th March 2015 and my previous letter dated the 28th April 2015.

I noted with interest the terms of the Stage 1 report published by the Committee in relation to the Human Trafficking and Exploitation Bill and also the contributions to the Stage 1 debate at Parliament on the 12th May 2015 and I feel it is appropriate at this stage to reiterate a number of the points that I have made in relation to my Instructions which are required under section 7 of the Bill and any potential statutory defence for victims of human trafficking and exploitation.

As you will know I have already published a draft set of Instructions for consultation and a number of groups have provided comments. Prior to any final set of Instructions being published I will take in to account what has been said during the consultation period and would welcome any further comments from interested parties to ensure that the Instructions are as comprehensive as possible.

There are a number of clear advantages to using Instructions to frame the approach of the Scottish criminal justice system to victims of human trafficking who have been coerced to commit an offence. Instructions will allow anyone to highlight a potential victim of human trafficking, whether that is the victim themselves, the victims’ family or friends, community groups, a group such as TARA or Migrant Watch who have been providing support for the victim, the solicitor representing the victim, the Police Officers who are investigating the cases or the Prosecutors who have the cases reported to them.
Once the case is highlighted there will be no restriction on the type of information which can be used to make the decision regarding proceedings. This information could be in the form of intelligence, opinion evidence, hearsay evidence, evidence from other jurisdictions, or evidence reported by individuals who do not wish to provide a police statement or be part of the criminal justice process.

In addition the Instructions will apply at all stages of the criminal justice process. Police officers will be alert to them whilst they are investigating any criminal offence, Prosecutors will require to provide a report to the National Lead Prosecutor for Human Trafficking irrespective of whether their recommendation is to continue or discontinue proceedings and any decision to proceed will be capable of review by Prosecutors at any stage of the proceedings including during a trial. Even after someone has been convicted and sentenced for an offence Prosecutors will still consider the information provided to them, and if it comes to light that the victim was compelled to commit the offence then steps can be taken to have the conviction quashed. Indeed I can confirm that this step was recently taken in relation to a conviction for shoplifting.

The implementation of Lord Advocate’s Instructions are consistent with a human rights based approach towards victims of human trafficking. They ensure that the onus to raise the issue is never laid squarely on the shoulders of the victim. As you will be aware victims of this type of offending are individuals who may be suspicious of those in authority, may have limited understanding of the legal system, may understand very little if any of what is being explained to them or may not consider themselves to be a victim of human trafficking or exploitation at all.

A statutory defence would not only usually require the victim to raise it, it would also usually require them to raise it in sufficient time so that the Court was properly notified of their intention to rely on it and would require their defence to be supported by evidence which would be admissible under Scots law.

Were the decision made to implement the protection of victims of human trafficking by means of a statutory defence this would, by necessity, restrict the terms of my Instructions. I would be bound to take my lead from the legislation passed. For example if the route taken in England and Wales or Northern Ireland were to be followed there would be a large number of offences where the special defence would simply not apply. If this were the case my Instructions would also have to be limited in their scope, as any decision by a Prosecutor to discontinue a case which Government had stated should not be subject to the protection could rightly be challenged.

Were there to be no restriction on the offences that were covered by a statutory defence then the test in legislation would have to be carefully defined so that juries were able to clearly understand and assess the relationship between the nature of the offence, including offences such as murder and rape, and the compulsion placed on the victim to commit that offence, all within the confines of the evidence presented to them during the trial.
I believe that my Instructions provide the best protection for vulnerable individuals who are forced to commit criminal offences as a result of having been trafficked or exploited. By its very nature this type of offending operates in the shadows and given the circumstances victims find themselves in it is unnecessarily onerous to add further burden to them in order to ensure their rights are protected. This protection is properly offered by Prosecutors following instructions. There is work which will be required to support the Instructions and I will undertake to work with the relevant stakeholders within the criminal justice and third sector communities to raise the profile of human trafficking and exploitation including the mechanisms for identification of victims and I will also review my Instructions on a regular basis and welcome feedback on any specific cases.

Finally, if a statutory defence was introduced in legislation this would result in a two tier system for potential victims of human trafficking as my instructions would only apply post conclusion of criminal proceedings, as the statutory defence would be the choice of Parliament in transposing the Human Trafficking directive in domestic law in relation to the criminal proceedings. My instructions could in the circumstances only apply when the statutory defence was not available.

I hope this information is of assistance to the Committee.

Yours sincerely,

FRANK MULHOLLAND QC