

International Association of Prosecutors Conference 2022, Tbilisi, Georgia

SIGS: Heads of Prosecution Services session: International Cooperation Directly through Prosecution Authorities

4:00pm – 5:30pm, Monday 26 September 2022

Outline of intervention by Jennifer Harrower, Deputy Head of Local Court, Crown Office and Procurator Fiscal Service, Scotland

- We all know the difference it makes when mutual legal assistance work is done by experienced specialists; and when you have contact details for the person you know can help. This makes obtaining assistance from colleagues in another jurisdiction so much effective and efficient. The main point I want to emphasise today is the benefit of early prosecutor to prosecutor dialogue in all types of international cooperation scenarios.

International cooperation in Scotland

- The legal channels for transmitting and receiving requests can feel like a layer of bureaucracy to get through and an impediment to resolving a request. However the channels are there for good reason for example, having a structure is essential when handling large number of incoming requests as the UK does. Having direct contact with the right person can smooth the path of a request; allow you to highlight particularly urgent requests or discuss complex issues;
- In the UK there are different legal jurisdictions and different prosecuting authorities. Additionally for receiving requests and for transmission of some requests there are central authorities. A central authority assesses whether a request can competently be executed and then transmits the request to the executing authority;
- The set up in Scotland facilitates requests being dealt with as directly as possible and by professionals best placed to assess what is required to fulfil the request as quickly as possible;
- The Lord Advocate, ministerial head of the criminal and deaths investigation systems, is the Central Authority, with the COPFS International Cooperation Unit acting on her behalf and acting as executing authority in seeking coercive measures. Significantly that means a request from another country is coming to a central authority that has responsibility for actually dealing with the request;
- Our International Cooperation Unit is staffed with experienced, specialist prosecutors and they liaise with other prosecutors across the service

about incoming and outgoing requests. The advantage in prosecutors dealing with MLA requests is being able to understand what is sought and why it is sought. Legal concepts in criminal justice systems are not always the same in one country to the next, so often the task of the receiving authority is to translate a request into an achievable domestic measure. Additionally, being the executing authority in obtaining court orders means understanding what a domestic court would need before any order is granted, and also where they will not grant an order. It can also be easier for prosecutors to recognise cases that are urgent in terms of evidence being lost or time bars that may be an issue for continued prosecution;

- This is not to say that law enforcement does not have a role in executing requests. They do. The police regularly carry out investigations. However they do so at the direction of the prosecutor. The prosecutor instructs and has oversight of the police work and brings to this their expertise and understanding as prosecutor.

Jurisdiction and post-Brexit issues

- An area where direct communication with prosecutors is essential is in relation to cases with concurrent jurisdiction. Ensuring that a prosecution takes place and enabling justice in the most appropriate place is the key consideration. One of the main difficulties here is that not all countries have the same jurisdiction – particularly extra-territorially. Historically in Scotland jurisdiction was based on purely where the conduct took place. This has changed over time and legislation now provides for the ability to bring prosecutions for a number of offences committed outside Scotland.
- Post-Brexit, having timely and meaningful direct contact with prosecutors in EU member states has become increasingly important, principally because ten countries have declared an absolute nationality bar on extradition to UK jurisdictions with other countries asserting conditional bars. Being able to meet prosecutors in the EU country allows us to discuss how justice can be served particularly in more serious cases, including by transfer of proceedings to the other country.

JITs

- The ultimate form of direct cooperation between prosecutors is the Joint Investigation Team (JIT). The main advantage of having a JIT agreement in place is that this allows for direct sharing of evidence between parties within the JIT.

Key points about direct cooperation

- Whether we are talking about a straightforward request for mutual legal assistance; a JIT; or another case where there is not a JIT but a decision is required on which of two countries will prosecute a crime; experience shows that there is huge benefit in early, detailed dialogue between prosecutors:
 - for understanding of what one country can and can't do by way of cooperation; and where something can't be done, whether there is another way of achieving what the requesting prosecutor is looking for. For example we have found that some colleagues in other jurisdictions believe that we in Scotland do not have the facility to transfer proceedings to authorities in another country because this is not the subject of a treaty with the UK. In fact this is something we can do and we consider this on a case by case basis;
 - to ensure the prosecutor providing assistance obtains evidence in such a way that it is most useful to the requesting prosecutor;
 - for understanding of the different legal concepts, evidential requirements and processes in different jurisdictions, including the disjunctions between a common law based system and inquisitorial systems. For example that some countries, such as Scotland, are heavily reliant on oral testimony and witnesses to "speak to" documentary evidence and to identify someone in the courtroom; that in some countries there is judicial involvement in the process for citing witnesses to give evidence. Understanding these sorts of issues at an early stage can make providing assistance more straightforward and improve the quality of the evidence a prosecutor obtains to support their case

Limitations

Issues include:

- UK policy of not assisting in cases where the death penalty is to be sought – but this is routinely dealt with by way of undertakings from the requesting prosecutor. Similarly in order to uphold ECHR rights there are limitations on assistance that can be provided in cases where corporal punishment is involved and these are considered on a case by case basis.
- Prescription – this is an issue post-Brexit particularly in historical sexual offence cases. Most European countries have a bar on prosecuting offences after a certain period of time.
- Non-age