



# The Attorney General Falkland Islands

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# The Attorney General's Guidance on the Prosecution of Short-Term Visitors

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# 1. Introduction

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1. Due to vibrant fishing, tourism, scientific research and business sectors the Falkland Islands has large numbers of visitors. Visitors may be present within the jurisdiction for as little as a few hours or a few days. Where a short-term visitor becomes the subject of a police investigation or prosecution specific issues can arise as a result of the shortness of their intended stay.
2. This can give rise to particular public interest considerations when deciding whether to prosecute. For example there are sometimes outside pressures which are brought to bear on prosecutors because of the circumstances of the incident, such as considerations concerning detention when detention is disproportionate to the alleged offending, as well as factors relating the personal circumstances of the visitor. Sometimes these factors are relevant and sometimes they are not.
3. The nationality of a suspect is **not** a factor in a prosecution decision. Anyone in the Falkland Islands is subject to the law, both for the protection it affords and the rules it sets down. When a visitor enters the jurisdiction they become subject to the law in the same way that a long term resident is subject to the law. Where a visitor contravenes the law then their actions will be subject to investigation and where appropriate to prosecution, just as a long term resident may be held to account in the same way. Conversely the protections and freedoms afforded to long term residents are also afforded to visitors and they will be treated just as fairly as any other person.
4. Some of the unique circumstances that apply to short-term visitors means that on occasion decisions may be reached that are different to decisions that would be reached if the person was staying in the Falkland Islands for a longer period of time or was a permanent resident.
5. It is important to state that visitors are not afforded preferential treatment and it is not the case that visitors are looked on more favourably than longer term resident. The fact that a person is in the jurisdiction for a short period of time is a factor that will be taken into account when making decisions about that person. This is no different than other specific factors being taken into account in respect of longer term residents that do not apply to visitors. Each case has separate considerations and all relevant considerations will be considered when reaching decisions.
6. This Guidance explains why different public interest considerations may apply to short-term visitors because of their temporary status and not because of their nationality.

## 2. Detecting Crime

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7. The Royal Falkland Islands Police, the Customs and Immigration Department and the Department of Natural Resources have powers to investigate criminal offences. It is the aim of those Departments to always act swiftly to respond to any reported criminal offence.
8. The reporting of a criminal offence the authorities can take place in several ways. The most common methods of reporting are:
  - (a) Reporting by a member of the public who is the direct victim of a crime that has been committed;
  - (b) Reporting by a member of the public who either witnesses a crime being committed or who has information about a crime that has been committed;
  - (c) Reporting through the receipt of information or data which reveals that a crime may have been committed.
9. Swift and timely reporting of crime is crucial to its detection. If a member of the public witnesses any criminal offence being committed, they should report it immediately. It must be appreciated that many visitors are only in the Falkland Islands for a short-time and a visitor who commits a crime may do so in the hope that they will have left the Falkland Islands by the time their offence has been discovered. Once a person has left the jurisdiction it becomes much more difficult to detect crime and to bring prosecutions.
10. Swift and timely reporting of crime directly to an investigating authority is therefore crucial if that authority is to have sufficient time in which to act.

## 3. Extradition

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11. Once a person suspected of committing a crime has left the Falkland Islands they cease to be subject to the laws of the jurisdiction. In order to bring offenders to justice countries across the world have entered into agreements whereby people can be returned to a jurisdiction they have left if they are wanted for a criminal offence. This process is known as extradition and is the legal means by which a person who commits an offence in one country, and then leaves that country, can be brought back to the country where the crime was committed to face justice.
12. Securing the return of suspected offenders is a very real issue for all countries and circumstances are such that it is often impossible to secure the return of an offender by extraditing them from their own country.
13. Difficulties with extradition arise for a number of reasons such as:
  - (a) Extradition is only available for more serious offences. Those who commit certain less serious offences cannot be forced to return to the Falkland Islands.
  - (b) The lack of extradition agreements with other countries. The Falkland Islands is party to a number of such agreements but there are certain countries that have chosen not to enter into such agreements or, if they have done so, do not recognise their validity.
14. This means that there are occasions where a crime is committed by a visitor but no action can be taken against them as the offence is only detected after they have left the Falkland Islands.
15. This is also a difficulty where a visitor is suspected of having committed a crime but a lack of evidence means that a case cannot be brought prior to the visitor leaving the Falkland Islands.

## 4. Investigatory Discretion

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16. Prosecutors and the public should understand that investigators are the people on the ground when dealing with an incident. Those investigators, quite properly, have discretion as to how they deal with that incident.
17. Prosecutors must always try to support investigators in the exercise of that discretion. By the time prosecutors receive files it is likely that some time will have passed from the incident. It is easy to judge an investigator's actions with the benefit of hindsight and some matters are best dealt with by a practical and discretionary approach on the part of the investigator.
18. This is true of all criminal matters and rather than seek to prosecute people the moment prosecution becomes an available option, investigators have discretion to deal with matters by way of advice or warnings. The exercise of this discretion will be based on the circumstances and seriousness of the alleged offending.

## 5. Code for Prosecutors

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19. The guidance contained in this document should be read in accordance with the Attorney General's Code for Prosecutors. The Code for Prosecutors sets out in detail how prosecutors reach decisions as to whether to charge people with criminal offences.
20. In brief, that Code for Prosecutors requires, in most circumstances, that prosecutors apply a two stage test when considering whether to prosecute a person for an alleged criminal offence. The two stages are:
  1. **Evidential Stage** Is there sufficient evidence to provide a realistic prospect of conviction?
  2. **Public Interest Stage** If there is sufficient evidence, is it in the public interest to prosecute?
21. Only if there is sufficient evidence to prosecute can prosecutors go on to consider the public interest stage. If there is not sufficient evidence to prosecute then that is the end of the matter.
22. The evidential stage and the public interest stage are always applied to every case when considering whether to charge irrespective of whether the suspect is a resident in the Falkland Islands or a visitor to the Falkland Islands.

### The Evidential Stage

23. The status of the person concerned makes no difference to the question of whether there is sufficient evidence to prosecute. There will never be a situation where a visitor is treated differently from a resident in this respect.
24. In order for the evidential stage to be satisfied investigators must gather evidence swiftly and comprehensively in order to present the best possible case to a prosecutor.
25. Prosecutors must be confident that a thorough investigation has been conducted or case files will be returned to investigators for further action to be taken before a charging decision is made.
26. Evidence gathering in respect of offences committed by short-term visitors must be conducted in the same thorough manner as an investigation into an offence committed by a non-visitor.

## Public Interest Stage

27. The public interest stage is only considered if there is sufficient evidence to prosecute. If prosecutors are satisfied that the evidence is sufficient they must then go on to consider the public interest. "Public interest" does not refer to decisions that are publically popular. Indeed in some cases the public interest may be markedly different to what is apparently a popular public cause.
28. The public interest is assessed by balancing all of the factors within a case. Decisions in respect of the public interest are often difficult and this is particularly the case in respect of visitors of certain nationalities. When considering the public interest, prosecutors must take an impartial and fair view when making any decision in this respect. The nationality of a suspect is not a relevant public interest consideration. Prosecutors will not be swayed by such irrelevant considerations or public or political pressure but will take proper account of all matters of public interest and importance.
29. It is a fundamental principle that prosecutors must always consider each and every case independently and separately. There can never be a blanket approach to the question of public interest. Each set of circumstances is unique and prosecutors must use their experience, knowledge and expertise and apply it to the specific facts of a case. This means that prosecutors must never decide that they will apply a standard approach to a particular type of offence. Each case is assessed individually.
30. A natural consequence of this is that similar types of offences may result in different offenders being dealt with in a different way. For example, one offender who commits an offence may be prosecuted yet another person who is with him and commits the same offence may not be prosecuted, given that different public interest considerations apply to the second offender.
31. Depending upon the many different circumstances of any offence and the offender concerned, if the offender is a short-term visitor this may be a relevant consideration when assessing the public interest.
32. In this respect there are a number of public interest factors prosecutors should have in mind when considering whether to prosecute a short-term visitor to the Falkland Islands. Not all factors listed in the Code for Prosecutors are included below but prosecutors should remember that all relevant factors in the Code for Prosecutors must be considered.



33. The following headings raise specific issues in respect of crimes committed by short-term visitors.

**(a) The seriousness of the offence**

34. The more serious the offence a visitor has committed, the more likely it will be that a prosecution for that offence will be required. The more serious the offence, the more likely it is that other public interest factors tending against prosecution will be outweighed.

**(b) The culpability of the suspect**

35. This is a very important consideration when assessing whether to prosecute. It is more likely that a visitor will be prosecuted for an offence where evidence exists to demonstrate:

- (a) that the offence was premeditated or planned; or
- (b) that the visitor took a leading role in the offence or encouraged others to commit the offence; or
- (c) that the visitor has a history of committing criminal offences; or
- (d) that it is likely that the offence will be repeated or will continue unless a prosecution occurs.
- (e) that there has been attempt to intimidate the public or to deliberately cause public unrest.

36. Prosecutors must note, however, that there are special considerations in respect of short-term visitors to the Falkland Islands.

37. It may be difficult to establish whether a visitor has a history of committing previous offences. While this may not cause significant difficulties if the visitor comes from a country with good relations with the Falkland Islands, such as the United Kingdom, Republic of Ireland, members of the Commonwealth, members of the European Union and other British Overseas Territories, very real practical difficulties arise where the visitor comes from a country which does not have a diplomatic relationship with the Falkland Islands. It will be impossible to obtain reliable information in those circumstances.

38. Prosecutors must never assume that a person has a history of offending and must only act upon reliable and evidentially admissible information.

39. It is important to note that the likelihood of further offending is not limited to the Falkland Islands. The Falkland Islands takes their international responsibilities seriously. Despite being a small country, it strives not only to protect the interests of its own residents and visitors but also of residents in other nations. The Falkland Islands will bring offenders to justice here with a view to preventing the commission of offences in other countries.
40. The Falkland Islands authorities will also share information with investigators abroad. It is well established that those who commit certain types of offences are likely to continue to offend. It must never be the stance of prosecutors to limit their assessment of the likelihood of offending to the geographical confines of the Falkland Islands. Where a visitor is considered to pose a risk of re-offending in another country, prosecutors must take this factor into account. Where appropriate, this may be a powerful factor in favour of prosecution particularly where the offence is regarded as serious.
41. It is the policy of the Falkland Islands is to prevent those who have committed serious offences here to return. This is factor prosecutors can take account of when assessing the public interest.

#### **(c) The likely penalty and out of court disposals**

42. Where a visitor is likely to only receive a nominal penalty for an offence, this will be a public interest factor tending against prosecution. The courts of the Falkland Islands apply recognised sentencing guidelines. Prosecutors should not attempt to precisely foresee the penalty that a court might impose in any given case. Prosecutors should consider the likely sentencing range for an offence and decide whether the court is likely to impose a significant sentence within it. It is for the court alone to sentence offenders. Prosecutors must not assume that a court may take some exceptional course due to the fact that the offender is a visitor.
43. Also, prosecutors should be alive to the use of proportionate other means of disposal. The circumstances of a case may indicate that it is appropriate to either issue a verbal warning to a visitor or administer a citeable caution. Such disposals can act as a formal record that an offence was committed and may have implications for the visitor should they attempt to return to the Falkland Islands in the future. However, the use of out of court disposals must never be used for reasons of convenience. The use of out of court disposals must be proportionate and proper in the circumstances.

#### **(d) Respect for justice and the rule of law**

44. It is important for prosecutors to bear in mind that decisions they make will have an impact on the view taken by other countries of how it regards respect for the Rule of Law.
45. It is important that it is seen internationally that the Falkland Islands expects its visitors to respect the law and that the Falkland Islands treats visitors in accordance with the law.

46. This will often mean that repeated breaches of the criminal law in a similar manner will demand prosecution. Even where those repeated offences are minor in nature the public interest may demand prosecution.

**(e) Impact of offending on the victim or the community**

47. Prosecutors should ensure that they have sufficient evidence to properly assess the effect of any crime which appears to offend against these principles. It is important to obtain either Victim Impact Statements or Community Impact Statements to fully understand the effect of such a crime.

**(f) Protection of the national interest**

48. The Falkland Islands economy is dependent upon natural resource industries such as:

- (a) Agriculture.
- (b) Commercial fishing.
- (c) Future hydrocarbon production.
- (d) Tourism.

49. Any offence which is calculated to interfere on any significant scale with such industry should be regarded as serious. Furthermore, it should always be noted that those who interfere with, or take advantage of in some unauthorised fashion, the industries of the Falkland Islands are likely to be motivated by financial gain. Such motive will always make it more likely that an offender will be prosecuted. Prosecution can act as a significant deterrent to those who may be minded to illegally exploit the natural resources of the Falkland Islands and this should always be considered where such acts occur.

**(g) Proportionality of prosecution**

50. Although prosecutors should not decide the public interest on the basis of this factor alone, regard should be had to the cost of criminal proceedings to the Falkland Islands, especially where it could be regarded as excessive when weighed against any likely penalty.
51. The Falkland Islands has limited financial resources and it faces many challenges and demands upon the public purse. It is essential that regard is also given to the public interest factors identified above when considering the public interest, the cost of criminal proceedings is a relevant factor when making an overall assessment of the public interest.

52. An example of a factor to be taken account of in these circumstances may be the expense in securing the attendance of witnesses living in other countries.
53. Where an offence is serious and likely to result in a significant penalty being imposed, this factor will be of much lower importance in the overall public interest decision. However, where a minor offence has been committed, this factor (when coupled with the other public interest considerations) may assume more significance in determining whether action other than prosecution can properly be taken.

#### **(h) Detaining a suspect**

54. Investigations into criminal offences take time and although investigators are committed to completing investigations in the shortest time possible this must be balanced against the need to make investigations fair and comprehensive.
55. This may mean that a short-term visitor has to stay in the Falkland Islands beyond the date on which they expected to leave and may be placed on bail with a condition that their passport is surrendered to prevent them from leaving.
56. Where a short-term visitor is required to stay beyond the date of their expected departure this may come at a financial cost to the person, their employer, their sponsor or the Falkland Islands Government.
57. The ability of a visitor to financially support themselves while an investigation or prosecution is ongoing is not a relevant factor to take into account. If the cost of support falls on a third party, including the Falkland Islands Government, then this also is not a relevant factor to consider.
58. Investigators and prosecutors must always bear in mind any financial burden and personal costs that are born by any person under criminal investigation and seek to conclude investigations as swiftly as possible whilst ensuring that justice is done.
59. Likewise the prosecutor must not authorise a charge simply because a person is shortly due to leave the Falkland Islands.
60. At all times the prosecutors must apply the Code for Prosecutors and if circumstances mean that a person may be able to leave prior to a decision being properly made then that fact should not influence the prosecutor towards attempting to make a decision early where it is not right to do so. If this means that a person is then not able to be returned to the jurisdiction this is an outcome that must be accepted in order to ensure that all people are treated fairly and in accordance with the Rule of Law.

# Document Control

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