



Legal briefing on amended Clause 13, Part 2 of the Policing and Crime Bill 2008-9

Prostitution, Trafficking and Human Rights

Enshrined within the UK's current legislation is men's right to buy women, this is directly contradictory to a society based on gender equality¹. Rights of Women is concerned that the current debate around prostitution fails to recognise the harm caused by the sexual exploitation of vulnerable women, men and children. As Sigma Huda the former UN Special Rapporteur on Trafficking has noted:

“Prostitution as it is actually practiced in the world does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution and/or a person's experience does not involve, at the very least an abuse of power and/or an abuse of vulnerability. Power and vulnerability in this context must be understood to include power disparities based on gender, race, ethnicity and poverty².”

In Part 2 of the **Policing and Crime Bill 2008** the Government proposed a number of changes to the law on prostitution to tackle the growing demand to sexually exploit vulnerable women, men and children. Clause 13 of the Bill originally proposed the insertion of section 53A into the **Sexual Offences Act 2003** creating an offence of 'Paying for sexual services of a prostitute controlled for gain'. The meaning of the phrase **“controlled for gain”** is clear following the Court of Appeal's judgement in **R v Massey [2007]**³ where the Court considered the types of behaviour that may or may not constitute control in an appeal against conviction for controlling the activities of another person relating to that person's prostitution for gain⁴:

“In our judgment, “control” includes but is not limited to one who forces another to carry out the relevant activity. “Control” may be exercised in a variety of ways...It is certainly enough if a defendant instructs or directs the other person to carry out the relevant activity or do it in a particular way. There may be a variety of reasons why the other person

¹ O'Connor M and Healy G (2006), *The Links Between Prostitution and Sex Trafficking: a Briefing Handbook*, Dublin: Coalition Against Trafficking in Women, European Women's Lobby.

² Special Rapporteur on Trafficking from 2004 to 2008 in *Integration of the human rights of women and a gender perspective*, United Nations. E/CN.4/2006/62.

³ EWCA Crim 2664

⁴ Contrary to section 53(1) of the **Sexual Offences Act 2003**

does as instructed. It may be because of physical violence or threats of violence. It may be because of emotional blackmail, for example, being told that “if you really loved me, you would do this for me”. It may be because the defendant has a dominating personality and the woman who acts under his direction is psychologically damaged and fragile. It may be because the defendant is an older person and the other person is emotionally immature. It may be because the defendant holds out the lure of gain, or the hope of a better life. Or there may be other reasons.

Sex workers are often vulnerable young women with disturbed backgrounds, who have never known a stable relationship or respect from others and are therefore prey to pimps. It is all too easy for such a person to fall under the influence of a dominant male, who exploits that vulnerability for financial gain...⁵

Professor David Ormerod has welcomed this judgement’s interpretation of “control” as affording protection to particularly vulnerable people⁶.

The Amended Clause 13

The Home Secretary Jacqui Smith has amended clause 13 replacing “controlled for gain” with “**used force, deception or threats of a kind likely to induce or encourage**” a person to provide sexual services. These changes significantly narrow the range of circumstances covered by the offence, for example, it would **no longer** offer protection to those who are emotionally vulnerable and controlled by an abusive partner or pimp.

The way that the amendments have been drafted will also make the new offence almost impossible to successfully prosecute in the magistrates’ courts⁷. Whilst force, coercion, deception or threats are commonly used by traffickers, proving this is the case at trial is very challenging. Consequently, the trafficking offences in the **Sexual Offences Act 2003** do not require that force, coercion, deception or threats are used, or even that the traffickers gained financially from the trafficking, only that a person was brought into, moved around in, or taken out of the UK for the purposes of sexual exploitation⁸. The proposed amendments are therefore out of line with current, working, legislation on trafficking and the control of prostitution for gain and, in our view, are far too complex for magistrates’ courts to be able to deal with.

Without successful prosecutions the offence will not cause a reduction in the numbers of those who seek to purchase the sexual services of vulnerable women, men and children. The amended clause 13 will therefore not protect

⁵ Paragraph 20-22 of the judgement which was given by Toulson LJ.

⁶ David Ormerod is Professor of Criminal Justice at Queen Mary, University of London as well as being a barrister. His publications include *Blackstone’s Criminal Practice 2008* of which he is general editor with the Rt Hon Lord Justice Hooper. Professor Ormerod’s views on this case were given in *Crim. L. R.* 2008, 9, 719-721.

⁷ The proposed offence is summary only which means that it will ordinarily be tried in the magistrates courts’.

⁸ See sections 57-59 of the **Sexual Offences Act 2003**

vulnerable people nor change behaviour. Consequently Rights of Women supports Fiona MacTaggart, a Labour MP and former Home Office Minister, who is seeking to amend the Home Secretary's amendment, to ensure that 'force' should be interpreted as it is in the **Forced Marriage (Civil Protection) Act 2007** to include coercion by threats or other psychological means⁹.

Failing in our international obligations

The changes will also result in the UK not complying with our obligations under international human rights law to tackle the demand to sexually exploit vulnerable women, men and children.

The exploitation of women through prostitution is a form of violence against women as defined in the UN Declaration on the Elimination of Violence against Women¹⁰. This definition has been adopted by the Government in its development of a national strategy on violence against women. The 1995 UN Fourth Conference on Women (1995) Platform for Action also recognised sexual violence, trafficking and forced prostitution as forms of violence which require positive State action¹¹.

Article 5 of the UN Convention on the Elimination of Discrimination Against Women (CEDAW), requires States, including the UK, to challenge social attitudes that tolerate inequality and discrimination and "...to modify the social and cultural patterns of men and women, with a view to achieving the elimination of prejudices and customary and other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women". Article 6 goes on to require States to take "all appropriate legislative and other measures" to deal with trafficking and the "exploitation of the prostitution of women". General Recommendation No. 19¹² goes further in describing the positive obligations on States to eliminate gender based violence (including sexual violence, forced prostitution and trafficking) and makes clear that States may be responsible for private acts if they fail to act with due diligence to prevent the violation of rights or to

⁹ See section 63A(6) of the **Family Law Act 1996** as amended by the **Forced Marriage (Civil Protection) Act 2008** http://www.opsi.gov.uk/acts/acts2007/ukpga_20070020_en_1.

¹⁰ The UN Declaration on the Elimination of Violence against Women defines violence against women in Article 1 as: "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life". Article 2 of the Declaration further states that violence against women encompasses, but is not limited to: "...Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution..."

¹¹ Under strategic objective D.3, which is focussed on eliminating trafficking in women and assisting victims of violence due to prostitution and trafficking the Beijing Platform for action called on governments, including the UK to: "Take appropriate measures to address the root factors, including external factors, that encourage trafficking in women and girls for prostitution and other forms of commercialized sex, forced marriages and forced labour in order to eliminate trafficking in women, including by strengthening existing legislation with a view to providing better protection of the rights of women and girls and to punishing the perpetrators, through both criminal and civil measures".

¹² General Recommendation No. 19 (11th Session, 1992) on Violence against women.

investigate and punish acts of violence. The recommendation also states that trafficking is a violation on the prohibition on sex based discrimination.

The UN Convention against Transnational Organised Crime and its Protocol (the Palermo Protocol) defines and prohibits trafficking. Article 9 of the Palermo Protocol requires States to “discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking”. The Convention on Action against Trafficking in Human Beings 2005¹³ also requires States to analyse the factors that result in women being trafficked and suppress them, including the demand to sexually exploit women.

The international human rights law outlined here outlines the myriad of positive obligations on the UK Government to tackle prostitution, trafficking and sexual violence. Positive obligations require States to do more than simply exercise due diligence in the investigation of criminal activity. Rather, they require States to **analyse and respond to** the causes of prostitution, trafficking and violence against women and take concrete steps to **reduce the demand to sexually exploit women**. The amended clause 13 will not reduce the demand to sexually exploit vulnerable people and is therefore out of line with our obligations under international human rights law.

This briefing is not legal advice. The information in this briefing is accurate as of 18.05.09.

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- Providing women with free, confidential legal advice by specialist women solicitors and barristers¹⁴.
- Enabling women to understand and benefit from their legal rights through accessible and timely publications and training.
- Campaigning to ensure that women’s voices are heard and law and policy meets all women’s needs.

For further information visit www.rightsofwomen.org.uk or telephone 020 7251 6575.

¹³ For further information see the *Explanatory Memorandum on the Council of Europe Convention on Action against Trafficking in Human Beings* available to download at <http://www.crimereduction.homeoffice.gov.uk/humantrafficking004a.pdf>

¹⁴ For advice on family law, domestic violence and relationship breakdown telephone 020 7251 6577 (lines open Tuesday to Thursday 2-4pm and 7-9pm, Friday 12-2pm). For advice about sexual violence, immigration or asylum law telephone 020 7251 8887 (lines open Monday 11am -1pm and Tuesday 10am -12noon).