



Briefing on Clause 13, Part 2 of the Policing and Crime Bill 2008

In Part 2 of the **Policing and Crime Bill 2008** the Government has 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 proposes the insertion of section 53A into the **Sexual Offences Act 2003** so that it reads:

- “53A Paying for sexual services of a prostitute controlled for gain
- (1) A person (A) commits an offence if—
 - (a) A makes or promises payment for the sexual services of a prostitute (B), and
 - (b) any of B’s activities relating to the provision of those services are intentionally controlled for gain by a third person (C).
 - (2) The following are irrelevant—
 - (a) where in the world the sexual services are to be provided and whether those services are provided,
 - (b) whether A is, or ought to be, aware that any of B’s activities are controlled for gain.
 - (3) An activity is “controlled for gain” by C if it is controlled by C for or in the expectation of gain for C or another person (apart from A or B).
 - (4) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”

Controlled for gain

This offence is therefore a strict liability offence; there is no need to prove the state of the offender’s knowledge in order to secure a conviction, only that he (or she) had made or promised a payment for sexual services from a person (B) who is intentionally controlled for gain by a third person (C). The issue in the offence is, therefore, what amounts to being “controlled for gain”.

Subsection (3) of the proposed offence states that an activity is “‘controlled for gain’ if it is controlled by a third person, C, for or in the expectation of gain for C, or another person (who is not A or B), for example, another individual in an organised crime network (D).

The definition of what constitutes ‘gain’ is set out in section 54 of the **Sexual Offences Act 2003** which reads:

- “54 Sections 52 and 53: interpretation
- (1) In sections 52 and 53, “gain” means—

- (a) any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount; or
- (b) the goodwill of any person which is or appears likely, in time, to bring financial advantage.”

Whether or not a person is controlled for gain will depend on the nature of C's behaviour towards A. In the case of **R v Massey [2007]**¹ the Court of Appeal 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 gain². The evidence at the appellant's trial was that he had organised her methods of work, set up a website for her, arranged bookings with clients and that the complainant had done this because she was intimidated by the appellant, with whom she was in a relationship. The complainant had been 19 when she met the appellant, who was older than her, and had been in care. The appellant's case was that he organised her work for her so that it was safer for her. The trial judge ordered the jury that in order to prove that the appellant had “controlled” the complainant the Crown had to prove that: “he exercised control over her activities, in the sense that she was acting under compulsion exercised over her activities by the defendant. The Crown do not have to prove that on every occasion she acted under compulsion; they must prove that over the whole period the defendant was exercising control over her activities”.

The appellant argued that this definition of control was incorrect and that his conviction was therefore unsafe. The Court of Appeal ruled that the conviction was safe and said the following about the meaning of “control”:

“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 not necessary or appropriate for us to seek to lay down a comprehensive definition of an ordinary English word. 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 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

¹ EWCA Crim 2664

² Contrary to section 53(1) of the **Sexual Offences Act 2003**

person to fall under the influence of a dominant male, who exploits that vulnerability for financial gain. Exploitation of prostitution for financial gain is the broad mischief against which section 53 is aimed, whether or not it involves intimidation of the prostitute or prostitutes concerned. At one stage it was submitted by Mr Gerasimidis that some degree of absence of free will on the part of the prostitute is an essential ingredient of control. But on reflection he withdrew that submission and, in our judgment, he was right to do so. If, for example, a group recruits young women from overseas and puts them to work in organised prostitution in the United Kingdom, we do not see any ground for saying that the prosecution would have to prove absence of free will in order to be able to show that the organisers were controlling the activities of the women for gain.

Although, as we have stressed, we do not seek to substitute alternative words for the word “control” which Parliament has used, our approach to the interpretation of the word in its statutory context is also consistent with its ordinary English usage. The *Concise Oxford Dictionary* defines “in control of” as “directing an activity”. It defines the noun “control” as “power of directing, command”. By contrast, it does not include the words “compel, force or coerce”, although they would doubtless be forms of control”.³

Professor David Ormerod has welcomed this judgement’s interpretation of “control” as affording protection to particularly vulnerable people⁴.

When interpreting the proposed new offence the courts will look at previous, relevant case law like that discussed above. It is clear therefore, that women who work with a maid (for security purposes for example) would not be considered to be “controlled for gain” but that those whose work is controlled by another person for their own benefit would.

Evidential issues

Concern has been raised about the ability to investigate and prosecute this offence. It is clear that investigating sexual violence poses unique challenges. Investigations and prosecutions that are supported by the person involved in prostitution (as was the case of **R v Massey [2007]**⁵ above) should present fewer difficulties than those where the person involved does not support the prosecution. However, this is the case with all sexual offences and is not a problem specific to the proposed new offence. It is important to note that those giving evidence in relation to the proposed new offence would benefit from special measures under section 17 of the **Youth Justice and Criminal**

³ Paragraph 20-22 of the judgement which was given by Toulson LJ.

⁴ 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.

⁵ EWCA Crim 2664

Evidence Act 1999⁶ and would be given anonymity under **Sexual Offences (Amendment) Act 1992**.

The international legislative context – violence against women and international human rights law

The historical failure of States, including the UK, to deal with the human rights implications of prostitution and trafficking has had profound implications on the ability of those States to prosecute and punish perpetrators of these types of criminal activity. Consequently, we welcome current government plans to develop the legislation on prostitution in a way that is more consistent with a human rights based approach.

Any measures proposed to tackle prostitution must be in line with the UK's obligations under the following international instruments:

- UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)
- Universal Declaration of Human Rights (1948)
- UN Slavery Convention (1926)
- Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956)
- European Convention of Human Rights (1950) (the ECHR)
- The International Convention on Civil and Political Rights (1966)
- UN Working Group on Contemporary Forms of Slavery (est. 1975)
- UN Declaration on the Elimination of Violence against Women (1994)
- UN Forth Conference on Women (1995) Platform for Action

⁶ Special measures are practical steps that are taken to make the process of giving evidence at trial less intimidating for vulnerable and intimidated witnesses; they are available under section 19 of the **Youth Justice and Criminal Evidence Act 1999** (YJCEA 1999). Special measures that may be available in court include:

- **Screens** which can be placed either around the defendant or the complainant so that the defendant cannot see the complainant.
- A **live link** enables the complainant to give evidence by a live televised link from another part of the court building (or a different building).
- Exclusion from the court of the public and press (except for one named person to represent the press) will be considered in all cases which involve sexual violence or intimidation.
- **Video recorded evidence** enables a pre-recorded interview with the complainant to be played to the court as examination-in-chief.
- Giving evidence through an **intermediary** who is appointed by the court to assist a witness. This is only available to witnesses who are entitled to special measures because of their age or a disability.
- **Aids to communication**, such as an interpreter or a communication aid (for example, a symbol book or alphabet board) may be used to enable a witness to give evidence. As with the use of an intermediary, these special measures are to assist witnesses with disabilities to communicate their evidence.
- **Removal of wigs and gowns** in the Crown Court where someone who is under 18 years old is giving evidence (in the magistrates court and Youth Court wigs and gowns are not worn).

- UN Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (known as the Palermo Protocol) (1998)
- The Convention on the Elimination of All Forms of Discrimination Against Women (1971) and the Optional Protocol to the Convention (1999) (CEDAW)
- The European Union Council Framework Decision on Combating Trafficking in Human Beings (the Framework Decision).
- Convention on Action against Trafficking in Human Beings (the Trafficking Convention).

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:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) 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;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

The 1995 UN Fourth Conference on Women (1995) Platform for Action went further in recognising sexual violence, trafficking and forced prostitution as forms of violence against women which required positive State action.

“Strategic objective D.3.

Eliminate trafficking in women and assist victims of violence due to prostitution and trafficking.

Actions to be taken

130. By Governments of countries of origin, transit and destination, regional and international organizations, as appropriate:

- a. Consider the ratification and enforcement of international conventions on trafficking in persons and on slavery;
- b. 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;
- c. Step up cooperation and concerted action by all relevant law enforcement authorities and institutions with a view to dismantling national, regional and international networks in trafficking;
 - d. Allocate resources to provide comprehensive programmes designed to heal and rehabilitate into society victims of trafficking, including through job training, legal assistance and confidential health care, and take measures to cooperate with non-governmental organizations to provide for the social, medical and psychological care of the victims of trafficking;
 - e. Develop educational and training programmes and policies and consider enacting legislation aimed at preventing sex tourism and trafficking, giving special emphasis to the protection of young women and children”.

The UK also has clear legal obligations under CEDAW, Article 6 of which requires States to take “all appropriate legislative and other measures” to deal with trafficking and the “exploitation of the prostitution of women”. General Recommendation No. 19⁷ 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 investigate and punish acts of violence. The recommendation also States that trafficking is a violation on the prohibition on sex based discrimination.

In addition to looking at specific measures aimed at dealing with violence against women, it is also important to understand the positive obligations the Government has under the ECHR. Under Article 1 of the ECHR the UK is required to secure the Convention rights and fundamental freedoms of “everyone within their jurisdiction”. A failure to effectively protect a woman from violence may be a breach of:

- Art 2 ECHR (her right to life);
- Art 3 ECHR (her right to be free of inhuman and degrading treatment);
- Art 4 (her right to be free from slavery and servitude);
- Art 12 ECHR (her right to marry and found a family); and
- Art 13 ECHR (her right to an effective remedy).⁸

These obligations are all in addition to those that are imposed by the Council of Europe’s Trafficking Convention⁹.

The above discussion of international human rights law is important because it outlines the myriad of positive obligations on States to tackle prostitution,

⁷ General Recommendation No. 19 (11th Session, 1992) on Violence against women.

⁸ See for example **Kontrova v Slovakia [2007]** Application no 7510/04 31st May 2007.

⁹ 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>

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 violence against women which in this case are the causes of prostitution, trafficking and sexual violence. This includes the demand to sexually exploit women.

Fulfilling positive obligations may require legislative action, such as the proposals new offence, but they also involve non-legal measures, such as the development of safe exit strategies for women who wish to leave prostitution. Both legislative and non-legislative measures are necessary if the Government wishes to fulfil its international obligations in this area as paragraph 130 of the Beijing Platform for Action makes clear.

This briefing is not legal advice. The information in this briefing is accurate as of 13.01.09.

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¹⁰ 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).