

The Criminalisation of the Purchase and Sale of Sex



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Briefing Note for MSPs

In November 2010, Trish Godman MSP put forward a consultation document¹ on a private members bill entitled 'Criminalisation of the Purchase and Sale of Sex (Scotland)'. The proposals put forward options to criminalise either both the seller and the purchaser of sex, or to criminalise only the purchaser, as well as related selling activities.

Limited academic and practitioner research was used in creating the consultation document for the Bill. Much of the 'evidence' used was biased and regarded as being of low academic value and ethically poor. The consultation document took a moral position and was highly-charged with personal opinion. It focused on the seller as victim and the buyer as perpetrator, emphasising men as sexual aggressors and linking sex work with trafficking.

The results of the consultation were published by the Scottish Parliament in March 2011.² They illustrated that two thirds of those who had responded were wholly or partly in favour of criminalisation. Significantly, of the nine academics who responded, eight were not in favour and fundamentally opposed the proposal, with one stating, "*The consultation is based on false premises and biased statements including sexist and paternalistic notions which have no place in a modern legislation*" (Dr Linda Cusick).

The Association of Chief Police Officers in Scotland (ACPOS) stated that they could not support either option tendered, and had significant concerns as to how the proposed offence would apply practically. ACPOS made the following statements in their response:

- "*ACPOS has concerns as to how sufficient evidence of such activity could be secured when balanced against the proportionality and necessity i.e. would it be justifiable and proportionate to carry out an intimate forensic medical examination of the purchaser and / or seller in such a situation in order to prove sexual contact?*"

¹ Godman T. 'Criminalisation of the Purchase and Sale of Sex (Scotland) Bill', Public Consultation, November 2010.

² Godman T., "Criminalisation of the Purchase and Sale of Sex (Scotland) Bill; Summary of Consultation Responses", March 2011.

“there has been some criticism of the law in Sweden in that women are less visible and accordingly more difficult to reach by the support system and that the sex trade in Sweden has gone underground and online, putting sex workers in a greater danger”³

- Law Society of Scotland

• “ACPOS is of the opinion that officers may not be able to gather sufficient evidence to report to the Procurator Fiscal, which in turn would mean there would be too few convictions for the proposed new offence to deter others.”

The Law Society of Scotland published their response³ which raised doubts as to the proposal’s compatibility with Article 8 of the European Convention on Human Rights which states that everyone ‘has the right to respect for his private and family life, his home and his correspondence and that there shall be no interference by a public authority’. They stated:

- “the proposal seeks to criminalise an activity which is not illegal i.e. sexual intercourse between consenting parties, albeit against the background of a financial transaction”
- “the proposal has of course to be set against Article 8 and considered as to whether it can be construed as an encroachment upon one’s personal liberties”

The Law Society of Scotland also raised points about the practicality of policing and enforcement in the following statements:

- Prohibiting the advertising of brothels and prostitution “may well be very difficult to enforce given the use of the internet and that services advertised online may of course be advertised as escort services”
- “From an enforcement point of view this may of course involve procedures such as police surveillance. Against that background, a balance clearly has to be struck between the level of criminality and the cost of enforcement”

The ‘Swedish Model’

Great emphasis in the consultation document was placed upon the reported successes of the model first implemented in Sweden in 1999, which is often referred to as ‘The Swedish Model’. Conversely, no mention – in the interests of a balanced consultation – was made of successful examples of decriminalisation of the sex industry – for example in New Zealand, where changes under the ‘Prostitution Reform Act’ have been based upon a duty to protect, whilst maintaining clear sanctions against the coercion of sex workers.

Under the ‘Swedish Sex Purchase Act’ it is illegal to purchase sex but not to sell sex. Again the Law Society of Scotland noted that: “there has been some criticism of the law in Sweden in that women are less visible and accordingly more difficult to reach by the support system and that the sex trade in Sweden has gone underground and online, putting sex workers in a greater danger.”³

³ The Law Society of Scotland’s Response to the ‘Criminalisation of the Purchase and Sale of Sex (Scotland) Bill’, February 2011

“when reviewing the research and reports available, it becomes clear that the [Swedish] Sex Purchase Act cannot be said to have decreased prostitution, trafficking for sexual purposes, or had a deterrent effect on clients to the extent claimed.”⁴

- Dodillet and Östergren

The Swedish Sex Purchase Act has been hailed as success by the Swedish government and other political actors. One of the stated aims (Proposition 1997) of the legislation was to export it to other countries. The 'Swedish Model' has since been marketed heavily through articles, website, books, movies and significant amounts of lobbying towards the European Union.

However, more recent independent research has begun to expose the chasm between the stated success of the ban and the lack of evidence and data supporting this. Dodillet and Östergren found:

*"when reviewing the research and reports available, it becomes clear that the Sex Purchase Act cannot be said to have decreased prostitution, trafficking for sexual purposes, or had a deterrent effect on clients to the extent claimed."*⁴

Confusing sex work and trafficking

The consultation document also conflated sex work with human trafficking and stated that if the legislation were to proceed, then human trafficking would diminish. As shown above, the evidence for this claim is absent. The persistent confusion between trafficking in persons and sex work leads to laws and interventions that negatively impact sex workers.

SCOT-PEP does not support trafficking in any form.

The *UNAIDS Guidance Note on HIV and Sex Work* clearly states that trafficking in persons for the purposes of sexual exploitation is a gross violation of human rights.⁵ At the same time, the Guidance Note strongly and clearly states that trafficking in persons for any distinct purpose, including commercial sexual exploitation, should never be implicitly or explicitly conflated with sex work.

According to international treaties, trafficking in persons is defined as *"the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation"*.⁶

By definition, sex work means that adult female, male and transgender sex workers who are engaging in commercial sex have consented to do so (that is, are choosing voluntarily to do so), making it distinct from trafficking. Trafficking, on the other hand, involves coercion and deceit, resulting in *loss of agency* and lack of consent on the part of the trafficked person.

⁴ Dodillet S., and Östergren P., 'The Swedish Sex Purchase Act: Claimed Success and Documented Effects'. Presented at the International Workshop: Decriminalizing Prostitution: Experiences and Challenges. The Hague, March 3-4, 2011.

⁵ Joint United Nations Programme on HIV/AIDS. *UNAIDS Guidance Note on HIV and Sex Work*. Geneva, 2009.

⁶ United Nations. 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children', supplementing the 'United Nations Convention against Transnational Organized Crime' (Palermo Protocol), 2000.

After six months of 822 raids by every police force in the country ... the end result was that Pentameter finally convicted of trafficking a grand total of only 15 men and women.

- UK Human Trafficking Centre

The scale and precise nature of 'sex-trafficking' into the UK has been exaggerated by politicians, the media and some campaigning groups. Indeed, the application of recent anti-trafficking initiatives in the UK has been unsuccessful and exposed sex workers to greater danger. Operations 'Pentameter' and 'Pentameter 2' were the UK's biggest ever investigation of sex trafficking and failed to find a single person guilty of trafficking.⁷ After six months of 822 raids by every police force in the country, the data in the report from the 'UK Human Trafficking Centre' revealed that:

- 10 of the 55 police forces found no-one to arrest.
- 122 of the 528 arrests announced by police never happened.
- Among the 406 actual arrests, more than half of those arrested (230) were women, and most were never implicated in trafficking at all.
- Of the 406 arrests, 153 had been released weeks before the police announced the success of the operation.
- Most of the remaining 253 were not accused of trafficking: 73 were charged with immigration breaches; 76 were eventually convicted of non-trafficking offences involving drugs, driving or management of a brothel; others died, absconded or disappeared off police records.
- They found only 96 people to arrest for trafficking, of whom 67 were charged. 47 of those never made it to court. Only 22 people were finally prosecuted for trafficking, including 2 women who had originally been "rescued" as supposed victims. 7 of those were acquitted.
- The end result was that Pentameter finally convicted of trafficking a grand total of only 15 men and women.⁸

A 'Guardian' investigation also revealed that:

*"Internal police documents reveal that 10 of Pentameter's 15 convictions were of men and women who were jailed on the basis that there was no evidence of their coercing the prostitutes they had worked with. There were just 5 men who were convicted of importing women and forcing them to work as prostitutes. These genuinely were traffickers, but none of them was detected by Pentameter."*⁷

In conclusion, the failure of such initiatives, which confuse sex work with trafficking, impact negatively on sex workers and expose them to greater levels of risk and insecurity. Sex workers are best placed to spot a trafficked person - and have no interest in supporting human trafficking - and criminalising sex workers means the people best placed to spot a trafficked person will then be prevented from helping them.

⁷ Davies, N. 'Inquiry fails to find single trafficker who forced anybody into prostitution', The Guardian, October 2009

⁸ United Kingdom Human Trafficking Centre, 'United Kingdom Pentameter 2 statistical assessment of victims recovered and suspects arrested during the operational phase' draft report, March 2009.

Impact of criminalisation

Legislation that criminalises the purchase and sale of sex and targets the sex industry as a whole, results in harmful outcomes for sex workers, including increasing their HIV risk, vulnerability to abuse and exploitation and limiting their access to effective healthcare and support services. This has

been well documented around the world, as recently highlighted at a recent UNFPA/UNAIDS conference:

*"As a result of the criminalization of sex work, the locales where sex work takes place are surrounded by other forms of criminality such as criminal gangs, gambling, large scale corruption and extortion. This negatively impacts the health, safety, and human rights of sex workers."*⁹

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Raiding sex work venues and forcibly “rescuing” or “rehabilitating” sex workers results in increased displacement of sex workers, mobility of sex work venues and migration among sex workers; it also has a direct impact on HIV risk. Forced rescue and rehabilitation practices lower sex workers’ control over where and under what conditions they sell sexual services and to whom, exposing them to greater violence and exploitation. In turn, this leads to loss of solidarity and social cohesion (social capital) among sex workers, including reducing their ability to access health care, legal and social services. Low social capital is known to increase vulnerability to sexually transmitted infections among sex workers.¹⁰

In relation to street-based sex work, increased criminalisation will only serve to drive it further underground, leading to an increase in attacks on women, making them more vulnerable.

SCOT-PEP spent approximately 15 years as a service provider, including working with sex workers working on the streets in Edinburgh. The ‘Prostitution (Public Places) (Scotland) Act 2007’ has already directly led to sex workers taking more risks, engaging with clients more likely to pose a risk or clients who refused to wear condoms, dropping prices, spending less time ‘assessing’ and negotiating a contract with potential clients – due to fear of arrest. The Act also had the effect of making people work in more isolated ways and places, led to an increase in ‘solo’ working and meant that less ‘intelligence’ was being shared between sex workers.

Criminalising clients makes sex workers more apprehensive about seeking help from the police when they have problems with an abusive client.

Conclusion

SCOT-PEP urges MSPs not to support any further attempt to introduce a bill to criminalise the purchase and sale of sex in the Scottish Parliament. As an organisation we would welcome any opportunity to discuss this issue further with individual members, or indeed to be part of any initiative which would lead to a more informed, evidenced-based debate on the sex industry in Scotland.

⁹ Creating an Enabling Legal and Policy Environment for Increased Access to HIV & AIDS Services for Sex Workers’, Thematic Task Team on Creating an Enabling Legal and Policy Environment in preparation for the 1st Asia and the Pacific Regional Consultation on HIV and Sex Work, 12 – 15 October 2010 in Pattaya, Thailand.

¹⁰ Kerrigan D, Telles P, Torres H, Overs C, Castle C. ‘Community development and HIV/STI-related vulnerability among female sex workers in Rio de Janeiro, Brazil’. Health Education Research, 23:1, 137-145, 2008.