

# Criminal Law News



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## **Law Society of England and Wales published a 'Practice Note' on criminal prosecutions of victims of trafficking**

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**February 2016.**

### **Keywords**

Victims, human trafficking, defences, UK Modern Slavery Act 2015, explanatory notes, government guidelines, Law Society of England and Wales, belated actions.

### **Abstract**

The UK has been slack in fulfilling its international obligations regarding human trafficking. The UK Modern Slavery Act 2015 has nothing to say about the demand for paid sex, even though it addresses the demand for other forms of trafficking through its supply chain provisions. The UK has disappointed many in condoning prostitution, one of the longest-standing forms of exploitation, but instead has given much importance to modern-day slavery. An effective way of tackling demand for prostitutes and the attendant exploitation would be to make it an offence to purchase someone for sex. That legislative solution goes right to the root of the problem.<sup>i</sup> Yet perhaps the point is that to curb modern day slavery, is to curb prostitution and pornography, through curbing the supply side. However, the UK has dragged its feet, especially when one considers that Internet Pornography brings in over £4 billion to the UK Gross Domestic Product.

### **Law Society's practice note**

The Law Society of England and Wales recently published a Practice Note titled *Criminal Prosecutions of victims of trafficking*.<sup>ii</sup> This ‘Practice Note’ is years overdue since many lawyers had highlighted the problem for many years now and so cannot be treated as a new or official guideline as it is just a practice note and not legislation or a statutory instrument. There had been issued warning about the way prosecutions of human trafficking in the UK were being carried out, such warning made since 2012 by the Crown Prosecution Service (‘CPS’) and the Criminal Cases Review Commission (‘CCRC’) which had noted the severe failings by defence solicitors in such cases as well as by the CPS and the UK police, creating potential miscarriages of justice. Even as long ago as 2012; there were 946 known human trafficking victims, which number included 234 child victims. Furthermore there have been two government sponsored reports and many law books written and published on this matter, namely, *No Way Out*<sup>iii</sup>; *Criminalisation of Migrant women*<sup>iv</sup>; *Human Trafficking*<sup>v</sup>; *Legal responses to trafficking in women for sexual exploitation in the European Union*<sup>vi</sup>; and *Smuggling and trafficking in human beings*<sup>vii</sup> and others.

### **What does the Law Society’s practice note contain?**

The practice note advises solicitors how to identify that someone being prosecuted is in fact a victim of human trafficking, setting out indicators that may identify a human trafficking victim. It sets out the basics of the relevant international conventions and protocols and its explanation of the UK Modern Slavery Act 2015. It states that it is the solicitor’s duty to enquire and/or investigate claims that a client is a victim of human trafficking. It refers the solicitor to the prosecution guidance issued since 2013 by the Crown Prosecution Service (‘CPS’). This CPS guidance in fact does cover the eventuality of a defendant being a human traffic victim.

## **UK Modern Slavery Act 2015**

The UK government has passed a statute Modern Slavery Act 2015<sup>viii</sup> which in part has addressed the local issue of human trafficking and has issued government guidelines on implementing this law by February 2016, relating it to those corporations with a turnover of over £32 million, but which guidelines impact on all suppliers to the corporation concerned and applies to England and Wales, Scotland and Northern Ireland.<sup>ix</sup>

## **Does Modern Slavery Act 2015 really address human trafficking to and through UK?**

In the Explanatory Notes to the Modern Slavery Act 2015, the UK section 2 offence also applies to all UK nationals who commit trafficking offences overseas<sup>x</sup>. The Explanatory Note 4 states that:

‘Modern slavery is a brutal form of organised crime in which people are treated as commodities and exploited for criminal gain. The true extent of modern slavery in the UK and indeed globally, is unknown...’

Although the UK’s Modern Slavery Act 2015 extends mostly to England and Wales, it contains consequential amendments relating to Northern Ireland and Scotland.<sup>xi</sup>

## **Form over substance in this UK Modern Slavery Act**

It is actually surprising that the European Union has not kicked the UK out of the EU for non-compliance of many of its Directives. Relevant to this article is the Framework Decision 2002/629/JHA, [2002] OJ L 203/1 which largely reflects the United Nations (‘UN’) Trafficking Protocol. Article 3 of the UN Trafficking Protocol states:

‘Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, the exploitation of the prostitution of

others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.’

Paragraph 2 of the EU Council Framework Decision 2002/629/JHA simply replicates the UN Trafficking Protocol, Article 3(b) - on consent.

However the EU Council Framework Decision introduced additional provisions such as the demand for sanctions against trafficking to be effective and proportionate with minimum and maximum penalties. The UK has only now implemented this Directive in 2015, 13 years later.

### **Why such slap-dash tardiness and lack of respect to the EU?**

In 2010, the UK Parliament was presented with a *Human Trafficking (Border Control) Bill*. It was unsuccessful. It had been a Private Member’s Bill presented by Member of Parliament (‘MP’) Mr Peter Bone on 5 July 2010 and is usually known as the First Reading of the Bill. It was a Bill to require border control officers to stop and interview potential victims of trafficking notwithstanding entitlements under European Union law to free movement of persons; and for connected purposes. A Private Member’s Bill is often not printed until closer to the date of its Second Reading and this Bill was on the Order Paper for a Second Reading debate on 13 May 2011. This Bill was never published.

There had been another related Bill which did achieve a Second Reading on 23 October 2015<sup>xii</sup> at 2.55pm, namely, the *Advertising of Prostitution (Prohibition) Bill* (House of Lords, moved by Lord McColl of Dulwich). Lord McColl had for many years tried to introduce an anti-human trafficking statute but to no avail<sup>xiii</sup>. He said:

‘...The evidence I have seen indicates that the majority of individuals in prostitution today are victims of exploitation and violence of one form or another. I set out some of that evidence in my speech then, and I hope the House will indulge me if I repeat some of the arguments again as they are very pertinent to my Bill. Multiple academic studies, including data compiled for the Home Office, demonstrate that the majority of people who sell sex are incredibly vulnerable and subject to real exploitation. For example, research has shown that homelessness, living in care, and debt and substance abuse are all common experiences prior to a person entering prostitution, which is sometimes reflected in the evidence received by our all-party group inquiry. Many of those in prostitution have suffered abuse and violence in the home. Dr Max Waltman of Stockholm University notes that international studies have consistently found that, the majority of prostituted persons—somewhere between 55% and 90% ... were subjected to sexual abuse as children.’

Lord McColl of Dulwich continued and said that:

‘A reduction in the levels of prostitution is essential, and that this would positively impact not only those domestically but also individuals who might be trafficked into England and Wales in the future.’

The proposed anti-advertising of prostitution Bill was recommended in a 2014 resolution of the Council of Europe parliamentary assembly. That resolution, which was passed by an overwhelming majority in 2013, stated clearly that, ‘trafficking in human beings and prostitution are closely linked ... legislation and policies on prostitution are indispensable

anti-trafficking tools'. The Council of Europe resolution called on all Member States to ban the advertising of sexual services. In response Lady Butler Sloss stated that she had not appreciated that advertising for sex workers was still legal in the UK.

The Lord Bishop of Derby quoted some statistics by the Institute of Economic Affairs that online pornography was worth £4 billion a year in the UK.<sup>xiv</sup> He reminded the House of Lords that in the 19th century there was a lot of debate in the House of Lords and the House of Commons about legislation to stop women and children being exploited in factories and said that although it did not fully stop such exploitation it acted as a marker the state should put down to say how we value people and how we wish to protect them.

Then Baroness Butler-Sloss stated that she had absolutely no intention of supporting the abolition of prostitution for a number of practical reasons because it is one of the oldest businesses in the world, and it is likely to go on<sup>xv</sup> regardless of what Parliament might say.

Then Baroness Gale (Labour Party) reminded the House of Lords<sup>xvi</sup> that this Bill will help the UK to fulfill international obligations to address the demand for paid sex in relation to trafficking and prostitution generally and that the UK has international obligations to reduce the demand for human trafficking under Article 18 of the EU directive and Article 6 of the Council of Europe convention on this subject, given that both the UK's international obligations to address demand and the fact that, according to the national referral mechanism, trafficking for sexual exploitation is the most common experience for victims of trafficking in England and Wales.<sup>xvii</sup>

Most importantly she stated that 'it seems rather strange that the Modern Slavery Act has nothing to say about the demand for paid sex, even though it addresses the demand for other forms of trafficking through its supply chain provisions', seeming not grasping the whole point of curbing the economics of trafficking.

This Bill succeeded to its second reading.

Before this date the UK Policing and Crime Act 2009 tackled human trafficking, especially addressing the supply side of many Western brothels, which the author in her annotations of this statute said:

‘The woman and children who are the supply side of many Western brothels and who act in hardcore, bestial and perverse pornography films and other material are trafficked to Western countries, namely, the Netherlands, Western Europe, the United States of America, Greece, Spain, Switzerland, Australia, Germany and Austria. To stop and remember women’s eternal plight is necessary, to remember the eternal and universal plight of women, dealing with the supremacy of men, to exploiting the predatory sexual greed of men through the ages. From the recent stalking and killing of young girls by sexual criminals for instant sexual gratification, is not dissimilar to the millions of instances of violence on women when drunken men have raped wives, daughters, servants and strangers as inhibitions are unleashed, leading the circular devastation of unmarried mothers, unwanted pregnancies, silence, fear and social outcasting of the victim women and offspring. (See Levenstein, L, ‘From innocent children to unwanted migrants and unwed mums: two charges in the public discourse on welfare in the United States: 1960-1961’ *Journal of Women’s History*, 2000, 11 (4), 10-33). Even in modern times of liberal laws and legal equality, women still have the added burden of coordinating families, childcare, household management, as well as making a living outside the domestic environment. The United Nations estimated that 12 million children are trafficked each year. This is not the total figure for all child prostitutes in the world as there are an extra estimated one million children in their own countries who are sexually exploited by tourists who travel to the children’s countries for sex with children,



making the probable number of these abused innocent minors about 2 million. Trafficking is part of serious organised crime and occurs mainly for the purpose of prostitution<sup>xviii</sup>.

### Conclusion

Since the UK has been without laws to stop human trafficking despite being a Member State of the European Union and despite its ratification of many relevant international conventions, it can do no harm to observe whether the Modern Slavery Act 2015 and the Law Society's relevant practice note will show results.

### Endnotes

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<sup>i</sup> Sally Ramage, 'Tackling trafficking of woman and children- part 1', *The Criminal Lawyer*, Issue 166, April 2006.

See also Sally Ramage, 'Tackling trafficking of women and children-part 2', *The Criminal Lawyer*, Issue 167, May 2006.

See also, Sally Ramage, 'Human trafficking in 2008 – blowing away some myths', *The Criminal Lawyer*, Issue 184, July/August 2008.

<sup>ii</sup> See Eduardo Reyes, 'Human trafficking victims failed by defence teams, CCRC alleges', *Law Society Gazette*, 25 October 2012.

<sup>iii</sup> Editor, 'No way out', *Prison Reform Trust*, January 2012.

<sup>iv</sup> Liz Hales and Lorraine Geisthorpe, 'The criminalisation of migrant women', *Cambridge University Press*, August 2012.

<sup>v</sup> Lee, M. (Ed) (2007) *Human trafficking*, UK: Willan Publishing (ISBN 978-1-843-922414).

Human trafficking is one of organised crime's most lucrative markets with the size of its annual trade ranking only behind the illicit drugs and arms markets. This book mainly deals with human trafficking as it affects immigration policies, prostitution, and cheap labour in the

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European Union and in particular, the United Kingdom. See [http://www.criminal-lawyer.org.uk/reviews\\_2007\\_Human\\_Trafficking.pdf](http://www.criminal-lawyer.org.uk/reviews_2007_Human_Trafficking.pdf).

<sup>vi</sup> Askola, H. (2007) *Legal responses to trafficking in women for sexual exploitation in the European Union*, Oxford: Hart Publishing (ISBN 978-1-84113-650-9).

This author argues that sexual services by prostitutes is a commodity and such working as prostitutes in the European Union ('EU') should be lawful under the EU Freedom of Movement but that it is not. See [www.criminal-lawyer.org.uk/reviews\\_2007\\_Legal\\_Responses-to\\_Trafficking\\_for\\_Sexual\\_Exploitation.pdf](http://www.criminal-lawyer.org.uk/reviews_2007_Legal_Responses-to_Trafficking_for_Sexual_Exploitation.pdf).

<sup>vii</sup> Zhang, S.X. (2007) *Smuggling and trafficking in human beings*, Westport, US: Praeger (ISBN 0- 275-989-518). There is a distinct difference between smuggling and trafficking of people. Human smuggling is the act of assisting and facilitating, often for a fee, the unauthorised entry of a foreign national into a country....Trafficking, as defined in the United Nations ('UN') Convention against Transnational Organised Crime, Trafficking Protocol 2000, identifies elements of trafficking as being 'recruitment and facilitated movement of a person within or across national frontiers by means of coercion, threats or deception for the purpose of exploitation'. See [http://www.criminal-lawyer.org.uk/reviews\\_2007\\_Smuggling\\_and\\_Trafficking\\_in\\_Human\\_Beings.pdf](http://www.criminal-lawyer.org.uk/reviews_2007_Smuggling_and_Trafficking_in_Human_Beings.pdf).

<sup>viii</sup> See [http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukga\\_20150030\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukga_20150030_en.pdf).

<sup>ix</sup> See Note 12, Explanatory Notes to UK Modern Slavery Act 2015.

<sup>x</sup> See Note 16, Explanatory Notes to UK Modern Slavery Act 2015.

<sup>xi</sup> See Note 10, Explanatory Notes to UK Modern Slavery Act 2015.

<sup>xii</sup> Hansard, Column 946.

<sup>xiii</sup> See the Report on prostitution published by the All-Party Enquiry Committee titled '*Shifting the Balance*', March 2014.

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<sup>xiv</sup> Hansard Column 951, 23 October 2015. He reminded the House of Lords that in the 19th century there was a lot of debate in the House of Lords and the House of Commons about legislation to stop women and children being exploited in factories and said that although it did not fully stop such exploitation it acted as a marker the state should put down to say how we value people and how we want to protect them.

<sup>xv</sup> Hansard, Column 955, 23 Oct 2015.

<sup>xvi</sup> Hansard, Column 956, 23 October 2015.

<sup>xvii</sup> In the Introduction to the *Annotations of the UK Policing and Crime Act 2009*, Sally Ramage wrote:

‘There has always been and there will always be a criminal element in society made of largely of people who transgress the law wittingly and for their own ends. There have always been pirates who want something for nothing, and with advanced technology, such pirates want whole systems for nothing. There is espionage, double-dealing and trafficking of arms, people, and much else...’ See Editor, (2009) *Current Law Statutes Annotated, Volume Two*, London: Sweet & Maxwell (ISBN 978-0-414-04192-9, at 26-27.

<sup>xviii</sup> *Ibid* - at 26-28.



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