Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from CARE for Scotland

Introduction

CARE is a charity and has over 30,000 registered supporters from all Christian denominations throughout the UK. CARE’s Public Affairs Department acts as a think tank on ethical issues in biology and medicine, as well as in education and social issues. CARE also briefs supporters and Parliamentarians as relevant issues are considered in Westminster, Brussels and the devolved Parliaments and Assemblies.

CARE for Scotland has an office in Glasgow. CARE for Scotland has approximately 3,000 registered supporters drawn from across the main denominations in Scotland. Since 1999 CARE for Scotland has maintained a significant public policy presence with a parliamentary officer liaising with the Scottish Executive/Government and the Scottish Parliament. We have responded to many consultations and frequently given evidence to parliamentary committees.

CARE is supportive of the measures in the Bill. We limit our specific comments to Sections 34 and 35 of the Bill which deal with extreme pornography and people trafficking.

Extreme Pornography

CARE welcomes the proposal in Section 34 of the Bill to criminalise the possession of extreme pornography. We are conscious that this new offence is similar to that introduced by Section 63 of the Criminal Justice and Immigration Act 2008 which applies in England & Wales. Section 34 of the Bill largely replicates the relevant sections of the Criminal Justice and Immigration Act, 2008. However the Bill goes further that that Act and we are supportive of the Scottish Government’s aim to legislate also for an offence which will cover “all obscene pornographic images which realistically depict rape or other non-consensual penetrative sexual activity.”

However, there are a number of issues which the Committee may wish to consider in relation to section 34. Whilst the new offence is to be commended, the devil is in the detail with significant new definitions introduced in this clause. Specifically there are two thresholds to this offence – ‘pornographic’ and ‘extreme image’, defined by three rather complex sub-clauses.
Firstly section 34(2) defines a “pornographic” image if “it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal”. This section makes clear that if the image is one of a series it must be considered in context. If it is taken out of context and the rest of the images were not pornographic, then the single image is not considered pornographic. The significant points to note here are:

- The use of the word “pornography” has, in the past, been resisted as part of obscenity legislation. In particular, it does not feature in section 51 of the Civic Government (Scotland) Act, 1982. Moreover, the definition of pornography in the Criminal Justice and Immigration Act 2008 (and in this Bill) differs from the definition of pornography in section 51 of the Sexual Offences Act 2003 which applies in England & Wales, that is “a person is involved in pornography if an indecent image of that person is recorded; and similar expression and ‘pornography’ are to be interpreted accordingly.” At the time that the UK Government announced this new definition in August 2006, they acknowledged that the joint Home Office and Scottish Executive consultation had raised concerns about how to interpret the term “pornography”.¹

- It is up to the jury to determine whether an image is pornographic, but it is not clear how – will there be a question about the intent of the original publisher if they are not the person being prosecuted. In Lord Halsbury’s Obscenity Bill debated in the House of Lords on 18 Dec 1996, he used the term “in a manner which a reasonable person would regard as grossly offensive”. This suggestion was criticised by the Labour opposition of the day because of the difficulties of defining both a reasonable person or grossly offensive and the Government said that the “personal moral code of the individual concerned could fundamentally affect the judgement reached” and would therefore not provide the courts with any certainty. The definition in Section 34 of this Bill seems similar to that contained in Lord Halsbury’s Bill and the same concerns arise – will the judgement depend on how easily the jury are sexually aroused?!

- There is no power for the police to confiscate (forfeit) the material, so that even if a person is prosecuted the images can remain in circulation.

2. Secondly, section 34(2) defines an “extreme image” by use of a list approach, which in the past has been deemed unworkable by the Home Office². The images to be restricted are those that are realistic in their

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¹ Ibid, page 5, para 4
² Note this was not the major criticism of Lord Halsbury’s Bill in the debate, but was expected to be because of previous Home Office statements.
depiction of the activities contained in the list. The points to note on this sub-clause are:

- Images of sexual violence towards a live person where consent is involved and severe injury is not caused, or likely to be caused, are not prohibited.
- The question of realism is tricky. Does this definition this mean an image that is “photo-realistic” or could it cover extremely violent cartoon material or material derived from a photo?
- Films classified by the British Board of Film Classification under the Video Recordings Act 1984 are specifically excluded from the legislation, unless a part of a classified work has been extracted for the purpose of sexual arousal.

3. Thirdly, section 34(2) defines an “image” as a moving or still image, or data that can be converted into such an image. It is not clear if a series of images as described in clause 34(2) will be lead to more than one count of possession or not, i.e. is a film one image or a series of images?

**Human Trafficking**

We welcome Section 35 of the Bill, which tightens the law on human trafficking. However, we do feel that an opportunity has missed to really tackle one of the root causes of human trafficking.

Economic poverty, gender discrimination and social vulnerability are all root causes for human trafficking. In addition, the high level of profit to be made – due to the rising demand for prostitution - is a major pull factor for criminal gangs to engage. Until the root causes of sex trafficking and other forms of sexual exploitation through prostitution are sufficiently addressed, attempts to diminish the phenomenon will be limited.

We are encouraged that the Scottish Government, along with the UK Home Office, has ratified the *Council of Europe Convention on Action against Trafficking in Human Beings*, which came into force on 1st April 2009. Article 6 of the convention clearly indicates the necessity of tackling demand in order to reduce this type of exploitation. In Scotland’s commitment to tackle human trafficking, this must be a priority. Article 19 of the Convention stresses the importance of criminalising the use of services of a victim of trafficking.

It is important to note that this legislative move alone will not end exploitative prostitution. It is a complex issue which requires a multi-faceted approach including safe exit strategies and support, education, funding for local projects and awareness raising initiatives. Moreover, even when legislation exists it can be difficult to secure successful prosecutions as evidenced by the fact that there have been no successful prosecutions in Scotland under the offences introduced
by the Criminal Justice (Scotland) Act 2003. However, criminalising the purchase of sexual services is a significant part of reducing exploitative prostitution and sex trafficking as it directly tackles the demand which cultivates the industry.

The UK Government has included in the Police and Crime Bill a proposal to outlaw the purchase of sexual services from someone controlled for another person's gain. Whilst this is welcome, it does raise questions as to how it will be enforced. CARE is of the view that it would be more effective to simply outlaw the purchase of sexual services. Moreover, not to do so suggests that society is willing to condone male exploitation of women who are not trafficking victims and/or are not controlled for another person's gain, but find themselves through drug addiction or other life circumstances driven into prostitution. This is the case in relation to off-street prostitution as the measures introduced to counter kerb-crawling by the Prostitution Public Places (Scotland) Act 2007 do not apply.

The Scottish Government are considering their position on these matters and are yet to indicate if they will bring forward legislation. This raises the prospect of more people being trafficked into Scotland, which ACPOS estimates already receives a disproportionate number of trafficked persons compared to the rest of the UK, if the UK Government legislates for England & Wales and the Scottish Government chooses not to legislate in this area. Even if a delay is involved before the legislative framework north and south of the border is brought into line, there is likely to be an increase in people trafficking for the purpose of sexual exploitation into Scotland.