

CEASE

UK

CENTRE TO END ALL SEXUAL EXPLOITATION

An evidence-based response to:

Call for written submissions: Report of the United Nations Special Rapporteur on trafficking
in persons, especially women and children

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CEASE UK (Centre to End Sexual Exploitation) set out below a response to the United Nation's (UN) call for written submissions regarding the implementation of the non-punishment principle in the context of trafficking in persons, with a particular focus on women and children. As CEASE's area of expertise is, broadly, combating sexual exploitation within the UK, this submission will focus on the implementation of the non-punishment principle more generally within the UK, and, more specifically, within the context of trafficking for the purposes of prostitution.

Prostitution in the UK is a devolved issue, so while it would be accurate to say any law reform may only apply to England and Wales, there is no reason it could not also be applied the UK as a whole.¹ It operates as partially-criminalised, and partially decriminalised, and prostitution as defined in the Sexual Offences Act (SOA) 2003 is lawful in and of itself.² However, aspects such as soliciting, brothel keeping, and street prostitution are illegal.³

While not all trafficking is for the purposes of prostitution, and not all prostitution results from trafficking, it is CEASE's position that the two systems are intrinsically linked: in other words, **wherever there is prostitution, there is some form of trafficking**. This is the case irrespective of which legislative approach is applied: blanket decriminalisation;⁴ legalisation;⁵ or partial decriminalisation of prostituted individuals (commonly referred to as the "Nordic Model"⁶ – although the *number* of trafficked individuals varies accordingly.

¹ Home Affairs Committee, *Prostitution*, (HC 2016-17, 26-III) para 12

² Sexual Offences Act 2003, s54(2): A prostitute is somebody who '*provides sexual services to another person in return for payment*'.

³ *ibid*

⁴ United States Department of State, 'Trafficking in Persons Report 2020' (U.S. Department of State 2020) < <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> > accessed 14 February 2021 p372

⁵ Seo-Young Cho, Axel Dreher and Eric Neumayer, 'Does Legalized Prostitution Increase Human Trafficking?' (2013) 41 *World Development* 67

⁶ n4 p468

We applaud UK Government for the steps it has taken to combat trafficking in persons, predominantly with the implementation of the Modern Slavery Act 2015, and the earlier ratification of the Palermo Protocol in 2006. With reference to the basis of the UN consultation, the non-punishment principle can be found in various domestic and international pieces of legislation (which impose obligations varying in how onerous they are),⁷ as well as the Modern Slavery Act (MSA 2015) which contains a domestic statutory defence to certain criminal acts within s.45.⁸

The idea of not punishing individuals who have been subjected to exploitation is one that the Government is cognisant of, and as Ofer posits, there is good reason to believe the Government is committed to applying these principles of its own accord, and not simply due to international pressure.⁹ It is CEASE's position that this is also a justifiable and highly intuitive stance to take from a human rights perspective: if an individual lacks autonomy due to the imposition of force or coercion, it would then represent a further violation of their dignity to punish them for acts they were forced to commit when they had no practical alternative.

These pieces of legislation are in addition to the broader obligations imposed upon the UK's public authorities, including Article 4 of the European Convention on Human Rights (ECHR),¹⁰ as well as guidance issued by the Crown Prosecution Service (CPS) to its prosecutors (prior to the introduction of the MSA 2015) to uphold the Article 4 ECHR obligation following the case of *R v O*.¹¹

⁷ Namely, Article 26 of the Council of Europe Convention which provides for the possibility of not imposing punitive measures on victims of trafficking who have committed unlawful acts and Article 8 of the EU Anti-Trafficking Directive 2011/36

⁸ Modern Slavery Act 2015, s.45

⁹ Nogah Ofer, 'Implementation of the Non-Punishment Principle in England: Why Are Victims of Trafficking Not Benefiting from the Protection from Prosecution Provided by International Law?' (2019) 11 Journal of Human Rights Practice 486

¹⁰ European Convention on Human Rights, Article 4

¹¹ *R v. O* [2008] EWCA Crim 2835

In theory, the UK has a strong legislative framework to prevent the punishment of individuals who have been subjected to trafficking; however, in practice there are still real issues that could and should be improved upon. In effect there is a *de jure/de facto* divide between what the legislation aspires to, and what occurs on the ground.¹² Before examining possible amendments that might be implemented, it is important to state why trafficking for the purposes of prostitution deserves special – or at least specific – attention.

Prostitution and Trafficking: Intrinsically Linked

Research demonstrates that within the EU, *conservative* estimates place the figure of women in prostitution who have been trafficked at one in seven:¹³ for example, in the Netherlands in the *SNEEP* case,¹⁴ six defendants were found guilty of trafficking more than 100 women into State-regulated prostitution via a sprawling and organised network of accomplices; in Germany only 7,700 of 40,400 who registered to provide “prostitution services” are German nationals, with 80% of all other registered individuals being foreign nationals,¹⁵ mainly from Romania, a country which has been referred to as ‘*the sex trafficking factory of Europe*’,¹⁶ and is ranked by the European Commission as one of the leading source-countries for victims

¹² For example, see Patrick Burland, ‘Villains not Victims? An Examination of the Punishment of Vietnamese Nationals Trafficked for Cannabis Cultivation in the United Kingdom’ (2017) Paper Presented at the International Seminar on Mixed Migration, Mahidol University, Thailand, 21–22 June. <http://un-act.org/publication/view/villains-not-victims-examination-punishment-vietnamese-nationals-trafficked-cannabis-cultivation-united-kingdom>; and Anti-Slavery, ‘Trafficking for Forced Criminal Activities and Begging in Europe - Exploratory Study and Good Practice Examples’ (2014) available at <https://www.unodc.org/e4j/data/university_uni/trafficking_for_forced_criminal_activities_and_begging_in_europe_-_exploratory_study_and_good_practice_examples.html?lng=en> accessed 14 February 2021

¹³ European Commission, ‘Report From The Commission To The European Parliament And The Council Second report on the progress made in the fight against trafficking in human beings (2018) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims’ <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20181204_com-2018-777-report_en.pdf> accessed 14 February 2021 p2

¹⁴ The SNEEP Case LJN: BD6972, Almelo District Court, 08/963001-07 Print judgement

¹⁵ Destatis, ‘Press release No. 286 from July 30, 2020’ (*Destatis*, July 2020) <https://www.destatis.de/DE/Presse/Pressemitteilungen/2020/07/PD20_286_228.html;jsessionid=E5E2AA88F8021E5B06128A3721713C6B.internet8731> accessed 14 February 2021

¹⁶ ‘How Romania Became Europe’s Sex Trafficking Factory’ *InsideOver* (19 March 2020) <<https://www.insideover.com/society/how-romania-became-europes-sex-trafficking-factory.html>> accessed 14 February 2021.

of trafficking.¹⁷ It is important to note that the prostitution market in Germany is estimated to be in excess of 400,000 individuals,¹⁸ a large proportion of which are likely to have been trafficked.¹⁹

In the UK, in 2016-17, figures estimated the number of prostituted individuals at approximately 72,000,²⁰ an increase from approximately 50,000 in 2014,²¹ and Ward et al found that the number of sex buyers had doubled during the decade 1990-2000.²² Why is this?

Although there are many factors behind why somebody might be compelled into prostitution, and thus contribute to a “market expansion”, the influx of women from *outside* the UK in recent years cannot be ignored. In July 2020, the Centre for Social Justice found that all types of modern slavery – including sexual exploitation – were increasing.²³

The report found that the most common type of exploitation was sexual exploitation (33%).²⁴ During the Covid-19 pandemic there was a 280% increase in the advertising of sexual services online in the West Midlands,²⁵ the women being of predominantly Eastern European origin. A representative from *Women’s Aid* stated that there had also been an increase in on-street prostitution in Birmingham.²⁶

¹⁷ n13

¹⁸ Philippe Adair and Oksana Nezhyvenko, ‘Assessing How Large Is the Market for Prostitution in the European Union’ (2017) 14 *Éthique et économique/Ethics and economics* 116.

¹⁹ Seo-Young Cho, Axel Dreher and Eric Neumayer, ‘Does Legalized Prostitution Increase Human Trafficking?’ (2013) 41 *World Development* 67

²⁰ n1

²¹ *ibid* para 16

²² H Ward and others, ‘Who Pays for Sex? An Analysis of the Increasing Prevalence of Female Commercial Sex Contacts among Men in Britain’ (2005) 81 *Sexually Transmitted Infections* 467.

²³ Centre for Social Justice and Justice & Care, ‘It Still Happens Here: Fighting UK Slavery In The 2020s’ (July 2020) <<https://www.justiceandcare.org/wp-content/uploads/2020/07/Justice-and-Care-Centre-for-Social-Justice-It-Still-Happens-Here.pdf>> accessed 14 February 2021

²⁴ *ibid* p23

²⁵ *ibid* p65

²⁶ *ibid* p64

In 2018, the APPG on Prostitution and the Global Sex Trade reported that ‘...*modern slavery and human trafficking are far more prevalent than previously thought*’, and that there were ‘*growing reports of organised crime groups sexually exploiting women around the UK in so-called ‘pop-up’ brothels*’.²⁷

While prosecution and investigation figures were provided to the inquiry, they concluded that they ‘*represent a small fraction of the true scale of organised sexual exploitation*’.²⁸

The prostitution market is almost certainly increasing, and although research in this area is limited, a 2010 report suggested that *at least* 10,000 women involved in off-street prostitution were victims of trafficking or non-UK nationals who were highly vulnerable.²⁹

Protecting the Vulnerable

Clearly there are a large proportion of individuals who have been trafficked into the UK to engage in prostitution. As the Palermo Protocol precludes the concept of consent within the context of sexual exploitation,³⁰ of which prostitution is a specific form, it flows naturally that any unlawful prostitution-related activity which takes place as a result of trafficking – such as soliciting, for example – should trigger a person’s rights under the MSA 2015 to be adequately protected.

When read with s.45(1)(b) MSA 2015, which states: “the person does that act because the person is compelled to do it”, and Article 3(b) Palermo Protocol’s preclusion of consent to

²⁷ All-Party Parliamentary Group, *Behind Closed Doors Organised sexual exploitation in England and Wales An inquiry by the All-Party Parliamentary Group on Prostitution and the Global Sex Trade* (APPG 2018) p2

²⁸ Ibid p5

²⁹ Keith Jackson, Jon Jeffery and George Adamson, ‘Setting The Record: The trafficking of migrant women in the England and Wales off-street prostitution sector’ (Project Acumen ACPO Migration And Associated Matters 2010) <<https://nordicmodelnow.files.wordpress.com/2017/12/setting-the-record-project-acumen-aug-2010.pdf> > accessed 14 February 2021

³⁰ Palermo Protocol, Article 3(b)

exploitation, it is difficult to see how any unlawful prostitution-related activity resulting from trafficking could not be an instance where they are “compelled to do it”.

The introduction of the MSA 2015 undoubtedly helped protect the rights of individuals who had been subjected to trafficking, particularly with reference to the s.45 defence as outlined above if this can be raised and supported to the satisfactory standards of proof. However, there is still a large implementation gap, resulting in high numbers of prosecutions of individuals who have been subjected to trafficking.³¹ A detailed review of *why* this is still the case is beyond the scope of this submission, although Ofer succinctly encapsulates some of the more prevalent reasons, including (non-exhaustively): failure to identify victims of trafficking upon arrest; the failure of prosecutors to understand the s.45 defence; the lack of awareness of the s.45 defence amongst the judiciary; failure by victims to disclose their trafficked status; and the suggestion the prosecutions are necessary to establish whether suspects are genuinely entitled to non-punishment protection.³² It is extremely difficult to discern accurate figures as to how this is represented within prostitution and subsequent punishment, although research demonstrates that it is indeed common,³³ particularly within the context of immigration-related offences (such as having no documentation), and more immediate offences such as soliciting, which is prohibited under the Street Offences Act 1959.³⁴

If an individual was found to be engaged in prostitution and merely *suspected* of being the victim of trafficking, this would require a lengthy process of (typically) a referral to the National Referral Mechanism, which would then entail an investigation to establish first “reasonable grounds” as to whether the individual has been subjected to trafficking, and then

³¹ n12

³² n9

³³ *ibid*

³⁴ Street Offences Act 1959, s.1(1)

a longer investigation to establish “conclusive grounds”.³⁵ This, of course, does not preclude subsequent prosecution if either conclusive grounds are found not to be made out, or the s.45 defence is not raised at all.

We submit that a rebuttable presumption that non-punishment should *prima facie* apply to prostituted individuals who appear to be foreign nationals and have been charged with criminal activity, which in its immediacy should apply to all prostitution-related unlawful activity (soliciting, loitering etc), as well as immigration offences. This would reflect the reality of prostitution as regards its demography and its links to trafficking, specifically within the UK. The nature of prostitution means it would be extremely unlikely for a foreign national to be involved in prostitution *as well as* a related immigration offence (e.g. not having the correct documents) who had not been subjected to trafficking prior to arrest.

CPS guidance outlines a four-stage approach when deciding to prosecute,³⁶ but we submit that this places an implicit burden on highly-vulnerable individuals to demonstrate they fulfil the relevant criteria. For example, there may not be “clear evidence” of a s.45 defence if prosecutors are unaware of what exactly they are looking for, coupled with reticence on the part of individuals to provide full accounts of their own exploitation.

³⁵ Rhys Rosser, ‘Section 45: Loophole or Lifeline’, < <https://www.2bedfordrow.co.uk/section-45-loophole-or-lifeline/>> accessed 14 February 2021

³⁶ CPS, Human Trafficking, Smuggling and Slavery <<https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>> accessed 14 February 2021

Further, research demonstrates that the s.45 defence is used inconsistently, meaning the consideration may not even be raised before the court *at all*, thus leaving vulnerable individuals without the defence they would ordinarily otherwise be entitled to.³⁷

If the guidance was amended accordingly so that it was prefaced with the aforementioned rebuttable presumption – i.e. the individual is presumed to have a statutory defence unless proved otherwise – this would reflect already-existing CPS guidance that advises those within prostitution – trafficked or otherwise – should not be treated as criminals.

This is not a wholly alien concept within the context of criminal law; in other words, the accused only needs to adduce evidence of a defence, it is then for the prosecution to disprove beyond all reasonable doubt. The case of *R v. MK and Gega* applied this to the context of the s.45 defence.³⁸ While the specifics of that case are beyond the scope of this submission, an important principle can be distilled, namely, the adducing of evidence to shift the evidential burden to the prosecution within the context of s.45.

CEASE submits that the aforesaid rebuttable presumption relating to foreign nationals engaged in prostitution (i.e., they are presumed to have been trafficked) should *prima facie* act as the adducing of evidence for the prosecution to then disprove.

CEASE submits that there is extensive evidence suggesting a dramatic increase in the number of individuals trafficked for the purpose of sexual exploitation, specifically within prostitution, and this necessarily implies a duress of circumstance (when read with Article 3(b) Palermo Protocol). Therefore, and to conclude, we recommend that the Government implement a new statutory regime recognising the reality of prostitution and its links to

³⁷ n9

³⁸ *R v. MK and Gega* [2018] EWCA Crim 667

trafficking, and to take further steps to ensure already-vulnerable and exploited individuals are not then criminalised for circumstances entirely outside of their control