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Policing and Crime Bill

Bill 7 of 2008-09

This Bill is due to be debated on second reading in the House of Commons on 19 January 2009. It is a wide-ranging Bill drawing together a number of disparate policy issues.

It includes measures on police accountability and effectiveness, such as a new duty for police authorities to have regard to the public's views on policing in their area. However, the Government's plans for directly elected police authorities, which provoked some controversy, have been dropped from the Bill.

The Bill also covers aspects of prostitution and certain orders relating to sex offences. It would create a new offences of paying for sex with someone who is controlled for gain, and modify the law relating to soliciting.

Other policy issues covered in the Bill include the regulation of lap dancing clubs, licensing conditions and police powers relating to alcohol, proceeds of crime, extradition, airport security, criminal records, importation restrictions on offensive weapons and football banning orders.

Sally Almandras, Sally Broadbridge, Louise Butcher
Alexander Horne, Philip Ward and John Woodhouse

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Summary of main points

The *Policing and Crime Bill* is scheduled to have its second reading on 19 January 2009.

The Bill covers a wide range of policy issues. Part 1 includes a number of measures on police accountability and effectiveness. For example, it would introduce a new duty for police authorities to have regard to the public's views on policing in their area. It also sets out a new statutory framework for collaboration between forces and amends the appointments process for senior officers. However, the Government's plans for directly elected police authorities, which provoked some controversy, have been dropped from the Bill.

Part 2 of the Bill contains a number of provisions affecting the sex industry. These include a new, strict liability, offence of paying for the sexual services of a controlled prostitute, which is intended to reduce the demand for prostitution, and a new power for the civil courts to make orders closing brothels for up to three months where there is evidence that they have been used for activities connected with particular prostitution or pornography offences. There would also be a new sentencing option under which those convicted of loitering or soliciting for the purpose of prostitution could be required to attend a series of meetings with a supervisor. Part 2 would also replace the existing offences of kerb-crawling and persistent soliciting with a single offence which could be prosecuted on the first occasion, and would extend the conditions which can be imposed on sex offenders to restrict their travel abroad.

Lap dancing clubs are currently regulated in the same way as other places of "entertainment". Local authorities, residents and others have argued that this regime is too lax for controlling such venues and have called for them to be reclassified as "sex establishments" in the same way as sex shops and sex cinemas. Clause 25 effects this change.

Research points to clear evidence of links between alcohol consumption, crime and ill health. Excessive drinking by young people has aroused particular public concern. Part 3 of the Bill amends police powers to deal with young people drinking in public and introduces a new offence of persistently possessing alcohol in a public place. It tightens penalties for selling alcohol to young people and for refusing a police instruction to stop drinking in a "designated public place." The Bill also creates the legislative mechanism for introducing a mandatory code of practice for alcohol sales, covering such areas as supermarket price promotions. Although standard conditions on premises licences had hitherto been discouraged, an amendment to licensing law would enable licensing authorities to impose block conditions on a number of premises within one area.

Part 4 of the Bill amends the asset recovery regime that was established under the *Proceeds of Crime Act 2002*. The proposals would enable enforcement officials to remove property from suspected offenders prior to conviction; allow for additional search and seizure powers designed to prevent the dissipation of property; and would introduce an administrative forfeiture procedure for cash which had been "detained" where the owner did not challenge the seizure. Part 4 would also extend the time limit within which civil recovery actions could be launched, from 12 years to 20 years.

Part 5 of the Bill makes some modifications to the *Extradition Act 2003*.

Part 6 of the Bill relates to airport security. It amends the arrangements for airports policing by de-designating the nine airports currently designated for policing purposes. Instead, those airports which come under the National Aviation Security Programme will go through a new procedure, also set out in the Bill, to develop an Aerodrome Security Plan (ASP). If that ASP specifies that policing measures are required at the aerodrome then the aerodrome must prepare a Police Service Agreement (PSA), as set out in the *Aviation Security Act 1982*.

The Bill would also make a number of amendments to current criminal records legislation, in particular relating to checks for school governors and fees for volunteers. It would also enable employers to request that details of an individual's "right to work" status be included on their criminal records check. This proposal was prompted by concerns regarding the employment of illegal workers in sectors such as care homes.

The Bill's border control provisions would amend the existing powers of Revenue and Customs officers. They would also clarify the respective powers of the Scottish Executive and the UK Government to ban the import of offensive weapons.

The remaining clauses of the Bill would make minor amendments to the status of Crime and Disorder Reduction Partnerships (in England) and Community Safety Partnerships (in Wales), the Scottish Drugs Enforcement Agency and the Serious Organised Crime Agency.

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I Introduction

The Bill was introduced in the House of Commons on 18 December 2008 as Bill 7 of 2008-09 and was published on the same day. It is scheduled to have its second reading on 19 January 2009.

The Bill covers a wide range of policy issues, including police accountability and effectiveness, prostitution, the regulation of lap dancing clubs, alcohol misuse, the recovery of criminal assets, extradition, airport security, football banning orders, criminal records and the importation of offensive weapons. The Bill follows a number of policy reviews and consultation papers in these areas, which are discussed further below.

The Bill applies to England and Wales, although in relation to Wales the provision and schedule on lap dancing (clause 25 and schedule 3) would be commenced by order of the Welsh Ministers as this is a devolved matter. A number of clauses also extend to Northern Ireland[1] and to Scotland.[2] The Explanatory Notes to the Bill indicate that, under the Sewel Convention, the agreement of the Scottish Parliament may be required in relation to the provisions relating to football banning orders, extradition and proceeds of crime.[3]

II Police reform

A. Background

1. The Flanagan Review of Policing

In March 2007 the Government launched *Building on Progress: Security, Crime and Justice*, a policy review report detailing its proposals and ideas for confronting crime and criminals over the next 10 years.[4] One of the measures included in the report was a review of the police service, which Sir Ronnie Flanagan, HM Chief Inspector of Constabulary (HMCIC), was appointed to lead. The Home Secretary asked the review to focus on neighbourhood policing, reducing bureaucracy, improving local accountability and the effective management of resources.

Sir Ronnie presented an Interim Report[5] to the Home Secretary on 12 September 2007 followed by the Final Report[6] on 7 February 2008. The Final Report made the following key recommendations:

- streamline the amount of information routinely recorded for many crimes while retaining extensive recording for serious crimes;

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1 Clauses 14, 19, 20 to 24, 29, 72, 77, 80(1), 80(3)-(5) and 81 and Schedule 2. See *Explanatory Notes to Policing and Crime Bill*, 18 December 2008, para 25 for further details..

2 Clauses 77 to 80. Clause 90 of the Bill provides that the consent of the Scottish Ministers is required before the Secretary of State may order the commencement of clauses 79 and 80.

3 EN, para 24. For general information as to extent see also EN, paras 22 to 25 and 509 to 213.

4 Cabinet Office, *Building on Progress: Security, Crime and Justice*, 27 March 2007

5 Sir Ronnie Flanagan, *The Review of Policing: Interim Report*, 12 September 2007

6 Sir Ronnie Flanagan, *The Review of Policing: Final Report*, 7 February 2008

- review the Notifiable Offences List, which defines all those crimes which should be recorded by the police and notified to the Home Office, with a view to reducing its coverage;
- overhaul the current stop and account process[7] by removing the relevant form and replacing it with a 'receipt' of the encounter (in the form of a business card or similar) and a verbal record on Airwave, the digital radio network used by the emergency services;
- maintain the current receipt based system for stop and search but enhance it once new technology emerges;[8]
- establish service-wide standard systems and processes in areas such as IT systems, air support, fleet and uniform; and
- strengthen the accountability of the police at a local level.

2. The Casey Review: Engaging Communities in Fighting Crime

In October 2007 Louise Casey, former head of the Government's Respect Task Force, was commissioned to conduct a cross-departmental review on how front line agencies can better engage their communities in the fight against crime. The review examined how local communities, the police, local criminal justice agencies and other local partners could best work together to reduce crime and the fear of crime and raise community confidence in local agencies. The Cabinet Office described the aim of the review in the following terms:

> The review will build upon the work already underway as part of Sir Ronnie Flanagan's review of policing, which is looking at strengthening neighbourhood policing and local accountability. It reflects the high priority the Government places on tackling the fear of crime, and involving local communities in setting priorities and designing local solutions.[9]

The review, *Engaging Communities in Fighting Crime*,[10] was published in June 2008 and made a number of recommendations on improving local accountability and increasing local engagement, including proposals that the Government should:

- give Neighbourhood Policing teams across all forces a common name, identity and level of service;
- add powers to detain and to issue fixed penalty notices for disorder to the standard set of powers held by Police Community Support Officers;

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7 "Stop and account" occurs when an officer requests a person in a public place to account for themselves, which may include accounting for their actions, behaviour or presence in an area or possession of anything. *Code of Practice A* issued under the *Police and Criminal Evidence Act 1984* requires officers to record such encounters.

8 See Library Standard Note SN/HA/3878 "*Stop and Search*" for further background on police powers of stop and search.

9 Cabinet Office News Release CAB/080/07, *Connecting Communities with the Fight Against Crime*, 5 October 2007

10 Cabinet Office, *Engaging Communities in Fighting Crime: A review by Louise Casey*, 18 June 2008

- in relation to community sentences, replace the term "unpaid work" with "Community Payback" and make the work more visible and demanding;
- hand full responsibility for producing national crime statistics to the UK Statistics Authority or another independent organisation;
- extend the provision of local monthly crime information to all parts of the country by 2009; and
- hand responsibility for reducing police bureaucracy and paperwork to a senior police officer, working directly to the Police Minister.

3. The Policing Green Paper

On 17 July 2008 the Government published *From the Neighbourhood to the National: Policing Our Communities Together*,[11] a Green Paper described by the Home Office as "the Government's substantive response to the independent review of policing by Sir Ronnie Flanagan and Louise Casey's review 'Engaging communities in fighting crime'."[12]

The Green Paper focused on three key areas of police reform: empowering citizens; professionalising and freeing up the police; and the Government's strategic role. Its key proposals included:

- Reforming police authorities to make them more democratic and effective in responding to local concerns. The Green Paper proposed that the majority on each police authority would no longer be formed from local councillors but from directly elected "Crime and Policing Representatives".
- Removing all but one top-down target for police forces. The single remaining target would be to increase public confidence in the police and other agencies to reduce crime.
- A "Policing Pledge" setting out what people can expect from their local police team. The pledge would incorporate national standards for the amount of time spent on the beat and response times to calls and incidents. The pledge would also include contact details for the local neighbourhood policing team and a list of the top three locally agreed crime and anti-social behaviour priorities for action in that particular neighbourhood.
- Online "crime maps" enabling the public to see a visual representation of the crime in their local ward or neighbourhood.
- Standardising uniforms and training for Police Community Support Officers (PCSOs) and conducting a review of current PCSO powers.
- Adding probation trusts to the list of "responsible authorities" that comprise Crime and Disorder Reduction Partnerships (in England) or Community Safety

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11 *From the Neighbourhood to the National: Policing Our Communities Together*, Cm 7448, July 2008

12 Home Office Press Notice 135/2008, *Cuts in Police red tape and more say for the public on Policing*, 17 July 2008

Partnerships (in Wales) and extending the remit of these partnerships to explicitly include the reduction of re-offending.[13]

- Implementing a co-ordinated IT strategy for the police service as a whole, to be led by the National Police Improvement Agency (NPIA).
- Reforming the chief officer appointments system.
- Facilitating collaboration between police forces, particularly in relation to procurement, the provision of corporate services and the policing of serious and organised crime.
- Enhancing the role of Her Majesty's Inspectorate of Constabulary (HMIC) in exposing and tackling under-performing police forces and authorities.

Several of these proposals, for example the Policing Pledge and crime maps, are capable of being implemented without legislation and do not therefore appear in the Bill. Those that do require legislation have generally been taken forward in the Bill, with the exception of directly elected Crime and Policing Representatives; as the next section explains, this proposal has been put on hold for the time being.

B. Accountability

1. The Green Paper's proposals

In the Green Paper the Government proposed to improve the accountability of police authorities by introducing directly elected Crime and Policing Representatives (CPRs):

> 1.71 We are therefore committed to introducing a stronger link between those responsible for delivering policing and the public they serve. **We will legislate to reform police authorities, making them more democratic and more effective in responding to the needs of the local community**. We will retain the crucial role that independent members play, and they will be appointed as they are at present with, as now, at least one of the members a magistrate or 'lay justice'. We will also retain at least one councillor on each police authority to ensure we maintain the important links and relationships with local government.
>
> 1.72 The majority on each police authority will, however, no longer be formed from local councillors however. **Instead, people throughout England and Wales will directly vote for individuals, known as Crime and Policing Representatives (CPRs), to represent their concerns locally**.
>
> 1.73 First they will sit on their local CDRP (England) or CSP (Wales), ensuring that local issues are being addressed through existing partnership structures. One of the CPRs in each area will also chair the CDRP/CSP. Second, they will sit on the **force's police authority, and, amongst their other duties, will ensure** that local issues are reflected at the force level. Police Authorities – newly constituted – will retain their current

[13] See "Strategies for crime reduction" on page 104 of this Research Paper for further details.

> responsibilities particularly around ensuring forces are working together to address regional and national issues.[14]

In its summary of Green Paper consultation responses, the Government commented that "a significant number of respondents were sceptical" about its proposals for direct elections to police authorities. It also noted that some respondents were concerned that direct elections might lead to the politicisation of the police and conflicting mandates between the council and the directly elected CPRs.[15] For example, in its response to the Green Paper the Association of Chief Police Officers (ACPO) stated:

> 1.9 In particular, ACPO urges the Government to reconsider the impact of the **directly elected local Police Authority** to be accountable to local communities for policing delivery. At a time when Government is taking steps to better enable the delivery of strategic protective services … this Green Paper proposal would skew policing activity to the local with no compensatory counter weight in the strategic direction. That counter balance is currently performed by a Chief Constable with operational independence who must determine, with professional judgement, how to meet the full spectrum of demands AND a Police Authority which, whilst representing local communities, has a strategic responsibility to ensure that serious harms and threats affecting the wider society are being adequately and efficiently addressed. Altering the "checks and balances" provided by the tri-partite structure will greatly damage the governance of policing. (…)
>
> (…)
>
> 4.2 (…) There are other dangers of course. The election of someone on a single issue or on an extremist "ticket" is a real possibility. In that case the delicate balance of the tripartite arrangement flies out of the window.
>
> 4.3 The possibility is also introduced of having conflicting accountabilities. One can imagine a political complexion of the Force area as a whole being opposed by the political complexion of a directly elected Police Authority.[16]

In its response to the Green Paper the Association of Police Authorities (APA) raised concerns about the potential for politicisation of the police, increased localism and dilution of the strategic relationship between police and local councils.[17]

The response from the Police Federation of England & Wales (Polfed) raised the following concerns:

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14 *From the Neighbourhood to the National: Policing Our Communities Together*, Cm 7448, July 2008, pp32-33

15 Home Office, *Summary of Green Paper consultation responses and next steps*, November 2008, pp6-7

16 ACPO, *ACPO Response to the Green Paper*, October 2008, pp7-8 and 23-24

17 APA, *The policing green paper: a response from the Association of Police Authorities*, October 2008, pp12-19

- We are unconvinced that directly elected members would ensure greater representativeness of the local communities that a police authority is there to serve.

- Police officers pride themselves on political independence – the notion that police authorities would be open to greater political influence (particularly if elected members are in the majority) contradicts this basic principle.

- How would the representativeness of candidates be measured? What measures could be taken to prevent the proposed elected positions being targeted by a highly organised local group with a particular agenda. Should such a group be successful, it could lead to extreme policy difficulties for the Police Authority and/or the local council, which would then clearly impact on the Chief Officers and subsequently our members and the general public.

- In practice - given their experience and knowledge of local elections – it seems likely that the majority of such positions might be filled by local councillors. What then will be the gain to the present system?

- There are cost implications of the elective process which are not dealt with by the green paper in any way. Where will the funding come from? Will this require cutting back of other areas of policing?[18]

However, the Government indicated that it would nevertheless be proceeding with its proposals for directly elected CPRs:

> 1.7 The Government believe that Crime and Policing Representatives will provide clear and transparent governance structures that will simplify the system so the public can readily understand how to influence their policing and will be able to do so. The Government believes this will greatly improve the connection between the public and the police, and therefore confidence in policing. The government has also noted that the APA's own IPSOS MORI polling showed that 55% actively support this policy and only 19% disagreed with it.
>
> 1.8 The Government continue to believe, therefore, that there are very strong arguments in favour of this policy and will be introducing the necessary legislation to implement these proposals for directly elected Crime and Policing Representatives at the first opportunity.[19]

The Conservatives' proposals for increasing police accountability would involve replacing police authorities with directly elected police commissioners:

> We believe that effective policing is neighbourhood policing – the closer to the community the better. For that reason we also wish to reform the governance arrangements for the police force as a whole. Instead of being directed by, and accountable to, the Home Secretary, police forces should be directed by and

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18 Polfed, *Policing Green Paper Consultation Response*, October 2008, p4

19 Home Office, *Summary of Green Paper consultation responses and next steps*, November 2008, pp7-9

> accountable to the communities they serve. A Conservative government will make each police force accountable to an individual directly elected by the citizens of the police force area. Police Commissioners would be responsible for:
>
> - setting the police budget;
> - appointing (and dismissing) the chief constable;
> - setting local policing priorities;
> - consulting widely with local people to find out what they want from their local police;
> - monitoring how well the police perform against local targets;
> - ensuring best value from the local police budget.
> - publishing local crime statistics online, on a monthly basis and in map form.
> - ensuring that Beat Meetings are held in each neighbourhood on a quarterly basis, so that the public can hold the police to account for their performance.[20]

The Liberal Democrats propose that where police forces have the same boundaries as councils, the council should be the police authority holding the Chief Constable to account. Where police forces straddle councils, a third of the police authority should be nominated councillors and two thirds directly elected by single transferable vote.[21]

2. The Bill's provisions

Clause 1 of the Bill would impose a new statutory requirement on police authorities to have regard to the views of the public concerning policing when discharging their functions.[22] This would complement the existing duty of police authorities, under section 96 of the *Police Act 1996*, to obtain the views of the public concerning policing. The human rights NGO Liberty has described the new requirement as a "compromise position … unnecessary and motivated by a desire to be seen to be doing something rather than addressing a particular problem with the current arrangement". [23]

Also under Clause 1, HMIC would be given the power to inspect, and report to the Secretary of State on, a police authority's compliance with this new requirement. This would be in addition to HMIC's existing power to inspect and report on a police authority's performance of its functions.

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20 Conservative Party, *Repair plan for social reform*, October 2008, p37

21 Liberal Democrat Justice and Home Affairs Team, *Cutting Crime: Catching Criminals With Better Policing*, October 2008

22 The functions of police authorities, as set out in section 6 of the *Police Act 1996* and the *Police Authorities (Particular Functions and Transitional Provisions) Order 2008, SI 2008/82*, are as follows: securing the maintenance of an efficient and effective police force; holding chief officers to account for the exercise of their functions; monitoring their force's performance in complying with the *Human Rights Act 1998* and carrying out the local policing plan; securing that arrangements are made for their force to co-operate with other forces in the interests of efficiency or effectiveness; and promoting equality and diversity in their force.

23 Liberty, *Liberty's Second Reading Briefing on the Policing and Crime Bill in the House of Commons*, January 2009, para 2

The Government's proposals for directly elected CPRs have been dropped from the Bill. Speaking to the *Guardian* on the day of the Bill's publication, Home Secretary Jacqui Smith explained that she had "reluctantly" removed the proposals following a series of events, in particular the arrest of Conservative MP Damian Green and the resignation of Sir Ian Blair, that had raised questions regarding the politicisation of the police.

> She said: "The Tories' behaviour [following these events] has raised fears that the police were being politicised, making it more difficult to win public support for my proposals for some members of the police authority to be directly elected."
>
> Explaining her reluctant volte face, she said: "Looking at what has happened over the past two months, there has been a fundamental shift in the way people think about the politicisation of the police. I put that down to the London mayor's intervention in the resignation of Sir Ian Blair and the events surrounding the Damian Green affair. "I think it is right to step back to focus on the radical changes we are already making to the police at the neighbourhood level, and to think about what some recent events mean for the politicisation of the police.[24]

The Home Secretary has instead asked David Blunkett to prepare a report on how to achieve a consensus within Labour on increasing police accountability. The report is due before the next general election and its proposals will be fed into Labour's manifesto.

In response, shadow Home Secretary Dominic Grieve commented:

> "The danger of politicisation of the police comes from the complete micro-management that has been the hallmark of this government over the last 11 years.
>
> "Our plans to replace police authorities with directly elected police commissioners are entirely different from those of the government.
>
> "They are about both restoring the professional judgement of the police, while making them accountable to and able to work with the public, not Whitehall diktats." [25]

C. Appointment of chief officers

Under the current appointments system, chief officer roles (covering the ranks of Assistant Chief Constable, Deputy Chief Constable, Chief Constable and their London equivalents up to Commissioner) are advertised by police authorities. Eligible candidates choose which posts to apply for and the successful candidate is appointed by the relevant police authority subject to approval by the Secretary of State.[26] This ministerial approval follows advice from the Senior Appointments Panel (SAP). The SAP currently exists on a non-statutory basis and is made up of members drawn from ACPO,

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24 "Labour forced to ditch police elections plan", *Guardian*, 18 December 2008, p1

25 "Police elections plan is dropped", *BBC News*, 18 December 2008

26 The power of police authorities to appoint chief officers (subject to ministerial approval) is set out in sections 9F, 9FA, 9G, 11, 11A and 12 of the *Police Act 1996*.

the APA, the Metropolitan Police Service and the Home Office. The SAP also includes an independent member. Until 1 December 2008 the SAP was chaired by Sir Ronnie Flanagan in his role as HMCIC. As of 1 December 2008 Sir Ronnie stepped down as HMCIC but the Home Office has indicated that he has agreed to continue chairing the SAP in an independent capacity.[27]

The current appointments system has been criticised on the grounds that it prevents active career management and succession planning and lacks transparency and equality:

> The Senior Appointments Panel (SAP), which advises Ministers on chief officer appointments, has co-ordinated discussions of current position on the numbers of candidates to be a chief officer compared to the number of available posts. HMIC, police authorities, chief officers and superintendents tell us that we need to do more to ensure that there is a sufficient supply of chief officers to match the posts that need to be filled. ACPO have told us that they believe the chief officer appointments system needs to be looked at, including that more needs to be done on succession planning, especially for the most important posts, by building a national cadre of top police leaders. APA worry that police authorities do not always get the best possible lists of candidates for their posts, and that many good superintendents are not selected as eligible to become chief officers. In short, there is wide agreement that we need better talent management.[28]

An article in *The Times* highlighted the difficulties a number of police authorities had encountered in trying to fill senior vacancies:

> The vacancy for Chief Constable of Lincolnshire attracted just one candidate, despite being advertised twice. In Dyfed-Powys, where the police chief resigned during a misconduct inquiry, only two people applied for the job and there was just one applicant for the deputy chief's position.
>
> One key post, leading the Greater Manchester force, has drawn four applicants despite every chief constable, or equivalent rank, being canvassed. The Times understands that the police authority had hoped to have a shortlist of six when applications closed last week.
>
> When the chief's job became vacant in Wiltshire last year there were only three applicants, while in Thames Valley the acting chief was unopposed when she applied to succeed to the post permanently.[29]

A Home Office Impact Assessment on proposed reforms to the SAP made the following comments on the rationale for change:

> Currently, the system is one in which police authorities exercise one of their relatively few powers – of chief officer appointment – in a context which is in practice very lightly managed from the centre. Many police authorities are likely to see the changes to a much more managed system as encroaching heavily on

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27 Home Office, *Summary of Green Paper consultation responses and next steps*, November 2008, p16
28 *From the Neighbourhood to the National: Policing Our Communities Together*, Cm 7448, July 2008, p49
29 "Police recruitment crisis as officers spurn chance to be chief constables", *Times*, 19 June 2008

> a core role and protest accordingly. Likewise, currently individual aspiring chief officers are fairly lightly managed. The new system would be more directive – but also more supportive and transparent. A reform of the SAP would enable the SAP's role to link into the NPIA leadership strategy, which identifies particular skills for senior roles. If appraisals of candidates are based on these skills areas then SAP can better match candidates to skills required for particular posts. Implementing the leadership strategy will also send a clear signal to potential candidates and enable them to prepare better for the Senior Police National Assessment Centre (SPNAC).[30]

The Green Paper proposed reforming the SAP in order to "create a more cohesive national cadre of top police leaders".[31] In its response to the Green Paper the APA "welcomed" the review of the SAP and indicated that it supported the proposal for the SAP to be chaired by an independent rather than a senior police officer. It went on to state that:

> Although the role of SAP in succession planning is welcomed, this should not dilute the scope for police authorities to choose the right candidates for their chief officer teams – in this context an advisory role for SAP would be welcomed.[32]

By contrast, ACPO's position was that the SAP, together with control of the Personal Development Review (PDR) process for senior officers, should remain under the chairmanship of HMCIC:

> The continuation of SAP under the chairmanship of HMCIC reinforces the ACPO proposal (see paragraph 4.9 [of the ACPO response]) that HMIC should continue to lead on PDR completion utilising their professional judgement borne from practical experience and knowledge of the challenges that are faced everyday by Chief Officers within the police service. The idea, expressed in the Green Paper, that this would be a "conflict of interest" for a HMIC with a newly defined, is utterly spurious. If HMIC is to have a stronger role in force performance then the leadership of the force is a key area of interest for the HMIC. ACPO draws a parallel with GP assessments – always done by clinicians rather than those governing the service.[33]

Proposals to reform the SAP appear in clause 2 of the Bill, which would put the SAP on a statutory footing by inserting new provisions into the *Police Act 1996*. The SAP would be constituted in accordance with arrangements made by the Secretary of State, such arrangements to provide for: an independent chair and members appointed by the Secretary of State; and representative members nominated by the Secretary of State, ACPO and the APA. The Secretary of State would be required to consult ACPO and the APA prior to making or revising any such arrangements.

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30 Home Office, *Impact Assessment of Police Green Paper: Leadership*, 23 May 2008, p13

31 See paragraphs 3.27 to 3.28 of the Green Paper for further details.

32 APA, *The policing green paper: a response from the Association of Police Authorities*, October 2008, p32

33 ACPO, *ACPO Response to the Green Paper*, October 2008, p32. See paragraphs 3.9 to 3.11 of the *Summary of Green Paper consultation responses and next steps* for further details of proposed changes to the PDR process, involving a transfer of responsibility from HMIC to police authorities; these changes do not require legislation and do not therefore appear in the Bill.

The Bill would give the SAP two statutory functions. The first would be to advise the Secretary of State on: any matter on which it is consulted by the Secretary of State in connection with senior officer appointments; consents to deputy chief constables and assistant chief constables fulfilling the role of chief constable for a period of more than three months; and consents for the second most senior officer in the City of London Police to act as Commissioner for a particular period. The second would be to advise the Secretary of State and police authorities on matters relating to succession planning, namely: increasing the pool of potential candidates for appointment as a senior officer; and the training and development needs of such potential candidates.

D. Collaborative working

1. Background

In September 2005 HMIC published a report entitled *Closing the gap: a review of the fitness for purpose of the current structure of policing in England & Wales*. The report examined the provision of "protective services" (also known as "Level 2" services"), which relate to the policing of issues such as terrorism and serious organised crime that cut across multiple Basic Command Unit (BCU) levels. It came to the conclusion that:

> … when viewed from the context of the range of challenges and future threats now facing the service and the communities it polices, the 43 force structure is no longer fit for purpose. In the interests of the efficiency and effectiveness of policing it should change. Whilst some smaller forces do very well, and some larger forces less so, our conclusion is that below a certain size there simply is not a sufficient critical mass to provide the necessary sustainable level of protective services that the 21st century increasingly demands.[34]

It recommended that the existing 43 force structure be replaced by a number of "strategic forces":

> 1.57 This is the most radical option with forces being re-grouped against a framework of design considerations, such as: exceeding critical mass; criminality; and geography. Again local policing arrangements (BCU, etc) need not be disrupted whilst force level services are rationalised. A prescriptive reform approach could be initiated relatively quickly if a new executive and strategic authority were appointed at an early stage and a tight timescale was set.
>
> (…)
>
> 1.62 The strategic forces option offers the best business solution. It offers the best potential, within reasonable time-scales, of improving protective services and providing better value for money. However, it needs to be well supported and to be part of a strategy that reconfigures intelligence, performance and value for money to help enable the Police Service "to

[34] HMIC, *Closing the gap: a review of the fitness for purpose of the current structure of policing in England & Wales*, September 2005, p11

> guard (all) my people" (the mission detailed on the Queen's Police Medal).[35]

In response to the report, in November 2005 Charles Clarke, then Home Secretary, announced proposals for enforced mergers of forces, reducing the overall number of forces from 43 to as few as 12.[36] However, the merger plans were put on hold following objections from a number of police forces and police authorities.[37] As an alternative to mergers, the Home Office instead established a "Protective Services Programme Plan" aimed at ensuring effective collaboration between forces. Tony McNulty, then Minister for Policing, wrote to police authorities and chief officers on 14 February 2007 to outline the programme of work:

> … I propose a four element strategy, which was recently discussed by the National Policing Board (NPB). We will set up a sub-board of the NPB to oversee this work.
>
> i.) Together with forces and authorities, the NPB should identify and prioritise for action the highest needs, judging risk of harm by area and type of service. Building on the protective services standards now being agreed by the Service, there should be:
>
> - a two year time frame – 2009 – for significantly reducing risk in high need areas
> - a longer time-frame where needed – 2011 – for other areas to build up to acceptable standards and for high need areas to meet higher standards
>
> ii.) Forces and authorities should produce proposals to achieve these standards including by joint action.
>
> - These proposals would be examined for overall coherence and assessed against a risk framework to be agreed by the tri-partite partners and HMIC
>
> iii.) Based on forces and authorities' joint proposals demonstrator sites would be established in the meantime, particularly in areas of high need:
>
> - To promote workable solutions
> - with the aim of removing the barriers to collaboration and seeking in their police to create a gradient for self-sustaining improvements in protective services; and
> - potentially supported in some cases by limited seed corn funding and flexibilities
>
> Groups of authorities and forces are invited to apply for demonstrator status as soon as possible.
>
> iv.) The Home Office will address the police financing landscape the better to balance the protective service priority and the means of delivering such services, increasingly through joint approaches.[38]

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35 *Ibid*, p11

36 "Plan to cut police forces to 12", *BBC News*, 10 November 2005

37 Home Office press release, *Home Secretary delays police force mergers*, 20 June 2006. See also "Police force merger u-turn denied", *BBC News*, 11 July 2006.

38 Letter dated 14 February 2007 to all chairs of police authorities and all chief officers from Tony McNulty MP regarding police reform and protective services (Dep 07/793)

On 17 July 2007 Mr McNulty announced that 22 bids for demonstrator status had been received, from which a total of ten demonstrator sites collaborating on matters ranging from back office services to serious organised crime had been selected:

> These initiatives have been selected from 22 bids to provide a balanced programme across England and Wales to explore and develop the models of collaboration between forces that can deliver these vital services to protect the public more effectively and more efficiently.
>
> Collaborative working is a key part of a national programme of work the Government are taking forward, in consultation with the Association of Chief Police Officers and the Association of Police Authorities to improve the way the police combat serious organised crime and other threats to public safety. All police forces will be expected to meet newly developed protective service standards. Forces will need to collaborate to do this and the demonstration sites initiative will help ensure that all forces can learn from the experiences of these sites and make use of their best practice.
>
> The selected demonstrator sites will together be offered £3.7 million in Home Office funding to contribute to their start-up costs and they will take part in an evaluation process to be managed by the National Policing Improvement Agency which will monitor and measure their progress and delivery of benefits and develop a shared body of knowledge for the police service.[39]

The current legislation relating to collaboration agreements is set out in section 23 of the *Police Act 1996*. Under section 23, two or more chief officers may (subject to the approval of the relevant police authorities) make collaboration agreements between their forces in the interests of the efficiency or effectiveness of policing. In addition, two or more police *authorities* may make collaboration agreements for the provision of premises, equipment or other material or facilities. A collaboration agreement may be varied or determined by a subsequent agreement. The Secretary of State has the power, after considering any representations made by the parties concerned, to direct those parties to enter into a collaboration agreement or an agreement to vary or determine an existing agreement.

2. The Green Paper's proposals

Chapter 6 of the Green Paper looked at building on the existing collaborative arrangements between forces and, in some circumstances, making collaboration compulsory:

> 6.7 (…) Our vision is for collaborative solutions to be undertaken as part of mainstream policing, complementing and adding value to national and local structures, forming a key part of how policing is delivered in the 21st Century. Policing will be enhanced by a wide spectrum of collaborative working from close collaboration across a wide range of business areas, with a view to exploring the possibility of voluntary merger, to more selective collaboration where forces

[39] HC Deb 17 July 2007 cc13-15WS. On 12 December 2007, Mr McNulty indicated that the number of demonstrator sites had risen to 13 – see HC Deb 12 Dec 2007 cc7-8WS

> benefit from delivering a particular policing function jointly. Our job is to facilitate and support forces and authorities in this work.
>
> 6.8 The legislative framework that currently supports collaboration has served as a valuable platform on which to build some innovative and bold collaborative ventures. It could continue to do so, however, we are committed to providing the necessary levers and incentives to ensure that collaboration is an integral and seamless part of policing and to that end we want to achieve absolute clarity in the governance and legal framework that underpins joint-working. We will be exploring what options exist to bring forward new legislation with this objective in mind. We will also continue to seek opportunities to reward and recognise collaboration.
>
> 6.9 As part of the work on decision-making and the protective services inspection work being undertaken by HMIC, we will consider requiring collaboration for protective service areas where there is an operational and business imperative for decisions and processes to be taken at particular levels and in a consistent manner. For example, we could propose a minimum level of central decision-making to strengthen the current response to serious and organised crime. [40]

In its response to the Green Paper, ACPO indicated that it remained "positively, but not unanimously, in favour of the strategic merger of policing forces in the future".[41] ACPO also expressed its support for "the central mandate of national or collaborative solutions where a case can be proven", although it urged the Government to "be wary of legislation ossifying the Service and precluding local and future creative partnerships".[42]

The APA made the following comments in its response:

- The APA is interested to see that the Home Office wishes to explore the possibility of voluntary merger, and would be interested to know how the issue of precept harmonisation would be overcome.
- The APA believes that the current legislative framework offers a good platform for collaboration, but it could be refined to offer clarity on the issue of direction and control. Furthermore, we would agree that the review of the Regulation of Investigatory Powers Act should ensure that any changes to the Act allow for collaborative ventures without creating additional bureaucratic processes.
- The APA believes that there is benefit in the Home Office encouraging closer working at a national and local level, e.g. through providing development funding for the RIU [Regional Intelligence Units] network and encouraging the development of a national tasking and coordinating process for serious organised crime involving ACPO, SOCA, UKBA and HMRC, but this should not extend to 'mandated collaboration'.
- If partners are reluctant to collaborate this will usually be for good reason and may not be identifiable through a quantitative analysis, for example where organisational cultures were deemed to be incompatible. The

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40 *From the Neighbourhood to the National: Policing Our Communities Together*, Cm 7448, July 2008, p72

41 ACPO, *ACPO Response to the Green Paper*, October 2008, p20. For further background on ACPO's position see ACPO, *Police Reform Green Paper: The Future of Policing*, March 2008, Chapter 4.

42 *Ibid*, p21

> preferred approach should remain to encourage voluntary collaboration through putting in place a package of levers and incentives.[43]

3. The Bill's provisions

Clause 5 of the Bill would replace section 23 of the 1996 Act with nine new sections. Chief Officers or police authorities would continue to be able to enter into collaboration agreements, although the new sections aim to set out a more detailed legal framework as to the circumstances in which such agreements can be made.

The Secretary of State would continue to have the power to give directions to forces or authorities regarding collaboration agreements. In addition, the Secretary of State would have new powers to issue guidance about collaboration agreements to chief officers or police authorities[44] or to terminate collaboration agreements. The Secretary of State would also have to be consulted regarding plans for collaboration agreements involving seven or more police forces or authorities.

Police authorities would be required to establish accountability arrangements for collaborations involving their own police force. These accountability arrangements could also be established jointly with another police authority whose force was also party to the collaboration, for example by way of a joint committee.

Clauses 6 to 8 of the Bill would make certain procedural amendments to the *Police Act 1997* and the *Regulation of Investigatory Powers Act 2000* in order to streamline the authorisation process for matters such as surveillance and interference with property where a collaboration agreement is in place. Subject to certain conditions being satisfied, authorisation by one collaborating force for such activities could be extended to members of another collaborating force, removing the need for duplicate authorisations to be issued by both collaborating forces.

E. Secondments

In the Green Paper the Government emphasised the developmental role of external secondments:

> Development does not, of course, simply mean training. As noted, it is important that aspiring and current chief officers develop themselves through national work. As well as contributing to policing in England and Wales such work often provides important development opportunities. More widely, it is important that significant numbers of aspiring and current chief officers take secondments out of the police service for a while. This will help make the service as outward-facing as possible, including in helping police leaders play their part amongst the wider leadership of the public sector. The Government will review elements of the police pensions legislation which can make it more difficult for police officers to take secondments outside of the police service.[45]

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43 APA, *The policing green paper: a response from the Association of Police Authorities*, October 2008, p44

44 The Explanatory Notes to the Bill anticipate that any such guidance would cover matters such as "best practice in accountability and governance structures in collaborations of different kinds". EN, para 48

45 *From the Neighbourhood to the National: Policing Our Communities Together*, Cm 7448, July 2008, p53

In order to remain eligible for, among other things, promotions, pay rises and pension benefits, a police officer on secondment must be on "relevant service". The activities that constitute relevant service are currently listed in section 97(1) of the *Police Act 1997*. The approach to date has been to amend section 97 on a case by case basis to list the particular activities that constitute relevant service.[46] Clause 8 of the Bill aims to make updating the definition of relevant service more flexible by introducing a power enabling the Secretary of State to amend the list of activities in section 97 by order. A similar order-making power would also be added to the *Police Pensions Act 1976*.

F. Standardised technology, procedures and facilities

Under section 53 of the *Police Act 1996*, the Secretary of State currently has the power to make regulations as to standards of police equipment where this would promote the efficiency and effectiveness of police forces. Such regulations may, for example, require all police forces to use only the equipment specified in the regulations or prohibit all police forces from using specified equipment. Any such regulations must apply to all police forces. Section 53 specifies that "equipment" includes vehicles, headgear and protective and other clothing.

Clause 10 of the Bill would amend section 53 by clarifying that "equipment" extends to software.[47] It would also remove the requirement for regulations made under section 53 to extend to all forces; the Secretary of State would instead have the flexibility to make regulations in respect of "one or more police forces".

Section 53A of the 1996 Act currently permits the Secretary of State to make regulations requiring all police forces in England and Wales to adopt particular procedures or practices. Section 57(3) of the 1996 Act contains a similar power to make regulations as to common specified facilities and services, where such regulations would be in the interests of promoting efficiency and effectiveness. Clauses 11 and 12 of the Bill would amend the existing provisions so that any regulations made under sections 53A or 57(3) would not need to extend to all forces; again, the wording would be changed to "one or more police forces". Clause 11 would also bring section 53A into line with sections 53 and 57(3) by introducing a requirement for the Secretary of State to consider efficiency and effectiveness before making regulations under section 53A.

Liberty has raised concerns that removing the requirement for regulations to apply to *all* police forces may result in the politicisation of individual forces:

> Enabling the Home Secretary to direct the type of policies that apply to specific police forces to promote efficiency in that force, raises the specter of political interference in particular police forces. The current power does not allow the

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46 EN, para 63

47 For background information on IT procurement and the police see *Impact Assessment of changes to the Police Act 1996 to enable the HS to make regulations regarding the procurement and development of Police ICT systems and services on the grounds of efficiency and effectiveness*, Home Office, 17 October 2008

Secretary of State to pick and choose between police forces, which is some limit on the power of central government to control how a particular force operates.[48]

III Sexual offences and sex establishments

A. Current Law

Although prostitution is legal (and its proceeds taxable), there are several criminal offences closely associated with it in England and Wales:

- Causing or inciting prostitution for gain (*Sexual Offences Act 2003,* section 52)
- Controlling prostitution for gain (*Sexual Offences Act 2003,* section 53)
- Brothel-keeping and associated offences (*Sexual Offences Act 1956,* sections 33 to 36)
- Trafficking into, within or out of the UK for sexual exploitation (*Sexual Offences Act 2003*, sections 57-60)
- Loitering and soliciting by a common prostitute in a street or public place for the purpose of prostitution (*Street Offences Act 1959* section 1)
- Persistent soliciting of a person or persons for the purpose of prostitution (*Sexual Offences Act 1985* section 2)
- Kerb crawling (when a person in a motor vehicle attempts to solicit someone for the purposes of prostitution) (*Sexual Offences Act 1985* section 1)
- Placing of advertisements relating to prostitution in or near phone boxes (*Criminal Justice and Police Act 2001* sections 46 and 47)

Some of the offences were amended by the *Sexual Offences Act 2003* to make them gender-neutral. They affect pimps and brothel-keepers, and soliciting by and of prostitutes, but do not criminalise the exchange of money for sex between adults. One author has suggested that 'the only way that prostitution can be practised without committing a criminal offence is as a one-to-one arrangement between two consenting adults in private'.[49]

A new set of offences relating to the abuse of children through prostitution came into force under the *Sexual Offences Act 2003*, which made it an offence to pay for the sexual services of a child (section 47), as well as to cause or incite child prostitution (section 48), control a child prostitute (section 49), or arrange or facilitate child prostitution (section 50). A person convicted of paying for the sexual services of a child under 13 may be liable to life imprisonment, and the maximum penalty available for most

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[48] Liberty, *Liberty's Second Reading Briefing on the Policing and Crime Bill in the House of Commons*, January 2009, para 6

[49] Joanna Phoenix, *Making Sense of Prostitution*, 1999, p20

of the other offences is 14 years' imprisonment (the longest determinate sentence possible). These are higher than the maximum penalties for the equivalent offences relating to adults.

The *Criminal Justice Act 1982* ended the use of imprisonment as a punishment for women convicted of soliciting. People convicted of kerb-crawling also face a fine rather than imprisonment, whereas imprisonment is an option for most of the other prostitution-related offences.

B. Proposals for reform (1984 – 2002)

There have been calls for reform of the law on prostitution for many years. The Wolfenden Committee considered the possible introduction of licensed brothels in its comprehensive 1957 report, but concluded that there were fundamental objections to such a proposal which could not be countered.[50]

The Criminal Law Revision Committee looked at prostitution both on and off the street in reports published in 1984[51] and 1985[52] respectively. The reports discuss the history of attempts to control prostitution, and the different options available. Among the recommendations made by the Committee in its 1985 Report were proposals to deal with the problem of kerb-crawling, which was the main target of the Sexual Offences Act 1985.

A cross-party Parliamentary Group on Prostitution, chaired by Diane Abbott MP, was established in 1993 and published a report in July 1996. It had taken evidence from a number of statutory and voluntary agencies, and also from prostitutes themselves. The report concluded that there was considerable agreement from all the groups who gave evidence that the current legislation relating to prostitution was not working well, in particular because it was fragmented rather than coherent and integrated. It therefore recommended that the Home Secretary carry out a comprehensive review of the legislation relating to prostitution. The group also agreed on several particular recommendations relating to a review of the law, including that

- the legislation should employ gender-neutral terminology, to remove the current discrepancies in the ways in which the law treats males and females involved in prostitution;
- a power of arrest should be attached to the 'kerb crawling' offences;
- sanctions should cover 'cruisers' who consistently drive around red light districts;
- alternative sanctions should be available for kerb crawlers and cruisers, including the endorsement of driving licences and community service orders;

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50 Wolfenden Report, *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd 247, 1957, p97

51 Criminal Law Revision Committee, *Prostitution in the street*, Cmnd 9329, August 1984

52 Criminal Law Revision Committee, *Prostitution: off-street activities*, Cmnd 9688, December 1985

- the offences relating to 'living on the earnings of prostitution' should be redrafted to refer to those whose role is essentially coercive or exploitative;

- sanctions should be increased against those who encourage young people to enter prostitution and against those clients who avail themselves of the services of juveniles; and

- the offence of 'soliciting for the purposes of prostitution' should attract sanctions such as community-based sentences rather than fines, but where fines are imposed, revised guidelines should be issued to ensure that they are consistent and appropriate.[53]

Kerb crawling was made an arrestable offence from 1 October 2001, by section 71 of the *Criminal Justice and Police Act 2001* (amending the *Police and Criminal Evidence Act 1984*).[54]

The Government announced in 1998 that it would conduct a wholesale review of sexual offences and penalties,[55] and that in doing so it would consider the laws relating to soliciting.[56] An independent review was duly set up, and published its recommendations to Ministers in the form of a consultation document, *Setting the Boundaries*, in July 2000.[57] The review did not consider how or whether prostitution should be legal or illegal since that was beyond its remit:

> It is important to emphasise that we are not looking at how or whether prostitution should be legal or illegal: that is beyond our remit. Therefore we have not looked at a swathe of offences in the Sexual Offences Act 1956 dealing with brothel keeping, etc., or parts of other Sexual Offences Acts that deal with kerb-crawling, or section 1 of the Street Offences Act 1959, except insofar as they link to the sexual exploitation of others. This whole area is a substantial one worthy of consideration.[58]

However, it acknowledged the intensity of the debate and the diversity of views, and recommended that a further review examine this issue:

> …We have recommended elsewhere that male and female prostitution should be regulated by the law in an equitable fashion. That may provide an opportunity to consider the wider aspects of the law on prostitution, which were beyond our remit to consider. Changes may be desirable but in a way which does not produce unintended adverse consequences for either those who are exploited through prostitution, or for the communities which can suffer its side effects. We therefore recommend that there should be a further review of the law on prostitution.

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53 Report of the Parliamentary Group on Prostitution, July 1996, pp 39-42

54 see Home Office press notice 191/2001, *New arrest powers to tackle crime, guidance for police*, 2 August 2001

55 HC Deb vol. 314 c10, 15 June 1998

56 HC Deb vol. 314 c358w, 22 June 1998

57 Home Office, *Setting the Boundaries: Reforming the law on sex offences*, DP 00/124, 7July 2000

58 Ibid.

> Recommendation 53: There should be a further review of the law on prostitution.[59]

The Government agreed to consider the recommendation of having a further review:

> We will examine the scope for a review of the issues surrounding prostitution and the exploitation, organized criminality, drug abuse and anti-social behaviour associated with it.[60]

Setting the Boundaries also recommended that there should be offences of:

- Exploiting others by receiving money or reward from men and women who are prostitutes;
- Managing or controlling the activities of men and women who are prostitutes, for money or reward; and
- Recruiting men or women into prostitution whether or not for reward or gain.

In November 2002, having responded to *Setting the Boundaries*, the Government published its new policy on sexual offences in a white paper entitled *Protecting the Public*.[61] Chapter 5 of this white paper covered "offences involving commercial sexual exploitation", and proposed the introduction of three new offences: commercial sexual exploitation of a child; commercial sexual exploitation of adults (of either sex); and trafficking people for commercial sexual exploitation. A 'stop-gap measure' against trafficking had recently been brought in by sections 145-6 of the *Nationality, Immigration and Asylum Act 2002*.[62]

C. Sexual Offences Act 2003

A Bill to give effect to the proposals of *Protecting the Public* was introduced in the House of Lords on 28 January 2003 and received Royal Assent as the *Sexual Offences Act 2003* on 20 November 2003. It came into force on 1 May 2004.

The 2003 Act did not introduce a comprehensive new set of prostitution-related offences. However, it changed some of the existing offences to make them gender-neutral, brought in a new offence of trafficking for sexual exploitation to replace the stop-gap provision in the *Nationality, Immigration and Asylum Act 2002*, and created new offences on the abuse of children through prostitution and pornography and on exploitation of prostitution.

The sections of the 2003 Act which relate to prostitution are as follows:

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59 Ibid.
60 Home Office, *Responses to Setting the Boundaries,* DP 02/2302, November 2002
61 Home Office, *Protecting the Public: strengthening protection against sex offenders and reforming the law on sexual offences*, Cm 5668, November 2002
62 in force 10 February 2003: SI 2003/1

Abuse of children through prostitution and pornography
47 Paying for sexual services of a child
48 Causing or inciting child prostitution or pornography
49 Controlling a child prostitute or a child involved in pornography
50 Arranging or facilitating child prostitution or pornography
51 Sections 48 to 50: interpretation

Exploitation of prostitution
52 Causing or inciting prostitution for gain
53 Controlling prostitution for gain
54 Sections 52 and 53: interpretation

Amendments relating to prostitution
55 Penalties for keeping a brothel used for prostitution
56 Extension of gender-specific prostitution offences

Trafficking
57 Trafficking into the UK for sexual exploitation
58 Trafficking within the UK for sexual exploitation
59 Trafficking out of the UK for sexual exploitation
60 Sections 57 to 59: interpretation and jurisdiction

Schedule 1 - Extension of gender-specific prostitution offences

The Home Office has produced Explanatory Notes on the Act, and also guidance for the police and courts on the new offences.[63]

D. Review of the law on prostitution (2004)

The Government had announced in July 2001 that it would look into setting up a review of the law on prostitution, as recommended by *Setting the Boundaries*. Details of progress towards this review were set out by the Home Office Minister Lord Bassam on 2 February 2004:

> **Lord Faulkner of Worcester asked Her Majesty's Government:**
> When they will set up their review of the law on prostitution; and what will be its terms of reference.
>
> **Lord Bassam of Brighton:** My Lords, a scoping exercise for the review is well under way, examining issues arising from prostitution, to establish what measures need to be included in a national strategy for prostitution in order to reduce exploitation, protect communities, and address the links with serious crime, particularly the illegal use of class A drugs. The scoping exercise is looking at both street-based and off-street prostitution, and we hope to be ready to publish a paper for public consultation later this year.[64]

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63 Home Office Circular 21/2004, *Guidance on Part 1 of the Sexual Offences Act 2003,* 29 March 2004
64 Lord Bassam of Brighton, HL Deb 2 February 2004 c437-9

Lord Bassam added that the Government review would include an examination of the potential for legalising prostitution and licensing brothels. Other areas considered by the review included:

- children involved in prostitution;
- the links between prostitution and drug use;
- trafficking for prostitution;[65] and
- the possible introduction of official 'tolerance zones' for prostitution.[66]

In July 2004 the Home Office published a consultation paper entitled *Paying the Price: a consultation paper on prostitution.*

In January 2006 the Government published a report summarising the responses to the consultation paper and setting out its proposals for "a co-ordinated prostitution strategy". The report's executive summary says:

> 2. The strategy will focus on disrupting sex markets by preventing individuals, and particularly children and young people, from being drawn into prostitution; by providing appropriate protection and routes out for those already involved; by protecting communities from the nuisance associated with prostitution; and by ensuring that those who control, coerce or abuse those in prostitution are brought to justice.
>
> 3. The key objectives of the strategy are to:
>
> - challenge the view that street prostitution is inevitable and here to stay
> - achieve an overall reduction in street prostitution
> - improve the safety and quality of life of communities affected by prostitution, including those directly involved in street sex markets
> - reduce all forms of commercial sexual exploitation.
>
> 4. Changing attitudes is a key element of the strategy. It is crucial that we move away from a general perception that prostitution is the 'oldest profession' and has to be accepted. Street prostitution is not an activity that we can tolerate in our towns and cities. Nor can we tolerate any form of commercial sexual exploitation, whether it takes place on the street, behind the doors of a massage parlour or in a private residence.
>
> 5. Once an individual becomes involved in prostitution it can be difficult to find a route out. The long-term damage, both emotionally and physically, can be significant. This means that prevention is a crucial element of the strategy. Bringing to justice those involved in sexual exploitation is a crucial element of deterrence. The Sexual Offences Act 2003 introduced a robust legal framework for addressing exploitation and the strategy will ensure that these new offences

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65 Ibid.

66 'Green light for overhaul of prostitution laws', *Independent*, 8 June 2004; 'Prostitutes to have exit strategy but not tolerance zone', *Guardian,* 10 June 2004

and stiff penalties are used to best effect. In particular, we must leave no one in any doubt that involving young people in prostitution is child abuse.

6. We also have a range of measures – civil and criminal – to address the nuisance associated with street prostitution. Street prostitution must not be accepted or ignored. Local partnerships must find ways to listen to the concerns of communities and work with them to find a lasting solution. That solution must not only provide routes out for those providing sexual services but also deter those who create the demand for them. Making a real impact on disrupting the market means tackling all aspects – demand, supply and opportunity.

7. The prostitution strategy includes:

- prevention – awareness raising, prevention and early intervention measures to stop individuals, particularly children and young people, from becoming involved in prostitution (Section 1)
- tackling demand – responding to community concerns by deterring those who create the demand and removing the opportunity for street prostitution to take place (Section 2)
- developing routes out – proactively engaging with those involved in prostitution to provide a range of support and advocacy services to help them leave prostitution (Section 3)
- ensuring justice – bringing to justice those who exploit individuals through prostitution, and those who commit violent and sexual offences against those involved in prostitution (Section 4)
- tackling off street prostitution – targeting commercial sexual exploitation, in particular where victims are young or have been trafficked (Section 5).

8. Addressing prostitution will require strong partnerships, involving a wide range of enforcement and support agencies. Success in delivering safer communities through a significant reduction in street prostitution and other forms of commercial sexual exploitation will depend on the will and commitment of local partnerships to address prostitution with confidence and energy – confidence that it really is possible to make a difference, and energy to tackle the many challenges involved. Many individuals and communities already pay a significant price for the existence of a sex market – in those communities we simply cannot afford to ignore the many problems associated with prostitution.[67]

The executive summary includes a table summarising action to be taken by central and local government and other agencies to implement the strategy and tackle prostitution.

1. “Tolerance zones” or managed areas

In June 2004, a group of academics at Liverpool John Moores University reported on the results of a public consultation by Liverpool City Council on plans to develop managed zones for street prostitutes. This report comments on the use of “tolerance zones” or “managed areas” as a means of dealing with problems associated with street prostitution:

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[67] Home Office, *A Coordinated Prostitution Strategy and a summary of responses to Paying the Price*, January 2006

> The aim of a managed zone is to physically restrict street prostitution to an agreed non-residential area. It should be designed to minimise any harm to communities (residential and business) while maximising the opportunity to provide protection and support services to women working on the streets. Ultimately a managed area should help address the causes of prostitution and assist those involved with returning to legitimate forms of income generation. In order to work, the implementation of a managed zone requires a zero tolerance approach to prostitution taking place in any area outside of the zone. In summary, a successful managed zone should provide:
>
> - a designated area for street sex work
> - residential areas free from street sex work
> - a safer environment for street sex work
> - improved access to support and services for women involved in prostitution
> - a clearer system for policing prostitute related offences.
>
> Some locations in the UK and abroad have previously established tolerance zones where prostitution is permitted. In the case of Liverpool, a managed zone is a more appropriate term as it describes the proactive management of street prostitution and related issues and not purely a toleration of street prostitution in certain locations.[68]

The report noted that across the UK informal managed areas or tolerance zones had been in operation in Edinburgh (closed in 2001 due to redevelopment of the surrounding area and complaints from new residents), Aberdeen and Bolton.[69]

The Government's strategy document rejected the option of dealing with problems caused by street prostitution through the use of managed areas or "tolerance zones":[70]

> **The case for and against managed areas**
>
> We were particularly keen to have views on managed areas as some councils have expressed an interest in trying a managed approach to street prostitution. A managed area is generally considered to be an area in which no arrests are made for prostitution-related offences although the enforcement of the law on other matters (for example, drug offences) continues. There is currently no legal mechanism for the designation of such an area.
>
> Many respondents commented on this issue. Of these, there were some in favour of the introduction or trial of managed areas but a clear majority were firmly opposed. Those who argued in favour considered that the safety of women could be better safeguarded, and communities better protected from prostitution-related nuisance, through the designation of managed areas. It was considered that they would contain the market, enabling support projects to engage with those

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68 Pete Clark et.al. *Consultation on a Managed Zone for Sex Trade Workers in Liverpool Executive Summary* , June 2004, p.2

69 *Ibid.,* p2 and Table 1

70 Home Office *A Coordinated Prostitution Strategy and a summary of responses to Paying the Price*, January 2006, pp8-9

involved in street prostitution, while keeping prostitution away from residential areas, thereby reducing the nuisance to communities. The exclusion of pimps and drug dealers would reduce serious crime and enable a safer environment to be created for all involved.

Many respondents were doubtful that suitable areas for such zones could be identified – particularly areas where local residents or businesses would be happy to live within, or in close proximity to, a zone. Those who were opposed to managed areas also considered it doubtful that those involved in prostitution, and those who want to pay for street sex, would be prepared to use such an area. Women often commented that they feel safer working in residential areas. The exclusion of pimps and drug dealers could also exclude pimped women and women with problematic drug use – and almost all those currently working on the streets fall into one or other (or both) of these groups. Equally, those wanting to purchase street sex generally prefer to remain anonymous and may be reluctant to visit an area where they are more visible. There are also resource implications for the police and local authorities, both in respect of managing the areas and policing the streets outside the zones.

Finally, and perhaps most importantly, the creation of a managed area – even as a short-term arrangement – could give the impression that communities condone, or at least are forced to accept, street prostitution and the exploitation of women. While managed areas may offer some opportunity to improve the physical safety of those involved, there is no amount of protection that can keep women from harm in this inherently dangerous business. The majority of respondents shared this view.

Government Response: We reject the option of managed areas. The clear aim of Government will be to disrupt street sex markets to significantly reduce the numbers involved in street prostitution. The focus of enforcement will be on kerb crawling to respond to community concerns and to reduce the demand for a sex market. We will bring forward reforms to the offence of loitering or soliciting to introduce a more rehabilitative approach and to remove the stigmatising term 'common prostitute'. Guidance will remain firmly against the use of the criminal law in respect of children involved in prostitution save in the most exceptional circumstances – as a 'last resort' where services fail to engage with young people and they return repeatedly to the streets. The strategy will include the development of guidance to local partnerships on how to respond to community concerns about street prostitution. (Section 2)[71]

Liverpool City Council's plan was eventually shelved after the government published its long-term 'Prostitution Strategy' in January 2006 in which it ruled out the idea of managed zones for prostitutes.[72]

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[71] *Ibid.*, pp8-9

[72] See Information Commissioner's Office *Freedom of Information Act 2000 (Section 50) Decision Notice Reference* FS50079486, 10 January 2007

2. Off-Street Prostitution: Legalising Brothels

There have from time to time been suggestions that brothels should be legalised under licence, and the July 2000 consultation paper on sexual offences *Setting the Boundaries* set out the main arguments quite succinctly:

> We heard a range of evidence about other aspects of the law on prostitution. A number of organisations, notably the Josephine Butler Society, the English Collective of Prostitutes, the Sexual Freedom Coalition and Europap suggested that there should be a much more radical consideration of the law on prostitution. In recent years there have been recent significant changes in the law around the world. The Netherlands and Germany allow regulated prostitution and Sweden has changed the law to criminalise those who buy sex rather than those who sell it. Some Australian states now regulate and allow prostitution as a trade. It is suggested that regulating prostitution enables the more effective action against trafficking and the exploitation of children, greater safety and less stigma for those sex workers who fully exercise their choice to do that work. Others argue such regulation increases the use of men and women as commodities of trade, that allowing a legal market merely increases the illegal activity and that selling sex is unacceptable in a civilised society. Communities are very concerned about overt prostitution in their midst, and about the linkage between sex markets and other forms of criminality including drugs. There was no consensus across a set of widely diverging views.[73]

In its strategy report, the Government summarised the arguments for and against various possible changes to the law concerning off-street prostitution. It also said it would make proposals for an amendment to the definition of a brothel so that two (or three) individuals could work together:

> **Tackling Off-Street Prostitution**
>
> 5.1 This area of prostitution varies enormously, from high-earning entrepreneurs to small brothels in residential areas and premises licensed as saunas or massage parlours in urban areas. Respondents offered significantly differing views on the acceptability and safety of this area of prostitution. While some premises appear to operate discreetly, others can cause considerable nuisance in the neighbourhood. It is also clear that working off street can be as dangerous and exploitative as working on the streets. While some respondents to Paying the Price consider this to be a sensationalist view of off street prostitution, the Government must address sexual exploitation wherever it exists, and particularly when it involves the most vulnerable members of our communities – including children and women trafficked from abroad for the purposes of prostitution.
>
> 5.2 This element of the strategy will include:
>
> - reform to the law on the definition of a brothel
> - the development of a UK action plan on trafficking
> - action research on off street premises.

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[73] Home Office, *Setting the Boundaries: Reforming the law on sex offences*, DP 00/124, 7July 2000, p 117

Policing brothels

On licensing, some respondents told us that:

- brothels should be allowed to operate as ordinary businesses

while others felt that it:

- creates new hierarchies, forcing those who cannot or will not comply into an illegal sector (or onto the street)
- increases acceptability and demand, and so increases the number of brothels in the market
- does not control the involvement of organised crime
- sends the wrong message to young people, and the wider public, about the acceptability of prostitution.

On registration, respondents told us that:

- where registration systems exist, few of those eligible choose to comply
- outreach and harm reduction projects have better outcomes
- public health education is effective in safeguarding public health as it can be targeted at those involved in prostitution and those who pay for sex.

Respondents suggested:

- permitting small worker-run establishments (safer and less exploitative)
- greater scrutiny of businesses licensed to operate as massage parlours/saunas.

5.3 Respondents were divided in their views on the merits of licensing (or decriminalising) off street prostitution. A minority (including those respondents who identified themselves as men who pay for sex) felt that off street prostitution should be accepted by communities and that the thrust of Government policy should be towards making it safe for all concerned. For this group licensing (or decriminalisation) offered the prospect of imposing certain standards of health and safety, and regularising the nature of the business to remove the current stigma associated with it.

5.4 Others – the majority – were more sceptical about the potential value of such a scheme. Principal concerns were that evidence from abroad had failed to show that such a scheme was capable of 'cleaning up' the business. There were real concerns that it would create an even more hierarchical structure, with those unwilling or unable to comply with regulations banished to an illegal sector or to the streets. There were also fears that both the legal and illegal sectors would grow as a result of an increasing acceptance of prostitution. The aim of the strategy is to minimise the opportunities for exploitation.

5.5 Paying the Price also sought views on registration for the individual instead of, or as part of, a licensing scheme for the owner of the premises. A number of those who commented were concerned to improve public health and supported registration as a means of encouraging regular health checks. However, the majority of those who responded on this issue considered that registration would

> be resisted by most of those involved in prostitution who prefer to maintain their anonymity, and that such a scheme could be counter-productive in terms of improving sexual health as it would deter those who currently voluntarily undertake regular health checks. What is most important is to ensure that sexual health services are fully accessible to all – including those involved in prostitution and those who pay for sex – and that regular checks are encouraged through public education.
>
> 5.6 While the majority opposed the widespread legalisation of brothels, there was considerable support for an amendment to the law to allow more than one person to work together in prostitution. At present only one person may work as a prostitute – more than that (and that can include a 'maid') and the premises are classed (in case law) as a brothel. This runs counter to advice that women should not work alone in the interest of safety. The Government will make proposals for an amendment to the definition of a brothel so that two (or three) individuals may work together.

This proposal was discussed in a number of press articles at the time. However, an article in *the Guardian* in December 2006 indicated that, when questioned, the Home Office and Downing Street had given "no hope of action" on this:

> Home Office ministers said they supported the idea of these mini-brothels and it was widely backed even by those who did not wish to see the wider decriminalisation of prostitution. Ms Mactaggart also wanted to scrap the legal terminology of being a "common prostitute" saying it was offensive and outdated.
>
> But when asked yesterday what had happened to these proposals, both Downing Street and the Home Office gave no hope of action. Instead, in the face of a tabloid campaign of opposition, both stressed that any question of introducing "managed zones" had been ruled out, and said a new round of consultations with residents' associations and other stakeholders would be held over the 'mini-brothels' plan before any action was taken.[74]

In a Written Answer to Fiona Mactaggart on 9 January 2007, the Government confirmed that further consultation was thought necessary and promised an announcement "in due course".[75]

3. Comment on the strategy

In his comments on the Government's strategy the Conservative home affairs spokesman Edward Garnier said the Government should focus on the underlying problems which cause prostitution:

> Prostitution is a serious problem, which needs to be tackled in a thoughtful and sensible way.
> We need to focus on the underlying social problems which force men, women and children into prostitution, such as family breakdown, drug misuse, child abuse, domestic violence and debt.

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[74] "Tolerance zones plan in tatters", *Guardian*, 14 December 2006

[75] HC Deb 5 January 2007 c551W

> The Conservative Party realise the need to try and stem the demand for prostitution, yet Government policy cannot simply focus on demand. It must also look thoughtfully and intelligently at the issues which lead vulnerable people to becoming prostitutes in the first place.[76]

The Liberal Democrat spokesman Mark Oaten described the new strategy as a "missed opportunity", saying:

> It will do very little to reduce the number of prostitutes on the street, to improve the appalling conditions they work in, or to tackle health problems.[77]

He added:

> We need smart solutions not the same old failed approach.
> We support the piloting of 'managed zones' in designated areas of cities, subject to a code of conduct and regular contact with police and health workers. The object of these zones is not to 'tolerate' prostitution but to move it to a specified area where professionals can work with prostitutes to help them reach a point where they can choose other employment.[78]

E. *Criminal Justice and Immigration Bill 2007-08*

The *Criminal Justice and Immigration Bill,* published in June 2007, contained provisions to amend the offence of "loitering or soliciting for the purposes of prostitution", removing the term "common prostitute" and introducing the possibility of a new sentence of "orders to promote rehabilitation" as an alternative to a fine for those convicted. The background to and effect of those provisions are described in the Library Research Paper on the Bill.[79] There was some disappointment that there had been no opportunity for a comprehensive review of the laws on prostitution.[80] Removal of the term "common prostitute" was generally welcomed and uncontentious, but there were reservations about the proposed new sentencing order. Some opposition to these provisions was coordinated by *The Safety First Coalition* which Lord Faulkner of Worcester described as a:

> … remarkable group of individuals and organisations including religious groups such as Zacchaeus 2000, as well as the Royal College of Nursing, the National Association of Probation Officers and the English Collective of Prostitutes. Their stance is supported by medical consultants and the British Psychological Society, using practitioner knowledge and evidence from the top medical and legal journals.

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76 Press release from Edward Garnier QC MP, *Prostitution 2: Tackle underlying problems say Tories,* 24 January 2006

77 "Prostitution strategy green lights small brothels", *Epolitix*, 17 January 2006

78 Ibid.

79 Library Research Paper 07/65, The *Criminal Justice and Immigration Bill*; see also Library Research Paper 07/65, *Criminal Justice and Immigration Bill: Committee Stage Report* and House of Lords Library Note, *Criminal Justice and Immigration Bill*, 17 January 2008

80 See Lynne Jones MP, HC Deb 8 October 2007 c69 ; Lord Faulkner of Worcester HL Deb 22 January 2008, c180

> The coalition came together following the murders of the five young women in Ipswich, to put forward the point of view that everyone deserves to be safe, regardless of gender, race, occupation or lifestyle. This received widespread support from the people of Ipswich, who rather than blaming such women themselves believe that everything possible should be done to ensure their safety in future.[81]

The Coalition's briefing paper on that Bill is available online.[82]

a. Orders to promote rehabilitation

During debate in Committee, David Heath (LD) said:

> I question whether compulsory rehabilitation under the model that the Government propose will have the effect that they desire. This is not a criticism of Ministers' intentions, but a concern about the outcome. I fear that it will result in the exact opposite of what the Government want. First, it runs the risk of criminalising a large number of prostitutes. Many will be unable or unwilling to meet the terms of rehabilitation orders, for economic or other reasons, and will find themselves in jail as a consequence. That is the way in which we used to deal with prostitution, and it was ineffective then, yet we are, apparently, to revisit it. That point was made expressly by Harry Fletcher, the assistant general secretary of the National Association of Probation Officers, who said:
>
> > "These new measures will turn the clock back by 25 years. Thousands of prostitutes face the prospect of being jailed for up to 72 hours if they fail to obey new court orders set out in the Criminal Justice and Immigration Bill...Prostitutes are unlikely to attend compulsory meetings when they know that there is no alternative source of employment or income. It is highly unlikely that three sessions with a trained counsellor will persuade any prostitutes to give up their work."
>
> He concluded that there will be a high breach rate and that a large number of people will be criminalised—a situation that we thought we had turned away from some time ago.
>
> There are other questions about the effectiveness of the measures, particularly regarding who the counsellors and supervisors will be, what basic training they will have, what regulation will cover their operations and what sort of services they will offer. Will they be able to mandate other services to provide support that is diagnosed as being required? I return to drug rehabilitation; if that is a key component, as it often is, will other providers of supervision or support be leapfrogged in order to provide those services? If not, will there be long waiting lists for rehabilitation? That would also result in the breach of orders and mass criminalisation.
>
> This policy is not mature and has not been properly thought through.[83]

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[81] HL Deb 22 January 2008 c181
[82] http://www.allwomencount.net/EWC%20Sex%20Workers/CJIBbriefing.htm
[83] PBC Deb 27 November 2007 c555

David Burrowes (Con) questioned whether rehabilitation orders were a realistic approach and whether there were resources to match the Government's desire to rehabilitate street prostitutes and divert them away from their trade. He asked for clarification as to who the supervisors would be and how they would be regulated.[84] He sought reassurance on the issue of enforcement, in view of concern that failure to attend meetings could result in detention lasting for up to 72 hours and that the cycle of orders might involve a failure-to-attend order, a further order and then prison.[85] Vernon Coaker responded:

> The strategy acknowledges that the law on loitering or soliciting requires reform for it to be fit for purpose. The offence of loitering or soliciting, which is currently punishable by way of a fine, is frequently described as a revolving door, so we wanted to introduce an alternative to a fine, such as the rehabilitative penalty. The new orders will not be highly prescriptive, nor will the requirements be particularly onerous, given the low-level nature of the offence. However, they will require offenders to attend three sessions with a supervisor in order to begin to deal with the reasons behind their involvement in prostitution.
>
> The clause does not specify who can or should perform the role of supervisor, only that they should seem to the court to have the necessary qualifications or experience to help the offender make best use of the meetings to address the causes of their offending and find ways in which to stop it. In practice, we expect that role to be performed by someone based in a dedicated support project and already working with those involved in prostitution, but there could be others. Although the courts will have the discretion as to whom is considered appropriate and capable of carrying out the role, guidance will say very clearly that those with the most relevant skills will already be working in specialist projects. That partly answers the question of the hon. Member for Enfield, Southgate. There are numerous advantages in using existing project workers to act as supervisors, not least the fact that many might continue to be in contact with the individual long after the order has been completed.[86]

He added that the Government did not wish the 72 hours provision to be used often, but that at the end of the day it was important to make available a sanction should somebody knowingly, deliberately and wilfully choose to ignore the fact that theywere subject to an order. He did not believe that it would be used in many circumstances.[87]

The provisions met similar criticisms in the House of Lords. Lord Faulkner referred to a meeting which had recently been organised by the Coalition in one of the Committee Rooms. It had been attended by a number of Peers who had heard:

> unanimous criticism of the clause, which, to quote from [the Coalition's] briefing, "introduces compulsory rehabilitation under threat of imprisonment".[88]

He went on:

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84 PBC Deb 27 November 2007 c559
85 PBC Deb 27 November 2007 c569
86 PBC Deb 27 November 2007 c565
87 PBC Deb 27 November 2007 c570
88 HL Deb 22 January 2008 c181

> On the surface, Clause 124 may appear a well meaning effort to get people out of the sex industry. I respect my noble friend Lord Hunt for putting forward that point of view in his opening speech. Indeed, it is linked to a proposal in Clause 123 to do away with the term "common prostitute", which dates back to the Vagrancy Act 1824. That is long overdue. Yet what chance is there that women such as Judy, to whom I referred a moment ago, would ever turn up for these rehabilitation sessions? The answer is almost none at all. Have we forgotten what we know about addiction? Compulsion does not work, and the person must be willing and supported in order to be able to change her life.
>
> The Safety First Coalition believes that a failure to appear would lead to a summons back to court, possible imprisonment for 72 hours and that "women could end up on a treadmill of broken supervision meetings, court orders and imprisonment".
>
> This is clearly a view with which the Joint Committee on Human Rights concurs, in its paragraph 155 on page 117, as the noble Baroness, Lady Stern, pointed out in her brilliant speech a little earlier. In other words, this measure could increase the criminalisation of consensual sex with the effect that, instead of seeking help to get out of the sex industry or deal with a drug dependency, it would be driven further underground. Driving prostitution underground is guaranteed to increase sex workers' vulnerability to rape and other violence, as violent men would know that the risk of arrest deters sex workers from reporting assaults.
>
> The truth is that recent piecemeal legislative changes mean that we now have some of the most punitive laws on prostitution anywhere in the world, particularly given the increasing numbers of anti-social behaviour orders being directed at women working in the sex industry who then end up in prison for breach of the orders.

He added that he intended to table amendments to drop the prostitution provisions from the Bill.

b. Small brothels

Harry Cohen asked why the Government had dropped the proposal made by Fiona Mactaggart, when she was a Home Office minister, that two or more women could practise and work from shared accommodation, which would be safer for them.[89] Vernon Coaker replied:

> We consulted on that, but there was huge opposition to changing the rules to make them refer to two or more people. There was big opposition to such change, from the public and the police, and so on. We are reflecting on that and will perhaps be looking to consult again. That has not been forgotten; it is just that there was no consensus about trying to move forward on it.[90]

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89 PBC Deb 27 November 2007 c547
90 PBC Deb 27 November 2007 c565

c. Paying for sexual services

Phillip Hollobone proposed a new clause to make it an offence for a person intentionally to obtain for himself and pay for the sexual services of another person.[91] He suggested that it

> would make an important contribution to tackling demand; it would make life far more difficult for pimps; and it would send out an important signal that buying sex is not acceptable.

Vernon Coaker explained the Government's position, saying:

> We have some concerns about a generic offence that criminalises paying for sex, as adopted in Sweden. Most notably, to pick up on the point made by the hon. Member for Cambridge and his hon. Friend the Member for Somerton and Frome, we have concerns about the impact that such a move might have on those involved in selling sex and their vulnerability to exploitation and violence.
>
> I am also concerned that criminalising all sex buyers could force some of those involved in selling sex to Column number: 568continue to do so but to adopt more covert practices. That would drive it underground and create a more hidden sex market, making it increasingly difficult for support services and enforcement agencies to identify and make contact with those individuals. That could expose them to heightened violence, exploitation and unsafe sexual practice. As the hon. Member for Cambridge said, it is worrying that, since that offence was introduced advertising on the internet, for example, has increased.
>
> I recognise that there is considerable support for us to do more to tackle the demand for prostitution and trafficking. I would not wish to rule out possible changes for the future. We need to look more closely at the experience of other jurisdictions, such as Sweden, that adopt alternative approaches to see how we might strengthen our approach to tackling demand in England and Wales.

d. Loitering by under 18s

The Committee also considered a Liberal Democrat amendment to decriminalise loitering or soliciting for the purposes of prostitution by persons aged under 18. The Minister said that, although he could offer no commitment, he would consider whether, later in the Bill's passage, there was a need to change the law.[92] However, when the Bill reached the fourth day of its Committee Stage in the House of Lords, Lord Hunt announced that the prostitution provisions were amongst those which the Government was withdrawing, to ensure that Royal Assent was achieved by 8 May 2008.[93] The move was hailed as a victory by the Safety First Coalition.

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91 PBC Deb 27 November 2007 c539

92 PBC Deb 27 November 2007 c538

93 HL Deb 27 February 2008 c659 (to ensure that there was no gap between the termination of the existing voluntary agreement between prison officers and the Prison Service, and a new statutory bar on industrial action taking effect)

F. Tackling Demand for Prostitution Review (2008)

Meanwhile, the Government had announced that a six month review was beginning with a visit to Sweden led by Home Office Minister, Vernon Coaker.[94] He said:

> 'The Government is committed to reducing the dangers associated with street prostitution and all forms of commercial sexual exploitation, including the abhorrent trade of trafficking in human beings. Tackling demand is one of the areas where my colleagues and I think we can have the greatest impact and that is why we are looking at what more we can do in this area.
>
> 'The visit to Sweden and other countries over the next six months is a chance to see how the problem is being tackled internationally and an opportunity for us all to learn lessons from each other.'

In June 2008 the Conservative Women's Organisation held a summit, at which Theresa May sought views so that the Conservative Party could be as informed as possible when formulating policy on prostitution. Summaries of the presentations given are available on the Conservative Women's Organisation website.[95]

At the Labour Party Conference in September 2008, the Home Secretary announced a three-point plan to:

- Remove the requirement that only persistent kerb crawlers and men who solicit on the street can be prosecuted. An alternative requirement for kerb-crawlers - that they act "in a manner that is likely to cause annoyance to people in the neighbourhood" - is also to be removed. The changes will mean that kerb-crawlers and men soliciting sex on the street can be prosecuted after a first offence.

- Give new powers to councils and the police to close down brothels for at least three months if prostitutes are being run by a pimp or have been trafficked. At the moment, police can close brothels only if there is anti-social behaviour and if Class-A drugs are involved.

- Change the law so that men can be prosecuted if they pay for sex with a woman who is being exploited – defined by [the Home Secretary] as "controlled for another person's gain". Police are only able to pursue a prosecution if they can prove the women did not consent to sex ie rape.[96]

Also in September, Home Office officials sent out a letter asking for views from interested parties on those proposals, which the Home Secretary intended to place before Parliament at the beginning of December 2008.[97] The deadline was 8 October 2008. Respondents were asked in particular for their views as to whether any such legislation might have positive or negative impacts, on different communities, which

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94 Home Office Press Release, *Tackling Demand For Prostitution Review Begins With Sweden Visit*, 14 January 2008

95 Conservative Women's Association, *CWO Summit on Prostitution Report*, 18 June 2008

96 "Labour conference: Total ban for sex soliciting and kerb-crawling", *The Guardian*, 22 September 2008

97 Letter dated 26 September 2008, available from the website of the sex workers organisation *Outsiders* (www.outsiders.org.uk, site visited 14 January 2009

ought to be taken into consideration. Some recipients were critical of the very short deadline.[98] When John McDonnell asked the Home Secretary when her department planned to publish the responses, the reply was that it had not proved possible to respond in the time available before prorogation.[99]

The Review was published on 19 November 2008. A Home Office press release explained:

> There are … currently no specific offences to tackle those who pay or offer to pay for sex with someone who has been trafficked or exploited, unless there is sufficient evidence to prove that customer knew the prostitute did not consent to sexual intercourse. In these situations, the police and prosecutors would look at prosecution for rape.
>
> The government's intention is to look at criminalising those who pay or offer to pay for sex with victims of these crimes, in order to deter the sex buyers who fuel illegal exploitative and coercive practices as soon as parliamentary time allows.
> […]
> The government now intends to remove the 'persistence' requirement from both offences [under the Sexual Offences Act 1985], and in the case of kerb-crawling, to remove the alternative requirement of 'in a manner that is likely to cause annoyance to people in the neighbourhood'. The purpose is to make it possible to prosecute the kerb crawler in the first instance, increasing the deterrent to those who consider paying for sex on the street or in a public place.
>
> At present, the police have no powers to close premises associated with the sexual exploitation of adults or children, unless there is sufficient evidence to warrant the use of a premise closure order or a crack house closure order. However, many places where sexual exploitation takes place will not be associated with anti-social behaviour or the use, supply or production of Class A drugs. This means that, in practice, premises that are subject to police investigations for offences relating to sexual exploitation can reopen and begin operating again quickly.
>
> The government now intends to introduce a new order that allows for such premises to be closed and sealed for a set period, providing an opportunity for agencies to act swiftly and decisively to prevent further exploitation and abuse from taking place. The order will prohibit entry to the premises by any individual for a period of three months.[100]

The Key Actions of the Review are set out in the document as follows:

> A comparison of the approaches adopted in other jurisdictions, including ministerial visits to Sweden and the Netherlands and a comparative study (undertaken by the London Metropolitan University) into the approaches taken in nine different countries be published shortly.

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98 See for example Release, *Release's response to proposals regarding prostitution legislation*, 2008

99 HC Deb 26 November 2008 c2290W

100 Tough action to protect vulnerable women and tackle kerb crawlers, 19 November 2008, Home Office Press Release

> • A rapid evidence assessment (REA) of research available on sex buyers, conducted by the University of Huddersfield to be published shortly.
>
> • An audit of enforcement and prosecution practice in England and Wales to learn from good practice and assess whether a consistent approach is being taken to this issue across the country.
>
> • A pilot marketing campaign, aiming to increase awareness of trafficking for sexual exploitation amongst sex buyers. The materials were tested with a small group of men who pay for, or would consider paying for, sex.
>
> • Consultation with key stakeholders and practitioners, including the police, Crown Prosecution Service and those supporting individuals involved in prostitution.

The Review explained that the Netherlands model, of licensed prostitution, was not considered to be an effective option, as there was no evidence to suggest that overall demand would be reduced through a licensing system. But the Review stopped short of proposing the criminalisation of all paying for sex, on the Swedish model, explaining that public attitudes in the UK are currently much more divided than those in Sweden:

> suggesting that the Government needs to work to challenge the attitudes of sex buyers and the public as a whole before criminalising the purchase of sex per se becomes a viable option.

What was proposed instead "taking into account the difficulties with enforcing the Swedish model in the UK at this time", was that only paying for sex with a person who is being controlled for someone else's gain (i.e a pimp or trafficker) should be criminalised. In addition, given the practical difficulties in proving whether a defendant knew if a woman was controlled or not, the new offence should be a strict liability offence:[101]

> to aid prosecution and remove any ambiguity from possible offenders' minds about the potential consequences of sex with a trafficked or exploited woman.

The Review also recommended legislation:

- amending the offences of kerb-crawling and persistent soliciting (s.1 and s.2 of the Sexual Offences Act 1985) to remove the requirement to prove that a person has acted persistently, thus allowing prosecution for a first offence; and

- introducing closure powers for premises linked to sexual exploitation, in order to allow the police and partner agencies to restrict access to such premises for up to three months.

[101] i.e. liability for a crime that is imposed without the necessity of proving "mens rea", often understood as "intention"

In the ministerial foreword to the Review, the Home Secretary said that she accepted the Review's recommendations and would take action to implement them as soon as possible.

G. Other countries

The Tackling the Demand for Prostitution Review cites a comparative study into the approaches taken in nine different countries, undertaken by the London Metropolitan University, and shortly to be published, among the key actions of the Review. That study does not appear to have been published yet.

1. New Zealand

Belinda Brooks-Gordon's 2006 book on prostitution includes a survey of other countries' policies. She referred to New Zealand's new law:

> The New Zealand law is another recent model that is highly relevant but as been effectively omitted from Paying the Price. This comprehensive law came into force in June 2003 and contains sections dealing inter alia with: age limits of sex workers, brothel location, coercion, contractual responsibilities, employment rights, gang involvement, immigration provision, 'living on the earnings', media advertising, morality, numbers engaged in sex work, occupational safety and health, public health, safer sex responsibilities, soliciting, and street work (Barnett 2004). One year on, the results for the New Zealand policy are exceptionally promising. Local bodies have been able to set special rules about the situation of sex work establishments, for example with regard to their distance from schools or churches. There have been good results on exploitation as the police have enforced age limit legislation and three brothel owners have been charged with employing under age sex workers. Police time has been saved as arrests against sex workers have ceased. There have been no reports of offensive behaviour by sex workers and adult entertainment adverts have decreased. There is stronger provision in the law against coercion and sex workers are making use of the law to protect themselves from dangerous situations. Sex workers now have employment contracts and have asserted their employment rights. Moreover, there has been no increase in gang involvement. This comprehensive and successful policy on sex work unfortunately merits only two lines in Paying the Price.[102]

2. Sweden

There has been much debate about the Swedish model where the person providing the sexual service does not commit any offence but, since 1999, it has been an offence for a person to buy the service. There is a wealth of material available online to explain the new law and to assess its effect.[103] Some commentators are warmly enthusiastic while

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[102] Belinda Brooks-Gordon, *The Price of Sex: prostitution, policy and society*, 2006, p. 52

[103] See for example Scottish Parliament Local Government and Transport Committee, *Evidence Received for Prostitution Tolerance Zones (Scotland) Bill Stage 1 from Metropolitan University* 4 February 2004: "How Sweden tackles prostitution", *BBC News*, 8 February 2007; "Prostitution: International answers", BBC News, 24 July 2004; "How making the customers the criminals cut street prostitution", *Guardian,* 5

others are highly critical. The main report in favour of the law comes from Gunilla Ekberg, who until recently worked for the Swedish government.[104] Her article says that the number of women involved in prostitution has decreased, the number of buyers has decreased even further and recruitment to the sex industry has almost ground to a halt. She says there is no evidence that the sale of women has moved from the streets to the internet and that there is no notable increase in the number of Swedish men who travel abroad as sex tourists. However, her article has been strongly criticised for failing to provide evidence to back up her assertions.[105] The critical paper, by Vincent Clausen, does not develop an evaluation of the Swedish strategy towards prostitution; nor does it discuss the principles behind the Swedish law.

Belinda Brooks-Gordon criticised the Swedish approach:

> A misreading of policy occurs in the opposite direction with regard to Sweden. The 1998 Swedish law made it a crime to purchase or attempt to purchase a temporary sexual relationship. In the contemporary European context, this is exceptional. The Swedish Prostitution Act 1999 regards all sex workers as victims, reduced to sexual objects, and exploited by men to satisfy their base sexual needs. The Swedish legislator ignores the fact that there are a lot of prostitutes who decide to earn money by selling sexual services to those who like that kind of sex. In spite of this there is uncritical acceptance of the Swedish model in Paying the Price which omits to take account of the enormous problems encountered since the Swedish law was implemented, the wide legal and policy differences between Sweden and England, and the widespread criticism of Sweden's approach in the legal and policy literature (Kulick 2003). Official reports have concluded there has been no drop in street solicitation in Sweden. There has been an increase in internet advertising. Prostitutes interviewed in the media report that women with drug problems have been driven to desperation or even suicide by the new law, social workers state that it has been harder to reach prostitutes, and police reports state that it has been harder to prosecute pimps and traffickers because clients used to be willing to be witnesses, but are now disinclined to co-operate. Recent reports by the Board of Police concluded that women are now forced to take more clients since prices have dropped and there are more unstable and dangerous clients than before. Police harassment of sex workers has increased, as they can be forced to give testimony, and be searched (Kulick 2003). This has implications for sexual safety as condoms can be used as evidence a person is sex working. The law has been catastrophic for non-Swedish sex workers who are deported and government prosecutors complain that they cannot gain a conviction because sex workers are deported before they can even provide a statement. There has been a negative effect on sex workers reporting violence.
>
> The law was passed in Sweden despite enormous opposition by the National Board of Police, National Social Welfare Board, the Attorney General, and the National Courts of Administration. Importantly, there is a different legal base for the law in Sweden which grew out of agrarian Lutheranism. The wider context of the law is also different in Sweden to any other state in Europe. The Swedish

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January 2008; Socialstyrelsen, *Prostituion in Sweden,* 2003, Vincent Clausen, *An assessment of Gunilla Ekberg's account of Swedish prostitution policy*, January 2007

104 'The Swedish Law That Prohibits the Purchase of Sexual Services', *Violence Against Women*, vol. 10, no. 10, October 2004

105 Vincent Clausen, *An assessment of Gunilla Ekberg's account of Swedish prostitution policy*, January 2007

> legislation reflects different social attitudes to those held in England. A major difference is that Sweden has a longstanding social-democratic tradition in attempted reform of human nature, resulting in punitive laws relating to regulation of alcohol to work fare for the unemployed (Outshoorn 2001). These are measures which while not unproblematic in Sweden are a wholesale failure elsewhere.
>
> […]
>
> From the point of view which respects a sex worker's voluntary decision to become a sex worker, the Swedish Prostitution Act 1999 has been rejected by legal scholars, it also has to be rejected on the grounds of efficacy, yet it has been unjustifiably accepted in Paying the Price.[106]

Similar laws were passed in Finland in 2006, and Norway in 2008.

3. Netherlands

The ban on brothels in the Netherlands was abolished on 1 October 2000, and at the same time tougher sentences were introduced for forms of commercial operation involving the use of force or abuse to coerce people into prostitution or the use of minors. The maximum custodial sentences for these offences were increased. The aim of the change in the law was:

- to control and regulate the sex industry;
- to improve measures to combat commercial operations involving involuntary prostitution;
- to protect minors from sexual abuse;
- to improve the position of prostitutes;
- to separate prostitution from the attendant criminal elements;
- to reduce prostitution involving people resident in the Netherlands illegally.

Municipalities were given the power to pursue a local licensing policy. The abolition of the general ban on brothels and legalisation of commercial operations involving voluntary prostitution was intended to enable the authorities to control and regulate the sex industry. That and the making of a distinction between prohibited and non-prohibited forms of commercial operation was intended to improve the legal position and working conditions of prostitutes of both sexes.[107]

Recent reports in the media suggest that the Mayor of Amsterdam plans to reduce the city's red light district, and that the prostitutes' union has accused him of using a

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[106] Belinda Brooks-Gordon, *The Price of Sex: prostitution, policy and society*, 2006

[107] See Dutch Ministry of Justice Press Release, *Prostitution occurs in a third of Dutch municipalities*, 25 March 2000. See also a study for the Norwegian Ministry of Justice, *Purchasing Sexual Services in Sweden and the Netherlands* (abbreviated English version) 2004

crackdown on criminal activity as an excuse to close the [prostitute] windows and reverse years of tolerance.[108]

4. Other jurisdictions

The following extract from an online encyclopaedia gives a general overview of the law on prostitution in a variety of countries:[109]

> Legality of selling sex
>
> At one end of the legal spectrum, prostitution carries the death penalty in some Muslim countries; at the other end, prostitutes are tax-paying and unionised professionals in the Netherlands and brothels are legal and advertising businesses there (however, prostitutes must be at least 18 and the age of consent is 16 in other contexts). The legal situation in Germany, Switzerland (where the issue of legal age is a source of avid dispute, some insisting that one can legally be a prostitute as of one's sixteenth birthday, other maintaining it is eighteen), and New Zealand is similar to that in the Netherlands (see prostitution in the Netherlands, prostitution in Germany and prostitution in New Zealand). In the Australian state of New South Wales, any person over the age of 18 may offer to provide sexual services in return for money. In Victoria, a person who wishes to run a prostitution business must have a licence. Prostitutes working for themselves in their own business, as prostitutes in the business, must be registered. Individual sex workers are not required to be registered or licensed. In some countries the legal status of prostitution may vary depending on the activity; in Japan, for example, vaginal prostitution is against the law while fellatio prostitution is legal, as women who perform fellatio for money are not considered prostitutes in Japan.
>
> In Turkey, street prostitution is illegal. Prostitution through government regulated brothels is legal. All brothels must have a license, and all sex workers working in brothels must be licensed as well. Municipality based "Commissions for the struggle against venereal diseases and prostitution" are in charge of issuing such licenses. Along with the reduction of perversity and sexual crimes in society, the Turkish brothel's main use is in times of invasion. Instead of having soldiers who are faced with dying for their country never having been in the company of a woman, the brothel allows the soldier to become "national" and boldly defend their country in time of need.
> […]
>
> In all but two U.S. states, the buying and selling of sexual services is illegal and usually classified as a misdemeanor. Regulated brothels are legal in several counties of Nevada (see prostitution in Nevada). In Rhode Island, the act of sex for money is not illegal, but street solicitation and operating a brothel are.
>
> In Canada, prostitution itself is legal, but most other activities around it are not. It is illegal to live "off the avails" of prostitution (this law is intended to outlaw pimping) and it is illegal (for both parties) to negotiate a sex-for-money deal in a public place (which includes bars). To maintain a veneer of legality, escort

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[108] "Red-light windows closed by mayor's war on crime: Netherlands", *The Times,* 27 December 2008,
[109] http://www.nationmaster.com/encyclopedia/prostitution

agencies arrange a meeting between the escort and the client. A Canadian Supreme Court ruling in 1978 required that to be convicted of soliciting, a prostitute's activities must be "pressing and persistent". Similarly, in Bulgaria prostitution itself is legal, but most activities around it (such as pimping) are outlawed.

Rules vary as to which roles in prostitution are illegal: being a prostitute, being a client, or being a pimp. In Sweden it is legal to sell sex, but it is illegal to be a pimp and since 1999 also to buy sexual services. The reason for this law is to protect prostitutes, as many of them have been forced into prostitution by someone or by economic necessity. Norway has the same laws as Sweden, except that it's not illegal to buy sex. Prostitutes are generally viewed by the government as oppressed, while their clients are viewed as oppressors. In the case of a prostitute under 18 in the Netherlands, being the client or pimp is illegal, but being the prostitute is not, except if the client is also underage (under 16). In most countries with criminalized prostitution, prostitutes are arrested and prosecuted at a far higher rate than their clients.

In Brazil and Costa Rica prostitution per se is legal, but taking advantage or profit from others' prostitution is illegal.

Prostitution is legal for citizens in Denmark, but it is illegal to profit from prostitution. Prostitution is not regulated as in the Netherlands; instead, the government attempts through social services to bring people out of prostitution into other careers, and attempts to lessen the amount of criminal activity and other negative effects of prostitution.

In Thailand, prostitution is illegal as stated in the Prevention and Suppression Act, B.E. 2539 (1996) [2].

Establishments engaged in sexual slavery or owned by organized crime are the highest priority targets of law enforcement actions against prostitution. Police also frequently intervene when prompted by local resident complaints, often directed against street prostitution. In most countries where prostitution is illegal, at least some forms of it are tolerated. This ambiguous status allows the police to extort money or services, particularly information on criminal activities that prostitutes are often well-placed to obtain, from prostitutes in exchange for "looking the other way".

H. Commentary on the Proposals

The following organisations have made their comments on these proposals available online, and are referred to below:

- **The English Collective of Prostitutes**, which is part of the International Prostitutes Collective, and has been campaigning for the abolition of the prostitution laws since 1975.
- **EAVES**, a London-based charity that provides housing and support to vulnerable women and carries out research, advocacy and campaigning to prevent all forms of violence against women, which produced a response together with **Rights of Women**.
- **Release**, which provides free and confidential specialist advice on drugs and drugs law to the public and professionals, and campaigns for changes to UK drug

policy to bring about a fairer and more compassionate legal framework to manage drug use.

1. Prostitution

a. New offence

Clause 13 would insert a new section 53A into the *Sexual Offences Act 2003*, providing:

> **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."

This would create a new, strict liability offence of paying or promising payment for the sexual service of a prostitute who is controlled for gain by a third person, with the maximum penalty of a £1000 fine. The Home Office Impact Assessment envisages that although this would be a strict liability offence, it is likely that prosecution will require evidence of the existence of a pimp.

The location in which the services are to be provided are expressed to be irrelevant, and the jurisdiction in which the payment (or promise to pay) is not mentioned, which suggests that extraterritorial jurisdiction is intended. This would follow a precedent set by new laws which came into force in Norway earlier this month. It is now an offence punishable by imprisonment for a Norwegian citizen to pay for sex, whether in Norway or elsewhere.[110]

The proposed new offence has been welcomed by some, but has attracted criticism both as to principle and drafting. A number of commentators have taken the view that the new offence would be counterproductive, harming those who it was intended to protect.

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[110] Agence France-Presse, *Norway prepares to punish sex purchasers, at home and abroad*, 31 December 2008

Release says that the proposal is "unworkable" and that "a strict liability offence would be utterly inappropriate". It comments that:

> The transactions sought to be encompassed by this proposed new offence are generally so brief and functional and often pushed underground by the punitive framework already in place (whether or not the sex worker is independently working or being controlled for gain), that it is unrealistic to expect the client or the person paying to know the circumstances of the sex worker's employment, that is whether they are 'controlled'. Therefore, even if a requirement were imposed that the accused had a specific intention to pay for sex with a person controlled for gain or was reckless as to so paying for sex, the prosecution would never be able to meet its burden of proof. This would be compounded by the difficulties already faced by sex workers during the investigation process where they often receive poor service or little respect from the investigating officers, and then when they are witnesses in court their credibility is impugned through the adversarial process – this makes them unlikely to support prosecutions and unlikely for a conviction to be obtainable under the proposed offence.

Release submits that the focus of new legislation around sex-working remains and should always be on reducing the vulnerability of those who are sex-working, but that the proposed legislation will be counter-productive, creating new dangers for vulnerable community, forcing the activity even further underground and increasing the marginalisation of sex workers, making it harder for them to seek assistance, support or escape from difficult situations. It suggests that:

> the Government is trying to criminalise prostitution and the paying for sex by the back door with these proposals but any such base-line reform demands a considered and evidence-based review, not a rushed consultation such as this one. The Government's desire to 'send a message' in this as in so many areas is no basis for policy change and in any event wrongly presupposes that the people to whom the message actually applies (those who control and pay for prostitution, not voters) tune in to that frequency. Politically motivated policy change such as this, which can only cause harm to the vulnerable communities it purports to protect, should not go forward to become law.

The **English Collective of Prostitutes** sees no reason why sex between consenting adults should be criminalised just because one party pays the other for her or his services, and asks:

> While the new proposed offence speaks of sex with a person controlled for gain, how will it be established that the person is controlled for gain? Controlled by whom? For whose gain? Will a co-worker, a maid, a partner or any one else who relates to a sex worker be considered guilty? Are clients expected to know what sex workers' working arrangements are? Which arrangements will be deemed legal and which not?

It offers a representative example of potential uncertainty:

> Ms A is a former sex worker in her forties. To get an income for her retirement, she rented a room to a sex worker who pays her a small weekly amount. She has been charged with brothel-keeping. Because the offences of brothel keeping (1956 Sexual Offences Act[1]) or controlling prostitution for gain (2003 Sexual Offences Act[2]) require no evidence of force or coercion, it is likely that she, like

> many of other women being prosecuted under these laws, will be found guilty. But what is her crime? Renting to a prostitute woman? Should sex workers be so discriminated against that no one will rent to us?
>
> Under the proposed offence, any client of the woman working for Ms A could be convicted. But what is his crime? The woman is working voluntarily and is likely to be making a better income than most women in commonly available low waged jobs.

The **English Collective** criticises the adoption of the Swedish model, commenting:

> While the 1999 Swedish law which criminalised men who buy sex is being used as an example, there has been no investigation of its consequences for women's safety. Yet police in Sweden recently commented that the law has driven women into the hands of pimps and made it harder for the police to prosecute violent men, including traffickers. The UK proposal is even worse than the Swedish law as women selling sex are not being decriminalised. It bears more resemblance to US prohibition laws which criminalise both sex workers and clients. There is no evidence of less prostitution or better safety or welfare in the US, on the contrary.
>
> No attention is being paid to New Zealand where prostitution was decriminalised five years ago. A recent government review found: no rise in numbers of women working; women able to report violence without fear of arrest; attacks cleared up more quickly; judges ruling that sex workers are entitled to expect protection; drug users viewed as patients not criminals; women finding it easier to leave prostitution as convictions are cleared from their records.

EAVES and Rights of Women says that it does support the introduction of a new criminal offence of paying for sex with a person controlled for gain, but has some concerns about the proposal.

> It is unclear from the proposal what activity would be covered by the offence, what the mens rea would be and how it would fit in with existing offences under the Sexual Offences Act 2003 (the SOA 2003). Given the diverse groups of men who pay for sex and the range of sexual activities that may be paid for, Eaves and Rights of Women believes that the offence should cover not just sexual intercourse (as the current proposal appears to) but instead to any form of sexual activity

Gloucestershire's Chief Constable Dr Timothy Brain, who is the **Association of Chief Police Officers** (ACPO) spokesman on prostitution and related vice matters, has welcomed the new provisions, saying:

> With these proposals the Government has clearly signalled its intention to bring about a sea change in attitudes towards prostitution. Any man who intends to pay for sex with a prostitute will have to think very carefully, because it will be no defence in future to claim that they did not know someone was trafficked or controlled by someone else for gain.
> […]
> As the legislation is drafted it will be essential that the parliamentary draftsmen ensure the definition of 'controlled' is drafted in such a way as to be enforceable by the courts. We do not want the direction of the legislation to be lost in a confusion of legal argument. The legislation must be practical.

> We also hope that the Government will ensure there are a practical range of rehabilitation and protective measures to assist those who want to leave prostitution but are unable to do so because of the circumstances they are in.[111]

In evidence to the Home Affairs Select Committee on 9 December 2008, Commander Allan Gibson, the Metropolitan Police Head of Child Abuse Investigation and Economic and Specialist Crime, Specialist Crime Directorate expressed doubts about the enforceability of the proposed new offence:

> **Q24 David Davies**: Basically, we turn a blind eye, do we not? I am not blaming the police, but society, politicians, we know that these establishments are there and where they are but we turn a blind eye providing nobody complains about them?
>
> **Commander Gibson**: There is a sense in which there is a tolerance of a certain level of prostitution in society. That is not just true of policing; it is true of the whole of society. We know that it is a difficult problem to eradicate. If we were to focus on prostitution alone, I think you would end up in a situation of saying there is a certain amount we should do but perhaps not exhaust all our resources doing it; but when you have women being trafficked for the purpose of prostitution, I think that is an aggravating factor and we need to build that into our response and, when we have information that what is taking place is not prostitution but rape, then I think that changes it completely.
>
> **Q25 Chairman**: So the Government's proposals, which we will examine the Leader of the House on later on, will cause you problems, will they, when men are going to be expected to ask prostitutes whether or not they have been trafficked and then be subject to criminal offences?
>
> **Commander Gibson**: I cannot speak for the organisation on that because I have not the mandate to do so. I can give you a personal view. I think that is going to be very difficult to enforce.[112]

George Pitcher, religion editor of *The Daily Telegraph*, who is curate at St Bride's, Fleet Street, wrote

> Anyone who has done any work with prostitutes - and the Church of England quietly does a great deal - will know that they fear legislative meddling from politicians.
>
> The latest Government proposals, aimed at criminalising men who pay for sex, is precisely the sort of high-minded proposal that is aimed at protecting prostitutes, but which may actually put the most vulnerable in even greater danger.

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[111] Gloucestershire Constabulary Press Notice, *Gloucestershire Chief Responds to Announcement of New Prostitution Measures*, 19 November 2008

[112] Home Affairs Committee, *UNCORRECTED TRANSCRIPT OF ORAL EVIDENCE* To be published as HC 23, 9 December 2008

> The first effect of such legislation would be to drive the "good" punters out of the market. Cosy, self-satisfied, middle-class observers may claim that there is no such beast as a good user of prostitutes. The prostitutes themselves would disagree.
>
> With their regular clients inhibited by new laws, working women may be forced by circumstances - their own economics or the pressure of pimps - to entertain the scumbags at the bottom of the barrel, who couldn't care less about the legal risks.
>
> The market for the oppressive, abusive and violent will expand, offering less protection for prostitutes, rather than the greater protection that is intended.
>
> Furthermore, anyone who knows prostitutes will tell you that they rely significantly on whistle-blowers among their clientele for exposing the worst practices. Victims of coercion and human-trafficking are often identified to police by the people most likely to know who they are - the men who use their services.
>
> Such informants and witnesses, prostitutes fear, will be increasingly inhibited from exposing criminal practices in the trade if they know they could face prosecution themselves.
>
> This is not a licence for complacency. The status quo is hideously inadequate in protecting the most abused of women. But it is to suggest that laws made by legislators with an eye to the electorate, rather than care for the oppressed and vulnerable, can make lives considerably worse for those who most need our protection.[113]

Writing in *The Sunday Times*, Minette Marrin said:[114]

> [The Home Secretary's] central idea in these proposals is to make it illegal for anyone to pay for sex with someone who is being controlled for another's gain. And, crucially, her plan placed the duty on the punter to discover whether the prostitute is controlled by a pimp, a trafficker in human flesh or a drug dealer. Ignorance would be no defence.
>
> Anyone with a tittle of sense would see that this is unworkable and unfair. Yet Smith insists she sees no disadvantage at all, apart perhaps from the necessity of "marketing" the idea to men. I think she is going to have considerable difficulty marketing it to women as well, even to those who disapprove of prostitution in any form.
> […]
> In the name of protecting those unfortunate women who are genuinely controlled for another's gain, she has proposed a plan that she knows is unworkable and unfair. Its real point is that it's designed to make men "think twice about paying for sex". All men with all prostitutes, in effect. A virtual ban. What she wants is to deal with the "demand side" of prostitution: if only men didn't demand sexual services, there wouldn't need to be any nasty supply. The otherworldliness of this was bettered only by Baroness Warnock's recommendation last week that rather than use prostitutes men should masturbate – a quaint variant on "let them eat cake".

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[113] Blog posted by George Pitcher on *Daily Telegraph* Website, *New laws would make life worse for prostitutes*, 19 November 2008 (site visited 14 January 2009)

b. Loitering and soliciting: by prostitutes

Clause 15 effectively replicates a provision dropped from the *Criminal Justice and Immigration Bill*.[115] It would amend the offence of loitering or soliciting for the purposes of prostitution, by removing the term "common prostitute" but including an element of persistence, so that the offence is committed only is there is loitering etc twice or more in any three-month period (disregarding conduct before commencement of the section). Currently the police would expect to issue two prostitutes' cautions in three months before considering a person a "common prostitute", though it may be that one previous caution is enough at law.[116] **Clause 15(4)** repeals the provision under which a person cautioned for loitering or soliciting could apply to the magistrates' court to have the caution removed from the police record. Apparently this has fallen into disuse.[117] Under section 19 of the *Criminal Justice and Immigration Act* 2008, cautions can now be considered "spent" under the *Rehabilitation of Offenders Act* 1974, ("ROA") which used not to be the case.

c. Soliciting: by clients

Sections 1 and 2 of the *Sexual Offences Act 1985* introduced two offences under which those who buy sex can be prosecuted:

> kerb crawling (where someone solicits from a motor vehicle, or within the vicinity of a motor vehicle), for the purposes of prostitution, persistently or in a manner that is likely to cause annoyance to people in the neighbourhood
> persistent soliciting for the purposes of prostitution (effectively kerb crawling but without a vehicle)

Clause 18 replaces the existing offences under section 1 and 2 of the *Sexual Offences Act 1985* (which will be repealed) with one offence. In this case, the amendment *removes* the need for persistency, so that kerb crawling or soliciting will be an offence on the first occasion. According to the Home Office Impact Assessment, the requirement of proof of persistence "has acted as a significant limitation on the prosecution of the kerbcrawling and persistent soliciting offence". Clause 18 also removes the need for the soliciting to be shown to be likely to cause nuisance or annoyance to others.

The **English Collective of Prostitutes** says that to remove the element of persistence would make it impossible for women to work outdoors, and would penalise men whether or not they are causing a nuisance. **Release** adds that the mischief targeted by the offence of kerb-crawling is nuisance to the public, and that a single, brief encounter does not amount to any nuisance. It also says that the requirement of persistence protects both the vulnerable sex worker (who has an actionable complaint against an unwanted or unsavoury potential client's persistent invitations which the police have a duty to follow up if she complains) and the innocent motorist:

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[114] "Slithery Jacqui Smith wants a backdoor ban on prostitution", *The Sunday Times*, 23 November 2008
[115] clause 71
[116] see *R v Morris-Lowe* (1984) Cr App Rep 114, CA
[117] *Criminal Justice and Immigration Bill: Explanatory Notes*, Bill 130-EN, 54/2, para. 409

> As a consequence of removing the requirements and thereby enabling prosecution based on a simple instance of kerb crawling, the powers which are delegated to the police become broader and vaguer, a situation which was noted in Parliament as being dangerous when this offence was previously discussed. The debate in relation to the bill which preceded the Sexual Offences Act 2003 noted the stigma involved when a person is charged and prosecuted for a sexual offence. Such course of action may affect the person's reputation and family, and if convicted would lead to a criminal record and the imposition of a fine which if unpaid could lead to loss of liberty through imprisonment, all for one incident that causes no nuisance or annoyance to anyone, in the pursuance of a legal activity.

EAVES takes the view that men who buy sex must take a share of the responsibility for the harms caused by prostitution and that, with the health and safety of people with no option but to offer prostitution services from the street being of paramount importance –

> the current policy of tolerating a "first time" kerb-crawler but not a "repeat offender" is illogical and dangerous. Consequently, Eaves and Rights of Women welcome a focus on demand that focuses on the harm caused by men who buy sex.

It adds that:

> The legislative focus at present appears to be concerned only with the effects of kerb crawling on the public, rather than on those who are directly exploited and harmed by prostitution. Eaves and Rights of Women believes that the removal of persistence, annoyance and nuisance from the offence of kerb crawling would bring it in line with the reforms brought in the by the SOA 2003 which focus on protecting vulnerable people rather than public morality.

d. New sentencing order

Clause 16 and Schedule 1 also effectively reproduce, with some modification, provisions which were dropped from the *Criminal Justice and Immigration Bill*.[118] Orders "to promote rehabilitation" are now more neutrally described as "orders requiring attendance at meetings". Under the previous provisions it would have been permissible for an offender arrested for breach of an order to be detained for up to 72 hours if s/he could not be brought immediately before the appropriate court. In Schedule 1 to the Bill there is no reference to 72 hours: there is an obligation on the person in whose custody the offender is to bring the offender before any magistrates' (or youth) court "as soon as practicable", and

> That person may make arrangements for the offender to be detained until brought before the court.[119]

Clause 17 provides that the ROA rehabilitation period for someone given one of these orders would be six months from the date of conviction.

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[118] Clause 72
[119] Schedule 1 para 9(3)

The **English Collective** comments that:

> For the past year the government has been pushing a punitive agenda -- its earlier attempts to introduce compulsory "rehabilitation" for sex workers was defeated. Once again it disregards public opinion which increasingly favours decriminalisation as crucial to tackling sex workers vulnerability to violence.

The **Safety First Coalition**'s briefing on the equivalent clause in the *Criminal Justice and Immigration Bill* put forward five arguments against the proposal:

> a) Clause 72 purports to help women get out of prostitution. Most sex workers are mothers and/or young people struggling to survive. The Bill contains no provision for extra resources to address the poverty, debt, rape and domestic violence, homelessness, drug use, depression or a combination of these, which force many women and young people into prostitution. And the government has announced that drug services are being cut.
>
> b) Clause 72 will increase women's vulnerability to rape and other violence. Women will be forced underground into more isolated and dangerous areas to avoid arrest and imprisonment. Criminalisation discourages women from coming forward to report violence and those who do report are often dismissed because of their occupation. Violent men are left able to attack again. According to the most conservative estimates, at least 60 prostitute women have been murdered in the last 10 years. The shameful 5.6% conviction rate for rape must also be tackled.
>
> c) Evidence shows that compulsory rehabilitation schemes on arrest do not help. What is needed is services independent of the criminal justice system based on women's expressed needs.
>
> d) Imprisoning women for non-violent offences goes against recommendations in the HO commissioned Corston report (March 2007). Imprisoning women, as society's primary carers, destroys families, starting with the thousands of children separated from their mothers.
>
> e) A criminal record makes it almost impossible for sex workers to get another job, thus institutionalising them in prostitution.[120]

e. Closure orders: sexual offences

Clause 20 and **Schedule 2** would insert a new Part into the *Sexual Offences Act 2003* granting the courts the power to close, on a temporary basis, premises being used for activities related to certain prostitution and pornography offences. The Explanatory Notes state that the provisions

> broadly follow existing provisions on "crack house" closure orders under Part 1 of the Anti-social Behaviour Act 2003, closure orders for premises associated with persistent disorder or nuisance under Part 1A of that Act and closure orders in an area experiencing disorder under Part 8 of the Licensing Act 2003

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[120] http://www.roystpierre.com/index.php?name=News&file=article&sid=43

The evidence base specified in the Home Office Impact Assessments states:

> We believe there exists a number of premises being used in connection with trafficking for prostitution or controlling or inciting prostitution for gain. This was highlighted in a recent report by the Regional Intelligence Unit for the South West who identified a number of premises being used for such purposes.
> At present police are limited to the powers of arrest and have few powers to close premises associated with prostitution, unless there is sufficient evidence to warrant the use of a premises closure order or a 'crack house' closure order.
> **Rationale for Proposal**
> Many premises where offences related to prostitution take place will not be associated with antisocial behaviour or the use, supply or production of Class A drugs. This means that in practice, premises that are subject to police investigations for offences relating to prostitution can reopen and begin operating again within a matter of hours of a police raid.

The Impact assessment based on an estimated total of expected orders of 780-1200 per year estimate of 780-1200 a year.

ACPO spokesman Dr Timothy Brain said that measures to close brothels were to be welcomed and would give police powers to protect neighbourhoods from the nuisance and harm they create: it was important to realise that this measure extended beyond trafficking and directly concerned domestic prostitution as well.[121]

EAVES suggests that current police practice is only to enter brothels where there is information suggesting

- the exploitation of children;
- trafficking;
- extreme violence and/or coercion;
- organised crime; or,
- serious financial gain

and that other brothels are likely to be left to operate without disturbance "despite their fundamental illegality and exploitative premise."

It believes:

> that the development of a new power that would enable the police to close a brothel using a civil order would be a useful tool that could form part of a more coordinated response to prostitution. We also believe that such an order would enable the police to respond to the needs of local residents who are affected by the criminal activity and harassment that goes hand-in-hand with the commercial sex industry.

But it fears that, unless such orders were enforced alongside measures aimed at assisting women exit prostitution, there would be the danger that those individuals would

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[121] Gloucestershire Constabulary Press Notice, *Gloucestershire Chief Responds to Announcement of New Prostitution Measures*, 19 November 2008

be moved to other premises where their sexual exploitation would continue. That reservation is strongly echoed by **Release** and the **English Collective**, which ask why further legislation on brothels should be considered necessary, and are concerned that the closure of brothels would force prostitutes to work in more dangerous environments as well as causing homelessness. Both are critical of the legislation on which the proposal is modelled. **Release** describes the 'crack house closures' provisions under Part 1 of the *Anti Social Behaviour Act 2003* as

> an insidious piece of legislation

on which there was no formal consultation. It says

> Many Closure orders are obtained on the most tenuous evidence and, in fact, in our experience the court will never refuse a police application for a Closure Order. Release has witnessed numerous cases where vulnerable people become displaced, eventually homeless and face the threat of criminal charges.

It also expresses deep concern about provisions which blur the distinction between civil and criminal proceedings, where it is made a criminal offence to breach an order (such as a brothel closure order) made in civil proceedings, and concludes:

> It is clearly stated that one of the aims of these proposals is to 'support those in prostitution to develop routes out'. It is submitted that to couch criminalisation and eviction as support is disingenuous in the extreme and it is noted that no alternatives to sex work are being put in place for these vulnerable populations as part of this policy plan.

f. Orders imposed on sex offenders

Foreign Travel Orders (FTOs) were introduced by the *Sexual Offences Act 2003*, for use in preventing those convicted of sexual offences against children from travelling to specified countries where there is a risk they will abuse children. The proposed effect was set out in a Home Office press release:[122]

> The foreign travel banning order […] will enable courts, following an application by a chief officer of police, to prohibit sex offenders from travelling abroad in certain circumstances. It would be a civil preventative order and operate in the same way to current sex offender orders. Two conditions would need to be met before an order could be made:
> • The person will have been previously convicted of a sexual offence against a child under 16 either in the UK or abroad;
> • The court must be satisfied, from behaviour displayed by the offender since the original offence, that a foreign travel banning order is necessary to protect children outside the UK from serious sexual harm.

[122] Home Office press notice 118/2003, Government crackdown on sex tourism

According to a report published by the charity ECPAT UK,[123] only three FTOs had been made up to August 2008. The Report called:

> for an urgent shake-up in the way that the UK deals with British nationals who have been prosecuted abroad for child sex offences. ECPAT UK is calling on the government to immediately bring offenders back to the UK after sentence is served so they can be placed on the sex offenders register then risk assessed and managed, and where appropriate, that future foreign travel is restricted so they cannot be a threat to vulnerable children. British law enforcement has the tools to protect children abroad, they just don't use them.[124]

On 20 August 2008, Jacqui Smith announced measures to strengthen the travel restrictions on convicted child sex offenders. The Home Office Press Notice identified key measures as:

- requiring registered sex offenders to notify the police earlier of their intentions to travel abroad
- automatic removal of an individual's passport when they are subject to a blanket foreign travel order
- extending the duration of a foreign travel order (currently six months) to five years.[125]

This followed consultation with police and the **Child Exploitation and Online Protection Agency** (CEOP). It was said that more changes could follow, and that, from the autumn, it was intended to make registered sex offenders notify the police of any travel abroad, not only if they will be abroad for three days or more, as at present.

Clause 22 raises the age of a child that must be at risk in order for a FTO to be made, from 16 to 18. clause 23 extends the maximum duration from 6 months to 5 years. Clause 24 requires offenders subject to blanket FTOs to surrender their passports at a specified police station (for the duration of the order).

I. Lap dancing

The term "lap dancing club" refers to establishments which make the majority of their income from "erotic dancing" of an adult nature featuring women. This includes routines commonly known as lap dancing, table dancing, pole dancing, stripping and striptease. The UK's first lap dance club opened in 1995.[126] Estimates for the total number in operation vary from 150 to 300.[127] There is a wide spectrum of opinions about such clubs – from those who claim that they are "sexually empowering" for the women who work in

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[123] consisting represents a coalition of leading charities within the UK including: Anti-Slavery International, Jubilee Campaign, NSPCC, Save the Children UK, The Children's Society, UNICEF UK, and World Vision UK.

[124] Press notice New Report Shows Government Failure in Combating Child Sex Tourism, 17 August 2008

[125] Tightening rules for sex offenders, 20 August 2008

[126] Fawcett Society, *Campaign to reform lapdance club licensing* (undated, 2008?)

[127] Home Office, *Impact assessment of new measures to regulate lap dancing clubs*, 16 December 2008, p4

them to those who say they are demeaning to women and men alike and part of an unhealthy sexualisation of our culture.[128]

Lap dancing clubs are currently regulated in the same way as other places of "entertainment". Critics argue that this regime is too lax for controlling such venues and have called for them to be reclassified as "sex establishments" in the same way as sex shops and sex cinemas, using earlier (but still current) legislation, the *Local Government (Miscellaneous Provisions) Act 1982*.

Representative of the groundswell of opinion against the present licensing regime is this Early Day Motion tabled in April 2008 by Lynda Waltho, which called for tighter regulation of such establishments:

> LICENSING OF LAP DANCING ESTABLISHMENTS
>
> That this House supports extending across England and Wales powers currently only held by London local authorities to license sex encounter establishments; supports removing a provision from the Licensing Act 2003 which has the effect of exempting lap dancing clubs from this licensing category; notes that lap dancing clubs are part of the commercial sex industry yet are currently licensed in the same way as cafes and karaoke; further notes that amending legislation would give local authorities the same licensing powers for lap dancing clubs as apply to sex shops and sex cinemas; and believes that this would be a crucial step in giving local people a better say in licensing policy.[129]

Part 2 of the Bill amends the licensing regime with the result that lap dancing establishments will be treated in the same way as other sex establishments.

1. The Licensing Act 2003

At present lap dancing clubs are licensed under the *Licensing Act 2003*. The Act, which came into effect on 24 November 2005, regulates both the sale of alcoholic drinks and the licensing of public entertainment. Functions which were previously administered by the licensing justices and local authorities, respectively, are now entirely the responsibility of local authorities. A single premises licence can authorise the sale of alcohol and the provision of what the Act defines as "regulated entertainment". The Act requires that an applicant for a "premises licence" specifies the type of licensable activity he or she wants to deliver. To the extent that it is "entertainment", lap dancing would fall within the definition given in Schedule 1, paragraph 2(1)(h), entertainment similar to dance. Although the guidance notes[130] on the form suggest that performances involving "nudity or semi-nudity" should be specified as such, it may happen that lap-dancing is specified as "dance." If this did happen, a local resident who wished to oppose an application for a new licence or variation of an existing licence would have the same opportunity to make objections (or "representations" as the Act calls them) as he or she would to a pub licence, a process which is described in a guidance note published by the

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[128] For a range of opinions from lap dancers themselves, see "The daily grind", *Times 2*, 19 June 2008, pp7-9,

[129] EDM 1375 2007-08 (119 signatures by end of session)

[130] DCMS, *Application for a premises licence to be granted under the Licensing Act 2003*

Department for Culture, Media and Sport (DCMS).[131] All representations must be relevant to the licensing objectives set out at the beginning of the Act (s.4), namely:

- the prevention of crime and disorder;
- public safety;
- the prevention of public nuisance; and
- the protection of children from harm.

Before the 2003 Act came into force, a striptease venue would have required a Public Entertainment Licence, with a Special Nudity Provision (issued by the local authority), together with (if it served alcohol) a separate liquor licence issued by local magistrates.

Concerns have been raised by local authorities that the new regime could lead – or has led - to a relaxation of controls, because the grounds on which a local authority can refuse a licence are now constrained by the four licensing objectives, none of which may help in blocking an application if the licensee can make a sufficiently strong case that the proposed activity qualifies as an "entertainment similar to dance". For example, the crime and disorder objective *might* apply, but not if the premises in question is a tightly run establishment. The authority may successfully argue that, to avoid breach of the crime prevention objective, it is necessary to ensure that there is no contact between customers and dancers, and to enforce that it is necessary to have a "1 metre" rule. Such rules have been upheld in a number of cases, including in Westminster and Tower Hamlets.[132] Likewise the public nuisance objective might be invoked, but more plausibly in relation to what goes on immediately outside the premises than what happens inside. When the *Licensing Bill* was before Parliament, the Minister, Lord McIntosh of Haringey, explained:

> The Bill does not define 'public nuisance'. It retains the wider meaning that it has under common law; not that in the 1990 Act or in any other statutory definition. 'Public nuisance' therefore retains the strength and flexibility to take in all the concerns likely to arise from the operation of any premises conducting licensable activities in terms of the impact of nuisance on people living or doing business nearby.[133]

Later in the same debate he illustrated his point by stating that loud music in the early hours of the morning, car doors slamming and people coming and going all amount to a "public nuisance".[134]

Critics of the present regime have expressed frustration that a licence cannot be refused on grounds of morality but must be assessed solely on grounds relating to the licensing objectives. Guidance issued by DCMS to local authorities summarises the position as follows:

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131 DCMS, *Guidance for interested parties: making representations*, December 2007,
132 Philip Kolvin, *Licensed premises: law and practice*, 2004, p554
133 HL Deb 19 June 2003 c913
134 c917

> 2.17 The Indecent Displays Act 1981 prohibits the public display of indecent matter, subject to certain exceptions. It should not therefore be necessary for any conditions to be attached to licences or certificates concerning such displays in or outside the premises involved. For example, the display of advertising material on or immediately outside such premises is regulated by this legislation. Similarly, while conditions relating to public safety in respect of dancing may be necessary in certain circumstances, the laws governing indecency and obscenity are adequate to control adult entertainment involving striptease and lap-dancing which goes beyond what is lawful. Accordingly, conditions relating to the content of such entertainment which have no relevance to crime and disorder, public safety, public nuisance or the protection of children from harm could not be justified. In this context, however, it should be noted that it is in order for conditions relating to the exclusion of minors or the safety of performers to be included in premises licence or club premises certificate conditions where necessary.[135]

Every three years the local authority is required to consult on, and publish, a licensing policy statement.[136] The Act does not define what should go into these policies but they should broadly relate to the exercise of licensing functions and how the licensing objectives are to be promoted. In theory, an authority could use the policy to establish a presumption against a particular form of activity that it did not wish to see in its area, for example lap dancing, The onus would then be on the applicant to displace the presumption by demonstrating that the objectives of the policy could be met even if a departure from policy were granted. However, in practice, such a presumption might not be sustainable. As a textbook observes:

> In order to include in a policy a 'no stripping' rule at all, there would need to be some rational basis arising from the licensing objectives; otherwise the policy may be challengeable on Wednesbury grounds.[137]

There may also be planning considerations. If there is a change of use requiring planning permission, a planning authority might have regard to the general character of the area and to residents' legitimate fears.[138]

J. The Local Government (Miscellaneous Provisions) Act 1982

EDM 1375 (cited above) called for lap dancing clubs to be licensed in the same way as sex shops and sex cinemas. Such "sex establishments" are governed by a separate regime. Here, the relevant legislation is contained in section 2 and schedule 3 of the *Local Government (Miscellaneous Provisions) Act 1982* and is adoptive, so that if a local authority has formally adopted the provisions, the operation of any sex establishment in the area will be illegal unless it has been licensed. The procedure which a council must follow for a successful adoption is laid down in section 2 of the 1982 Act. For example, the London Borough of Barking and Dagenham has resolved to adopt the arrangements

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135 Dept for Culture, Media and Sport, *Guidance issued under section 182 of the Licensing Act 2003*, rev ed, June 2007,

136 *Licensing Act 2003* s5

137 Philip Kolvin, *Licensed premises: law and practice*, 2004, p550. In law a decision is "Wednesbury unreasonable" if it is so unreasonable that no reasonable authority could ever have come to it.

138 Kolvin, p556

contained in Schedule 3 to the Act for the licensing control of sex establishments within its area.[139]

Under paragraph 12 of schedule 3 of the 1982 Act, a local authority may limit the number of sex shops it considers appropriate for the area or it may determine that the appropriate number is nil. A licence may be refused on the grounds that it would be inappropriate having regard to the "character of the relevant locality", and licences have been refused for premises close to schools, churches, and even a family pub.[140] In a case heard in 1986 the Court of Appeal expressly assented to the proposition that the local authority might adopt a policy for the determination of applications, provided that the policy did not preclude the individual consideration of applications. The policy, they declared, may specify areas where applications are more or less likely to succeed and/or establish location criteria, such as the following:

- The premises must not be sited in or near a residential area;
- The premises must not be sited near shops used by or directed to families;
- The premises must by not be sited near religious buildings such as churches;
- The premises must not be sited near educational establishments or leisure facilities frequented by children or families.[141]

It is a condition of every sex establishment licence that nobody under the age of 18 be admitted and that no goods or the interior of the premises will be visible to passers by. A person who runs a sex establishment without a licence or contravenes a term of the licence is guilty of an offence and is liable to a fine of up to £20,000.

Once the application has been submitted, the local authority can determine the application by delegation to a committee, sub-committee or an officer. The applicant is entitled to appear before and make representations to the committee and the authority is obliged to consider relevant objections made within the 28-day period. Local people thus have an opportunity to object to an application for a sex establishment on the grounds that it would be inappropriate given the character of the area or, for instance, if located in an area that is primarily residential. The moral case against such establishments cannot be used as a ground for refusal. However, as a textbook comments, "while the authority is not itself to make moral judgments, it may react to local sensibilities, which in truth may well be based precisely on moral condemnation of the activity in question".[142] Having determined to grant the licence, the authority is able to impose conditions with which the licence-holder must comply. A police constable and/or an authorised officer of the authority is able to enter and inspect, at any reasonable time, a sex establishment to check that the conditions of the licence are being complied with and no offences committed.

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139 See London Borough of Barking and Dagenham, *Sex establishments: general guidance notes* (undated),
140 Kolvin, p889
141 R *v Birmingham City Council ex parte Quietlynn Ltd* (1986) 85 LGR 249
142 Kolvin, p891

1. The Greater London Council (General Powers) Act 1986

Following the proliferation of unlicensed sex establishments (e.g. "peep-shows") in the Soho area of London in the 1980s, a new category of licensable venue was created, known as "sex encounter establishments". The category was created by way of an amendment to the 1982 Act and was defined as follows:

> (a) premises at which performances which are not unlawful are given by one or more persons present and performing, which wholly or mainly comprise the sexual stimulation of persons admitted to the premises (whether by verbal or any other means); or
>
> (b) premises at which any services which are not unlawful and which do not constitute sexual activity are provided by one or more persons who are without clothes or who expose their breasts or genital, urinary or excretory organs at any time while they are providing the service; or
>
> (c) premises at which entertainments which are not unlawful are provided by one or more persons who are without clothes or who expose their breasts or genital, urinary or excretory organs during the entertainment; or
>
> (d) premises (not being a sex cinema) at which pictures are exhibited by whatever means (and whether or not to the accompaniment of music) in such circumstances that it is reasonable for the appropriate authority to decide that the principal purpose of the exhibition, other than the purpose of generating income, is to stimulate or encourage sexual activity or acts of force or restraint associated with sexual activity;[143]

There are two points of note here. The first is that, since the four paragraphs are alternatives (linked by "or"), the composite definition goes extremely wide. It appears from paragraph (c) that any form of "topless" entertainment could be caught by the definition. The second is that, since the amendment was introduced by way of legislation specific to the capital,[144] its potential application is currently restricted to Greater London. Given that lap dancing clubs operating in the capital have since 2005 been licensed under the *Licensing Act 2003*, this provision has fallen into disuse.[145] It is worthy of mention here, nonetheless, because one of the suggestions canvassed by those advocating a change in the law is that all lap dancing venues be classified as "sex encounter establishments". Legislatively, this would entail extending the 1986 amendment so that it applied throughout England and Wales. However, this is not the route the Government has chosen to adopt, although elements of the 1986 definition have been carried over into the present Bill.

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143 *Local Government (Miscellaneous Provisions) Act 1982* Schedule 3(1) (as amended)

144 *Greater London Council (General Powers) Act 1986* s12

145 In her evidence to the Culture, Media and Sport Committee, Sandrine Leveque of Object commented that the London Borough of Hackney "was actually using that category until quite recently" (Uncorrected evidence, 25 November 2008, Q270)

2. Interaction of the 2003 and 1982 Acts

The *Licensing Act 2003* created a specific exemption by way of a further amendment to the 1982 Act.[146] The effect of the exemption is that, where the venue has a premises licence authorising "regulated entertainment", it is not to be deemed a "sex encounter establishment". However, since the term "sex encounter establishments" only applies in the capital, and most such establishments are in any case now licensed as "regulated entertainment" under the 2003 Act, the exemption seems to carry little weight.

In considering whether the 2003 Act is applicable, a more pressing question in authorities' minds will be: "Is it dance?" A 1995 case involving Westminster Council concerned a "peep show" in which nude women caressed their own sexual organs to music.[147] The premises' counsel argued that such entertainment was viewable as dancing. In his judgement Lord Justice Ward drew a distinction between a case where the public spectacle is constituted by a dance enhanced by the titillation of some nudity, and a case where the entertainment is predominantly the exposure of sexual organs where the entertainment element has become wholly incidental.

3. Parliamentary activity

A Westminster Hall debate in March 2008 on the operation of the *Licensing Act 2003* in Durham raised the issue of lap dancing. Dr Roberta Blackman-Woods described at length her constituents' efforts to object to a new lap dancing venue in the city centre. They argued that local licensing policies should prevent the licence from being granted. In particular, the council's licensing policy 14 appeared to be "helpful". It stated that the council "will discourage applications for licences which involve a sex related element near schools, places of worship, hospitals, youth clubs". The magistrates' court found in favour of the local residents. Dr Blackman-Woods explained that the court

> had concerns about the application in respect of all four licensing objectives and serious concerns with three of them. It found that there was a serious risk of exacerbating problems of crime and disorder and compelling evidence that a lap dancing club on North road would aggravate existing public nuisance problems and, in respect of the protection of children, that the club could hardly be worse sited.

However, the company involved then sought permission to launch a judicial review application in the High Court. The Member went on:

> If that is granted, residents will once again be plunged into a legal process with no resources with which to argue their case. Our experience is totally at odds, therefore, with information sent to us by the Home Office in December 2007, when the Minister stated:
>
> "while the applicant would be a party to the appeal it is not the case that the residents would be taking on the industry."

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[146] Para 3A sub-paras (i) and (ii) of the 1982 Act were substituted by the *Licensing Act 2003* s198(1) and Schedule 6 paras 82, 85(1), (3)

[147] *Willowcell v Westminster City Council*, (1995) 94 LGR 83

> In Durham, we very much feel as though we are taking on the industry.
>
> The Minister will say that he cannot comment on individual cases. I use that dreadful example simply to demonstrate a fundamental flaw in the Licensing Act. If local authorities make a wrong decision, it is terribly onerous for local residents to put it right. The whole system needs to be looked at, so that residents and other interested parties can object to the granting of a licence without becoming involved in onerous legal challenges.[148]

The Minister replied:

> **The Parliamentary Under-Secretary of State for Culture, Media and Sport (Mr. Gerry Sutcliffe):** (…) Having reflected on (…) the matters that have been raised today, I believe that the Licensing Act 2003 is able to control such premises when problems relate to the four licensing objectives. The examples that my hon. Friend gave me yesterday show that the Act has successfully been used in some areas to control lap-dancing premises when there have been problems with the protection of children from harm or with illegal activities being carried on there. The Act can also be used to apply conditions to protect the safety of those working and performing at such premises.
>
> Much can be legitimately done under the Licensing Act to control such premises, but I appreciate that there may be uncertainty among some local authorities, so I am happy to write to chief executives to clarify the position. It is important that we show some consistency and write to them about the position. The 2003 Act cannot, however, prevent such activities taking place because of concerns about public decency and obscenity, or the inappropriateness of that activity for a particular area. Although those may well be important and legitimate concerns, it is not appropriate to consider them under the Act. To do so would mean adding new licensing objectives that would then apply to all 200,000 premises licensed under the Act, and that would not be efficient or proportionate. It is also important to recognise that the Act is not about censorship and does not in itself regulate the content of entertainment. Those are much wider issues that relate to the balance between public sensibilities and the freedom of speech and artistic expression.
>
> I should add that the Court of Appeal has previously ruled that certain lewd sexual acts should not in any case be considered as public entertainment, so it is questionable whether entertainment licensing could ever cover all those activities. It is precisely because such exhibitions must be in tune with laws on indecency, obscenity, prostitution and pornography that the lead responsibility lies with the Home Office. If the regulation of those premises is inadequate, it might be that regulation akin to the licensing of sex shops under the Local Government (Miscellaneous Provisions) Act 1982 would be more appropriate, as my hon. Friend the Member for City of Durham said. Alternatively, it might be something that planning law could cover.[149]

In a Lords reply in June, the Government signalled its willingness to consider a change in the law. Asked about lap dancing clubs, Lord Bassam of Brighton acknowledged local authorities' concerns that they are not adequately able to control these establishments:

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[148] HC Deb 19 March 2008 cc287-9WH
[149] HC Deb 189 March 2008 cc290-2WH

> We are in the process of providing additional guidance for local authorities on the Licensing Act and how it can be used to deal with lap-dancing clubs. As part of this process, we will be asking licensing authorities for feedback if they still have concerns. This will tell us if the controls under the Licensing Act are sufficient or whether we need to do more to protect local communities.
>
> If we find that there is a need to provide licensing authorities with additional powers to deal with any nuisance or criminal activity associated with lap-dancing establishments, we will consider the full range of options. This could include changes to the Local Government (Miscellaneous Provisions) Act 1982, which regulates sex encounter establishments (such as sex shops and sex cinemas).[150]

Dr Blackman-Woods introduced a 10 Minute Rule Bill on *Sex Encounter Establishments (Licensing)* in the Commons on 18 June. She explained that her Bill sought to remove "two major obstacles":

> first, under the 1982 Act, lap-dancing clubs can be categorised as sex encounter establishments only in London. Secondly, if a premises already has a licence for a bar or restaurant under the Licensing Act, it is exempt from the provisions of the 1982 Act. Because of that exemption, even in London most lap-dancing clubs do not fall under the 1982 Act. It is that loophole that our campaign is aiming to close, by allowing local authorities to license lap-dancing clubs as sex encounter establishments outside London. That would restore powers held by local authorities prior to the Licensing Act and enable them to decide on the quantity and location of lap-dancing clubs in their areas.
>
> The way forward seems pretty straightforward, and that is why my Bill would amend the 1982 Act by extending the category of sex encounter establishments to outside London, and removing the exemption under the 2003 Act. What is being proposed is really common sense: it was clearly not Parliament's intention to have lap-dancing clubs treated the same as bars and restaurants, and altering the 1982 Act prevents us from having to argue for changes on this issue under the 2003 Act.[151]

The Bill was not printed and the Order for Second Reading lapsed.

In November the Culture, Media and Sport Committee held an evidence-session on lap dancing as part of its inquiry into the operation of the *Licensing Act 2003*. The following exchange, much reported in the press, is of interest in that it is axiomatic to the framing of the definition in the Bill that lap dancing is "sexually stimulating":

> **Q293 Philip Davies:** If these dances are taking place in a back room with just the customer and the girl that is doing the dancing, it is very difficult to regulate what is going on because by definition there are only two people in the room.
>
> Mr Warr:[152] Therein lies perhaps one of the biggest problems, the fact that not enough people understand the business blueprint and the operation of a club. Most people understand how a pub works or how a corner shop works. Actually

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[150] HL Deb 4 June 2008 cc59-60WA
[151] HC Deb 18 June 2008 c948
[152] Simon Warr, Chairman, Lap Dancing Association

> in our premises they are not sexually stimulating; it would be contrary to our own business plan if they were.
>
> **Q294 Philip Davies:** So you are saying that the purpose of a lap dancing club is not to be in any way sexually stimulating. Most people would find that a rather incredible statement.
>
> Mr Warr: Then you need to go to a club because the purpose of a club is to provide entertainment; it is to provide alcohol; it is a place of leisure. All right, the entertainment is in the form of nude and semi-nude performers, but it is not sexually stimulating.
>
> **Q295 Philip Davies:** So if I were to do a pole [*sic*] of 100 customers coming out of a lap dancing club and said, "Did you find that in any way sexually stimulating?" you would say that I would find a big, resounding, fat zero. On that basis you will probably have a lot of dissatisfied customers.
>
> Mr Warr: That is a valid question, how do you measure sexual stimulation and what is the definition of sexual stimulation?
>
> Mr Stringfellow:[153] From my many years of experience, of course it is sexually stimulating, so is a disco, so is a young girl flashing away with her little knickers showing. That is sexually stimulating. So is David Beckham laid out advertising Calvin Klein, he is sexually stimulating. So are the Chippendales, that is sexually stimulating.[154]

4. Public debate and the move to law reform

Throughout 2008 campaigning bodies urged their supporters to write to their MPs in support of the EDM and 10 Minute Rule Bill. For example, the Fawcett Society argued that "lap dance clubs are a form of commercial sexual exploitation and normalise the sexual objectification of women".[155] In April, Object staged a demonstration outside Parliament. Their spokesperson, Sandrine Leveque, told the press:

> "Our campaign strips the illusion that you can license cappuccinos in the same way as you license lap-dancing. The law currently makes it easy for lap-dancing clubs to open, and difficult for local authorities to regulate them or listen to the views of people affected by them. The industry has used this to its advantage and very quickly expanded."[156]

The newly-formed Lap Dancing Association (LDA), which includes the UK's largest lap-dancing chains, called for local authorities to be given powers to ensure clubs abide by a code of conduct which addresses issues of "minimum standards of public decency and morality" which are not required by existing laws.[157] However, LDA spokesperson Kate Nicholls told the press: "We don't see that there's any need for re-classification to

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153 Peter Stringfellow, club owner
154 Uncorrected evidence, 25 November 2008
155 Fawcett Society, Campaign to reform lapdance club licensing, (undated, 2008?)
156 "MPs back call for greater control of lap-dancing clubs", *Independent*, 26 April 2008
157 "Lap dance firms call for tighter regulation", *Guardian*, 28 April 2008. The LDA's Code of Practice is available on its website.

address the concerns raised." Rather, the LDA favoured tightening up loopholes in the 2003 Act, for example, ensuring a major variation to a licence is always needed to host lap dancing.[158] The Lap Dancing Association proposed an alternative approach that included using planning legislation to control the establishment of lap dancing clubs. According to the Home Office, this approach was considered but was opposed by the Local Government Association and some industry representatives who argued that it would be overly complicated and bureaucratic. It was also felt that this approach would not adequately address the issue of giving communities a stronger say.[159]

On 18 June, Gerry Sutcliffe, DCMS minister, wrote to all chief executives of local authorities inviting their views on a possible change in the law on lap dancing:

> [I]t would be helpful to have your views on what additional powers you think you need as a local authority to control such establishments and whether you think existing tools provided by the planning system could be used more effectively to supplement the controls offered by the licensing legislation.
>
> It would also be useful to know to what extent there are concerns in your area about the control of activities that do not fall within the definition of entertainment, such as topless waitresses or bar staff, or the more extreme lewd displays which the courts have previously said go beyond the definition of 'entertainment'.[160]

The consultation, which closed on 15 August, attracted 117 responses, the majority of which argued that additional legislation should be introduced to provide controls which are specific to lap dancing and similar premises.[161] For example, in a letter to *The Times*, councillors from Brighton, London and Warwick wrote that their councils needed greater regulatory powers because they were "powerless" to stop the spread of lap dancing clubs:

> Lap dancing clubs are in contradiction to efforts to promote gender equality. Yet by boxing lap dancing clubs into the same licensing category as cafes, and concurrently requiring the promotion of gender equality, the hands of local authorities have been tied.[162]

Likewise, Sir Jeremy Beecham, vice-chairman of the Local Government Association, said in his response that councils were often powerless to respond to residents' concerns about the clubs because of the "loophole" in the 2003 Act. He added: "Our towns and cities should be shaped as far as possible according to residents' wishes, not by the presence of unwanted lap-dancing clubs in the heart of them."[163]

In her speech to the Labour Party conference in September the Home Secretary Jacqui Smith announced: "We'll give communities a stronger say in stopping lap-dancing clubs opening in their areas."[164] By November it was reported that the Government was about

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158 "Government probe into lap-dancing clubs", *Morning Advertiser*, 12 June 2008
159 Home Office, *Impact assessment of new measures to regulate lap dancing clubs*, 16 December 2008, p4
160 HC Library Deposited Paper DEP2008-1663,
161 HC Deb 27 October 2008 c730W (Tobias Ellwood/Gerry Sutcliffe)
162 *Times*, 15 August 2008
163 Quoted in: "Tougher lap dance licensing urged", *BBC News*, 15 August 2008
164 21 September 2008

to act on this issue. The press was predicting a "new licensing regime to be announced this month". [165] What legislative form this would take was not yet clear. In an interview with *The Observer* the Home Secretary signalled her support for new measures:

> Smith said she believed the law had been 'left behind' by the explosion in lapdancing clubs, which were seen as acceptable entertainment for a corporate night out. 'If I were a business person and I were wanting to make the best impression on clients, who presumably are female as well as male, I do think it's a bit bizarre that you would take them to a lapdancing club,' she said.
>
> The new regime would make it more difficult to open them. 'It's not a complete ban on lapdancing clubs, but it's saying you don't operate in a vacuum, you have an impact on the community around you. I would hope it would make it harder for them to open, certainly in residential areas, and I would suspect that some of them will be closed when the licences come up for renewal.'[166]

5. The Bill

Clause 25 of the Bill inserts a new category of "sex establishment", to be called a "sex encounter venue", into Schedule 3 of the 1982 Act.[167] The effect is that lap dancing clubs would be regulated in the same way as sex shops and sex cinemas. Such a "venue" is defined as premises where certain entertainment is provided, or permitted to be provided, by or on behalf of the organiser in front of a live audience for the financial gain of the organiser or entertainer. The entertainment may take the form of a "live performance" or "live display of nudity" and "must reasonably be assumed to have been provided solely or principally for the purpose of sexually stimulating any member of the audience." An audience can consist of just one person. "Display of nudity" is defined at subsection 10 to mean "in the case of a woman, exposure of her nipples, pubic area, genitals or anus".

As we have seen, the 1982 Act[168] already permits local authorities to set a limit on the number of sex establishments in a locality and to refuse a licence on the basis that the number of establishments in the locality is equal to or exceeds the number which the authority considers appropriate. **Clause 25(4)** amends this by allowing them to set a limit on the number of sex establishments *of a particular kind*, as well as the number of sex establishments generally. The implication is that they could, if they so chose, set their face against lap dancing clubs, while continuing to allow sex shops to operate.

Likewise, local authorities already have the power to prescribe in regulations standard terms and conditions for sex establishment licences.[169] **Clause 25(5)** would allow local authorities to impose different standard conditions on a sex encounter venue compared

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165 "Smith: firms should not go to strip clubs", *Independent*, 17 November 2008

166 "Paying for sex to be criminal offence: Home Secretary plans to crack down on vice trade on the streets, while lapdancing clubs will face a stringent licensing regime", *Observer*, 16 November 2008, p15. Licences issued under the 2003 Act are not subject to automatic renewal; they can, however, be reviewed at any time if there are sufficient grounds.

167 Note the avoidance of the term "sex encounter establishment", as used in the 1986 amendment.

168 Schedule 3 para 12(3)(c)

169 Schedule 3 para 13(2),(3)

with other kinds of sex establishment, such as a sex shop. Standard conditions cover such areas as hours of opening and closing of sex establishments, displays or advertisements and the visibility of the interior to passers-by.

Fees for grant or variation of a licence are determined by the local authority, with the proviso that it is "reasonable".[170] This is different from the regime under the *Licensing Act 2003*, where fees are set centrally, based on the rateable value of the premises.[171] The issue of what is "reasonable" has been considered several times by the courts. The principles established are that it is appropriate that council tax payers be relieved of the burden of the cost of administering the licensing of sex establishments and the court has no duty or power to decide what is a reasonable fee, as long as the council has not acted perversely.[172] Information provided by the Lap Dancing Association based on the current cost of sex establishment licences in local authorities across UK puts the average fee for a new licence at £5447 and £4981 for a renewal.[173]

Schedule 3 of the Bill deals with transitional provisions. As stated above, the legislation is adoptive, and the paragraphs in this schedule envisage both the situation where the local authority has not yet adopted Schedule 3 of the 1982 Act and the situation where it has already done so. In the latter case, it may decide not to adopt the amendments introduced by the current Bill. If it did not adopt the amendments, this would have the consequence that the local authority could continue to license sex shops or sex cinemas but would not be in a position to license the new category of "sex encounter venue". Schedule 3 of the Bill does not specify any detail about the transitional arrangements following implementation of the Act. Everything is to be determined at a later date by statutory instrument, made by the "relevant national authority", i.e. the Secretary of State or Welsh Ministers. In particular, a mechanism may have to be devised by which licences issued under the 2003 Act, which are not normally subject to automatic renewal, can be called in for review, thereby affording the local authority an opportunity to take advantage of the new legislation, should it so choose.[174]

Clause 89 of the Bill determines that clause 25 and Schedule 3 extend to England and Wales only.

IV Alcohol misuse

Part 3 of the Bill contains provisions relating to young people and alcohol. There are also powers to allow the Secretary of State to create, through secondary legislation, mandatory and permitted conditions for alcohol licences.

In March 2004 the Prime Minister's Strategy Unit published its *Alcohol Harm Reduction Strategy for England*. Chapter 6 of this strategy looked at alcohol-related crime and disorder and made the following proposals:

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170 Schedule 3 para 19, slightly amended by clause 25(6) of the Bill
171 *Licensing Act 2003 (Fees) Regulations 2005, SI 2005/79*
172 Case law cited in Kolvin, p884
173 Home Office, *Impact assessment of new measures to regulate lap dancing clubs*, 16 December 2008, p5
174 Home Office official, 8 January 2008

> Government will reduce the problems caused by drinking in town and city centres by
> clearly defining the shared responsibilities of individuals, the alcoholic drinks industry
> and the Government. This will require:
>
> - making greater use of existing legislation and penalties to combat anti-social behaviour – for example, greater use of Fixed Penalty Notices;
> - working with the alcohol industry to manage and deal with the consequence of town and city centre drinking, by agreeing a new code of good practice and the joint funding of local initiatives; and
> - encouraging local authorities more actively to tackle problems where they occur.
>
> Government will tackle under-age drinking by:
>
> - greater enforcement of existing laws not to sell alcohol to under-18s;
> - improving the information about the dangers of alcohol misuse available to young people; and encouraging provision of more alternative activities for young people.
>
> Government will tackle alcohol-related repeat offending by further piloting of arrest referral schemes and exploring the effectiveness of diversion schemes.
>
> Government will seek better identification of alcohol problems and referral to alcohol services as part of existing measures on domestic violence.[175]

The original strategy contained a commitment to review progress in 2007. *Safe, sensible, social*, the latest instalment of the National Alcohol Strategy, duly appeared in June 2007. By this stage the following headline points had emerged:

> **Next steps in the national alcohol strategy:**
>
> • sharpened criminal justice for drunken behaviour;
> • a review of NHS alcohol spending;
> • more help for people who want to drink less;
> • toughened enforcement of underage sales;
> • trusted guidance for parents and young people;
> • public information campaigns to promote a new 'sensible drinking' culture;
> • public consultation on alcohol pricing and promotion; and
> • local alcohol strategies. [176]

Alongside this progress review, the Department of Health commissioned a detailed survey of evidence from academics at Sheffield University to assess the effects of price and promotion on alcohol-related harm. This was completed in September 2008. The findings suggested that reducing the quantity of cut-price alcohol on sale could reduce consumption and have significant effects on reducing alcohol-related crime and ill-health,

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[175] Cabinet Office, *Alcohol Harm Reduction Strategy for England*, 2004, p44
[176] Dept of Health and others, *Safe, sensible, social: the next steps in the National Alcohol Strategy*, 2007, p5

without necessarily penalising moderate drinkers. On alcohol pricing, the researchers concluded:

> An increase in the price of alcohol has been found to reduce alcohol consumption, hazardous and harmful alcohol consumption, alcohol dependence, the harm done by alcohol, and the harm done by alcohol to others than the drinker. Policies that regulate the alcohol market, including the price of alcohol, the location, density, and opening hours of sales outlets and controls on the availability of alcohol have been found to have an impact in reducing drinking and driving and related fatalities (Grube and Stewart 2004). The exact size of this impact varied between countries and a major limitation of the evidence base is that most studies examining the impact of such policies have been conducted in the United States. (…)
>
> There is scattered evidence that suggests that the various pricing policy options have a similar or stronger effect for the identified at-risk groups (young people under 18, young adult binge drinkers, and, in some studies, heavy drinkers) and may thus be especially suitable for reducing overall harms in these groups.[177]

On alcohol-related harm, the Sheffield study concurred with earlier research

> in identifying multiple associations and several causal links between alcohol consumption and the harmful effects on health and society (including crime and violence). While the evidence is not conclusive for all conditions it is of sufficient quantity and quality to support an increased level of intervention for both economic and public health-related reasons.[178]

A. Young people and alcohol

In June 2008 the Government published its *Youth Alcohol Action Plan*.[179] The Plan summarised evidence on the extent of drinking by young people and its consequences for them and the wider community. It also called for Government agencies to work closely with police and the courts to stop underage drinking. While accepting that drinking by young people in the home is the responsibility of parents, it committed Government agencies to providing clear health information for parents and teenagers about the impact excessive alcohol consumption can have on their lives. There was also an undertaking that Government would work with the alcohol industry to reduce further the sale of alcohol to underage buyers, and to ensure that alcohol is marketed and promoted in a responsible way. It concluded:

> While not all drinking by young people should be of concern, some drinking by young people could put their health at risk and some is clearly unacceptable – particularly when they drink to get drunk and especially when this happens in

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177 Sheffield University, School of Health and Related Research*, Independent review of the effects of alcohol pricing and promotion: part A: systematic reviews: project report for the Dept of Health*, September 2008, p38, http://www.dh.gov.uk/en/Publichealth/Healthimprovement/Alcoholmisuse/DH_4001740

178 Ibid, p239

179 Cm 7387

> public places. We will act to stop unacceptable drinking by young people under the age of 18 and expect action from industry in support of that objective.[180]

The Youth Alcohol Action Plan set out a number of measures to deliver its objective of tackling young people's alcohol consumption. These include:

> **Stopping young people drinking in public places**
>
> • Give police the powers to disperse under-18s who are drinking and behaving anti-socially from any location
>
> • Extend the Directions to Leave power to include 10-15 year olds
>
> • Extend alcohol arrest-referral pilots so that under-18s arrested for alcohol-related offences benefit from a brief intervention with a trained worker
>
> • Implement new legislation to make it an offence for under-18s to persistently possess alcohol in public places
>
> **Taking action with industry**
>
> • Encourage voluntary test purchasing schemes
>
> • Encourage the wider use of Proof of Age Schemes
>
> • Encourage the prompt rollout of Challenge 21 nationally[181]
>
> • Working with industry to improve the Alcohol Social Responsibility Standards, with a view to making them mandatory
>
> **Developing a national consensus on young people and drinking**
>
> • Conduct extensive consultation on the advice of the Chief Medical Officer and the DCSF Expert Panel
>
> • Issue guidelines on young people and alcohol
>
> • Establishing a new partnership with parents
>
> • Issuing guidance to parents regarding young people and alcohol
>
> • Extending Family Intervention Projects to include a focus on substance misuse
>
> • Encourage the police and other agencies to make greater use of Parenting Orders when a child or young person is caught persistently drinking in public places
>
> **Supporting young people to make sensible decisions**

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[180] Cm 7387, p13 (para 40)

[181] The "Challenge 21" initiative encourages retailers and licensees to seek proof of age from anybody who appears to be under the age of 21

> • Launch a communications campaign about the risks of alcohol – particularly aimed at 11-15 year olds
>
> • Implement the actions arising from the review of drug and alcohol education in schools.[182]

Don Shenker, Chief Executive of Alcohol Concern, gave the Plan a cautious welcome:

> "Alcohol Concern has consistently campaigned for the government to take stronger action to reduce the considerable levels of teenage alcohol misuse and its associated harms. This plan represents an excellent start. Parents should benefit from the plans to provide clearer advice on how to raise these issues with their children. We are also delighted to see that alcohol arrest referral pilots are to be extended to the under-18s.
>
> Nevertheless, changing behaviour among the young towards alcohol is a long term project, requiring contributions from parents, government, the drinks industry, and youth providers. We will continue therefore to urge industry and the government to work towards reducing the cultural impact that alcohol advertising and promotion has on British children. We also hope that the central government departments will co-operate to look at how local agencies can be resourced sufficiently to deliver on this vital agenda."[183]

Anne Longfield, Chief Executive of 4Children, said:

> "We welcome the Youth Alcohol Action Plan which is an important first step in tackling growing concerns around the level of young people's drinking and the negative impact this can have on their health, well being and the communities in which they live. It is particularly encouraging to see an emphasis being placed on helping parents to discuss drinking alcohol with their children as many may feel uncomfortable and unsure of how to engage their children in talking about the issue.
>
> "However, it is important that the plan does not also serve to criminalise and alienate vast numbers of young people, many of whom may be coping with additional pressures and difficulties, but supports young people in re-assessing their attitudes towards and making responsible decisions about alcohol."[184]

In November 2008 the Home Office published an "impact assessment of persistent public drinking by young people". Drawing on the evidence of two surveys[185] conducted by the NHS, it reaches these conclusions:

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[182] Dept for Children, Schools and Families press notice 2008/0104, *Young people and alcohol – a new approach launched in Government action plan*, 2 June 2008

[183] Alcohol Concern, *Alcohol concern responds to launch of new cross departmental Youth Alcohol Action Plan*, 2 June 2008

[184] 4Children Information and News, *Youth Alcohol Action Plan*, 2 June 2008

[185] NHS Information Centre, *Drug use, smoking and drinking among young people in England in 2007*, 2008; NHS Information Centre, *Smoking, drinking and drug use among young people in England in 2006*, 2007

> Although fewer young people are drinking alcohol, those who do drink are drinking more than before. Whilst not all alcohol consumption is harmful, there are risks associated with alcohol misuse, and in particular, these risks are greater when the drinker is under 18. These risks include serious health problems, both in the short and the long-term, and also a wide range of other problems which adversely affect the welfare of teenagers, for example, unprotected sex, teenage pregnancy, failing at school and the use of illicit drugs.
>
> Evidence shows that the proportion of young people who drink in a public place has also increased significantly, and it is the heaviest drinkers who are the most likely to drink in public. There is evidence that the consumption of alcohol in public places leads to unacceptable behaviour that can be a significant problem for the rest of the community. It is also one of the major causes of the public perceiving a problem with drunk or rowdy behaviour and/or antisocial behaviour in their area.[186]

This is the rationale for further action intended to "reduce the amount of alcohol that is consumed in public places by young people, and thereby reduce the harms associated with this".[187]

1. The Bill

Clauses 26 to 30 contain powers to control alcohol misuse. Most of these are amendments of existing legislation. One, in **clause 29**, is a new offence. Young people under 18 can be prosecuted for this offence if they are caught with alcohol, "without reasonable excuse", in a public place three times within a 12 month period. The maximum penalty is a level two fine (£500).

Under section 13 of the *Criminal Justice and Police Act 2001*, local authorities can designate areas that have experienced alcohol-related disorder or nuisance so that there can be restrictions on public drinking. The orders are called Designated Public Place Orders. While it is not an offence to consume alcohol within a "designated" area, the police have powers to control the consumption of alcohol within that place. If they believe someone is consuming alcohol or intends to consume alcohol they can require them to stop and confiscate it. If someone, without a reasonable excuse, fails to comply with the officer's request they are committing an offence which can result in a penalty notice or a fine. **Clause 26** increases the maximum fine for consuming alcohol in a designated public place from level two (£500) to level four (£2,500).

Under the *Licensing Act 2003*[188] it is an offence to sell alcohol to anyone under 18. An amendment was introduced into the 2003 Act by the *Violent Crime Reduction Act 2006*.[189] A new offence of "persistently selling alcohol to children" was created where "on 3 or more different occasions within a period of 3 consecutive months alcohol is unlawfully sold on the same premises to an individual aged under 18".[190] **Clause 27**

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186 Home Office, *Impact assessment of persistent public drinking by young people*, November 2008, p3
187 Home Office, *Impact assessment of persistent public drinking by young people*, November 2008, p5
188 s146
189 s23(1)
190 *Licensing Act 2003* new section 147A (in force from 6 April 2007)

further amends the offence of persistently selling alcohol to children from three occasions to two occasions within three months.

The *Confiscation of Alcohol (Young Persons) Act 1997* provides police officers in uniform and designated Community Support Officers with the power to remove alcohol from persons under 18 in a public place where alcohol is being consumed or the officer reasonably suspects consumption is about to take place. Section 155 of the *Licensing Act 2003* amended this and other previous legislation to give the police the power to confiscate alcohol in sealed containers from anyone in an area which has been designated by the local authority for the purposes of curbing anti-social behaviour, and from people under 18 in any public place. (Previously police powers concerning the confiscation of alcohol applied only in relation to opened containers.) Note that the enforcement power against underage drinking applies in any public place, not just one which is the subject of a "Designated Public Place Order".

During an enforcement campaign in autumn 2007, police from 21 forces across the country seized over 3,700 litres of beer, wine, cider, alcopops and spirits from youths aged under 18 who were found to be drinking in public places.[191]

In a speech at the Business Design Centre in London on 6 February 2008 to an audience of police and local authority licensing officers, representatives from the drinks and retail industry and others, Jacqui Smith said:

> There are three distinct groups I am determined to tackle – children drinking in public; binge drinkers; and those who sell alcohol irresponsibly.[192]

The Home Secretary also said the following, which suggested that police would use existing powers to confiscate alcohol being consumed in public places by young people, but if the legislation was "found inadequate" further legislation would be considered:

> We have now reached a worrying tipping point – where more 13 year olds have drunk alcohol than have not.
>
> This is clearly a cause for concern. Last autumn, we ran a half-term holiday campaign to confiscate alcohol for under-18s drinking in public places. Over the course of 4 weeks in just 23 local areas, nearly 3,700 litres of alcohol were confiscated – that's the equivalent of about 6,500 pints.
>
> We are now extending this approach, and during the next half-term holiday there will be a new campaign, involving 175 police Basic Command Units across the country. It is time to send the message that it is no longer acceptable for children to drink in public places. Their alcohol will be confiscated.
>
> If the current laws on confiscation from underage drinkers prove inadequate, I will consider the case for new legislation to make it clear that we do not want to see children drinking in public. If it's illegal for under-18s to buy alcohol, then they

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[191] Home Office press notice , *Six thousand pints of alcohol seized from under-18s*, 14 January 2008
[192] Home Office, Home Secretary's speech on underage drinking, 6 February 2008

> shouldn't have it in public either. If necessary, I will change the law to make it clear we won't tolerate them drinking in public. I want police officers to be able to use discretion when it comes to confiscation, and not be prevented from doing so by having to prove they have reasonable suspicion that children are about to consume. No-one would look at a group of kids drinking in public and say that that was right and that it shouldn't be stopped – not only for the good of the children themselves, but also for the good of the community. This is not about criminalising young people unnecessarily – that could be wholly counter-productive. But it is about taking action where there is a problem. [193]

Clause 28 amends the police's power to confiscate alcohol from young people in a public place so that they no longer need to prove that the individual intended to consume the alcohol. This amendment also requires the young person to give their name and address to the police, and allows the police to return the individual to their home or a place of safety if they are under 16.

Currently a police officer has the power to issue a "direction to leave" a locality to an individual aged at least 16 who is in a public place.[194] The direction prohibits their return to the locality for up to 48 hours. A direction can only be given if he thinks the individual's presence is likely to cause or contribute to alcohol-related crime or disorder in that locality, or to a repetition or continuance there of crime or disorder. The police officer also has to be satisfied that such a direction is necessary for the purpose of removing or reducing the likelihood of crime or disorder in that locality during the period for which the direction has effect. **Clause 30** extends the police's power to issue directions to leave so that they can be issued to children aged 10-15.

B. Licensing conditions

A core principle of the reform of licensing law embodied in the *Licensing Act 2003* is that there should be no "one-size-fits-all" solutions. This is underlined at several points in the Guidance issued to local authorities by DCMS:

> The Act requires that licensing conditions should be tailored to the size, style, characteristics and activities taking place at the premises concerned. This rules out standardised conditions which ignore these individual aspects. It is important that conditions are proportionate and properly recognise significant differences between venues. For example, charities, community groups, voluntary groups, churches, schools and hospitals which host smaller events and festivals will not usually be pursuing these events commercially with a view to profit and will inevitably operate within limited resources.[195]

Every three years the licensing authority is required to draw up a statement of licensing policy. Such statements, according to DCMS, should

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[193] Ibid.
[194] *Violent Crime Reduction Act 2006* s27
[195] DCMS, *Guidance issued under section 182 of the Licensing Act 2003*, rev ed, June 2007, p72 (para 10.13)

> make it clear that a key concept underscoring the 2003 Act is for conditions to be tailored to the specific premises concerned. This effectively rules out standardised conditions, as explained in paragraph 10.13 of this Guidance. However, it is acceptable for licensing authorities to draw attention in their statements of policy to pools of conditions which applicants and others may draw on as appropriate.[196]

The pool of conditions suggested by DCMS (covering such areas as use of toughened glass, drinks promotions and capacity limits) are listed in an appendix to the Guidance. Again, they are preceded by a caveat:

> Under no circumstances should licensing authorities regard these conditions as standard conditions to be automatically imposed in all cases.[197]

The Bill represents a shift of emphasis, in that it proposes an increase in the number of mandatory licence conditions that apply to all new or existing licences and club premises certificates which permit the sale of alcohol, and introduces a new category of "permitted conditions", which the licensing authority can, in consultation with "responsible authorities",[198] apply to more than one licensed premises or club at a time.

1. The case for mandatory and permitted conditions

In November 2005, the alcohol industry launched a set of *Social Responsibility Standards* to coincide with the implementation of the new *Licensing Act*.[199] They were signed by 16 trade associations and draw together industry good practice, advice and codes of conduct. Adherence to the Standards is voluntary.[200] The Standards were designed to "cover all forms of sales and marketing activity including packaging, merchandising, point of sale material, web sites, sponsorship, press releases, sampling, promotions, advertising, and retailing activity".

In February 2008, the Home Office commissioned KPMG to conduct a review into the effectiveness of these Standards in contributing to a reduction in alcohol harm. Although they found examples of good practice, most notably at a corporate level, KPMG recommended that the Standards be strengthened and enforced more effectively:

> We have concluded that currently the Standards are not being consistently adopted and applied across the whole of the alcohol industry. In the current trading climate the commercial imperative generally overrides adherence. Inducements to people to drink more and faster, to allow under-age people entry to restricted premises, and blatantly serving intoxicated people are evidence of this conclusion.

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196 Ibid, p91 (para 13.20)

197 Ibid, p117 (Annex D)

198 "Responsible authorities" are defined in s13 of the 2003 Act. They include the police, fire service and local health and safety authority.

199 Advertising Association and others, *Social responsibility standards for the production and sale of alcoholic drinks in the UK*, 2005

200 *The Portman Group Code of Practice on the Naming, Packaging and Promotion of Alcoholic Drinks*

> The Standards are currently having negligible impact in either reducing bad practice or promoting good practice on the ground. They lack focus, they are a confusing mix of regulatory and voluntary provisions, and they are not cross referenced to the Licensing Act. In driving responsible practice they are ineffective because of a lack of consistent monitoring and enforcement. We have not assembled any evidence which suggests there is any direct causal link between the impact of the standards and a reduction in alcohol-related harm.[201]

On 2 June 2008, the Department for Children, Schools and Families, the Home Office and the Department of Health announced plans to work with the alcohol industry to develop a new "alcohol retailing code", with a view to making this mandatory for anyone who sells alcohol to the public. A consultation was launched seeking views on how a new code could be used to end retailing practices that lead to alcohol-related health problems and social harm; it also asked whether this code should be backed up by new legislation to make it mandatory.[202] The majority of the 2,790 respondents were from the public and third sector (police, health, local authorities). Around 90% of those who responded to the question on whether a new alcohol retailing code should be made mandatory through further legislation felt that it should. However, the alcohol producers and trade bodies who responded argued that improvements could best be achieved through a system of co- or self-regulation with standards agreed between the Government and the alcohol industry.[203] In its Impact Assessment on the proposed code, the Home Office comments:

> We are sympathetic to these arguments and believe that self-regulation is a desirable choice when working with industry. However, we do not believe that a revised voluntary code would be any more effective that the one that large sections of the alcohol industry signed up to in 2005.

The Government's "preferred option" following the consultation was therefore "to introduce an enabling power whereby the Home Secretary can, in the future, draw up a code of practice for the alcohol industry which will permit the imposition of some mandatory licensing conditions".[204]

What would be covered by such a mandatory code? The headline points were given in a press notice issued in December:

> The Government will shortly consult on a range of compulsory conditions including:
>
> - banning offers like 'all you can drink for £10';
> - outlawing pubs and bars offering promotions to certain groups, such as women only;
> - ensuring that customers in supermarkets are not required to buy very large amounts of a product to take advantage of price discounts;

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201 Home Office/KPMG, *Review of the social responsibility standards for the production and sale of alcoholic drinks*, vol 1, April 2008, p10
202 Dept of Health, *Safe, sensible, social: consultation on further action*, July 2008
203 Dept of Health, *Safe, sensible, social: consultation on further action – consultation report*, December 2008, p15
204 Home Office, *Impact assessment of a code of practice for the alcohol industry*, November 2008, p7

- ensuring staff selling alcohol are properly trained;
- requiring that consumers are able to see unit content of all alcohol when they buy it; and
- requiring bars and pubs to have the minimum sized glasses available for customers who want them.[205]

Detail on each of these points is given in the Impact Assessment, which estimates the potential impact on business of each of these measures.[206]

Ken Jones, President of the Association of Chief Police Officers, commented:

> "Chief officers will welcome the introduction of powers to impose mandatory conditions on the supply of alcohol. The culture of drinking to excess in our towns and city centres, and irresponsible alcohol marketing and pricing by major companies, places a massive burden on public services around the country and plays a major part in violence and disorder."[207]

While generally supportive of the proposal, the Local Government Association was more circumspect:

> We are concerned that the mandatory conditions will impose blanket regulations across the board, which will not take account of local conditions. Mandatory conditions (without exemption) that apply to village halls, or sports and members clubs could impose a significant burden on them. In our view there needs to be a full consultation on the detail of mandatory conditions, the procedures involved in establishing the local conditions and the content of the Code.[208]

The proposed ban on supermarket alcohol promotions has met with a mixed response among retailers. The Association of Licensed Multiple Retailers reportedly commented that the measures are a "step forward", although it stressed supermarkets should be penalised for "irresponsibly cheap booze deals". Chief executive Nick Bish said: "Until we can take control of below cost selling and bulk-buying deals, we won't truly be able to make progress on restraining alcohol related disorder."[209] However, Stephen Robertson, Director-General of the British Retail Consortium, was reported as saying that it is wrong to penalise shoppers who drink without getting into trouble. He argued that already hard-hit consumers should not have to pay more for alcohol. Robertson said:

> "Denying hard-pressed customers access to value is wrong. We don't want social disorder either but controls on price and promotions will not tackle alcohol abuse. They just penalise millions of customers who drink perfectly responsibly."[210]

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205 Home Office press notice 216/2008, *Time's up for irresponsible drink deals*, 3 December 2008
206 Home Office, *Impact assessment of a code of practice for the alcohol industry*, November 2008, pp12-14
207 *ACPO statement on the publication of the Policing and Crime Bill*, ref 147/08, 18 December 2008
208 Local Government Association, *LGA briefing: Policing and Crime Bill*, 18 December 2008
209 "Alcohol laws welcomed by retailers, who call for supermarket penalties", 19 December 2008
210 "Alcohol legislation plans meet with mixed response", 3 December 2008

Some have questioned whether further legislation is required. Rob Hayward, Chief Executive of the British Beer and Pub Association, expressed the fear that a mandatory code would disadvantage already struggling pubs:

> "The Government has the weapons it needs to tackle irresponsible retailers by rigorously enforcing the Licensing Act. We don't need new laws and regulations, just better enforcement of existing laws."[211]

The shadow Home Secretary, Dominic Grieve, is reported in the same newspaper as saying that the measures would not tackle binge-drinking:

> "The answer lies in focused measures and law enforcement – not yet more laws and regulation that sound tough, but are never actually enforced."

In support of the case for *permitted* conditions, the Impact Assessment states:

> Licensing authorities currently have the power to impose conditions on a licence in order to support these objectives on a case-by-case basis. However, there is now evidence that licensing authorities are not always able to establish a clear link between local problems and a single premise, and are therefore often prevented from imposing licensing conditions even where they believe they would be beneficial. This has limited the effectiveness of the existing licensing mechanisms.[212]

According to the Home Office, the evidence referred to here is unpublished evidence emerging from discussions with stakeholders.[213]

The introduction of permitted conditions is viewed with some scepticism in the licensed trade. A legal commentator in the *Morning Advertiser*, the licensees' trade journal, writes:

> This represents a major shift in emphasis in the legislation and must be seen as a victory for local government lobbying. (…) This is quite a new concept and could effectively mean entirely different conditions applying to licences in adjoining local authority areas.[214]

2. The Bill

At present there are two mandatory conditions that apply when a premises licence authorises the supply of alcohol:

> (2) The first condition is that no supply of alcohol may be made under the premises licence—
> (a) at a time when there is no designated premises supervisor in respect of the premises licence, or
> (b) at a time when the designated premises supervisor does not hold a personal licence or his personal licence is suspended.

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211 "Curbs on cheap drink and 'sex clubs'", *Independent*, 4 December 2008
212 Home Office, *Impact assessment of a code of practice for the alcohol industry*, November 2008, p3
213 Personal communication, Home Office official, 9 January 2008
214 Peter Coulson, "Secretary of State's nine lives", *Morning Advertiser*, 8 January 2008, p8

> (3) The second condition is that every supply of alcohol under the premises licence must be made or authorised by a person who holds a personal licence.[215]

Schedule 4 amends the 2003 Act so that, where premises are licensed to sell alcohol, their licence is subject to further mandatory conditions to be specified in secondary legislation by the Secretary of State. He may specify up to nine conditions, each of which takes precedence over any existing licensing conditions. This is the intended mechanism by which a Code would be made mandatory.

Paragraph 3 of Schedule 4 amends the 2003 Act to impose as appropriate any of the "permitted" conditions on licensed premises if there has been "nuisance, annoyance [to the public] or disorder" associated with the "consumption of alcohol in the locality". The list of permitted conditions and the procedure for imposing them (and appealing against them) will be specified in secondary legislation and statutory guidance. Again, if these conditions are "inconsistent with, and more onerous than" the existing ones, the permitted conditions take precedence. Licensing authorities must consider the imposition of permitted conditions following a request from a "responsible authority". It is noteworthy that the new power applies to all premises "in a particular locality". There is no suggestion that the nuisance or disorder has to be tied to a particular pub or club. If there is evidence of this specific kind, it would in any case already prompt a review of the individual licence, with possible imposition of additional licensing conditions.

V Proceeds of crime

A. Background

The Government introduced the *Proceeds of Crime Act* (POCA) in 2002 and there have subsequently been a number of pieces of legislation amending the asset recovery regime which that Act established.

POCA set up the Asset Recovery Agency (ARA) and allowed it to take both criminal and civil proceedings to recover the proceeds of crime. The Act built on earlier statutes relating to drug trafficking, such as the *Drug Trafficking Offences Act 1986* and the *Criminal Justice Act 1988*. In particular, POCA introduced new powers to allow for civil forfeiture of assets where the ARA could prove to the civil standard of proof (the balance of probabilities) in the High Court that those assets were the proceeds of crime.

Detailed background information on the creation of the agency, and on the civil forfeiture arrangements in Ireland and the United States, can be found in Library Research Paper 01/79 *Proceeds of Crime Bill*.

Amendments to the asset recovery regime were made under the *Serious Organised Crime and Police Act 2005*. The Government subsequently abolished the ARA under the *Serious Crime Act 2007* and transferred its functions to a number of other bodies, including the Serious Organised Crime Agency (SOCA). Information about these

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[215] *Licensing Act 2003* s19

changes, the legal basis for asset recovery and the performance of the ARA can be found in the Library Research Paper 07/52 *Serious Crime Bill*.

In May 2007, the Government produced a consultation paper entitled the *"Asset Recovery Action Plan"* The consultation closed in November 2007. The paper suggested that a number of changes should be made to the asset recovery regime including:

(a) New powers to seize the high value goods of those charged with acquisitive crimes and enable them to be sold if necessary to meet confiscation claims under POCA;

(b) A new administrative procedure for cash forfeitures – cash would be forfeited automatically unless the owner exercised his right to a court hearing;

(c) The removal of loopholes in the civil recovery powers in the POCA.

In its consultation paper, the Government indicated that in 2006, it had recovered almost £125 million from criminals, but that it was targeting returns of £250 million by 2009/10. The paper stated that:

> Performance on asset recovery will for the first time be introduced as a Performance Indicator underlying the broader Public Service Agreement (PSA) target on Justice for all. Departments and agencies will have delivery plans setting out the contribution they will be making, and asset recovery will be a key part of these. Examples are the new confiscation orders enforcement target for 2007-08, targets for Her Majesty's Revenue and Customs (HMRC), Police, and Serious and Organised Crime Agency (SOCA) on cash forfeiture orders, and the civil recovery targets for the Assets Recovery Agency (ARA) in its Business Plan for 2007-08, building on the targets in earlier ARA Plans.[216]

A number of suggestions were made in the paper to strengthen the confiscation and civil recovery processes. These included the creation of a new power, automatically transferring title in any asset which was under restraint or in the possession of the public authorities, once the time to pay for a confiscation order had expired. The paper indicated that the power could specify that all of the defendant's title passed to the Crown, enabling third parties with any interest in the same property to continue to pursue their claim.

It suggested clarifying the law, legislating if necessary, to make it clear that law enforcement agencies could seize high value goods from those offenders charged with acquisitive crimes, whether or not the specific goods were required as evidence for the criminal investigation. Those assets could then be held pending the trial and sold off if necessary to meet the value of any order, using the powers proposed above. In those cases, the paper acknowledged that there would be a need for guidance to ensure only non-essential goods could be seized. It was proposed that individuals would be able to redeem the goods by putting an equivalent bond in place. It was accepted by the Government that there would need to be provisions for compensation in cases where the charged person was not ultimately convicted of an offence and where specific loss could

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[216] Home Office, *Asset Recovery Action Plan* May 2007, p 11

be claimed (as opposed to "normal processes like depreciation"). In relation to the seizure proposals, the paper noted that:

> There might be criticism of a power to seize goods without court process. But the power would only be used in cases where an individual had already been charged with an acquisitive crime and where a confiscation process is pending. Pre-emptive seizure of this sort serves the same purpose as the seizure of evidence for PACE[217] purposes, or indeed the ability to remand individuals in custody pending trial, if it is thought the individual is likely to flee the jurisdiction. The ultimate power to impose an order would remain with the courts. Finally the seizure power would also provide a visible sign, early in the case, of society's determination that nobody should be allowed to remain in possession of the proceeds of their crime.[218]

The paper also proposed the introduction of a new process of administrative forfeiture for cash seizures. Basically, this would mean that cash would be automatically forfeited without further process, unless the owner challenged the seizure, at which point a court hearing would be needed.

It advocated extending the time limit (known in law as a "limitation period") within which civil asset recovery actions can be launched, possibly indefinitely. The paper indicated that:

> Civil recovery is currently subject to a 12 year time limit, and it has been suggested that this prevents successful action against criminals who made their money longer ago than that, including some figures of particular public notoriety. Twelve years reflects one of the longest time limits in the civil law, although time limits for fraudulent tax claims are longer. There may be a case for arguing that the public interest demands a different presumption in the case of assets secured through crime, including possibly removing the time limit altogether.

It also promoted a new power to seize (on the civil standard of proof) high value goods which had been used as the instrumentalities of crime.[219]

To date the Home Office has not published a formal report on the responses to the *Asset Recovery Action Plan*, but the majority of the new measures on proceeds of crime contained in the *Policing and Crime Bill* (on the seizure, retention and sale of assets) were announced in February 2008 as part of the *Drugs Strategy Action Plan*.

The Explanatory Notes to the Bill say that Part 4 (entitled Proceeds of Crime) would "implement the main recommendations of the *Asset Recovery Action Plan* (2007)".

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[217] *Police and Criminal Evidence Act 1984*

[218] Home Office, *Asset Recovery Action Plan*, May 2007, p 25

[219] An instrumentality is something which is used to commit a crime. It might be for example a plane used to fly drugs into the country or a house where the garden or the attic has been used as a growing place for cannabis plants.

B. The Bill

The relevant clauses are contained in Part 4 of the Bill. Clauses 32-42 relate to confiscation powers, whilst clauses 43-46 relate to the civil recovery regime. The powers would apply throughout the UK.

Clauses 33-35 would introduce a power for "appropriate officers" to be able to retain property that has been made subject to a restraint order pursuant to POCA and seized as evidence under a seizure power (for example seizure as evidence, pursuant to provisions in the *Police and Criminal Evidence Act 1984*). In England and Wales, a new section 41A would be introduced into the POCA 2002.[220]

In the Explanatory Notes, the Government argues that:

> Any party affected by a restraint order may challenge it and on such an application, the Crown Court may vary or discharge it. When considering a restraint order, the Crown Court will take account of the estimated amount of the person's benefit from their criminal conduct and estimated value of the person's realisable property, to ensure that only property up to or less than the value of the person's benefit is restrained. The Government considers that these safeguards ensure that this power constitutes a proportionate interference with property in terms of Article 1 of Protocol 1[of the European Convention on Human Rights].

Clauses 36-38 would allow for additional search and seizure powers to prevent the dissipation of personal property where a confiscation order has been or may be made. These powers would be given to the police, officers of Revenue and Customs and accredited financial investigators.[221] **Clause 36** would make extensive additions to section 47 of the POCA 2002 in England and Wales.[222] The provisions appear to apply in a number of circumstances, including where a person has been arrested (rather than charged) with an offence (see proposed new s 47B). If the conditions of new section 47B are fulfilled, an appropriate officer would be able to seize "any free property held by the defendant" if the officer has reasonable grounds for believing that either (a) the property may otherwise be made unavailable for satisfying any confiscation order that has been or may be made against the defendant, or (b) the value of the property may otherwise be diminished as a result of conduct by the defendant or any other person. New section 47C (4) provides a list of exempt property (which broadly reflects the list of exempt property a bailiff is precluded from seizing).

The Explanatory Notes to the Bill state that the property could be seized "in anticipation of a confiscation order being made." They go on to say that "the search power requires a magistrates' court[223] to authorise it beforehand if practicable, or a senior officer's

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[220] Amendments are to s120 in Scotland and s190 in Northern Ireland

[221] The Bill makes plain that the reference to an accredited financial investigator is a reference to an accredited financial investigator who falls within a description specified in an order made for the purposes of that provision by the Secretary of State under section 453 of POCA.

[222] Amendments are to s127 in Scotland and s195 in Northern Ireland

[223] Proposed new s47G only refers to a Justice of the Peace rather than a full Magistrates' Court. Where property is seized without the approval of a JP, the Explanatory Notes make plain that all cases, "a court order will be required for the continued detention of the property beyond 48 hours."

authorisation[224] failing that" pointing out that a "Code of Practice will be drafted to cover the exercise of these powers, to ensure that they are exercised proportionately." Proposed new section 47P provides that the Secretary of State would be obliged to lay a draft of the code before Parliament and once such a draft has been laid may bring it into operation by order. The Government says that it "considers that these safeguards ensure that the powers will be exercised proportionately."

Clauses 39-41 would allow for seized property to be sold to meet a confiscation order in certain circumstances. The Government argues that this would apply only if the time to pay under the confiscation order had already come due, and it would require a magistrates' court to order the sale of the property. The Explanatory Notes suggest that the introduction of the power would avoid the need for an enforcement receiver to be appointed and state that there will be a right for third parties to apply to set aside the court's order (and in this way equivalent safeguards will be in place to those available when an enforcement receiver sells property in order to satisfy a confiscation order).

Clause 42 makes minor amendments to the compensation regime contained in section 72 of POCA 2002.

Clause 43 provides for the limitation period for actions for the civil recovery of property obtained through unlawful conduct under Chapter 2 of Part 5 of POCA to be extended from 12 years to 20. As mentioned in the *Asset Recovery Action Plan* (above) the 12 year limitation period currently in use is one of the longest time limits in the civil law (outside certain cases of fraud). The Explanatory Notes to the Bill indicate that the new limitation period would "apply to causes of action which accrued before the commencement of this section, but not if those causes of action were time-barred by the previous 12 year limitation period." Accordingly, the Government argues that "it is considered that this amendment is proportionate in terms of Article 1 of Protocol 1 [to the *European Convention on Human Rights*]." That provision provides for the protection of property and the peaceful enjoyment of possessions. The Government does not appear to have addressed potential arguments that might be raised under Article 6 of the *European Convention on Human Rights*, which provides a right to a fair trial in the Explanatory Notes (see commentary below).

Clause 44 creates a new power to search vehicles as part of the cash recovery scheme. This is an addition to the existing powers of search of premises and search of a person.

Clauses 45 and **46** apply to seized and detained cash respectively. The provisions would (amongst other things) introduce new powers to enable law enforcement to forfeit detained cash without a court order in uncontested cases. Currently cash is forfeited pursuant to a magistrates' court order. The Government has argued that the administrative forfeiture scheme to be introduced by **Clause 46** provides safeguards, since as soon as any person with an interest in the cash objects, the administrative forfeiture notice lapses. Additional safeguards are provided, including a subsequent right to apply to the court to set aside the forfeiture, and provision for an out-of-time application in exceptional circumstances. Furthermore, the administrative forfeiture

[224] In the case of the police, a senior officer is defined as an Inspector. Other criteria are applied to HMRC and accredited financial investigators

notice cannot be made unless the cash was initially detained pursuant to a magistrates' court order.

Clause 47 transfers the jurisdiction for applications relating to detained cash investigations from a judge of the High Court to a judge entitled to exercise the jurisdiction of the Crown Court in England and Wales (which includes Circuit judges, Recorders and High Court judges in their Crown Court capacity).

1. Commentary

At the time of writing, there was limited commentary on the proceeds of crime proposals. The Association of Chief Police Officers welcomed measures to strengthen "legislation to support police operations to recover the proceeds of crime."[225]

The human rights NGO Liberty has criticised a number of the proposals, expressing concerns about the authorities retaining property where a person has not even been charged with an offence. Individuals who were not convicted might still be deprived of their property for the duration of the criminal proceedings. It also argues that the proposals necessarily involve direct or indirect findings of guilt on the part of the property holder or persons connected to the property, as there is a requirement to show that the person has "benefited from conduct constituting the offence." Liberty states, in its briefing paper produced for the Second Reading debate, that: "this undermines the presumption of innocence, and the danger is that individuals will be 'convicted' by the civil courts in the eyes of the public without the protections that would be available in the criminal courts." Liberty also objected to the level of judicial supervision, suggesting that, at the very least, orders allowing the authorities to retain seized property should be approved by the Crown Court.

While there has been little other commentary on the provisions of the Bill itself, some observations were made about proposals when they were consulted on in the *Asset Recovery Action Plan.* The Fraud Advisory Panel, (which describes itself as an independent body of volunteers drawn from representatives from the law and accountancy professions, industry associations, financial institutions, government agencies, law enforcement, regulatory authorities and academia) criticised the proposals on limitation periods since adopted in **Clause 43.** In its response to the consultation paper, it indicated that "the problem with extending the limitation period is that it may be considerably more difficult for a defendant to assimilate evidence necessary to defend the case; memories may be faded and records thrown away." It therefore argued that "if there is to be any increase in (or removal of) the limitation period, this should be balanced by the possibility that, if due to the passage of time a fair trial would not be possible, the court can dismiss a claim that would otherwise have been barred by a 12 year limitation period."[226] The Panel also warned about powers to seize non-essential goods, arguing that this could "have a significant impact on an innocent defendant (and their family) for a significant period of time, without any compensation. Use of such a power in these circumstances may offend Article 1 of Protocol 1 of the *European Convention on Human Rights*." In consequence, it argued that "whilst such a power may

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[225] Association of Chief Police Officers, *Press Release*, 18 December 2008

[226] Fraud Advisory Panel, *Response to the Home Office Consultation Paper Asset Recovery Action Plan*, November 2007

be of great benefit in securing assets that might otherwise be dissipated, there should be adequate judicial checks on the powers. If adequate judicial checks are put in place, then such a power is to be welcomed."

VI Extradition

Part 5 makes a number of technical amendments to the *Extradition Act 2003*.

The UK is not a party to the Schengen Convention, and does not have direct access to the current Schengen Information System, which was originally intended to "compensate" for the removal of internal border controls by the participating states, and has been operational since 1995. It is being replaced by the greater capacity, second generation Schengen Information System ("SIS II) and the intention is that the UK will be able to send and receive data via SIS II from 2010. Although the UK will not have access to all the information on SIS II, it does pay a full contribution to the cost of the project.[227]

Some aspect of SIS II, such as the inclusion of extra data, have proved controversial. In 2007, the House of Lords European Union Select Committee conducted an inquiry into the legislative proposals which would govern the establishment, operation and use of SIS II. Its report sets out the background and issues arising.[228] The balance between civil liberties, security and justice under SIS II is considered in a paper recently published by Australian academics.[229] However, the proposed use of "alerts", transmitted under SIS II, for extradition purposes, does not appear to have attracted controversy. The system of alerts is explained by the Committee as follows:

> The 1990 Schengen Convention provides in Articles 92–119 for the establishment, operation and use of the SIS, and for protection of the data contained in it. Articles 94 to 100 divide the data entered in the SIS into a number of different categories of "alerts". The word "alert" is used in a technical sense, and is defined in relation to SIS II as "a set of data entered in SIS II allowing the competent authorities to identify a person with a view to taking specific action". The categories of alert are:
> (a) persons wanted for extradition to a Schengen State (Article 95);
> (b) a list of non-EU citizens ("third-country nationals") who should in principle be denied entry to any of the Schengen States (Article 96);
> (c) missing persons or persons to be placed under police protection (Article 97);
> (d) persons wanted as witnesses, or for the purposes of prosecution or the enforcement of sentences (Article 98);
> (e) persons or vehicles to be placed under surveillance or subjected to specific checks (Article 99); and
> (f) objects sought for the purpose of seizure or use in criminal proceedings (Article 100).[230]

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227 House of Lords European Union Committee, *Schengen Information System II (SIS II)*, 7 March 2007, HL 49 2006-07

228 ibid.

229 Katina Michael and MG Michael, *Schengen Information System II: The balance between civil liberties, security and justice*, University of Wollongong, undated

230 Para 12

The European Arrest Warrant ("EAW") has replaced all the previous instruments concerning extradition between Member States. The Framework Decision underlying the EAW envisaged that an issuing judicial authority would transmit the EAW directly to the executing judicial authority, *or* by issuing an alert for the requested person in the Schengen Information System. At present, the UK becomes aware of EAWs via Interpol channels or through the Serious Organised Crime Agency. **Clause 48** will allow the UK to meet its obligation to ensure that all current extradition alerts which have been entered onto the databases by other member states have been validated, so that the UK will be in a position to process SIS II alerts.

Sections 22 and 88 of the Extradition Act 2003 require the appropriate judge to adjourn the extradition hearing if he is informed that the person sought has been charged with an offence in the UK. This is what happened in the case of Abu Hamza, who was arrested in 2004 pursuant to an extradition request from the US. A full extradition hearing was due to resume on 19 October 2004 but on that day he was arrested and charged with 16 UK offences, including 10 counts of soliciting to murder and one count of possessing information likely to be useful to terrorists. He was subsequently convicted of 11 charges, including soliciting murder and inciting racial hatred, and he was sentenced to seven years imprisonment. The extradition proceedings were resumed in May 2007 after his appeal was dismissed.[231]

There is, however, no corresponding power or obligation to suspend extradition proceedings if the person is charged with a UK offence before the extradition hearing has begun. **Clauses 50** and **51** would require the judge to adjourn the proceedings when informed of a charge "at any time before the extradition hearing begins". One effect of this would be to prevent a person from avoiding a UK prosecution by consenting to be extradited so that there would be no need for an extradition hearing.

VII Aviation security

Clauses 60 and 61 and Schedule 5 of the Bill make changes to airport security and policing by heavily amending Parts 2 and 3 of the *Aviation Security Act 1982*.

A. Background

Nine UK airports—Heathrow, Gatwick, Stansted, Aberdeen, Prestwick, Edinburgh, Glasgow, Birmingham and Manchester—are 'designated' for policing purposes under section 25 of the *Aviation Security Act 1982*. This means that responsibility for policing the airport lies with the local Chief Constable. The 2002 Wheeler Review found the system of designation lacked credibility, being based on decisions taken a long time ago on an *ad hoc* basis.[232] The Review recommended that the system be overhauled, with a clear set of criteria for designation, based on local multi-agency risk assessments.

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[231] See Library Standard Note SN/HA/2895, *Abu Hamza al-Masri*, 23 July 2008

[232] DfT, *Airport Security: Report by Rt Hon Sir John Wheeler JP DL*, 2002, paras 5.36–5.39

In November 2005, the then Secretary of State, Alistair Darling, announced that the Government had decided to bring forward amendments to the *Civil Aviation Bill 2005-06* to amend the 1982 Act in order to clarify the respective responsibilities of airport managers, airport operators and others carrying out security functions directed by the Secretary of State under the Act.[233] Among other things, the various parties would be required to set up a 'police services agreement' (PSA) determining the level of police resources required in coming years.[234] The PSA stipulates the level of policing to be provided for the aerodrome; the payments to be made by the aerodrome in connection with that policing; and the accommodation and facilities (if any) that are to be provided by the aerodrome in connection with that policing. If the responsible authorities are unable to reach agreement in relation to the terms of a PSA, it must be referred to the Secretary of State.

In the same statement in November 2005, the then Secretary of State announced that he was intending to commission an independent, wide-ranging review of policing at airports; in a further statement on 10 January 2006 he announced that Stephen Boys-Smith would be appointed to lead the review.[235] Mr Boys-Smith reported to the Department and the then Secretary of State, Douglas Alexander, made a statement in July 2006 highlighting the key recommendations of the report:

> It endorses the principle of joint accountability for airport security and the concept of airports as "communities" where stakeholders must work together in full partnership to protect against a range of threats.
>
> It recommends continued and enhanced liaison between key stakeholders, including Government Departments, the Police Service and airport operators at both national and local level to maintain a consistent understanding of and response to threats and risks.
>
> It endorses the current Multi-Agency Threat and Risk Assessment (MATRA) approach already in place at UK airports and recommends that it is strengthened further.
>
> It recommends the system of "designation" is discontinued and that policing costs should generally be met by the industry on the basis that policing forms part of an agreed airport "community" response, that costs are clear and transparent, and that policing at airports is brought within the mainstream policing agenda.[236]

The policy of successive Governments has been that the cost of transport security should be borne by those that use the transport systems rather than by the general taxpayer. Thus, the costs of providing security measures on the ground fall to each transport industry, and are passed on to the end user, the passenger, as appropriate. The manager of a designated airport must make such payments in respect of policing the airport as he may agree with the Chief Constable. Where they cannot agree on the level of payment, the Secretary of State may be called on to determine the level. The

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[233] HC Deb 21 November 2005, c97WS

[234] Now section 6 of the *Civil Aviation Act 2006*

[235] terms of reference also given in the statement: HC Deb 10 January 2006, c8WS

[236] HC Deb 20 July 2006, cc56-57WS; the report is not in the public domain

Wheeler Report argued that some airport operators felt they were paying twice for policing: once through business rates and again under the 1982 Act.

Industry is not required to meet the costs of security regulation or compliance monitoring. The Government and police also pick up much of the cost of developing new technologies and other systems to support the industries.[237] When Mr Darling gave evidence to the Transport Select Committee in November 2005, he stated that, where the Government issues security directions to the transport industry, they have never been met by refusal on the grounds of cost. He gave the example of the requirement to separate incoming and outgoing passengers at airports, which is expensive but with which airport operators nonetheless complied.[238]

There is also an EU dimension. After 9/11 there was a flurry of activity to conclude both a co-operation agreement with the United States to combat terrorism, including aviation and other transport security; and to establish EU-wide common rules in the field of civil aviation security (the 'Civil Aviation Security Regulation'). Regulation EC 2320/2002 of the European Parliament and of the Council was adopted on 16 December 2002.[239] In September 2005, the Commission proposed a simplified and updated replacement for the Regulation.[240] However, progress was slow after the European Parliament (EP) re-inserted problematic amendments in relation to the funding of security measures and the freedom of Member States to impose, if warranted, more stringent measures. Following continued negotiation, Regulation EC 300/2008 was adopted on 11 March 2008.[241] The controversial measures regarding airport security funding are contained in Article 5, which states:

> Subject to the relevant rules of Community law, each Member State may determine in which circumstances, and the extent to which, the costs of security measures taken under this Regulation to protect civil aviation against acts of unlawful interference should be borne by the State, the airport entities, air carriers, other responsible agencies, or users. If appropriate, and in conformity with Community law, Member States may contribute with users to the costs of more stringent security measures taken under this Regulation. As far as may be practicable, any charges or transfers of security costs shall be directly related to the costs of providing the security services concerned and shall be designed to recover no more than the relevant costs involved.

B. Consultation on provisions to be included in the Bill

In July 2008 the Department for Transport published a consultation paper on "aspects of the *Transport Security Bill* designed to deliver more effective policing and security

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[237] Transport Committee, *UK Transport Security – preliminary report* (first report of session 2005-06), HC 637, 30 November 2005, Ev 4

[238] ibid., Qq 18–21.

[239] Official Journal L 355, 30/12/2002, pp1-22; it was implemented by three further Regulations in 2003: EC 622/2003 (4 April 2003) laid down measures for the implementation of the common basic standards on aviation security; EC 1217/2003 (4 July 2003) laid down common specifications for national civil aviation security quality control programmes; and EC 1486/2003 (22 August 2003) laid down procedures for conducting Commission inspections in the field of civil aviation security

[240] COM(2005) 429 final

[241] EC 300/2008, 1 March 2008, OJ L 92/72, 9 April 2008

planning arrangements at airports".[242] The proposals in the consultation were summarised as follows:

> Airports present a distinct and complex set of security challenges that need to be addressed through robust consultation and co-operation between the airport operator, the police, and other security stakeholders. The new security planning process set out in this document addresses this requirement. The consultation also sets out the intention that all UK airport operators should pay for agreed levels of dedicated policing at their airports.
>
> The new approach has five distinct stages:
>
> - risk assessment: inter-agency analysis of threat and risk posed by terrorism and other criminal activity - building on the work of existing Multi-Agency Threat and Risk Assessment (MATRA) groups at most airports
> - collective responsibility: senior, empowered stakeholders taking forward actions to enhance security with clear lines of individual accountability
> - Airport Security Plans: a forward-looking plan that addresses what needs to be done and by whom
> - police funding: appropriate policing levels targeted at mitigating threats to the airport, agreed and paid for by the airport operator
> - dispute resolution: a robust, flexible process for unlocking disputes in cases where parties cannot agree.
>
> The new proposals will apply to all sixty-three airports in the UK that are currently subject to the National Aviation Security Programme, and associated directions made under the Aviation Security Act 1982. Generally, this includes airports handling commercial flights but not those small aerodromes that only deal with private aircraft. All stakeholders at an aerodrome will have some involvement in carrying out security planning, with the airport operator and police having the most significant role.
>
> Guidance to support the new process will be extensive, addressing all of the stages of the new framework as set out in section 6 of this document. In addition, a new common threat assessment will be provided to risk assessment groups to provide a common understanding of threat.[243]

On 18 December 2008 the Minister for Transport, Lord Adonis, announced that:

> I have carefully considered the views that were expressed and have consequently asked that legislative proposals be enhanced to provide for ministerial determination of disputes. The draft legislation has also been enhanced to ensure that it is sufficiently flexible and scalable to apply to airports whatever their size.
>
> The new security planning process was also shaped by stakeholder views in other ways, in particular through a programme board which included senior

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[242] HC Deb 16 July 2008, c34WS
[243] DfT, *Airport Policing, Funding and Security Planning: A Consultation Paper*, July 2008, pp5-6

> representatives from our key stakeholder groups. Feedback provided at various local stakeholder events and the views aired at our national stakeholder event in November have also been important considerations.
>
> These proposals will now be taken forward in the Policing and Crime Bill, which will be introduced in the House today.[244]

On 5 January 2009 the Government published its detailed response to the consultation. This stated:

> Ministers have decided that they, rather than an independent expert panel, should take responsibility for resolving disputes over the contents or implementation of Airport Security Plans (ASPs) and Police Service Agreements (PSAs).
>
> As well as this substantive change to the proposals, amendments have also been made to the draft legislation to provide for a more flexible and saleable framework which can be applied to airports both large and small. We have also reflected respondents' views on the membership of Risk Assessment Groups (RAGs) and Security Executive Groups (SEGs) in the draft legislative provisions to ensure that these groups work logically at all airports.
>
> (…) The legislation only sets the framework within which the new process will operate; guidance will fill in the gaps – suggesting how stakeholders might implement the process to ensure the greatest returns. The draft guidance will be updated extensively to address areas that respondents felt ought to be covered … It is worth noting here that the guidance will be issued on a restricted basis to airport security stakeholders and will not be made publicly available.[245]

C. The Bill

The Explanatory Notes to the Bill give a detailed description of how the reforms outlined above have been translated into legislative amendments. The Explanatory Notes state that aerodromes that will automatically be subject to the new provisions will be those that:

> … are the subject of a direction or directions made by the Secretary of State in accordance with sections 12,13 or 14 of the *Aviation Security Act 1982*. In practice, an aerodrome directed under these sections will be one meeting the qualifying criteria for inclusion in the UK's National Aviation Security Programme (NASP).[246]

Presently around 60 UK aerodromes would meet these qualifying criteria[247]; in its memorandum to the Transport Committee for its 2005 report on Transport Security, the Department for Transport explained NASP as follows:

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[244] HL Deb 18 December 2008, c129WS
[245] DfT, *Government response to consultation on airport policing, funding and security planning*, 5 January 2008
[246] EN, para 303
[247] EN, para 391

> Under the 1982 Act, TRANSEC issues Directions to airlines, airports and others and requires these "Directed Parties" to carry out the measures specified—such as the screening of passengers and their bags. Directions are written in broad terms, leaving industry managers to identify the optimum means of implementing the requirements. They specify the minimum standard required though industry can apply additional measures should it choose to do so. The Directions, together with the recommended practices which indicate how standards may be best applied, make up the National Aviation Security Programme (NASP).[248]

Clause 60 provides for the establishment of Risk Advisory Groups (RAGs) and Security Executive Groups (SEGs) at aerodromes:

- **RAGs**[249] will be required to produce a comprehensive risk report, which will include analysis of the potential risks to the aerodrome, and which will make recommendations regarding the actions necessary to successfully mitigate these risks.

- **SEGs**[250] will then consider the risk report produced by the RAG; determine the security measures to be taken in respect of the airport; and determine which security stakeholder should deliver each security measure. They will then be required to decide on the mitigating actions required in respect of their aerodrome. These decisions will form the content of the Aerodrome Security Plan (ASP), which will formally document the security measures to be taken at an airport, the security stakeholder or stakeholders responsible for their delivery, and the procedures to be used to monitor the implementation of these measures.

In the event that the members of the SEG are unable to agree on the terms of an ASP, they may, in certain circumstances, refer the disagreement to the Secretary of State, who will make a determination in relation to any disagreement. Parties involved in a dispute will be required to abide by the terms of the Secretary of State's determination, although in certain circumstances they may appeal to the High Court.

Clause 61 and **Schedule 5** amend the arrangements for airports policing currently contained in Part 3 of the 1982 Act (see 'background', above). Essentially, the nine airports currently 'designated' for policing purposes will no longer have such a designation. Instead, those airports which come under the National Aviation Security Programme (see footnote 243, above) will go through the procedure outlined in clause 60 and develop an ASP. If that ASP specifies that policing measures are required at the aerodrome then the aerodrome must prepare a PSA.

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248 op cit., *UK Transport Security – preliminary report*, Ev. 7

249 The RAG's membership will include, as a minimum, a representative of the aerodrome manager and a representative of the chief officer of police. The manager of the aerodrome will also be required to appoint such additional members 'as he considers necessary' to allow for the proper consideration of potential risks to the aerodrome.

250 The SEG's membership will include, as a minimum, a representative of the aerodrome manager, and representatives of the chief officer of police and the police authority for the relevant area, and a representative of airlines operating at the airport. The manager will be required to appoint additional persons to the SEG 'as appear to him to be best placed to represent the interests of various categories of security stakeholders having a presence at the aerodrome'.

The content of PSAs will remain unchanged.

D. Responses to the Bill

As to responses to the aviation security provisions of the Bill, there has not been a great deal of comment. Before the Bill's publication, in May 2008, the *Financial Times* reported on airports' concerns about the anticipated measures in what was then thought to be a *Transport Security Bill*:

> A transport security bill outlined by Gordon Brown will mean that current regulations, under which only nine major airports pay for policing, will be extended throughout the sector to cover a total of more than 60 regional airports.
>
> It follows the recommendations of a wide-ranging review of policing by Stephen Boys Smith, a former senior civil servant, in the face of terrorist threats.
>
> Robert Siddall, chief executive of the Airport Operators Association, warned that the government could not expect a blank cheque from business at a time when many regional airports and low-cost airlines were struggling with the economic downturn and higher fuel prices.
>
> "The key will be in the detail. Some of the low-cost airlines are facing a tough time. They will want to see whether the costs are justified and affordable," Mr Siddall told the FT.[251]

The *Sheffield Telegraph* pointed to previous difficulties between South Yorkshire Police and Robin Hood Airport:

> Robin Hood Airport will be forced to foot the bill for its policing under a new law proposed by the Government.
>
> Legislation unveiled in yesterday's Queen's Speech will see the airport forced to pay South Yorkshire Police for its growing policing costs.
>
> The new law will transfer responsibility for "threat and risk analysis" at regional airports - and for picking up the bill - from the local police force to the airport operator.
>
> The owners of the site Peel Airports Group caused anger among police chiefs earlier this year after it refused to help with the £350,000 cost of providing a team of officers.
>
> Ministers believe it is unfair taxpayers are subsidising private airport operators who have benefited hugely from the boom in air travel.
>
> South Yorkshire Police employ a sergeant, six constables and two police community support officers to deal with potential security issues and problems with rowdy passengers and more low-level crime.

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[251] "Airports warn higher policing costs threaten viability", *Financial Times*, 15 May 2008

> In August 2007 members of South Yorkshire Police Authority, which oversees the work and finances of the police, were forced to pay for airport policing from cash reserves.[252]

The *Yorkshire Evening Post* labelled the changes a 'terror tax':

> Leeds Bradford Airport will be slapped with a multi-million pound "terror tax" under a new law proposed by the Government.
>
> Legislation unveiled in yesterday's Queen's Speech will see the airport forced to pay West Yorkshire Police for its growing policing costs.
> The new law will transfer responsibility for "threat and risk analysis" at regional airports – and for picking up the bill – from the local police force to the airport operator.
>
> The measure will ease the financial burden on the police – but hike costs for Leeds Bradford International, which is one of the fastest growing regional airports in the country (…)
>
> Former LBA managing director Ed Anderson, recently told the YEP: "Certain airports, like Leeds Bradford, don't pay at all for any policing but they will do in future. It's quite crucial that while everybody's feeling the pinch in the current economic climate, new costs are coming over the horizon and one of the things we must do is to make sure this is kept proportionate." [253]

VIII Miscellaneous

A. Criminal records

Clauses 62 to 72 of the Bill would make various amendments to the *Safeguarding Vulnerable Groups Act 2006*, which established an Independent Barring Board to operate a "vetting and barring scheme" to assess the suitability of persons seeking to undertake regulated work with children or vulnerable adults. Background information on the 2006 Act is set out in Library Research Paper 06/35. In addition to a number of proposed procedural and administrative changes, for example changing the name of the Independent Barring Board to the Independent Safeguarding Authority (ISA), the Bill includes substantive proposals relating to school governors, fees for checks on volunteers and the inclusion of immigration information in criminal records checks.

1. School Governors

Clause 63 relates to background checks on school governors. There is currently is no requirement for an educational establishment to obtain consent from prospective governors before applying for a vetting check under section 30 of the 2006 Act. However, clause 63 would introduce a requirement for a prospective governor to consent prior to such an application being made. The clause would also make it a criminal offence for a governor to take up their position without first consenting to the vetting

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[252] "Airport faces policing bill", *Sheffield Telegraph*, 4 December 2008
[253] "'Terror tax' bill for Leeds Bradford Airport", *Yorkshire Evening Post*, 4 December 2008

check or providing the person conducting the check with any information required to do so. Provision is made in subsections (4) and (5) of clause 63 for pre-commencement positions and appointments. No offence would be committed where the appointment of a governor took effect before the commencement of the clause. The Secretary of State may by order set a date when this exception comes to an end. This corresponds with the Government's policy to phase in the vetting and barring scheme operated by the ISA over a period of several years.

2. Fees for volunteers

Section 24 of the 2006 Act provides for prescribed fees for individuals who wish to register with the ISA. The "FAQs" section of the ISA's website indicates that the fee for applying to register with the vetting and barring scheme has been set at £64. People involved in regulated work as unpaid volunteers will not have to pay the application fee; there is currently no requirement for an unpaid volunteer who has benefited from a free ISA application to make any payment should they move into paid work at a future date. Clause 65 of the Bill would remove this loophole by inserting a new section 24A into the 2006 Act. The new section would require a person who has benefited from a free application (i.e. an unpaid volunteer) to pay the prescribed fee if and when that person moves into paid regulated activity.

3. Immigration status

Criminal records checks conducted by the Criminal Records Bureau (CRB) under Part V of the *Police Act 1997* are currently limited to details of an individual's convictions and, for enhanced level checks, information held on that individual by local police forces. Checks do not currently include any information relating to an individual's immigration status. Clause 69 of the Bill would amend this by inserting a new section 113CD into the 1997 Act that would allow an employer to be informed, should they request it, of an individual's "right to work" status. This information would be based on UK Border Agency records. If an employer makes a request for "right to work" information, the criminal records check will include a statement as to whether the individual concerned has a right to work or not and whether any conditions are attached to the relevant status. An additional fee would be payable for such a request.

The Explanatory Notes indicate that clause 69 was prompted by:

> … a request from the Home Secretary in early 2008 to explore the possibility of incorporating "right to work" checks within the CRB service following concerns about the employment of illegal workers in sectors required to obtain a CRB disclosure. Currently, CRB certificates are issued regardless of immigration status because it is not a specific requirement under Part V to consider this information.
>
> 456. The amendments will enable an employer to be informed, should they request it, whether prospective or current employees have a "right to work" in the UK based on the UK Border Agency (UKBA) records. This will assist employers in avoiding the employment of illegal workers which under the current legislation makes an employer liable to pay a civil penalty of up to £10,000 per person if found to be employing someone illegally. This civil penalty regime was

introduced in February 2008 and is set out under sections 15 and 22 of the Immigration, Asylum and Nationality Act 2006.[254]

B. Border controls

Clauses 73 to 77 of the Bill contain measures relating to the powers of Her Majesty's Revenue and Customs (HMRC) officers and the importation of certain prohibited goods.

1. Powers of Revenue and Customs officers

HMRC officers currently have a variety of statutory powers under the *Customs and Excise Management Act 1979* (CEMA), for example the power to examine goods or search premises, vehicles or persons.

Clause 73 of the Bill would add a new power to CEMA that would allow HMRC officers to require a person entering or leaving the UK to produce their passport or travel documents or to answer questions about their journey. The Explanatory Notes to the Bill indicate that this power is intended to enable officers "to question travellers and require the production of passports and travel documents for customs purposes".[255]

Clause 74 of the Bill is concerned with the prevention of money laundering and relates to certain existing powers of HMRC officers under the following sections of CEMA:

- section 28(1), which entitles an officer to access ships, aircraft and vehicles for the purposes of marking or securing goods carried within;

- section 77(1) and (2), under which an officer may require a person involved with importing or exporting goods to provide him with any such information relating to the goods as he requests. The officer is also permitted to inspect and take extracts from books or documents relating to the goods;

- section 159(1) to (4), which entitles an officer to examine certain goods, for example goods that have been imported or are to be exported, goods in a warehouse or Queen's warehouse[256] or goods that have been loaded into a ship or aircraft anywhere in the UK or the Isle of Man; and

- section 164, which entitles an officer to search a person (or anything he has with him) where the officer has reasonable grounds to suspect that the person is carrying any article that is chargeable with duty that has not been paid or is subject to prohibitions or restrictions on importation or exportation.

Clause 74 would insert a new section 164A into CEMA to provide that any reference to "goods" in these sections (and to "article" in section 164) includes a reference to "cash".

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254 EN, paras 455-6. For press coverage regarding the employment of illegal workers see, for example: "The care homes staffed by illegal immigrants, revealed in leaked Home Office report", *Mail on Sunday*, 30 March 2008; "Home Office in illegal immigrants cover-up", *Sunday Times*, 30 March 2008; "Care homes 'employing illegal immigrants'", *Observer*, 30 March 2008

255 EN, para 20

256 Queen's warehouses are operated by HMRC and are used for the storage and disposal of seized goods.

Under new section 164A(1),[257] HMRC officers would be able to use the powers in these existing sections for the purposes of searching for:

- cash that has been obtained through, or is intended for use in, unlawful conduct and that amounts to not less than the "minimum amount";[258] or

- cash that travellers entering or leaving the European Community are required to declare under the Cash Control Regulation.[259]

Clause 75 of the Bill relates to the existing statutory power of HMRC officers to intercept and check international postal traffic for customs or excise purposes.[260] Clause 75 aims to remove any ambiguity as to whether such interceptions are lawful for the purposes of the *Regulation of Investigatory Powers Act 2000* (RIPA), which prohibits the interception of communications unless the interception is made with "lawful authority". Section 1(5) of RIPA prescribes the circumstances in which an interception will have "lawful authority"; one such circumstance is if the interception is authorised by section 3 of RIPA. Section 3 authorises the following interceptions, which can therefore be conducted without a warrant:

- an interception that has been consented to by one or more parties to the relevant communication;

- an interception for the purposes of providing or operating a postal or telecommunications service, or where any enactment relating to the use of a service is to be enforced;[261] or

- an interception conducted with the authority of a person designated for the purposes of the *Wireless Telegraphy Act 1949*.

Clause 75 would add interceptions conducted by HMRC officers in exercise of their statutory powers to the section 3 list of authorised conduct, so as to make clear that such interceptions are lawful for the purposes of RIPA. The Explanatory Notes to the Bill state that:

> The clause puts beyond doubt that the protection from interception afforded to postal communications in RIPA does not restrict Revenue and Customs powers to check international postal traffic for customs or excise purposes.[262]

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257 The Explanatory Notes to the Bill describe new section 164A(1) as "clarifying", rather than amending, the powers in the existing sections (EN, para 468)

258 The "minimum amount" is £1,000 as specified in the *Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2006, SI 2006/1699*

259 *Community (Regulation (EC) No. 1889/2005 of the European Parliament and of the Council*. The Regulation requires travellers entering or leaving the European Community to declare cash equal to or exceeding €10,000 (or its equivalent in other currencies or easily convertible assets). For background information see EC Press Release IP/07/832, *New rules to combat money laundering and terrorist financing: persons entering or leaving the EU have to declare cash movements*, 14 June 2007.

260 The existing power is set out in section 159 of CEMA, as applied to postal traffic by section 105 of the *Postal Services Act 2000*.

261 The example given in paragraph 40 of the *Explanatory Notes to Regulation of Investigatory Powers Act* is where the postal provider needs to open a postal item to determine the address of the sender because the recipient's address is unknown.

2. Importation of prohibited goods

Clause 76 would create a new prohibition on importing or exporting false or unlawfully obtained identity documents, or identity documents intended for use in establishing a false identity or address. The classification of false identity documents as "prohibited" would enable HMRC officers to use a variety of existing powers under CEMA to search for and seize such documents. In particular, HMRC officers would be able to exercise their powers to seize and detain any goods imported or exported contrary to any statutory prohibition[263] and to search a person suspected of carrying a prohibited article.[264] It would also bring false identity documents within the existing criminal offences in CEMA of importing or exporting prohibited goods, or acquiring possession of such goods or dealing with them in any other manner.[265]

Clause 77 of the Bill would amend the existing provisions prohibiting the import of certain offensive weapons as set out in section 141 of the *Criminal Justice Act 1988*. Section 141(1) provides that it is an offence to manufacture, sell, hire or lend a weapon to which the section applies. Section 141(4) prohibits the importation of such weapons. The weapons to which section 141 applies are those specified by order of the Secretary of State.[266] In the case of Scotland, the order-making power in section 141 is exercised by the Scottish Ministers.

The list of specified weapons for England, Wales and Northern Ireland is set out in the *Criminal Justice Act 1988 (Offensive Weapons) Order 1988, SI 1988/2019* (as amended). The list of specified weapons in Scotland is set out in the *Criminal Justice Act 1988 (Offensive Weapons) (Scotland) Order 2005, SSI 2005/483*. Until recently, both Orders specified the same 17 items as weapons to which section 141 applies, including knuckle dusters, butterfly knives and blowpipes. However, in April 2008 samurai swords were added to the list of weapons specified in the 1988 Order.[267] The Scottish Parliament has not yet made any such addition to the 2005 Order.[268]

Under the current drafting of section 141 (in particular section 141(4)), the weapons specified by the Scottish Ministers in the 2005 Order are "prohibited" items for importation purposes. However, import policy is not a devolved matter; under the *Scotland Act 1998* "import and export controls" are specified as a matter reserved to the UK Parliament.[269] The Explanatory Notes to the Bill indicate that this discrepancy has led to disagreement between the Scottish Executive and Whitehall as to the competence of Scottish Ministers to make orders under section 141, given that such orders currently involve the creation of import controls.[270] This disagreement was highlighted in March

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262 EN, para 470. The Explanatory Notes describe clause 75 as "clarifying", rather than amending, the operation of RIPA.
263 CEMA, ss49, 68 and 139
264 CEMA, s164
265 CEMA, ss50, 68 and 170
266 *Criminal Justice Act 1988*, s141(2)
267 Inserted by the *Criminal Justice Act 1988 (Offensive Weapons) (Amendment) Order 2008, SI 2008/973*
268 For further background see Library Standard Notes SN/HA/330 "Knives and Offensive Weapons" and SN/HA/4762 "The use of swords in folk dancing". The current position in Scotland is also covered in "Sword ban is unkindest cut for Highland dancers", *Scotsman*, 11 June 2008.
269 *Scotland Act 1998*, Schedule 5, Part II, Section C5
270 EN, para 478

2008 during a Delegated Legislation Committee debate on the then draft *Criminal Justice Act 1988 (Offensive Weapons) (Amendment) Order 2008*, which proposed to add samurai swords to the list of section 141 weapons in England, Wales and Northern Ireland:

> **The Parliamentary Under-Secretary of State for the Home Department (Mr. Vernon Coaker):** (…) The Criminal Justice Act 1988 introduced an order-making power to ban the manufacture, sale and importation of specified offensive weapons. The current offensive weapons order prohibits 17 weapons, including sword sticks, knuckledusters, disguised knives and batons. Today, in an effort further to improve public safety we seek to add swords with a curved blade of more than 50 cm to the schedule to the Criminal Justice Act 1988 (Offensive Weapons) Order 1988. That will make it an offence to sell, manufacture, hire or import any sword that fits that definition, subject to defences that seek to allow legitimate use of such items. A person would be liable on summary conviction to a maximum term of six months' imprisonment and/or a fine. (…)
>
> **James Brokenshire (Hornchurch) (Con):** (…) On the territorial scope of the regulations, I note that the order extends to England and Wales and Northern Ireland but not to Scotland. I appreciate that there are issues about scope, and the rights, privileges and powers that the Scottish authorities seek to retain and exercise in Scotland. However, I should be grateful if the Minister set out the discussions that he and his officials had with the Scottish authorities about the operation of the regulations to ensure that a regime operates fairly and appropriately throughout the United Kingdom, that the order will affect Scotland as well as the rest of the UK, and what might happen in Scotland in the fullness of time.
>
> **Mr Coaker:** (…) We have had discussions on the matter with our colleagues in Scotland. There is some debate about competencies. I have spoken to the Justice Minister in Scotland about it, and we are continuing those discussions. With respect to England, Wales and Northern Ireland, I was not prepared to delay an important measure, but we will continue discussions with our colleagues in Scotland to ensure that we resolve the issue between us, so that we can have a UK-wide ban in legislation, which would be in everybody's interests.[271]

The Bill aims to resolve the debate as to competence by separating the power to specify weapons subject to import prohibitions from the power to specify weapons subject to a ban on manufacture, sale, hire or lending. The Bill proposes to achieve this by removing the references to importation from section 141 of the 1988 Act and reproducing them in new sections 141ZB and 141ZC.[272] Under the new sections the power to make an order specifying which weapons are subject to import prohibitions would lie with the Secretary of State alone, who would exercise this power on a UK-wide basis. The existing powers of the Secretary of State and the Scottish Ministers under section 141(1) of the 1988 Act to make orders specifying weapons that are banned from being manufactured, sold,

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[271] First Delegated Legislation Committee, SC Deb 17 March 2008, cc3, 8 and 13

[272] Part 9 of Schedule 7 to the Bill sets out the provisions for removing the existing references to importation from section 141 of the 1988 Act. Clause 77 of the Bill would introduce the new sections 141ZB and 141ZC.

hired or lent would remain in force but would be exercised separately from powers relating to importation:

> *Clause 77* will mean that importation restrictions will be created by the Secretary of State on a UK wide basis. Scottish Ministers will be able to make an order under section 141 which makes it an offence to manufacture, sell or hire a weapon specified in the order, but no importation consequences would flow from the order.[273]

C. Football spectators

The principal legislation for dealing with football-related disorder in England and Wales is the *Football Spectators Act 1989* (as amended). The 1989 Act (as amended) requires the court to impose a football banning order on anyone convicted of a relevant football-related offence[274] if it 'is satisfied that there are reasonable grounds to believe that making a banning order would help prevent violence or disorder at or in connection with any regulated football matches'. The police can also apply to a magistrates' court for the imposition of a banning order on any person that they can prove 'has at any time caused or contributed to any violence or disorder in the United Kingdom or elsewhere'.

A person made the subject of a football banning order under the 1989 Act (as amended) may not attend regulated football matches in England and Wales and may not travel abroad when designated football matches are being played abroad – he must instead report to a police station (for domestic matches) or surrender his passport (for overseas matches).

Further background on the development of football-related legislation is available in earlier Library research papers[275], a 2005 Home Office report,[276] and in Home Office guidance on football-related provisions in the *Violent Crime Reduction Act 2006*.[277]

The latest Home Office figures (November 2008) show that for the 2007/08 season there were 3,842 arrests for football-related offences at domestic and international matches in England and Wales. The number of football banning orders on 30 October was 3,172. With regard to those individuals whose banning orders have expired, 94% are assessed by the police as no longer posing a risk.[278]

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[273] EN, para 480

[274] Offences committed within 24 hours either side of kick-off for a domestic game or up to five days before an international fixture or the start of an international tournament abroad. Schedule 1 of the 1989 Act sets out a full list of relevant offences

[275] House of Commons Library research paper 01/73, *The Football (Disorder)(Amendment) Bill*, October 2001 and House of Commons Library research paper 00/70, *The draft Football (Disorder) Bill*, July 2000

[276] *Football (Disorder) Act 2000: report to Parliament*, Home Office, November 2005

[277] *Football related provisions within the Violent Crime Reduction Act 2006 – guidance*, Home Office, April 2007

[278] Home Office press release, *Football violence statistics released for 2007/08*, 25 November 2008

1. Scotland

The *Police, Public Order and Criminal Justice (Scotland) Act 2006* introduced football banning orders in Scotland. These came into force on 1 September 2006, with a Scottish Executive press release explaining that:

> Football Banning Orders will be available in two ways. Firstly a court can impose a banning order on an individual convicted of a football-related offence instead of, or in addition to, any sentence the court could impose for the offence. Banning orders imposed following conviction can last for up to ten years.
>
> Secondly, a Chief Constable can make a summary application to a sheriff court for a football banning order to be imposed against an individual whose behaviour has given cause for concern, although there may not be enough evidence to mount a prosecution. Banning orders imposed without conviction can last for up to three years.
>
> Offences that might result in a Football Banning Order include sectarian chanting, physical assault, or shouting racist remarks…

Further detail can be found in the Explanatory Notes to the Act[279] and from the Scottish Government website.[280]

2. The Bill

Clause 78 of the *Policing and Crime Bill* would amend the *Football Spectators Act 1989* so that those subject to football banning orders in England and Wales would also be banned from attending regulated football matches in Scotland and Northern Ireland.

Clause 79 of the Bill would amend the *Football Spectators Act 1989* and the *Police, Public Order and Criminal Justice (Scotland) Act 2006* so that when an individual is required to report to police, this may be done at a police station anywhere in the United Kingdom.

Clauses 80-82 make provision for the enforcement of the 1989 Act in Scotland and Northern Ireland and for the enforcement of the 2006 Act in England and Wales and Northern Ireland. A full description is given in the Explanatory Notes to the Bill.[281]

As this is a devolved matter, a Sewel motion will be required.

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[279] *Police, Public Order and Criminal Justice (Scotland) Act 2006*
[280] Scottish Government website, *Football banning orders*
[281] EN, pp75-7

D. Other provisions

1. Strategies for crime reduction

The Green Paper highlighted the role of Crime and Disorder Reduction Partnerships (CDRPs) in England and Community Safety Partnerships (CSPs) in Wales in tackling re-offending:

> 1.39 Part of the answer to tackling local problems is to ensure that the police are joined in their approach by agencies that deal with offenders on their return from prison – this was a theme drawn out very clearly by ACPO in their submission to the Green Paper. Reducing re-offending is an increasing priority for CDRPs/CSPs and Local Strategic Partnerships (LSPs), which are the focal point to bringing together and co-ordinating the actions of housing, health services, local authorities and other key players to help resettle and rehabilitate offenders. In order to encourage and formalise this work, we propose making two changes to CDRPs/CSPs:
>
> - Add, by statute, probation trusts to the list of 'responsible authorities'. Currently police, police authorities, local authorities, fire and rescue authorities and primary care trusts are responsible authorities, whereas probation is defined as a 'co operating body';[282] and
>
> - Expand the statutory duties of CDRPs/CSPs to include reducing re-offending.[283]

Clause 83 of the Bill would implement these proposals.

2. Serious Organised Crime Agency

Under paragraph 20 of Schedule 1 to the *Serious Organised Crime and Police Act 2005* the Serious Organised Crime Agency (SOCA) has the status of a non-Crown body:

> SOCA is not to be regarded –
>
> (a) as the servant or agent of the Crown, or
>
> (b) as enjoying any status, immunity or privilege of the Crown;
>
> and SOCA's property is not to be regarded as property of, or property held on behalf of, the Crown.

Clause 84 of the Bill would amend paragraph 20 so that SOCA employees working outside the United Kingdom would be treated as Crown servants for the purposes of the following enactments:

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[282] EN, para 495 provides further explanation of the difference between a "responsible authority" and a "co-operating body". Further background is available in Home Office, *Impact Assessment: Extending the duties of Crime and Disorder Reduction Partnerships (CDRPs) to include Reducing Reoffending; and making Probation a Responsible Authority*, 17 October 2008

[283] *From the Neighbourhood to the National: Policing Our Communities Together*, Cm 7448, July 2008, p21

- section 31(1) of the *Criminal Justice Act 1948*, which would make SOCA employees working outside the United Kingdom subject to prosecution and punishment for any indictable offence carried out whilst on duty abroad;

- sections 26 to 28 of the *Income Tax (Earnings and Pensions) Act 2003*, which would make SOCA employees working overseas liable to pay UK tax on their earnings; and

- section 299 of the *Income Tax (Earnings and Pensions) Act 2003*, which would entitle SOCA employees working overseas to the tax free allowances of a Crown servant intended to assist with working in a foreign jurisdiction.

3. The Scottish Crime and Drug Enforcement Agency

The *Firearms Act 1968* regulates the possession, handling and distribution of certain weapons and ammunition. Section 54 of the 1968 Act provides for certain exemptions and modifications in the application of the Act to "persons in the service of Her Majesty", currently defined as a member of a police force, a person employed by a police authority who is under the direction and control of a chief officer of police, or a member of the staff of SOCA.

Clause 85 of the Bill would add members of the Scottish Crime and Drug Enforcement Agency (SCDEA) to the definition of "persons in the service of Her Majesty" so that the 1968 Act will apply to SCDEA in the same way as it currently does to the police and SOCA.