



Policing and Crime Bill 2009

A Parliamentary Briefing Paper prepared for the Second Reading in the House of Commons on 19 January 2009

1. This briefing based on input from the Criminal Bar Association sets out the Bar Council's views on key aspects of the Policing and Crime Bill 2009 ahead of its Second Reading, which is scheduled for 19 January 2009. We welcome the introduction of the Policing and Crime Bill 2009 and look forward to the forthcoming parliamentary debates on the important measures and provisions contained within it.
2. The Bar Council generally supports the purpose of the Bill but notes that its provisions cover a diverse range of issues. This briefing focuses on the following areas:
 - i. Proceeds of crime
 - ii. Extradition
 - iii. Prostitution

Proceeds of Crime

3. The Bar Council understands the need to tighten up arrangements relating to the enforcement of confiscation orders in Clause 32. However, we are concerned about the introduction of new search and seizure powers relating to both individuals and property (Clause 36).
4. The Bar Council is concerned with two issues relating to the proceeds of crime provisions. Our first concern is the proposal for a magistrates' court to be able to order the sale of property (clause 39) that has been seized after a confiscation order has been made. Our second concern relates to the right of the defendant to choose how to pay his or her confiscation order. There is an increasing emphasis on the use of cash detention powers and the use of cash forfeiture by permitting detention periods for up to six months (it is currently three months).
5. The focus of forfeiture proceedings also moves away from judicial oversight by application to the magistrates' court to a new form of condemnation proceedings whereby an officer will issue a forfeiture notice putting the burden on any claimant

to establish that the money is in fact not the proceeds of crime or intended to be used in criminal conduct.

6. This is a move away from the traditional approach by the State to interference with property. In civil forfeiture the current provisions in the Bill extend the limitation period to twenty years which gives the State an advantage in civil litigation that private litigants do not have. The Bar Council believes that Parliament should give these issues closer examination and debate.

Extradition

7. The Bar Council generally welcomes the extradition provisions contained in the Policing and Crime Bill, but have the following observations that Parliament may wish to explore.

8. Clause 58 provides a mechanism by which the time limits for a provisional arrest (as detailed in Part I of the Bill) may be extended by up to forty-eight hours. The Bar Council would welcome clarification that the need for this extra time stems from difficulties complying with the existing 48 hour deadline following a person's arrest on a Friday evening. If this is the case, then the Bar Council considers that an extension of twenty-four hours would be sufficient.

9. The Bar Council further believes that there should be a requirement that the defence representatives are put on notice and permitted to make representations on behalf of the requested person at any application for an extension of time.

Representations should include:

- i. whether it is reasonable to grant an extension;
- ii. whether the judge can be satisfied on the balance of probabilities that the original time limit could not reasonably be complied with; or,
- iii. an application for bail.

10. On a point of drafting, the Bar considers that the reference to '12 December 2006' in Clause 48(6)(a) should read '20 December 2006' (the date on which the Permanent Representatives Committee confirmed its agreement on the draft Council Decision).

Prostitution

11. The Bar Council welcomes measures to prevent and reduce the trafficking of women. We recognise that, in the vast majority of cases, prostitution is not a life choice made freely. However, the Bar Council is concerned about the seemingly unintended consequences of Clause 13 (Paying for sexual services of controlled prostitute) as currently drafted.

12. Clause 13 proposes that section 53 of the Sexual Offences Act 2003 (the section that controls prostitution for gain) is amended to insert a new offence of 'Paying for sexual services of a controlled prostitute'. The objective of the new offence appears to

be twofold: to discourage prostitution in general, and to create an offence which is targeted on those prostitutes whose activities are controlled by third parties. We perceive there to be two issues which are discussed below.

Problems with the strict liability offence

13. The proposed new offence is one of strict liability and it is irrelevant whether the defendant knows he or she has fallen foul of it. There is no mental element and no defences are available. This approach is different to the one adopted by the Government when drafting the Sexual Offences Act 2003. That Act incorporated a number of mental elements including:

- i. Paying for the sexual services of a child (section 47): the elements of the offence include the fact that the defendant intentionally obtained for himself the sexual services of another person.
- ii. Causing or inciting child prostitution or pornography (section 48): the elements of the offence include an intention on the part of the defendant to cause or incite another person to become a prostitute or become involved in pornography.
- iii. The same is true for offences contrary to sections 49 (Controlling a child prostitute or a child involved in pornography) and 50 (Arranging or facilitating child prostitution or pornography) of the Sexual Offences Act 2003.

14. The principal concern that the Bar Council has with the proposed new offence is that a defendant may be found guilty in circumstances where he could have had no idea at the time that he was committing the offence. The offence as currently drafted risks convictions which may well be seen as unfair by reasonable people. Such convictions would bring the criminal law into disrepute, particularly given the stigma which would result.

A double standard for prostitutes and their clients

15. There is a further problem with the proposed clause. If the prostitute is controlled by a third party, by offering sexual services he or she will in most circumstances commit an offence under section 44 of the Serious Crime Act 2007¹. They will almost inevitably² be doing an act capable of “encouraging or assisting the commission of an offence.” A prosecution under this section requires the Crown to prove a specific intent in respect of his or her role (section 44(1)(b)), but not for the purchaser of the sexual activity. The double standard that results is an additional reason why the clause as currently drafted should not form part of the proposed Act.

16. The view of the Bar Council is that the proposed clause as currently drafted is unworkable, wrong in principle and will create unfairness. Following the Second

¹ And under section 44 of the Magistrates Courts Act 1980

² It is possible that he or she may have a defence under section 51 of the Act as a person in a ‘protected category’.

Reading debate, the Bar Council will provide a further briefing on how the clause as currently drafted could be, in our view, made more workable.

Conclusion

17. The Policing and Crime Bill 2009 is a substantial piece of draft legislation. It currently runs to ninety-one clauses comprising eight separate parts. The Bar Council is generally supportive of the Bill but urges Parliamentarians to consider carefully our reservations concerning the changes proposed to proceeds of crime and extradition legislation as well as the provisions that create an offence of strict liability relating to prostitution. While this last provision may serve to discourage the use of prostitutes, it raises the question of at what cost. If the cost is fairness, that cost is too great.

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