



**Eaves Housing for Women
The POPPY Project**

**The POPPY Project response to the Sentencing
Advisory Panel consultation paper on the
"Sexual Offences Act 2003 - The Exploitation
Offences."**

July 2004

INTRODUCTION

The POPPY Project, Eaves Housing for Women (POPPY), is funded by the Home Office to provide accommodation and support services to women (over 18) trafficked for the purposes of sexual exploitation into the UK. POPPY also carries out research and development work in two key areas; trafficking in the UK and research and development on exit strategies for women in prostitution in the UK.

POPPY works with women who have been exploited and abused by men, through prostitution. Therefore, in our response to the "Consultation Paper on the Sexual Offences Act 2003 - The Exploitation Offences", gendered terminology will be used. It is acknowledged, however, that women also exploit other women in prostitution, and that males may also be exploited.

POPPY welcomes the Sentencing Advisory Panel's attempts to provide greater legal guidance when sentencing for sexual offences, particularly for prostitution and trafficking offences. POPPY's response to the consultation paper will focus both on general issues that have been raised through our review of the said paper and those questions of the Sentencing Advisory Panel to which POPPY has specific knowledge and expertise. In addition POPPY has considered in detail the issue of compensation orders for reasons of clarity.

Any questions in relation to this response should be referred to:

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GENERAL CONSIDERATIONS

PARAGRAPH 11

POPPY notes that paragraph 11 of the consultation paper suggests that the starting points for sentencing should be higher where a victim is under 16 or under 13. However, no consideration is given to the vulnerability of a victim over the age of 16. (A detailed commentary on the issue of vulnerability can be found in response to Q11 below).

PARAGRAPH 15

In response to paragraph 15 POPPY is of the view that Anti-Social Behaviour Orders are an inappropriate sentence to prevent women soliciting, as they do not provide the necessary support to women to assist them in exiting the sex industry particularly when they are additionally working to fund substance misuse. Thus, women can be further trapped in a cycle of having to work to pay any fines caused by breach of an Anti-Social Behaviour Order. There is a general principle in criminal law that sentences which may cause an offender to re-offend because it places a financial burden upon them should not be used, as is for example the case with compensation orders. Until such services are developed that assist women to exit the sex industry and seek support with substance misuse issues where appropriate, this type of sentence would prove ineffective and cause a cycle of re-offending. Incarcerating a woman who is in breach of an Anti-Social Behaviour Order is also not a viable option and only increases their vulnerability.

PARAGRAPH 46

POPPY urges that the term "sex work" which is introduced in paragraph 46 should not be used by the Panel. POPPY supports the use of the term "prostitution" which is used to describe commercial sexual services previously in the consultation paper. POPPY is of the opinion that the term "sex work" legitimises exploitation inherent in prostitution and should not be used to describe sexual exploitation of trafficked women.

PARAGRAPH 53

POPPY disagrees with the Panel's decision to base its proposals on the sentencing principles that have been established in relation to immigration offences. Trafficking should not be considered as another immigration offence. Trafficking is a violation of the human rights of the victim and the sentencing principles in these types of cases need to be considered in light of the seriousness of such human rights abuses.

PARAGRAPH 54

POPPY believes that the Panel is misguided in paragraph 54 to suggest that arranging entry of strangers is an inherent feature in the trafficking of individuals. In POPPY's experience rather whilst some people are trafficked by strangers, trafficked persons are frequently recruited by a family member or someone that they know. It is

important that this is acknowledged to ensure that the offence of trafficking is correctly identified by law enforcement agencies.

SPECIFIC QUESTIONS RAISED BY THE PANEL

Q1. The Panel's view is that, in relation to exploitation offences that do not necessarily involve a 'for gain requirement', evidence that the offence was motivated by, or resulted in, an element of gain should be treated as an aggravating feature for sentencing. Do you agree?

POPPY supports the Panel's view that such an element of gain should be treated as an aggravating feature for sentencing. However, the Panel must re-iterate that this should not be interpreted to suggest that exploitation through the abuse of a position of trust is less serious, or the effects on the victim are less damaging.

Q2. The Panel considers that where the 'for gain requirement' is an inherent feature of an offence, this should already be reflected in the sentencing starting point, but that evidence of significant financial or other advantage to the offender should be an aggravating feature for sentencing. Do you agree?

POPPY considers that a significant financial gain indicates that the perpetrator has been exploiting the victim(s) or other unknown victim(s) for a considerable length of time. Therefore evidence of such a gain should be regarded as an aggravating feature for the purposes of sentencing. Whilst the level of gain may indicate the degree of exploitation exerted over the individual, it is not the only indication of this. Where significant gain cannot be proven this does not inherently mean that the exploitation of the individual is less serious.

Q11. Do you agree with the list of aggravating and mitigating features in relation to the 'exploitation of prostitution' offences (paragraphs 40 and 41). Are there others?

POPPY agrees that the factors listed in paragraphs 40 should be regarded as aggravating features. However, in POPPY's experience in addition the following factors should be treating as aggravating features:

- An intimate relationship between the offender and the victim.
- Recruitment of women from particularly vulnerable backgrounds such as a women who have been in local authority care, women with a previous history of physical or sexual abuse as an adult or a child, women initially recruited into prostitution as a child, women with a previous history of domestic violence, women with uncertain immigration status', and women suffering from mental health problems, learning difficulties, or language difficulties.
- Psychological control exerted to control women and enforce dependency. Examples of such control include the use of intimidation and threats, deception, emotional manipulation, the imposition of unsafe and unpredictable events such as isolation, and threats to disclose the woman's involvement in prostitution to her family or community.

- Exceptional physical effects on the victim should also include rape, torture, beatings, hunger, and physical exhaustion.
- In relation to the nature of sexual activity which a victim is required to take part references should also be made as to the degree of the woman's control over the activity, pressure that is exerted to undertake 'unsafe' activities to earn more money, pressure to work when sick, and being forced to abort or carry a child against her wishes.
- Threatening behaviour towards those close to the victim including her immediate family members.

In relation to mitigating factors, it is the view of POPPY that:

- There should be no minimum sentence, where the offender is a woman currently or previously exploited through prostitution by the same perpetrator and is acting out of fear or intimidation. The effects of his psychological control over her should be taken into account. She should not be sentenced to financial penalties as it would further impoverish her and is likely to require her to work in prostitution to pay this off.
- In light of the lack of exit strategies for women in prostitution, where the offender is a maid in a brothel, who became a maid to avoid having to continue working in prostitution, her circumstances should be considered a mitigating factor.

Q12. The Panel would like respondents to comment on the circumstances in which a non-custodial sentence might be justified for the offences of 'Causing or inciting prostitution for gain', 'Controlling prostitution for gain' or 'Keeping a brothel used for prostitution'.

In response to the Panel's reference to *R v Robinson*¹, it is important to consider a victim's route into prostitution. For example, if they entered prostitution as a minor or otherwise vulnerable person, and they remain in a vulnerable situation, coercion may be unnecessary to continue to exploit them. The fact that there appears to be no coercion should not in itself be a mitigating factor as regards a custodial sentence. Furthermore, where any women in the establishment could be deemed to be coerced, the non-exploitation of other women should not be a mitigating factor - the offender should be punished for the coercion.

A non-custodial sentence may be appropriate where the offender was an employee who was not in a position of authority, and was using a non-prostitution position within the industry as a way of endeavouring to get out of prostitution herself. It is important to consider such a woman's background and the vulnerability to exploitation or lack of options which it may present, as mitigating factors in relation to a custodial sentence.

Where the offender's role was controlled by someone who was also exploiting her, and to comply was a means of self preservation, then a non-custodial sentence is appropriate.

¹ *R v Robinson* (1984) 6 Cr. App. R. (S.) 159.

Furthermore, where the offender has assisted and supported other women in prostitution in accessing health and legal services, or exiting prostitution a non-custodial sentence may be appropriate.

Q13. What would be a meaningful sentence for someone who is not sentenced to custody?

For offenders previously or currently in prostitution, education/training schemes, or schemes such as the Lambeth Court Diversion Scheme² is a more appropriate sentence particularly to prevent re-offending and support women in exiting the industry.

Where the offender is not a woman involved in prostitution, or a woman seeking to exit prostitution, a custodial sentence should be applicable. In addition, where the offender has received a significant income which they were allowed to retain, compensation orders should be made to the victims. Where offenders were not allowed to retain their income, compensation should also be considered for victims who have suffered loss, damage or personal injury.

Offenders (excluding women involved in prostitution or those whose commission of the offence was in relation to her exiting prostitution) could also be subjected to curfews or exclusions from certain areas/establishments or contact with certain people.

Q14. Do you agree that the aggravating features in paragraph 52 will increase the seriousness of the trafficking offences? Are there others?

POPPY agrees that the aggravating features in paragraph 52 will increase the seriousness of the trafficking offences. However, in addition to the aggravating feature listed POPPY is of the opinion that the following should also be considered aggravating factors:

- The vulnerability of the victim due to previous sexual or physical abuse as an adult or child, domestic violence, and coming from an area with limited or no access to education or employment.
- The abuse of a power or trust, or the involvement of the woman's family in selling/handing her over to traffickers in some circumstances unwittingly, add to a victim's vulnerability and can be used by the trafficker to further control the victim.

² This scheme is set up to divert women involved in prostitution away from the criminal justice systems and to provide them with an opportunity to access support and linked into services. It is only available to women arrested for soliciting / loitering for prostitution in Lambeth. For women who wish to access this scheme, the magistrate will be informed, and if he agrees the case will be adjourned for about four weeks. The woman will have to keep 2 appointments, the first with a criminal justice worker, and the second with the criminal justice worker or another agency. If these are met, then the woman's case will be discontinued.

- Where a trafficker has recruited a victim through the pretence of being her 'boyfriend' and used this role in a manner akin to domestic violence, the victim is further disempowered to escape.
- Financial extortion, adding debt bondage through disproportionate deductions or total removal of wages for 'accommodation, food, travel, health care, sexual health care, personal items, etc'.
- The restriction of a victim's liberty through physical and/or psychological control strategies can also be treated as an aggravating feature.³
- Physical or sexual violence and control including rape, beatings, torture, hunger, physical exhaustion, isolation, and forcing women to witness violence against other women.
- The forced involvement in pornography of a victim.
- Forcing a victim to make a false asylum claim.
- Pressure to perform unsafe acts 'to pay off her debt more quickly', which lead to lack of control over what she would do, and lack of control over any money earned.
- Confiscation of passport and/or other identity card or papers.
- The re-trafficking of a victim by the same or another network, thereby increasing her vulnerability and reducing her escape options as it is likely she will just be trafficked again.

Q15. Do you agree that the normal disposal for a trafficking offence should be custodial, with a lesser penalty only being recommended in cases where extraordinary mitigating features exist? If not, why not?

The only mitigating factors that would warrant a non-custodial sentence would perhaps be where the offender was a victim of trafficking acting under the control of the trafficker. All other cases warrant a custodial sentence. This should be sufficiently severe to act as a deterrent, and acknowledge the serious human rights abuses perpetrated. The Court of Appeal indicated their approach to sentencing in trafficking cases when they increased Luan Plakici's sentence from 10 to 23 years.⁴ This must be acknowledged in the Panel's consultation paper.

COMPENSATION ORDERS

POPPY welcomes the Panel's guidance that the courts should consider making a compensation order in accordance with the provisions of the Powers of the Criminal Courts (Sentencing) Act 2000 in paragraph 17. However, POPPY notes with concern that the Panel do not clarify what these provisions stipulate. In POPPY's experience of these types of cases the criminal courts are not considering compensation orders. Indeed in the case of Luan Plakici, Wood Green Crown Court did not impose a compensation order, nor in their sentencing remarks did they give reasons for not making such an order as required by the provisions of the Sentencing

³ Psychological control tactics used by traffickers can include intimidation, threats to the victim/the victims family, threats to disclose the victims involvement in prostitution, lies and deception, emotional manipulation and persuading women that they will eventually pay off their alleged debt and be free or able to earn money for themselves.

⁴ *R v Plakici and Islami*, Wood Green Crown Court, 22 December 2003. Court of Appeal, 29th April 2004.

Act. Thus, it is imperative that the Panel take this opportunity to inform the courts of what their duties are as regards compensation orders. Moreover, in many cases a victim may not ask the CPS or police to bring compensation issues to the attention of the courts for fear that the defence will allege that their motives for complaint are purely for compensation. Thus, the courts need to be reminded of their obligations by the Panel.

In addition it should be clarified that compensation should not be considered pertinent solely 'in cases involving large numbers of trafficked victims who have been deceived into paying for the 'services' offered by the traffickers' as outlined in paragraph 17 of the consultation paper. It must be emphasised to the criminal courts that they are under a duty to consider a compensation order in every case where the victim of the offence has suffered personal injury, loss or damage. Furthermore, 'services' should be interpreted widely to include the 'debt' incurred during the trafficking process, and additional 'services' such as accommodation, transport, and personal items for which disproportionate charges were applied.

For these reasons POPPY will endeavour to outline briefly the duties of the courts under the Sentencing Act. Section 130 of the Sentencing Act grants the courts the power to make compensation orders. "A court by or before which a person is convicted of an offence, instead of or in addition to dealing with him in any other way, may, on application or **otherwise**, make an order..."⁵ It is generally accepted that "application" refers to an application from the CPS and the phrase "or otherwise" is interpreted as meaning that the courts have the power to make a compensation order of their own volition. Section 130(3) of the Sentencing Act states that "A court shall give **reasons**, on passing sentence, if it **does not make** a compensation order in a case where this section empowers it to do so".⁶

According to Tim Strouts of the Department of Constitutional Affairs, this section does not impose a duty on the courts to explain why they have not made a compensation order where an application has not been made or if the court has not considered doing so of its own volition, as this would oblige the court to consider a compensation order in every instance of personal injury, loss or damage resulting from an offence, which the courts are not doing.⁷ However, we believe that section 130 should be interpreted as empowering the courts to make a compensation order in every case where there is personal injury, loss or damage suffered. Therefore Section 130 (3) imposes a duty, in every case where a victim has so suffered, to give reasons as to why a compensation order has not been made.

This interpretation is confirmed by the "Magistrates' Court Sentencing Guidelines" which were issued in October 2003 for implementation on 1 January 2004. These guidelines specifically state "As well as assessing the seriousness of the offence, including the impact on the victim, and any mitigating factors affecting the offender, the court is under a **duty** to consider compensation in **every case** where loss,

⁵ Emphasis added; Powers of Criminal Courts (Sentencing) Act 2000, Section 130 (1).

⁶ Emphasis added.

⁷ By telephone 25 May 2004; Tel number 01904545479.

damage or **injury** has resulted from the offence, whether or not an application has been made (Powers of Criminal Courts (Sentencing) Act 2000, s. 130)."⁸

The amount of compensation should be such as the court considers appropriate. Compensation orders may be of particular importance where the amount awarded would amount to less than the minimum under the Criminal Injuries Compensation Scheme, which currently stands at £1,000. In such circumstances if a compensation order were not made then the victim would have to pursue a small claims case in the civil courts which requires further litigation. In 2001/2002 **10,292** applicants did not meet the eligibility criteria for receiving an award under CICA because their injuries were "not serious enough to qualify for the minimum award of £1,000."⁹ In addition it must be emphasised that a large proportion of victims of trafficking are returned to their countries of origin. The practical implications are that it is impossible for them to pursue a claim under the Criminal Injuries Compensation Scheme or in civil litigation.

The courts may refer to the Judicial Studies Board, Guidelines for the Assessment of General Damages in Personal Injury Cases, for guidance on the amount of compensation to be awarded. Furthermore, the courts should consult the tariffs under the Criminal Injuries Compensation Scheme as these tariffs deal with the types of injuries suffered in trafficking cases.

Should a court decide to make both a confiscation order and a compensation order in the same case, then under the Proceeds of Crime Act sections 13(5) and 13(6) if the defendant does not have enough means to satisfy both orders, the court must direct that a proportion of the funds confiscated are used to pay the compensation order. The amount must be the sum by which the defendant's assets will lead to a shortfall. Under section 6(6) of the Proceeds of Crime Act where the victim has started or intends to start proceedings for the personal injury, loss or damage suffered, the court must consider its duty in relation to a confiscation order as a power. This should result in the victim being compensated first rather than the Crown being enriched.

A compensation order will require the defendant "instead of or in addition to dealing with him in any other way"¹⁰ to "pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence."¹¹ Thus, the imposition of a custodial sentence does not relieve the courts of its duty to consider compensation in these types of cases.

Whilst POPPY accepts the reasoning under Section 130(11) of the Sentencing Act (and see for example *R v. Aitkens*¹²) that where a defendant is subjected to an immediate sentence of imprisonment, a compensation order is not to be made where it subjects a defendant on release from prison to a financial burden that he can not

⁸ Emphasis added. Magistrate's Court Sentencing Guidelines, 6th Edition, p. 89.

⁹ Facts and Figures, available at

<https://www.cica.gov.uk/portal/page?_pageid=115,65009&_dad=portal&_schema=PORTAL>.

¹⁰ Powers of Criminal Courts (Sentencing) Act 2000, Section 130 (1).

¹¹ Powers of Criminal Courts (Sentencing) Act 2000, Section 130 (1)(a).

¹² [2003] EWCA Crim 2587.

meet, as can be seen from the case of Luan Plackici this is not necessarily the case in relation to traffickers.¹³ Furthermore, the court must only have regard to the person's means in so far as they appear or are known to the court.

The Magistrates' Court Sentencing Guidelines state that "compensation should only be awarded in fairly clear, uncomplicated cases: if there are disputes and complications, the matter should be left to the civil courts".¹⁴ Thus, a compensation order is designed for cases where the compensation can be easily ascertained.

However, the Panel has accepted that trafficking cases do not automatically fall into the category of being too complicated as paragraph 17 states that the court should consider compensation orders in these types of cases. The injuries that are suffered by victims such as rape, physical assault and mental abuse, should generally be obvious and straightforward, and as previously noted tariffs under the Criminal Injuries Compensation Scheme are readily available for judges to review.

In summary POPPY strongly recommends that the Panel take this opportunity to clarify the law surrounding compensation orders and specifically guide for their use in combination with a custodial sentence, in all cases of personal injury, loss or damage suffered by the victim as a result of the offence. A victim of trafficking is entitled to compensation for the personal injury, loss or damage they have suffered. It provides a means to begin a new life and exit prostitution. For the practical reasons of location it makes it near on impossible for a victim to pursue a claim under the Criminal Injuries Compensation Scheme or in civil litigation. Furthermore, why should a state scheme such as the Criminal Injuries Compensation Scheme pay such compensation if it is readily available from the offender.

PROPOSED SENTENCING LEVELS

POPPY is concerned at the low starting points of sentencing in relation to all trafficking and prostitution offences. We believe that this is inconsistent with the principle that the commercial sexual exploitation of people is wrong.

¹³ *R v Plackici and Islami*, Wood Green Crown Court, 22 December 2003. Court of Appeal, 29th April 2004. In the case of Luan Plackici a confiscation order was made.

¹⁴ *Ibid.*