

## History Repeating Itself: The Regulation of Prostitution and Trafficking

This paper is intended to provide a comparison between three periods of British legislation on sexual offences, concentrating on those relating to prostitution and trafficking. The periods in question are the Victorian/Edwardian era, the 1950s and the turn of the twentieth century (1998-2003). My intention is to analyse the similarities and differences between these periods of reform in order to evaluate the historically recurring social pressures which influence change. I am also highlighting some of the negative consequences of legislative reform in the hope that they will not be repeated in the wake of the current Home Office Review of Prostitution. **Helen J. Self (2004)**

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In 1998 the government of the United Kingdom embarked upon a democratic process which was to lead, step by step, to major legislative reform. The end result of this procedure was to be the Sexual Offences Act 2003.

Initially, the Home Office published a leaflet 'A Review of Sex Offences' informing the public of its forthcoming review, stating:

'A review of the criminal law on sex offences is long overdue. The structure of the law is complex and made more difficult by changes and amendments over time. Much of the law dates from a hundred years ago and more, when society was very different...Sex offences, more than any other part of the criminal law, mirror the attitude of society to sexual roles, sexual behaviour, sexual orientation and sexual exploitation....In carrying out a review of this kind it is vital that the views of ordinary people, and those with relevant expertise, are sort and considered. We welcome all contributions which will help the Government develop the law in an open and fair way.'<sup>1</sup>

However, in the middle of this leaflet the Home Office announced, that although it wished to:

'...provide coherent and clear sex offences which protect individuals, especially children and the more vulnerable from abuse and exploitation; enable abusers to be appropriately punished; and be fair and non-discriminatory in accordance with the ECHR and Human Rights Act [1998]...[it] would **not** be looking at decriminalising prostitution or pornography, at reducing the age of consent below sixteen, or at procedural or evidential issues.'

This was an odd statement in itself, not least because prostitution is not, and never has been, a criminal offence. The review was to be the fifth reexamination of the twentieth century covering some aspects of prostitution and sexual offences, so there was little justification for the creation of public confusion through sloppy phraseology. Moreover, the human rights aspect of the law pertaining to prostitution has frequently been challenged without any great success. It appeared as if the Home Office was trying to address a much needed set of reforms 'while and at the same time' avoiding contentious issues.

From May 2004, when the new Sexual Offences Act 2003 came into force, the principal Act governing these offences was the Sexual Offence Act 1956. This consolidation Act brought together five previous statutes: the Criminal Law Amendment Act 1885, the Vagrants Act 1898, the Incest Act 1908, the Criminal Law Amendment (White Slavery) Act 1912 and the Criminal Law Amendment Act 1922. The advantage of a consolidation act, from a government point of view, is that, as it does not make any substantial alteration to the law, there is no cause for debate during its brief passage through Parliament. This means that both Parliament and the public are denied the opportunity of considering its implications. Consequently, the legislation governing sexual offences at the beginning of the twenty-first century originated in the Victorian and Edwardian period, making the Sexual Offences Act 2003 the first major reform for over a hundred years.

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<sup>1</sup> Home Office leaflet, *A Review of Sex Offences* (1998), The Stationary Office Group Ltd.

### Victorian -Edwardian influence

The original CLA Act 1885 was the first major Act to intrude into the private realm of personal sexual behaviour and was indicative of the rising influence of the 'women's movement' on the socio-political agenda of the time, the motivation being the protection of women and girls. It is, therefore, interesting to note that both the CLA Act 1885 and the SO Act 2003 came into being as a result of public campaigns; the first of which was for the repeal of the Contagious Diseases Acts (1864, 1866 and 1869), the second of which, during the 1990s, I will come to later. However, when comparing the 1870s and 1990s, it becomes apparent that the unsuspected link between the two campaigns was the protection of children. In order to illustrate this it is necessary to review some aspects of the history of the movement aimed at repealing the CDAs, before moving on to more recent developments.

The CDAs provided for the compulsory registration and surgical examination of women suspected of being prostitutes in certain military towns and ports in England and Ireland. The regulations provided for their detention in hospital for up to three months if they were found to be infected with a venereal disease, or imprisonment if a woman refused to cooperate. So given the nature of police surveillance, any poor woman was liable to arrest and detention, or imprisonment.

A number of prominent people (most notably Florence Nightingale and Harriet Martineau) became aware of the situation and began to draw public attention to the outrage. A meeting was called on 5 October 1869 which gave rise to the National Association for the Repeal of the CDAs, followed by the establishment of the Ladies National Association headed by Josephine Butler.<sup>2</sup> Nearly seventeen years of campaigning followed, leading to the suspension of the Acts in 1883 and repeal in 1886.<sup>3</sup>

However, the point of comparison which I wish to emphasise is that the eventual repeal of the Acts came about, not so much as a result of the campaign against the medical examination and registration of women, which dominated the initial debate, but in response to the investigative journalism of W. T. Stead, whose salacious articles in the *Pall Mall Gazette* were filled with lurid details of the violation and trafficking of children. Only the briefest glance at the original articles is needed to establish this fact, as they are scattered with emotive drawings of small children with adult men. Consequently, the public pressure which finally ensured the passage of the CLA Bill 1885 came about, not because the public cared about the fate of poor women, but because the middle-classes feared for the safety of their respectable daughters.<sup>4</sup> To some extent this is understandable, especially when seen in the context of an age of consent of thirteen.<sup>5</sup> Unfortunately, it also meant that the 1885 Act became a mixture of offences relating to both women and children (regardless of their differing circumstances and needs), with the intention of protecting them from predatory adults. One of the consequences of this assortment of offences, was that small lodging houses for the poor became labelled as illegal brothels so that many young women were turned out onto the streets where they became easy prey for pimps and bullies.<sup>6</sup> In other words, the law resulted in an increase in exploitation. As the moral panic relating to the 'White Slave Trade' accelerated, the

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<sup>2</sup> Josephine Butler was portrayed as a saint and the heroine of the repeal campaign by her early biographers, eg. L. Hay-Cooper (1921), *Josephine Butler and her Work for Social Purity*, London Society for Promoting Christian Knowledge.

<sup>3</sup> A good account of these incidents can be found in Paul McHugh (1980), *Prostitution and Victorian Social Reform*, Croom Helm, London and Trevor Fisher (1995) *Scandal: The Sexual Politics of Late Victorian England*, Alan Sutton Publishing Ltd.

<sup>4</sup>5. There are innumerable accounts of these events. See for, example, Charles Terrot (1959), *The Maiden Tribute: A Study of the White Slave Traffic of the Nineteenth Century*, Frederick Muller, London; Glen Petrie (1971) *A Singular Iniquity: The Campaigns of Josephine Butler*, New York. The moral panic which followed was reflected in Parliament and the press and caused many church-based organisations to embark upon a prolonged crusade. Campaigners included the Young Women's Christian Association, the Mother's Union, the National Council of Women Workers and a coalition of women's groups which became known as the Traveller's Aid Society.

<sup>5</sup> The age of consent was raised from 12 to 13 in 1875 as a result of a Private Members Bill presented by Mr Charley M.P (Salford).

<sup>6</sup> As Judith Walkowitz has so graphically described in her groundbreaking book *Prostitution and Victorian Society* (1980) Cambridge University Press

ensuing Acts of 1898, 1908, 1912 and 1922 strengthened the two parallel themes of child protection and anti-trafficking, measures which were vigorously campaigned for by social purists and feminists.

### **Post-war mid-century influence 1950-70, the Street Offences Act 1959**

The regrettable consequences of pushing women out of accommodation and onto the streets were compounded by the disruption of war, and in the late 1940s the Secretary of State for the Home Office, Sir David Maxwell Fyfe, decided that London streets gave a deplorable impression of British immorality to foreign visitors. The West End, in particular, had become the haunt of prostitutes who openly solicited passers-by for the purpose of prostitution. After some consideration he wrote a memorandum for the Home Office which set out the solution he desired, i.e. abandonment of the requirement for a citizen to give evidence of annoyance, arrest without warrant, an escalating scale of fines with prison sentences for persistent offenders. His personal solution to this public display of immorality, was based upon a report made by a Home Office Official, Philip Allen, who had been sent to the United States in order to investigate the way in which prostitution was regulated. The essence of the scheme was not to abolish prostitution, but to push women off the streets and into call-girl flats. However, Maxwell Fyfe felt that the necessary legal reforms could not be accomplished without the recommendation of an impartial and independent committee, as the women's organisations would be bound to oppose it. Consequently, it was agreed to appoint a departmental committee under the chairmanship of the Vice-Chancellor of Reading University, John Wolfenden. When the final report of the Wolfenden Committee was published in 1957, the recommendations exactly mirrored the proposals in Maxwell Fyfe's memorandum and provided the endorsement he required. To modern eyes this is a recognisable government manoeuvre, but not one that would have been uncovered at a time when the establishment was afforded a much higher level of respect.<sup>7</sup>

The proposed reforms were embodied in the 1959 Street Offences Bill, the passage of which was encouraged by a salacious press welcoming the prospect of a 'clean up'. This inspired the Home Secretary, R.A. Butler to use his marital links with Josephine Butler's family as a device for launching a moral crusade, an approach which has already been reflected by David Blunkett in 2003.<sup>8</sup> Given the incorporation of a presupposition of guilt, which was provided through the labelling of women as 'common prostitutes', the 1959 Act became an immediate success. However, a fact of life, commonly understood by the vice officers, is that there is nothing so inventive as the sex industry. Indeed, it is virtually indestructible. As one police officer described it 'it is like a balloon', if you squeeze it in one place it bulges out in another. This was soon to become apparent, as off-street outlets for prostitution multiplied and flourished.

There were other unwelcome side-effects to the 1959 Act, including an increase in kerb-crawling, which although partly due to an expansion in car ownership, was also a reflection of the difficulty men experienced in finding easily recognisable street women. However, in addition to this there was also a gradual recovery of the street scene, so that by the end of the 1960s the situation was infinitely more complex and difficult to police. As a result, two more government committees were appointed, leading eventually to the Sexual Offences (kerb crawling) Act 1985.<sup>9</sup> With the Home Office Review of Prostitution (2000) history was to repeat itself, since as in the 1950s, the only recommendation to be implemented from the many proposed by the Criminal Law Revision Committee (1982-86), was the solution originally desired by the Home Office.<sup>10</sup> As highlighted in the Criminal Law Revision Committee (1986), Seventeenth Report, 'Prostitution Off-street Activities', Cmnd. 9688. In

<sup>7</sup> For a detailed account of these events see Helen J. Self (2003), *Prostitution, Women and Misuse of the Law: The Fallen Daughters of Eve*, Frank Cass.

<sup>8</sup> See the *Guardian* 30 December 2003.

<sup>9</sup> Five Government committees were appointed during the century, these were:  
The Street Offences Committee (1928)  
The Committee on Homosexual Offences and Prostitution (1957),  
The Working party on Vagrancy and Street Offences (1974 -76),  
The Criminal Law Revision Committee (1980-86),

<sup>10</sup> Four reports were published by the Criminal Law revision Committee which sat from 1975 to 1986, three of which dealt with prostitution:

Criminal Law Revision Committee (1980), Fifteenth Report, 'Sexual Offences', Cmnd. 9213.

Criminal Law Revision Committee (1982), Working Paper on Offences Relating to Prostitution and Allied Offences.

Criminal Law Revision Committee (1984), Sixteenth Report, 'Prostitution in the Street', Cmnd. 9329.

addition, the 1885 Act created its own difficulties for the women who stayed on the streets, as it led to their increased vulnerability as a consequence of their being forced to make quick decisions concerning the safety of any transaction.

### **The turn of the century: Sexual Offences Act 2003**

As with the Victorian/Edwardian era, the pattern of events which led up to the enactment of the Sexual Offences Act 2003 was driven by public concern over children, but in this instance initiated by children's charities rather than a public uprising. The main players in this campaign were the Children's Society and Barnardos.

The cause of the Children's Society's concern arose out of the application of the Street Offences Act 1959. The disturbing aspect of this statute was that women and girls under the age of eighteen were acquiring prison records as a result of convictions for loitering or soliciting, accompanied by all the obvious negative side effects of acquiring a criminal record.<sup>11</sup> This, as Josephine Butler would have happily pointed out, ignored the responsibility of the client, who the Society argued was a child sex-abuser and ought to be punished accordingly. In the course of time the Association of Chief Police Officers, followed by the Home Office, issued guidelines for the application of the law with regard to minors, which retained the option of prosecution as a last resort.<sup>12</sup>

In the meantime, Barnardos embarked upon its 'Streets and Lanes' project in Bradford and published a number of documents focussing upon the abuse of children through prostitution. The report 'Whose Daughter Next' with its accompanying video, provided the background and documentation of abduction and imprisonment of young girls in apartments where they were offered for prostitution by their boyfriend/pimp, to whom they clung as the only source of affection and stability in their lives.<sup>13</sup> Various conferences and publications concentrating upon child abuse were to follow. The pressure generated by these concerns, alongside a resurgence of public concern over the trafficking of women into the United Kingdom, led the Home Office to embark upon the Sex Offences Review in 1999 and publish a report 'Setting the Boundaries: reforming the law on sex offences' in July 2000.

### **Trafficking**

The story of trafficking 'for the purpose of prostitution' is inextricably interwoven with the development of the legislation on prostitution, only the trajectory is different and somewhat confusing. As stated above, the spark which led to the repeal of the CDAs was public anxiety over the trafficking of women and children from Britain to brothels on the Continent of Europe, although a Select Committee of the House of Lords set up to investigate this matter uncovered very little evidence.<sup>14</sup> However, the passage of the CLA 1985 followed by the foundation of the National Vigilance Association under the secretaryship of William Alexander Coote, with the intention of making sure that the new legislation was implemented. This organisation was responsible for the spread of the Social Purity movement and the eventual emergence of five international conventions (1904, 1910, 1922, 1933 and 1949) against trafficking in women and children.<sup>15</sup> Culminating with the United Nations Convention for the

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<sup>11</sup> See Mark Lee and Rachel O'Brian 'The Game's Up: Redefining Child Prostitution'(1995), The Children's Society.

<sup>12</sup> Home Office/Department of Health Guidance on Children in Prostitution 1998.

<sup>13</sup> See 'Whose Daughter Next' (1998), Barnardos

<sup>14</sup> Select Committee on the Care and Protection of Young Girls (1881).

<sup>15</sup> International Agreement for the Suppression of the White Slave Traffic, signed at Paris on the 18 May 1904, ratified at Paris, 18 January 1905 by Great Britain, Germany, Denmark, Spain, France, Italy, Russia, Sweden, Norway, Switzerland, Belgium, Netherlands, and Portugal. Treaty Series No. 24. HMSO [Cd. 2689].

International Convention for the Suppression of the White Slave Traffic, signed at Paris May 1910. Signed by Austria & Hungary, Great Britain, France, Belgium, Brazil, Denmark, Spain, Italy, Netherlands, Portugal, Russia, Sweden. Treaty Series 1912. No. 20. [Cd. 6336].

League of Nations Convention on the Traffic in Women and Children, (Geneva, 18 October 1921). [A. 125 (1) 1921. IV.]

League of Nations Convention on the Traffic in Women and Children, Geneva, 18 October 1921. [A. 125 (1) 1921. IV.]

League of Nations Convention for the Suppression of the Traffic of Women of Full Age, 1933. (Copy in NVA archives, WL.

Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, 1949. Unlike Josephine Butler and the repeal movement, the social purist and the NVA were more interested in suppressing vice than they were in the injustices heaped upon poor women. Prostitution, they believed, embraced a world of vicious immoral activity in which the trafficker occupied the role of demon. The underlying factors, such as poverty, war, displacement, and economic migration were not taken into consideration, or allowed to cloud the objective of eliminating this evil trade.

The moral panic accompanying the emergence of the Victorian/Edwardian trafficking debate came at a time when immigration, particularly that of Jewish nationals fleeing from the pogroms, was emerging as a cause of government anxiety, accompanied by a degree of anti-Semitism amongst the general public. This was reinforced by innumerable lurid warnings, aimed at young women, of the dangers of abduction and transportation to South America, in particular to Buenos Aires. At the same time, voluntary agencies flourished and hundreds of committed anxious workers devoted themselves to the care of lost, strayed or emigrating young women. However, the dilemma, which never goes away, is the problem of defining what exactly is meant by 'trafficking', who can correctly be labelled as a trafficker or as a trafficked person, rather than a willing participant, and how to accommodate the notions of 'choice' and 'consent' when poverty and inequality are thrown into this complex equation.

Following the Second World War and the passage of the UN Convention on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949), there was a lull in the level of anxiety, but concern re-emerged in the 1990s accompanied, as in previous periods, by an increase in economic migration and asylum seeking. All the same, Victorian/Edwardian arguments have been repeated and used as a justification for reforming the law, including reference to the abduction and sexual abuse of children for the purpose of prostitution, brothel keeping and the global trafficking of young women and children. Moreover, it has frequently been asserted that, at the end of the twentieth century, the UK had no legislation controlling trafficking. The supposed 'gap' was addressed first in the Nationality, Immigration and Asylum Act (2002), followed by the Sexual Offences Act 2003. As a result, twelve new offences have been created, most of which are only a rewording of previous offences, but attracting greatly increased penalties of up to 14 years imprisonment and making them gender neutral. There is, also, an entirely new offence of 'facilitating prostitution within the United Kingdom'. Undoubtedly, some unpleasant characters will find their way into our overcrowded prisons and 'hopefully' have their assets confiscated. However, the sex industry is remarkably adaptable, whilst police resources and manpower are limited. Only time and case law will tell us how effective they prove to be.

In many ways the experience of 1990-2004 has mirrored events at the previous turn of the century. This resurgence of global anxiety has led to new demands for international conventions and agreements, the most important of which is the 'United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime (2000)', commonly known as the Palermo Protocol. However, the difficulty of distinguishing between consensual and forced prostitution remains at the nub of the argument surrounding what is meant by 'human rights' and 'choice' within this context, especially as it is commonly understood (just as it was by the League of Nations), that the majority of trafficked women know that they are destined for prostitution. What they do not know is the level of abuse they are likely to experience when they reach their destination or the difficulties they will encounter as illegal immigrants in moving out into mainstream society.

#### **The Home Office review of prostitution (2003-04)**

Following considerable pressure from a variety of concerned individuals and organisations during the 1990s, a review of prostitution was eventually agreed upon by the Home Office. The news was broken by the *Guardian* on 30 December 2003, some months after a scoping exercise aimed at defining the boundaries of the review had begun. Like his predecessor, the Home Secretary, David Blunkett, promptly identified himself with Josephine Butler's nineteenth century campaign and was reported to have said: 'We in this century must do what Josephine Butler attempted over 100 years ago, in a very different era and in a very different way.' One might hope that Mr Blunkett resists the temptation to moralise and remembers that Josephine Butler's campaign was more about justice and equality for poor women than it was about confronting their supposed immorality. However, whilst the various Home Office reviews, Parliamentary bills and acts have been in progress, new coercive measures have been added to the police armoury. These include Anti-Social Behaviour Orders (ASBOs), the banning of prostitutes' cards in telephone boxes, the power to arrest kerb-crawlers, and a number of changes within the Sexual Offences Act 2003, such as the creation of gender neutral offences and for the first time, legal definitions for the key words 'prostitute' and 'prostitution'.

Another interesting parallel has been the emergence of homosexuality as a key component at each of the three

historical stages, as if it was a related issue. It is well known that the CLA Act 1885 was passed with the last minute addition of section 11, which made homosexual acts between adults into a criminal offence. This eventually caused the downfall and imprisonment of Oscar Wilde as well as numerous other incidences of suicide, blackmail, police harassment and criminal prosecution. As a topic for the press in the 1950s, the recommendation made by the Wolfenden Committee, that homosexual acts conducted in private between consenting adults should no longer constitute an offence, completely overshadowed the measures concerning prostitution.<sup>16</sup> Echos of this debate were to recur during the deliberations of the Home Office Sexual Offences Review (1998-2000) and subsequent SO Act 2003, when Section 32 of the SOA 1956 (which made it an offence for a man to solicit in a public place for immoral purposes), became the focus for homosexual law reform on the grounds of sexual discrimination. Campaigners used the somewhat suspect argument that ‘cottaging’ was nothing more than men ‘chatting each other up’.<sup>17</sup> When the SO Bill 2003 was presented before the House of Lords, this particular aspect of the debate filled the House with Peers concerned over the use of public toilets for sexual liaison. Hence section 71 of the SO Act 2003 makes it an offence for a person to engage in a sexual activity in a public lavatory. How such an offence will be proved is another matter.

### Conclusion

Looked at historically, certain reoccurring themes related to prostitution stand out clearly. First, it seems to be our genuine concern for the protection of children, rather than women, which initiates policy reform. This leads to a situation through which offences pertaining to women are alternated with those intended to protect children, reinforcing the perception that women in prostitution are ‘child-like’ and without any right to sexual autonomy. A further stimulus for reform comes as a result of periodic upsurges in public concern over immigration and trafficking.

Second, the contradictions raised by a combination of the need for public order and the protection of vulnerable individuals has resulted in counterproductive attempts to simultaneously push women out of accommodation and off the streets. Given the accompanying trend for criminalizing men, these policies increase, rather than decrease the vulnerability of sex workers to violent abuse by pimps and clients. This is the consequence of pushing prostitution underground, stigmatising and isolating the participants and criminalizing so many related activities.

Perhaps the most important point which I wish to emphasise is that each new wave of legislation begins with a degree of success, but following some adjustment within the sex industry, it eventually make matters worse. The historical evidence suggests that coercive legislation has done little to solve the problems created by prostitution. Indeed, the situation deteriorated dramatically following the 1959 Street Offences Act, whilst the appointment of five Government reviews within a century gives testimony to the enduring nature and complexity of the situation. Finally, the state of play leading up to the SO Act 2003 is still more confusing, since it was said to be concerned solely with the protection of vulnerable members of society. This approach disguised the fact that the review would be looking at certain aspects of prostitution, and recommending changes to the law which would eventually impact upon sex workers. This sidestepped the need to look at the legislation pertaining to prostitution in the round and lost an opportunity for a public debate over the issue. Consequently, significant voices, in the form of campaigners for the health and safety of sex workers, were excluded from the official discussion, while at the same time additional coercive measures were added to the armoury of the police.

Currently, a further Home Office review of prostitution is taking place, and the debate, which has no end, continues unabated. Society has yet to decide whether regulation or liberalisation will improve the situation and whether people have a right to choose prostitution and at the same time be granted civil rights and protection from exploitation and abuse? All that seems to be clear is that the accumulation of coercive measures have failed to solve the problems, either for the people who work within the sex industry or the general public who sometimes suffer from the aggravating consequences. Nor have the police the resources in money and manpower to put this legislation into effect. Clearly, something new is needed and one can only hope that it will materialise.

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<sup>16</sup> This would have meant the repeal of the notorious section 11 of the CLA Act 1885.

<sup>17</sup> See ‘Setting the Boundaries: Reforming the law on sex offences (2000) Home Office, 6.6.15.