Northern Ireland Assembly

Committee for Justice

# OFFICIAL REPORT (Hansard)

## Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill: Attorney General for Northern Ireland

6 March 2014

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**Members present for all or part of the proceedings:**
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Tom Elliott
Mr William Humphrey
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley

**Witnesses:**
Mr John Larkin QC Attorney General for Northern Ireland

**The Chairperson:** I welcome to the meeting the Attorney General for Northern Ireland, Mr John Larkin QC. As usual, proceedings are recorded by Hansard and published in due course. Mr Larkin, you are very welcome, and thank you for making yourself available to the Committee to address members' issues. I hand over to you, and then members will have questions.

**Mr John Larkin QC (Attorney General for Northern Ireland):** Thank you very much, Chair. Once again, it is a pleasure to be before the Committee as it engages in its important work of legislative scrutiny.

I propose, although I suspect that it may not be entirely satisfactory, to go through the clauses one by one and make some quite technical observations, by and large, on each. Then, inevitably, there will be questions from members. I thought that it might be of assistance to the Committee if I were to set out views in writing, both as a result of my original thoughts and of any adjustments to them that arise from the views of the Committee. I thought that it might be preferable to do that rather than submit a short paper now when members' points might cause readjustment. If that is satisfactory, I will go through the clauses one by one.

I understand that clause 1 may have to be adjusted to take account of any changes that take place in the framework or in the Department's current consultation, to which allusion has already been made. Therefore I will say nothing more about it.

As members know, clause 2 deals with the irrelevance of consent. There is nothing really wrong with the clause, but I simply ask the question: what does it do? I am not sure that it does anything. In existing criminal law, consent is vitiated by the very features that are identified in paragraphs 2(1)(a) to

2(1)(e): if one threatens someone and obtains consent as a result of it, as a matter of common law that consent is vitiated. Therefore I am not sure what the clause does. Usually, if it is not necessary to enact a provision, then, in my view, it is necessary not to enact it. I leave that with the Committee.

Aggravating features are set out in clause 3. Again, there is no obstacle to the legislature setting out a series of aggravating factors. They are not inconsistent with judicial discretion in sentencing, so I have no observations of substance to make on clause 3.

Clause 4 has given rise to a little controversy. It is a perfectly proper device if the legislature is satisfied as to its policy.

This is not a hard minimum-sentence model, because any judge who considers that injustice will arise in a particular case by the imposition of the statutory minimum will be free to depart from that predictive statutory minimum. May I make two technical observations? The first is that it should be made clear that the custodial sentence will be applied only to a person of 18 years or above. Secondly, it may be thought appropriate to insert "immediate" before "custodial", because I imagine that it chimes with the policy intention. As drafted, it would be open to a court to impose a suspended sentence.

A more general observation on clause 4 is that if one is allowing for an exceptionality condition — in my view, it is quite a proper thing because it preserves judicial discretion — one might want to require some statement of reasons as to why a judge in any particular case considered the case to be exceptional.

With regard to clause 5 —

**The Chairperson:** So you do not regard clause 4 as being a mandatory minimum. Will that exceptionality still allow judicial discretion?

**Mr Larkin QC:** Let us assume, for the sake of argument, that someone has been involved in human trafficking in circumstances that do not quite give rise to a defence of duress but it is clear that someone has been a very minor cog in the wheel and that they themselves have suffered as part of that dreadful process and a judge considers that it would be the height of injustice to impose the predictive minimum that is set out in clause 4, no judge would ever be prevented from imposing the sentence that he or she thought just. The issue is that one might want to know what the reason was, and it might be worthwhile for the Assembly to consider inserting a provision that required the statement of reasons for believing the exceptionality condition was met.

**The Chairperson:** Thank you.

**Mr Larkin QC:** I understand that clause 5 may become redundant in view of the Department's consultation. Therefore, I will not make any observations on it just now. However, I am happy to make observations when it looks as if the clause has bedded down.

We now come to clause 6. The Committee will be relieved to hear that the policy wisdom of the clause is not a matter for me; it is a matter for the Assembly. However, there are some technical comments that I should make. First, in relation to competence, I note that the evidence that three Public Prosecution Service (PPS) officials gave to the Committee suggested that there may be issues around articles 8, 10 and 17 of the European Convention on Human Rights. Article 8 is engaged and, subject to the points that I make shortly, I do not think that this provision would infringe article 8. I do not see that article 10, which deals with freedom of expression, nor article 17, which deals with the abuse of rights, are likely to be engaged, far less breached, by this provision.

Turning to the technical issues, the definition of payment is too wide. Members will be aware that payment means:

> *"any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount."*

One of the policy aspects, of course, that have been pointed out by the PPS is that that may include lap dancing and things of that nature. That is a policy call for the Committee and the Assembly. However, the reference to sexual services troubles me because it strikes me that it is possible that it will mean that the mutual exchange between two persons of sexual services — if I do x, will you do z?

— would be caught by that provision. I do not think that that is the policy intention of those sponsoring the Bill. I think that it is safe, and important, to remove it from clause 6.

**The Chairperson:** The reference to "sexual services".

**Mr Larkin QC:** Yes. The words are in brackets in the substituted 64A(3). I suggest taking out from the third line of 64A(3) "including sexual services" because of what strikes me as the impermissible breadth that that would lead to. One can see how it has happened because that definition is, of course, taken from the definition provision in the 2008 order, but that in itself refers to different offences. It may be entirely appropriate in the context of those offences, but it strikes me as not being appropriate in the context of this offence. Incidentally, members may wish to note a point that occurred to me only relatively recently. One of the reasons for the apparent ineffectiveness of the old article 64A may be that it relies on the concept of "prostitute", which requires an additional evidential hurdle because "prostitute" is defined in article 58 of the 2008 order as someone who has offered sexual services on one occasion. I think that the context means that that means one other occasion apart from that giving rise to the particular investigation of a charge that is then before the courts. It is technically neat that this definition avoids the previous approach to defining "prostitute". The Committee might wish to consider that because, although the definition of "prostitute" in the 2008 order represents a narrowing, a modernisation and a refinement of the old common-law approach, the idea that people are, one might say, stigmatised as a prostitute henceforward strikes me as undesirable. One does not call someone a thief because, on one occasion, they stole a bar of chocolate. Therefore, if we can avoid it, we should not stigmatise individuals who may have got caught up in offending for all kinds of reasons.

The final technical issue on clause 6 relates to some uncertainty over the penalty. That is provided for in 64A(2):

> *"Person A guilty of an offence under this article is liable—*
> *(a) on summary conviction to a fine not exceeding level 3 on the standard scale;*
> *(b) to imprisonment for a term not exceeding one year or a fine not exceeding the statutory maximum, or both."*

It is not clear whether it is intended that this offence should be triable summarily only or on indictment. That should be made clear. I suspect that it may be intended to be triable summarily only, in which case one would have in 64A(2):

> *"Person A guilty of an offence under this article is liable on summary conviction—*
> *(a) to a fine not exceeding level 3 on the standard scale;*
> *(b) to imprisonment for a term not exceeding one year".*

If that were the policy intention, one would then delete the words:

> *"or a fine not exceeding the statutory maximum, or both."*

The other point that, I understand, has arisen from the police evidence in the context of this clause is in relation to the time limit. If the offence is triable summarily only, there is a presumptive time limit of six months in the Magistrates' Courts Order. It may be thought desirable to make specific provision extending that time limit if it is thought that it is best to keep this a summarily only offence.

As I said, the approach to the definition of "payment" comes from the 2008 order, and it might be thought desirable to ensure that there is a match between the other parts of the 2008 order and this provision. I am not sure that there is entirely. Again, that is capable of ready amendment should that be thought desirable.

Moving on to clause 7, I understand that —

**The Chairperson:** Sorry to interrupt, Mr Larkin. I assume that you have read the issues that the PPS raised on prosecuting cases under clause 6. If those technical issues were addressed, would that overcome the difficulties that it highlighted to the Committee?

**Mr Larkin QC:** I think that it would. That feeds into the policy approach, but, as I understood the police evidence, it seemed to be that, although this would not be the easiest offence in the world to

prosecute, they saw it as a useful addition to the police armoury. In response to your question, Chairman, it would address some of the PPS's concerns.

**The Chairperson:** Thank you.

**Mr Larkin QC:** I understand that clause 7(1) will go, if I have been correctly informed about the sponsor's intentions. I suggest that clause 7, including subsections 2 and 3, should go in its entirety, because those are statements of existing legal reality. If you say something again, it will be assumed as a matter of statutory construction that you are saying something slightly different, and that could give rise to problems in future. For example, it is simply true to say that the investigation or prosecution of any offence:

*"shall not be dependent on reporting or accusation by a victim wherever the offence takes place."*

The starkest example of that is that murder victims do not normally report the offences that have just been committed on them. Similarly, if a victim has withdrawn his or her statement, happily, as I think the Committee will be aware, in cases of domestic violence, the PPS and the PSNI, quite properly, very often proceed, even though the complaint has been withdrawn. Therefore I do not think that clause 7 adds anything, and, because it does not, I go back to the principle that, if it is not necessary to legislate, it is usually necessary not to legislate.

Clause 8 goes much further than the directive. The directive simply requires the UK to be in a position not to prosecute. The prosecuting authorities in the UK have always been in a position not to prosecute; they have always had discretion not to prosecute, particularly where the public interest so requires. The PPS has its internal guidance on this, and the Committee will perhaps recall my guidance to the PPS, which I hope to lay shortly. It includes specific provision for victims of trafficking. I think that clause 8 goes much too far, and, at present, for example, it would operate to bar the prosecution of the trafficked professional assassin.

**The Chairperson:** Is there any other way that we can amend it that still seeks to do what Lord Morrow wants it to do?

**Mr Larkin QC:** The Committee will no doubt hear again from Lord Morrow, but I get the sense — it may be a wrong sense — that the existing guidance may well satisfy Lord Morrow's concerns. I encourage him and the Committee to look specifically at the guidance that I have in place and hope to lay shortly dealing, among other things, with this very issue.

That probably deals with the great bulk of the technical issues. As one moves towards Parts 2,3,4 and 5, one is dealing with issues that I understand are still subject to quite a bit of potential fluctuation. I am happy to deal with any specific questions. The only issue that I will touch on is clause 19, and subsection 2 in particular. It strikes me that, if the policy decision is taken that this is a good Bill, one might want to make straightforward provisions in the Bill for its own commencement. For example, it should say whether it will be effective on consent or whether it will be effective after a certain period of months. If the previous evidence is anything to go by, there is still some remaining gap between the Bill sponsor and the Department. It may place the Department in the invidious position of having to make a decision about commencement with respect to legislation that it may not be entirely happy about.

**The Chairperson:** That could be put in and made effective on gaining Royal Assent.

**Mr Larkin QC:** Yes.

**The Chairperson:** That has been very helpful, Mr Larkin. Have members any other questions?

**Ms McCorley:** I might not have picked it up right. Can you clarify what you were saying about the definition in clause 6?

**Mr Larkin QC:** At present, clause 6 strikes me as too broad, because the reference to including sexual services in article 64A(3) could mean — obviously, it does not want to be indelicate — that there could be an exchange. For example, if you do x, I will do z — x and z obviously being activities of a sexual nature — would appear to be caught by that provision, and plainly that is not the intention of the sponsor, as I understand it.

**Ms McCorley:** So, you mean that it is too broad; it could be phone calls.

**Mr Larkin QC:** It is not so much that; that is a pure policy call. For example, lap dancing plainly seems to come within that. If one thinks that that is appropriately penalised — it is not for me to express a view on that — that is fine. My point is that this goes a little further. It means that two persons engaging in entirely mutual and uncommercial sexual exchanges might be caught by that.

**The Chairperson:** As in no transaction of money.

**Mr Larkin QC:** Yes, none whatsoever, nor any suggestion of exploitation. For example, you could have someone in absolute economic desperation and someone who is in a position to offer employment, and, again, in policy terms, that can be viewed as highly undesirable or not, as, undoubtedly, there are a variety of views about that. However, this is the situation where there is no commercial or exploitative issue around; it is simply two people engaging in sexual transactions of an entirely non-pecuniary and, I emphasise, uncommercial nature. If it is explicitly set out — you do this, I'll do that — one could come within this clause.

**The Chairperson:** I want to make sure that it can still be achieved even if it is the consenting adults but payment is involved.

**Mr Larkin QC:** Removal of the bracketed words in article 64A(3) will in no way affect the policy efficacy of what I think that Lord Morrow has designed it to do. This strikes me as an entirely accidental by-product and one that is not, on reflection, I suspect, desired.

**Mr Dickson:** Thank you. Your explanation has been very helpful. Again in that area, could the nature of a commercial transaction be, for example, a box of chocolates or a bunch of flowers?

**Mr Larkin QC:** We are moving into very delicate territory here. People may offer extravagant gifts with the hope of certain outcomes, but I have never in my life come across anybody, even at third or fourth hand, who has been as crassly explicit as to say, "If I were to bribe you with a nice bunch of flowers" —

**Mr Dickson:** What I am trying to get is this: where do you draw the line between something that is as innocuous as a bunch of flowers or a box of chocolates and, for example, a ring, a diamond stone or a bottle of champagne?

**Mr Larkin QC:** If one considers —

**Mr Dickson:** Where do you draw that line? When does it become a commercial transaction?

**Mr Larkin QC:** It is commercial if it is explicit. That is the quick answer to that. However, if one looks at an offence such as careless driving — driving without due care and attention — one sees that it is committed on a massive scale. If every instance of that offence was detected and processed by the police and the courts, the courts would, I hazard, do nothing else. To take Mr Dickson's example, some grotesque employer may say, "A promotion is coming up and, if you sleep with me, you will get the promotion". In one sense, many people may think, in a policy context, that, if someone exploits and engages in that crassly exploitative behaviour, it might well be properly penalised. The person who, on the other hand, takes his girlfriend or boyfriend away for a lavish weekend with certain hopes, does not fall within the clause.

**Mr Dickson:** But you could reverse the employment situation and the person may be offering the employer something for a promotion as well.

**Mr Larkin QC:** Yes.

**Mr Dickson:** If you extrapolate that onto the street or into much more casual relationships, such as people who do not know each other and who meet on the Internet or by phone, they become a bit like all those 32 mph or 33 mph speeders.

**Mr Larkin QC:** They do. However, the police have said that clause 6 is capable of being policed, not without its difficulty, but those are the examples of behaviour that, even if at the more extreme level

they were technically caught, would never come within the purview of any serious decision to prosecute.

**Mr Dickson:** I am sorry to carry this on, Chair. Therefore, regarding the line of questioning that Mr Wells has taken up on occasions, where does that leave the very clever, manipulative people out there who are providing services that we are trying to legislate against? Where does that leave them in being creative and finding a way around all this?

**Mr Larkin QC:** That is where the clause is helpful because it is broad. It will be difficult for such persons to avoid it. It is interesting that this model does not so much target them; there are other provisions in the 2008 Order, as you know, that do. This looks at demand, not at supply, which, certainly in this jurisdiction, is a new approach. As members will be aware, that approach has been tried in the Nordic countries and France.

**Mr Dickson:** Where does that leave persons who will inevitably claim that they are the innocent party but who, nevertheless, may have paid for something? The payment may be a bottle of champagne or a box of chocolates. Is that their defence?

**Mr Larkin QC:** The first defence is to say that the offence has not actually occurred; the item was bought —

**Mr Dickson:** The chocolates might have been consumed.

**Mr Larkin QC:** They will have been; I would be very surprised if they were not. *[Laughter.]* The chocolates and the champagne will have been consumed, but the question is this: was there an explicit, as it were, contractual arrangement? In the absence of that, the mere jostling around of hopes and expectations would not suffice to bring this within clause 6.

**Mr Dickson:** When we went to Sweden, we saw evidence that showed that there was surveillance to the point where the police were satisfied that sexual activity had happened inside the room. That was done by listening to conversations and, ultimately, to particular noises which, they decided, gave them sufficient evidence to open the door.

**Mr Larkin QC:** I suspect that the police are much better equipped to speak about that than I am. I suspect that the major use of that will be, largely, for a package of offences. People may well be arrested in particular contexts and evidence may come forward. Or, if it is thought that there is a particular problem — policing policy ebbs and flows on a variety of issues — you would have the kind of approach that is taken in North American cities where they do not have this legislation. They use decoy police officers and people are arrested by virtue of the act of solicitation and are charged with the inchoate offence rather than the complete offence.

**Mr Humphrey:** Thank you very much for your presentation, Attorney General. You will be aware that, in evidence to this Committee, the Northern Ireland Human Rights Commission welcomed the principle of clause 6, saying that it was not incompatible with human rights standards. Do you share its view?

**Mr Larkin QC:** I do. I hope I have said as much.

**Mr McCartney:** My question is about clause 4. Does the idea of exceptionality in clause 4 not undermine the concept of a minimum sentence? Pleading guilty early could be exceptionality.

**Mr Larkin QC:** The Committee will be aware of exceptionality in a different context; for example, that of legal aid and the decision of a magistrate to grant certificates for two counsel. Technically, the certification for two counsel should occur only in a murder case or where exceptionally the interests of justice so require. Yet, one knows that the certification of two counsel occurred in cases that, on the face of it, appeared to be far from exceptional. That is why I suggested that a useful addition may be the requirement for reasons to be given by a judge who considers that the exceptionality condition has been met in a particular case.

**Mr McCartney:** You could see a scenario at the end of every trial where, after the person has been found guilty, there is perhaps a long discussion about the reasons why the case is exceptional. I

wonder whether it would be better if the clause read, "It is a minimum sentence" or, "It is not a minimum sentence". That is what I suggest.

**Mr Larkin QC:** There are arguments about the potentially excessive rigidity of a minimum sentence regime. This bridges the gap between ensuring that the legislature is able to impose its views legitimately on the judicial branch of government while ensuring that injustice does not occur because of some truly — let us use the word — exceptional case that merits a different approach. That is why I think that one further preserves the harmony by insisting upon a provision that requires reasons to be given for the exceptionality.

**Mr McCartney:** In your opinion, the word "immediate" should come before "custodial", because you can get a custodial sentence that is suspended.

**Mr Larkin QC:** Absolutely.

**The Chairperson:** Do any other members have any questions?

**Mr A Maginness:** I have one question, Chair. I assume that, with clause 8, Lord Morrow is intending to try to give as wide as possible immunity to genuine victims of human trafficking. Would a better way of addressing that not be to look at the code for prosecutors to see whether that is reflective of the necessary flexibility that a prosecutor has?

**Mr Larkin QC:** I agree, and I think that I said that. I would add to that the section 8 guidance that I circulated to the Committee.

**Mr A Maginness:** As the Attorney General.

**Mr Larkin QC:** Yes.

**The Chairperson:** No other members want to come in on this issue.

Attorney General, while I have you in front of me, I want to ask you about the issue of on-the-runs, which members have spoken to me about, and which I will get to later in the Committee's business. A number of members have obviously asked about you as the Attorney General, because there were a lot of references to an Attorney General being involved in the process. What was your involvement in the scheme?

**Mr Larkin QC:** I have always wanted an opportunity to say this: "Not me, guv". *[Laughter.]* The references to the Attorney General that you will have come across do not refer to me. I had no part in the devising or administration of any scheme of that nature.

**The Chairperson:** You have a consultative role with the PPS. Has that ever been engaged?

**Mr Larkin QC:** The consultative role — I spoke to the Committee about this — is a rather curious one, in the sense that the director and I have a statutory discretion to consult one another on matters for which the Attorney General is responsible to the Assembly or on matters for which the Attorney General is responsible, but I do not have responsibilities. Once I have appointed a director and deputy director and have been consulted on the content of the code for prosecutors, which Mr Maginness mentioned lately, and tiny matters of that nature, I do not have to be consulted, and I certainly have not been consulted on the operation of the scheme.

**The Chairperson:** OK. I am not going to ask you questions about your view on the legality of the scheme pre- and post-devolution, because I know that some members want to seek your opinion on that, and because I do not want to bounce it on you at this stage. However, we may wish to engage your services.

**Mr Larkin QC:** First, I am very grateful for your forbearance, Chairman. As you know, it is matter on which I may be asked to advise Ministers or, as you say, on which I may be asked for advice by the Committee. In those circumstances, I would not be happy to informally offer a view at this stage. In addition, there are factual issues on which I am simply not sighted, so that too militates against the expression of even a tentative view at this stage.

**The Chairperson:** Mr Larkin, thank you for coming to the Committee.

**Mr Larkin QC:** A pleasure as always, Chairman. Thank you very much.