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**RESEARCH REPORT FOR WOMEN'S CENTRE, TREBINJE**

**23 OCTOBER 2008**

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## **INTRODUCTION**

This report is prepared by the London office of Dewey LeBoeuf for the Women's Centre, Trebinje in order to provide materials on women's issues for the conference taking place in Bosnia, Herzegovina on 29 October 2009. We have divided the report into four sections: (i) domestic violence, (ii) discrimination and other gender related issues, (iii) rape and (iv) trafficking. Each section deals with the UK law on that issue, how the law is enforced and the extent to which victims have access to justice and the broader social schemes in place to tackle the underlying problems.

Rather than attempting to limit the scope of the report, we have been inclusive in the information provided and you may find some parts more relevant than others. If you require more information on any particular part of the report we are happy to provide you with more materials, so far as they are available. Please note that this report is only intended only as source material for your purposes and does not contain any legal advice and should not be relied upon by any person for the purposes of taking any legal action.

We hope that this report is useful to you and have enjoyed this opportunity to assist you. Please let us know if you have any questions arising out of the material provided.

## **PART 1: DOMESTIC VIOLENCE**

### **SECTION 1: LEGISLATION AND CASE LAW**

#### **A. Civil Law**

Part IV of the Family Law Act 1996 sets out the legislation regarding non-molestation and occupation orders. Eligibility for orders depends on the type of order, and the relationship between the applicant and the other party. To apply for an order the applicant must be 'associated' with the person against whom they wish to take out an order.

S.62 (3) of the Family Law Act 1996 originally defined 'associated persons' as people who:

- are or have been married to each other, or cohabiting;
- have lived in same household (other than one of them being the other's tenant, lodger, boarder or employee);
- are relatives (this is defined to include most immediate relatives);
- have agreed to marry (evidenced by a written agreement, the exchange of a ring, or a witnessed ceremony);
- in relation to a child (they are both parents, or have or have had parental responsibility for a child); and
- are parties to the same family proceedings.

#### **1. Non-molestation orders**

Under s.42 of the Family Law Act 1996, non-molestation orders prohibit a person from molesting another person associated with him or any relevant child. An order prohibiting molestation can include either general or particular acts of molestation, none of which need be overtly 'violent', and can be used to order someone to stop using or threatening violence against (usually) a woman or a relevant child, or to stop intimidating, harassing, or pestering them. In deciding the outcome of any application, courts must have regard to the health, safety and well-being of the applicant or any relevant child. 'Health' is defined broadly in s.63(1) to include both physical and mental health.

Case law has evidenced<sup>1</sup> that, although there is no legal definition of molestation, the word clearly implies quite deliberate conduct aimed at a high degree of harassment, which must be sufficient to call for the intervention of the court. The courts also take a strict approach when applying s.63. For example in *G v F (Non-molestation order)*<sup>2</sup>, Magistrates refused to hear an application for a non-molestation order, on the grounds that both parties lived for much of the time in separate households and so were not strictly "associated persons".

#### **2. Occupation orders**

An occupation order regulates the parties' occupation of their present, former or intended home and may take a number of forms, including:

- (a) enforcing the applicant's right to remain in the home;

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<sup>1</sup> *C v C (Non-molestation order)* (1997) Times 16/12/97, Brown P

<sup>2</sup> (2000) Times 24/5/00, Wall J

- (b) requiring the other party to allow the applicant to enter and occupy the home;
- (c) prohibiting, suspending, or restricting the respondent's right to occupy the home; and
- (d) excluding the respondent from the home itself and/or from a defined area in which it is situated.

### 3. Who can apply for an occupation order?

Occupation orders may be granted under five different sections of the Act depending on the nature of the relationship of the parties and whether the applicant has an existing right to occupy the home. The parties must first be "associated". Application for orders may be made:

- (a) s.33, by a person who is entitled to occupy the home because she is either a legal owner or tenant, or has matrimonial home rights in relation to it against another person with whom she is associated, whether or not that person is also entitled to occupy the home - married couples and cohabitants and others who are sole or joint owners or tenants of their home. An order can be made for a specified period or until further order.
- (b) s.35, by a former spouse who is not entitled to occupy the home or who has matrimonial home rights in relation to it against his or her former spouse who is so entitled. An order under this section can only be made for an initial period of six months, but can be extended for periods of up to six months on one or more occasions.
- (c) s.36, by a cohabitant or former cohabitant who is not entitled to occupy the home against the other cohabitant or former cohabitant who is so entitled. An order under this section can be made for six months, and can be extended for one further period of up to six months.
- (d) s.37, by one spouse or former spouse against the other spouse or former spouse where neither of them is entitled to occupy the home. This situation could include a couple lodging in a relatives' or friend's house, or squatting. An order can be made for up to six months, and extended on one or more occasions, for further periods of up to six months.
- (e) s.38, by one cohabitant or former cohabitant against the other cohabitant or former cohabitant, where neither of them is entitled to occupy the home. An order can be made for up to six months, but can be extended for a further period of six months.

The Court must apply the 'balance of harm' test with regard to children, which in some cases will oblige the court to make an order. In applications under s.33, it is mandatory for the court to apply the test, the results of which override other criteria. In applications under sections 36 and 38, the court is required to have regard for the test but it does not override. The application of this test is evidenced in *B v B (Occupation order)*<sup>3</sup> where following repeated bouts of violence, a wife left the marital home, shared with her husband and his son, with her daughter. The Court of Appeal overturned the circuit judge's grant of an occupation order against W's husband, though the judge acknowledged that W and her daughter would also suffer harm, on the grounds that her husband's son would suffer more by virtue of being made to leave his school and his home.

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<sup>3</sup>(1999) Times 5/1/99, CA

## **B. Criminal Law**

There is no specific offence of domestic violence in English criminal law but many forms of domestic violence are crimes e.g. assault and battery. The criminal law and the courts perceive harm in terms of specific incidents, and will usually require some evidence of physical injury or harm as proof that a crime has been perpetrated, in the absence of independent witnesses. 'Actual bodily harm' has also been defined by case law to include shock and nervous conditions, suggesting that more recognition is now being given to the psychological effects of abuse both directly and indirectly on the survivor/victim. Nevertheless, this 'incident-focused' system does not adequately address many aspects of ongoing coercive, abusive and threatening behaviour, and often ignores the psychological effects and harm that this can cause.

### **1. Domestic Violence Crime and Victims Act 2004**

This Act includes a range of measures that aim to increase the safety of domestic violence survivors and link some criminal and civil remedies. The Act includes:

- (a) Breach of non-molestation order is now a criminal offence;
- (b) New offence - Causing the death of a child or a vulnerable adult:
  - (i) If a child or vulnerable adult dies as a result of the unlawful act of a person who was a member of the same household as him and had frequent contact with him, and at that time there was a significant risk of serious physical harm being caused to the child or vulnerable adult by the unlawful act of such a person, then any person who at the time of the act was a member of the same household as the child or vulnerable adult and had frequent contact with him is guilty of an offence if:
    - (A) he was the person whose act caused the death;
    - (B) he was, or ought to have been, aware of the risk of serious physical harm being caused to the child or vulnerable adult by his unlawful act, he failed to take such steps as he could reasonably have been expected to take to protect the child or vulnerable adult from the risk, and the act occurred in circumstances of the kind that he foresaw or ought to have foreseen.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, to a fine, or to both;

- (c) Extension of restraining orders to any offence – on conviction or acquittal if there is a continued risk;
- (d) Extending availability of injunctions to same sex couples and those who have never cohabited;
- (e) Statutory Domestic Violence homicide reviews for adults; and
- (f) Victims' Code of Practice and Commissioner for Victims and Witnesses. The Code should ensure that domestic violence survivors are given clear information about the whole criminal justice process from the reporting of an incident through to prosecution and sentencing and inform of what support is available.

## **2. Legislation facilitating the prosecution process for women survivors of domestic violence**

Section 23 of the Criminal Justice Act 1988 allows the Crime Prosecution Service ("CPS"), in very limited circumstances, to use the victim's statement as evidence without calling the victim to court. They have to prove beyond reasonable doubt that the person who made the statement is afraid to give evidence or is being kept out of the way. The victim does not have to give evidence to prove that he or she is afraid. This proof can come from someone else, for example a police officer or doctor or sometimes it can be seen from the victim's behaviour in court. If the court decides that the statement can be used under section 23, it must then decide whether, in the interests of justice, the statement should be used in this way.

The Youth Justice and Criminal Evidence Act 1999 introduced 'special measures' for all vulnerable or intimidated witnesses, from 2002. A victim can request that the measures are made available, and these may include the following:

- (a) Physically screening the witness (whether vulnerable or intimidated) from the accused in Crown Court;
- (b) Evidence from the witness by live link (whether vulnerable or intimidated) in Crown Court and Magistrates' Courts and for child witnesses in cases involving sexual offences, violence (including threats and cruelty) in Magistrates' Courts;
- (c) Evidence (whether a vulnerable or intimidated witness) given in private in Crown Court and Magistrates' Courts;
- (d) Removal of wigs and gowns in Court – (not applicable for magistrates); and
- (e) Use of video recorded evidence in chief for vulnerable witnesses in Crown Court and for child witnesses in cases involving sexual offences, violence (including threats and cruelty) in Magistrates Courts.

While the immediate arrest and removal of the abuser by police will often be helpful in providing many women and children with much needed 'breathing space' and time to consider what they should do, proceeding with prosecution may not, however, always be in their best interests.

### **C. Relevance of European Convention of Human Rights ("ECHR") to Domestic Violence**

The ECHR has been enshrined in English law under the Human Rights Act 1998 ("HRA"), and should be considered in relation to domestic violence cases and investigations, with the aim of striking a fair balance between right of the individual and rights of the community.

## **SECTION 2: ACCESS TO JUSTICE**

### **A. Government Responsibilities**

An Inter-Ministerial Group on Domestic Violence leads Government action to ensure that all key interdepartmental areas dealing with domestic violence policy are coordinated. The Government's strategy for dealing with domestic violence is based on prevention, support, protection and justice, and it monitors progress by way of an annual report. The Government welcomed the Select Committee (of the House of Commons) Report on Home Affairs<sup>4</sup> and it

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<sup>4</sup> Domestic Violence, Forced Marriage and "Honour"-Based Violence- Sixth Report of Session 2007/08

has established the National Domestic Violence Delivery Plan setting out a number of interventions.

None of the outcomes of the National Delivery Plan focus on prevention and early intervention, and the Government's focus remains disproportionately based on criminal justice responses. More needs to be done on preventing domestic violence from occurring in the first place and on ensuring the long-term safety of the victims. Women's Aid argues that there is an over-emphasis on a gender-neutral approach which is not effective because evidence shows that men who report domestic violence often have different experiences than those which women report.<sup>5</sup>

- Special Domestic Violence Courts ("**SDVCs**")

SDVCs represent a partnership approach to domestic violence by the police, prosecutors, court staff, the probation service and specialist support services for victims. These bodies work together in order to identify, track down and risk assess domestic violence cases, support victims and share information better so that more offenders are brought to justice. The Home Office intends that specialist courts should enable domestic violence to be fast-tracked and to be heard by specially trained magistrates.<sup>6</sup>

There is evidence of a significant increase in successful prosecutions where specialist courts are used.<sup>7</sup> The most successful SDVCs are those with strong multi-agency partnerships, effective systems for the identification of cases, focus on supporting victims at court, good training, dedicated staff and criminal justice perpetrator programmes.

Women's Aid, in response to the Select Committee Report, recommended that:<sup>8</sup>

- (a) the establishment of a national programme which monitors and evaluates SDVCs;
- (b) the development of SDVCs which integrate criminal, civil and family applications;
- (c) all magistrates, judiciary and court staff (in SDVCs and other courts) be trained in domestic violence issues; and
- (d) IDVAs be independent specialists, employed by specialist domestic violence organisations and have long-term secure funding to provide gender-specific services.

- Independent Domestic Violence Advisors ("**IDVAs**")

These advisors provide professional support to victims as they proceed through the criminal justice system and they act as a single point of contact. IDVAs help throughout the duration of their case, from pressing charges to going to court and they also help with housing, health and other related issues.<sup>9</sup> Since introducing these IDVAs the number of victims not wanting to press charges has dropped and there has been a much greater awareness about children who may potentially be at risk.<sup>10</sup> However each IDVA is hugely overstretched and there is a shortage of IDVAs with each advocate managing on average 150 cases.

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<sup>5</sup> Women's Aid Response to Domestic Violence, Forced Marriage and "Honour"-Based Violence- Sixth Report of Session 2007-08

<sup>6</sup> The SDVC Review 2007-8 'Justice with Safety'

<sup>7</sup> Domestic Violence, Forced Marriage and "Honour" para. 277

<sup>8</sup> [www.womensaid.org.uk](http://www.womensaid.org.uk)

<sup>9</sup> UK Report on National Campaign action carried out within the framework of the Council of Europe Campaign to Combat Violence against Women, including Domestic Violence.

<sup>10</sup> *Ibid.*



There have been complaints that the IDVAs are obtaining resources that had previously funded outreach workers and related community-based support. IDVAs only support the most high-risk victims so there is a feeling that those at lower risk, or those who do not go into refuge provision, are not obtaining any support at all.<sup>11</sup> The Government must ensure that it provides sufficient additional resources to implement its IDVA programme and not cease funding for existing services.

- Multi-Agency Risk Assessment Conferences ("**MARACs**")

MARACs are meetings between a range of statutory and voluntary agencies and they provide a forum for sharing information and taking action to reduce future harm to very high-risk victims and their children. By 2010/11 it is intended that MARACs will be operational in every area in the UK.

Evidence has shown that the participating agencies lack time and resources to attend regular and lengthy meetings.<sup>12</sup> Women's Aid recommends that the government should commission a qualitative review of the impact of MARACs on victims because their repeat victimisation monitoring is not adequate.

- No Recourse to Public Funds ("**NRPF**")

Research by the Southall Black Sisters shows that there are at least 600 women in the UK who have an insecure immigration status and are experiencing domestic violence.<sup>13</sup> The NRPF rule says that a woman subject to immigration control has no entitlement to welfare benefits, to Home Office asylum support for asylum seekers, or to public housing. However these are the benefits victims need in order to escape domestic violence and a report by Amnesty International UK concluded that the NRPF rule was disproportionate and violated human rights such as the right to life and the right to be free from inhuman and degrading treatment.<sup>14</sup>

The Government has very recently implemented a new scheme whereby NRPF teams advise these people on their personal circumstances and seek to find a solution to their destitution. In limited circumstances the council also provides care services, including accommodation and financial support. However a non-governmental Campaign to Abolish No Recourse to Public Funds has been established which aims to change the law so that women who have experience domestic violence, and who have an insecure immigration status, can access public funds. Women's Aid recommends that women experience domestic violence should be exempt from the NRPF rule.

- Sexual Assault Referral Centres ("**SARCS**")

These were introduced to ensure that victims were receiving appropriate mental and physical care and they are jointly funded by the local authority, health services and the police. Independent Sexual Violence Advisors have also been introduced to provide support for victims in a similar manner to IDVAs. There are currently 19 SARCS in place but the Government is committed to developing a SARC in every police force area by 2011.<sup>15</sup>

- Perpetrator Programmes

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<sup>11</sup> *Ibid*, para. 95

<sup>12</sup> Domestic Violence, Forced Marriage and "Honour" para. 92

<sup>13</sup> How Can I Support Her? Domestic Violence, Immigration and Women with no recourse to public funds by Southall Black Sisters and the Women's Resource Centre

<sup>14</sup> No Recourse, No Safety, The Government's failure to protection women from violence 2008, page 19

<sup>15</sup> Domestic Violence, Forced Marriage and "Honour" para. 92

These programmes attempt to tackle the root causes of domestic violence by helping the perpetrator understand why they use violence and to ensure that they take responsibility for this violence whilst teaching them behaviour strategies to prevent further abuse. There is need for better research because there is no hard evidence of the effectiveness of perpetrator programmes in the UK and the Probation Service needs to implement a better method of collecting data.<sup>16</sup> The shortage of places on these programmes means that some victims are not able to be protected from further attack.

Women's Aid recommends that all those convicted of domestic violence offences should be referred to perpetrator programmes, whatever level of offence they have committed, and that victims should be offered support as soon as the perpetrators are referred to these programmes.

## **B. Police**

The top level of the police service has made a commitment to improve the police response but many individual officers are still failing to deal properly to domestic violence.<sup>17</sup> The police service needs to ensure that every individual police officer is promptly trained to respond to domestic violence.<sup>18</sup>

Only a minority of domestic violence incidents are reported to the police and even fewer actually result in arrest or charge. Failure by the police to adequately assess the risk of harm to victims has, in some cases, resulted in homicides which could have been prevented.<sup>19</sup> There is a lack of awareness of the circumstances likely to trigger domestic violence and a failure to recognise risk factors in the perpetrator's history.<sup>20</sup> There is no guidance or a single risk standard by which to assess the likelihood of domestic violence but such a regime between all of the relevant agencies would improve overall consistency.<sup>21</sup>

The overall conviction rate for domestic violence is extremely low at around 5% and the reasoning for this is a mixture of the difficulty of finding sufficient evidence of abuse to pass the evidential burden required, a high rate of retraction of statements by victims and further attrition once cases reach court.<sup>22</sup>

The Domestic Violence, Crime and Victims Act 2004 introduced a new criminal offence for breach of a non-molestation order by making it a criminal offence punishable by up to five years imprisonment. However some police only issue cautions for breaches of injunctions (including for breaches of non-molestation orders). This is wholly inappropriate and dangerous in cases of domestic violence and the police service must ensure all police officers are explicitly instructed not to issue cautions and that the Crown Prosecution Service must charge for breaches of injunction.

Women's Aid, in response to the Home Office Report, recommended mandatory training for all officers on the dynamics of domestic abuse, risk assessment, risk management of perpetrators and evidence gathering.<sup>23</sup>

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<sup>16</sup> *Ibid.*, Conclusion Para 79

<sup>17</sup> *Ibid.*, para. 201

<sup>18</sup> *Ibid.*, para. 202

<sup>19</sup> *Ibid.*, para. 191

<sup>20</sup> Report by the Independent Police Complaints Commission in July 2007

<sup>21</sup> Association of Chief Police Officers

<sup>22</sup> Domestic Violence, Forced Marriage and "Honour" para 267

<sup>23</sup> Women's Aid Response to the Domestic Violence, Forced Marriage and "Honour"-Based Violence- Sixth Report of Session 2007-08

## C. CPS

The CPS is the principal prosecuting authority for England and Wales and it has developed a policy for prosecuting cases of domestic violence and guidance on how to charge a perpetrator. The charges are intended to reflect the seriousness of what took place including any element of pre-meditation or persistence in the perpetrator's behaviour and the severity of any injury suffered.<sup>24</sup> The CPS states that it is committed to keeping victims informed and to taking their interests into account.<sup>25</sup>

In deciding whether to prosecute a defendant, a prosecutor experienced in dealing with domestic violence cases, uses two tests:

- (a) evidential test- there must be sufficient evidence to provide a reasonable prospect of conviction; and
- (b) public interest test- if the case passes the evidential test the CPS considers if a prosecution is in the public interest.

The CPS takes into account factors such as the consequences for the victim of the decision whether to prosecute and the views of the victim. The CPS sometimes, where there is sufficient evidence, continues to prosecution even when the victim has retracted their case which discourages victim and witness intimidation.

The CPS asserts that it will work alongside the police and other bodies in the criminal justice system to improve its understanding of domestic violence. Specialist rape prosecutors and rape and domestic violence coordinators have been introduced to all areas. Witness Care Officers have been introduced to ensure that a single point of contact provides support for victims and witnesses throughout the case.<sup>26</sup>

Special measures can be taken in order to allow a victim or witness to give evidence such as the use of screens in court and allowing the provision of evidence via television link and video recorded evidence.<sup>27</sup> Practical and emotional support and specialist domestic violence advocacy services are also available.<sup>28</sup> The government has invested over £3 million to improve witness waiting accommodation and 90% of Magistrates' and Crown Courts now have a separate waiting area for victims and witnesses.<sup>29</sup>

The CPS recognises that not all victims want to obtain justice via the criminal law, with some preferring the civil remedies or other support mechanisms.<sup>30</sup> It also states that it will apply domestic violence policy when dealing with criminal offences that occur in a domestic context involving victims and perpetrators whatever their age.

In December 2006 the Sentencing Guidelines Council published its guidelines on deciding sentences in domestic violence cases which were aimed at making sentencing more consistent and ensuring that perpetrators are punished properly.<sup>31</sup> As a starting point for sentencing, offences committed in a domestic context should be regarded as being no less serious than

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<sup>24</sup> CPS Policy for Prosecuting Cases of Domestic Violence 2005, para. 7.1

<sup>25</sup> *Ibid*, para. 7.6

<sup>26</sup> Domestic Violence, Forced Marriage and "Honour" para. 273

<sup>27</sup> *Ibid.*, para 9.2

<sup>28</sup> CPS Policy for Prosecuting Cases of Domestic Violence 2005, para 5.1

<sup>29</sup> UK Report on National Campaign action carried out within the framework of the Council of Europe Campaign to Combat Violence against Women, including Domestic Violence.

<sup>30</sup> CPS Policy for Prosecuting Cases of Domestic Violence 2005, para 1.5

<sup>31</sup> *Overarching Principles: Domestic Violence and Breach of a Protective Order* Sentencing Guidelines Council

offences committed in a non-domestic context. Exposure of children to an offence (directly or indirectly) is an aggravating factor because they are likely to be adversely affected by witnessing or being aware of violence.

#### **D. Legal Aid**

Legal aid helps with the costs of legal advice for victims who cannot afford to pay themselves. Whether someone is eligible depends upon the type of legal problem they have, their income and capital, whether there is a reasonable chance of winning the case and whether it is worth the time and money needed to win. In most cases the victim's husband or partner's income and capital are also taken into account therefore it often means that the victim is not entitled to legal aid despite not being able to access this money.

The lack of availability of legal aid means that some victims cannot pursue their case through the courts, particularly in civil cases. The Rights of Women (a voluntary organisation) calculated that the cost of obtaining a civil injunction ranges from £300 for self-representation in court to £3,000 for use of a solicitor.

### **SECTION 3: NON-COURT PROTECTION PROGRAMMES**

#### **1. Charities and Women's Support Groups**

There are many support groups available to victims of domestic violence and outlined below are three of the largest organisations:

##### **(a) Women's Aid**

Women's Aid is the national domestic violence charity which co-ordinates and supports an England-wide network of over 300 local organisations, providing over 500 projects which include refuge accommodation, outreach services, children's services, telephone helplines and information services. According to the charity, Women's Aid helps an average of over 250,000 women and children every year.

The charity's work is built on 30 years of campaigning and developing new responses to domestic violence. Its services include:

- (i) refuge accommodation;
- (ii) outreach services - including information services in rural areas, and specialist outreach services for women from minority ethnic communities;
- (iii) floating support - offering support and help to women whether or not they are staying in refuge accommodation. Floating support is a specific type of outreach service that is designed to support women who wish to remain in their own homes (regardless of the type of tenancy they have), or who are in emergency or other temporary accommodation;
- (iv) aftercare and resettlement - refuge organisations generally provide on-going support to women and children who have been accommodated within a refuge but have now left. This may be by follow-up work by the woman's key worker in her new home, by the woman visiting the refuge organisation, or by a resettlement worker funded through 'floating support' schemes;
- (v) support groups;

- (vi) activities and support services for children;
- (vii) independent advocacy services; and
- (viii) Freephone 24 Hour National Domestic Violence Helpline - last year over 250,000 calls were made to this helpline.

(b) **Refuge**

Since setting up the world's first refuge in 1971 for women escaping domestic violence, Refuge has grown to become the largest provider of emergency accommodation and emotional and practical support to women and children in the country and the leading voice in the campaign to end domestic violence.

Refuge's ethos is about empowerment: it encourages and supports women and children to regain control of their lives and to move forwards in a positive way. Its aim is to provide a range of services and a voice against domestic violence for abused women and children. Refuge's programme comprises:

- (i) Provision - providing high quality services to women and children, including a national helpline, places of safety, community-based initiatives and counseling;
- (ii) Prevention - helping prevent domestic violence through campaigning, education, training and research. Refuge works in partnership with other agencies to raise awareness of domestic violence, its causes and solutions; and
- (iii) Protection - advocating changes, improvements and the implementation of legislation and encouraging other agencies to develop best practice services and consistent approaches to meet the needs of women and children experiencing domestic violence.

(c) **The National Centre for Domestic Violence ("NCDV")**

This is a centre specialising in helping victims obtain non-molestation and other orders from court. It takes a statement from the victim (including details of any children) and the staff advises as to the range of remedies available and as to the whole court experience. NCDV then arranges a court date and time, and prepares the witness statement. If the victim is eligible for public funding they are allocated a solicitor to meet them at court and if not then NCDV offers assistance at court in the form of a "friend" who sits with the victim throughout the court process.

NCDV aims to get cases to court on the first working day after initial contact but also has facilities to deal with the procedure required for urgent cases. Law students from universities and training centres throughout the country, police forces and Government agencies are continually trained to help NCDV provide this service.

## 2. **Emergency Housing**

Safe housing is critical for victims of domestic violence but Government planning and funds are needed to provide this. The Department for Communities and Local Government has invested in refuge provision but there is great inconsistency between local authorities in different areas of the UK.

(a) **Refuges**

A refuge is a safe house for women and children escaping domestic violence. The address is confidential and no men are allowed in the building. A refuge is a place where women can be sure they are safe, and where they can access emotional and practical support from staff who understand what they have been through. Every woman in the refuge is escaping abuse, meaning they can share their experiences and offer each other support.

There are over 500 refuge and support services in England, Scotland, Wales and Northern Ireland. Last year nearly 42,000 women and children stayed in refuges in England. Some refuges can accommodate a number of women and children, whilst others are small houses. Some refuges are allocated specifically for women from particular ethnic or cultural backgrounds. In addition, many refuges are designed to accommodate disabled individuals and they have staff and volunteers who can assist women and children who have special needs.

Most refuges now have specialist children's workers who offer a variety of children's services including:

- (i) onsite play activities such as structured daily play sessions;
- (ii) school holiday play schemes;
- (iii) information and support in finding suitable school or nursery places;
- (iv) key sessions with mothers to look at the particular needs of each child;
- (v) information and support on legal issues concerning children;
- (vi) advocacy for women and their children in relation to other services such as social services;
- (vii) support in accessing external children's support services (e.g. counseling);
- (viii) children's meetings regarding about issues affecting them in the refuge); and
- (ix) trips out (e.g. to sport and leisure facilities) and holidays.

Refuge organisations provide information, friendship and support for current and former residents. Furthermore, some refuges have outreach services, floating support or drop-in services that women and children who have left or have never gone into the refuge can use for support.

For more information or to find a space in a refuge, victims of domestic abuse can call the Freephone National 24-hour Domestic Violence Helpline, which is run in partnership between Women's Aid and Refuge. In addition, many refuge organisations have public contact numbers, and can be contacted directly. Alternatively, it is possible to contact refuge organisations through the Police, the Samaritans, social services or the Citizens Advice Bureau.

(b) **Sanctuary Schemes**

Sanctuary Schemes allow women and children to remain in their homes by installing safety measures (extra locks, alarms, etc) therefore minimising disruption to their lives. However it has been noted that these are often used by local authorities as a

cheaper course of action than having to provide alternative housing and they should only be used when the safety of the victim can be guaranteed.<sup>32</sup> Women's Aid has recommended that these sanctuary measures should only be installed following proper risk assessment and risk management measures and with specialist support for survivors and their children incorporated into the overall costs of the scheme.

(c) **Temporary and Permanent Housing**

Women who are forced to flee their home because of domestic violence can approach their Local Authority's Homeless Persons Unit or Housing Office for help. Under the Housing Act 1996 and the Homelessness Act 2002 if a victim of domestic abuse flees their home permanently or temporarily as a result of the domestic violence, their local authority has a duty to provide temporary accommodation while it decides whether the victim is in priority need for further housing assistance. Individuals are considered to be in priority if they are vulnerable because domestic violence has occurred.

Access to permanent housing for women and children who have left their homes is the key to recovery but there are significant problems with the current priority test for housing.<sup>33</sup> Due to the secretive nature of abuse, victims often find it hard to show evidence of violence and so long-term housing is given to others in the priority list. It is proposed that an amendment to the Housing and Regeneration Bill would include a new section designed to ensure that all domestic violence victims (both with and without dependent children) are given priority for housing. It is also suggested that local authorities introduce some form of support for victims, such as an interest-free loan, to assist them in their resettlement.<sup>34</sup>

**3. Social Services**

There is common myth that social services will remove children from their homes and place them in care where there is domestic violence. This is actually very rare. Social workers are trained to support mothers and work with them to try to keep the children safe from harm.

Social services can help victims of domestic violence and their children in a number of ways including:

- (a) providing information on and referral to specialist domestic violence support services;
- (b) talking to victims and/or their children about child protection concerns;
- (c) allocating a social worker to the family who can visit regularly to offer support;
- (d) arranging child protection case conferences where a variety of relevant people including the victim, other children, schools, health workers and social workers meet to plan the best ways in which to keep children safe from harm;
- (e) providing help in finding and/or paying for childcare; and
- (f) writing supporting statements to assist in any criminal and/or civil court proceedings.

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<sup>32</sup> Domestic Violence, Forced Marriage and "Honour" para 223

<sup>33</sup> Ibid., para 251

<sup>34</sup> Ibid., Conclusion para 66

#### **4. The Role of Health Professionals**

The Department of Health has introduced measures and a handbook to help health professionals identify victims of domestic violence. Around 30% of domestic abuse begins during pregnancy and one in three women seeking emergency medical treatment in inner city hospitals has suffered domestic violence.<sup>35</sup> Pregnant women are routinely screened by professionals taking a general social history, training events have been established for senior maternity practitioners and a Domestic Abuse and Pregnancy Advisory Group has been established. Consultations with health professionals may be one of the few occasions on which a victim is not accompanied by the perpetrator.

The Select Committee reports how the health service is poor in its response to these measures and there is evidence that some health professionals, General Practitioners in particular, are ignoring disclosure. Perpetrators often approach GPs or other health agencies to seek help with their offending behaviour so it is crucial that they are trained properly.<sup>36</sup> Other health professionals have not received any training at all on domestic violence.

GPs are concerned with the overall health of patients and their children and can provide support in the following ways:

- (a) treat injuries and/or depression;
- (b) provide information on or referrals to specialist domestic violence services; and
- (c) accurately record injuries and/or depression and their causes. This could be useful evidence of domestic violence in any future civil or criminal court proceedings and/or housing applications.

The British Medical Association recommends that information on domestic violence services should be available in all settings and that all professionals should practice selective and routine enquiries on patients. Research shows that doctors who have been trained are more likely to ask patients about domestic violence, and so are more likely to have patients disclose any abuse.<sup>37</sup>

#### **5. Health Visitors**

Many health visitors are trained to respond positively to mothers and children experiencing domestic violence and most will have had previous experience in working with families affected by domestic violence. Health visitors are interested in the overall health and wellbeing of mothers and children which includes the effects domestic violence has on them.

Health visitors can offer support in the following ways:

- (a) provide mothers with information on specialist domestic violence support services;
- (b) make a referral to social services if there are concerns about the safety of children;
- (c) document any injuries and/or disclosures of domestic violence which could be useful evidence in criminal and/or civil court proceedings and/or housing applications; and

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<sup>35</sup> Gazmarin J.A (2000) *Violence and Reproductive Health: Current Knowledge and Future Directions* cited in Select Committee on Home Affairs (Sixth Report)

<sup>36</sup> *Domestic Violence Perpetrators: Identifying needs to inform early intervention*, Home Office April 2006 cited in Select Committee on Home Affairs (Sixth Report)

<sup>37</sup> Glowa, Frasier & Wang (2003) cited in Select Committee on Home Affairs (Sixth Report)



- (d) reassure mothers that the violence is not their fault and that they can get help.

## **6. Child support agencies**

There are a number of agencies who can help support victims of domestic abuse and their children. These include:

- (a) Local Family Service Units offer a wide range of services including counseling and support groups for children;
- (b) Specialist children/family workers are located in many refuges across the country;
- (c) Parentline Plus is a telephone support service for parents;
- (d) Surestart is a Government programme to deliver the best start in life for every child. It brings together early education, childcare, health and family support; and
- (e) ChildLine is a free, 24-hour helpline for children and young people who need to talk.

## **SECTION 4: VIOLENCE PREVENTION PROGRAMMES**

### **1. Domestic Violence Prevention Project ("DVIP")**

Violence prevention programmes are run by organisations such as DVIP, a registered charity. The programmes are open to any man who identifies that he has a problem with abusive or violent behaviour towards women. Men may be referred to a violence prevention programme by statutory agencies including Probation Services, Social Services and the Family Courts, or they may be self referred. Statutory agencies usually fund the attendance of the men they refer. Self referrers may pay a fee for attendance based on an income-related sliding scale. DVIP has a waiting list for self referred men of up to two months for an initial assessment.

#### **(a) Individual Assessment**

All men referred to DVIP attend an individual assessment, which may take place over a number of sessions. The aim is to assess his motivation and whether he will benefit from the group programme. The criteria for acceptance on the DVIP programme are:

- The man is able to acknowledge his use of violence;
- He is able to see that his use of violence is a problem in and of itself;
- He is able to accept responsibility for ending his use of violence;
- His emotional and psychological well-being and current or previous mental health problems will not prevent him from benefiting from the programme;
- He understands the conditions that apply to his attendance on the programme; and
- His attendance is not likely to increase significantly the risk to the safety of his (ex)-partner, his children or others.

When men are referred by a statutory agency DVIP provides that agency with a detailed assessment report on the man, indicating whether it is prepared to offer him a place on the Violence Prevention Programme or giving reasons if not. In the case of Social Services and the Family Courts, risk assessments can be done over a number of sessions, including a series

of interviews with the man's (ex)-partner. In such cases the referring agencies carry out the assessment of any children involved.

**(b) Structured Group Work Programme**

DVIP's group work programme involves 32 structured sessions designed to help men to understand why they have used abusive behaviour, how they can change this, and how they can work towards constructing respectful relationships with women. Men are challenged to take responsibility for their actions rather than blaming their partners or outside factors for their violence. Men are taught to critically assess their gender based expectations of themselves and their partners.

The group work programme is specifically designed to address domestic violence. It draws on a wide range of approaches including cognitive, behavioural, social learning theory, psychodrama, psychotherapeutic and relationship skills teaching.

The structured programme is delivered in two stages. The first stage focuses on ending physical and sexual violence. The second stage is the larger part of the programme and focuses on ending other forms of abuse and developing relationship skills. The groups run on a rolling programme with a new intake of men every six weeks. Group sessions last three hours and are held weekly in the evenings.

**(c) Follow on group**

DVIP runs a fortnightly group for men who have completed the structured group work programme, providing ongoing support for men to maintain the changes they have made and encouraging non-abusive and respectful behaviour.

**(d) Individual work**

Through its experience DVIP has found that individual work does not have the same potential for supportive confrontation. It does not provide the same opportunities for men to learn from each other and break the silence which many abusers create. Accordingly, DVIP only offers individual work to men who are attending the groups but need extra support because of language or literacy difficulties, or for whom there are particular concerns about partner safety or suicide risk.

**2. Assistance for perpetrators**

Other organisations that perpetrators of domestic violence may contact or to which they may be referred include the following:

- (a) AVP London - runs workshops across the country for anybody who has difficulty with anger and communication and who wants alternatives to violence;
- (b) Everyman Project – a national helpline for anyone concerned about violence. It also offers a counseling service for violent men who want to change;
- (c) Respect – offers advice and information for perpetrators of domestic violence; and
- (d) The Freedom Programme – runs a 12 week rolling programme for any man who wishes to stop abusing women and children. Places are funded either privately or from various statutory agencies.

### **3. Cost to Society**

The cost of domestic violence to the UK economy and public services was estimated at £25.3 billion in 2005/6 which demonstrates the need to have effective prevention mechanisms in place. Acknowledgment of the vast cost of domestic violence to employers and the economy has been made by the Corporate Alliance Against Domestic Violence, a group of businesses and employers committed to tackling domestic violence in the workplace. More than 160 companies and many public sector organisations have joined the alliance which represents over two million employees.<sup>38</sup>

### **4. Public Funding**

Central government determines the overall policy agenda for government funding of voluntary and community organisations and funding can be distributed by intermediate funders such as local authorities which are better placed to decide on local priorities for funding based on their own knowledge of local need.

A report from New Philanthropy Capital on the funding of domestic violence services concluded that they were grossly under-funded in terms of government investment and charitable giving. For example, a Donkey Sanctuary's income was over double the £17m provided to the three largest charities for tackling domestic violence.<sup>39</sup>

London Councils have recently provided £720,000 towards projects tackling violence with the Women's Resource Centre receiving £600,000 to enable it to provide important advice, training and support to domestic violence organisations. This includes providing small organisations with accredited training, briefings, advice on monitoring information and quality assurance guidance.

Other charitable organisations also provide funding programmes for domestic violence such as Comic Relief, the National Lottery Charities Board, The Tudor Trust and the Heritage Lottery Fund.

### **5. Children and their contact with perpetrators after parental separation**

According to the Department of Health (2003), at least 750,000 children a year witness domestic violence. In some cases, the children themselves will suffer physical or sexual abuse from the same perpetrator.

When a parent applies for contact with his (or her) children, under the Children Act 1989, this will almost always be granted. The fundamental principle of the legislation is that the child's welfare should be paramount. It is often assumed that this principle is upheld by the child maintaining contact with both parents. In 2003, only 601 out of 67,184 contact applications were refused. In April 2001 the Good Practice Guidelines were introduced and recommended that the dangers are highlighted at an early stage in the proceedings, so that the safety of the child and the resident parent is secured before, during and after contact visits. However, despite these guidelines, the courts are criticised for failing to consider the seriousness of domestic violence in many cases. In three-quarters of cases when the courts have ordered contact with an abusive parent, the children have suffered further abuse. There have been examples of children being ordered to have contact with a parent who has committed offences against children. In some cases, children have even been killed as a result of contact or

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<sup>38</sup> UK Report on National Campaign action carried out within the framework of the Council of Europe Campaign to Combat Violence against Women, including Domestic Violence.

<sup>39</sup> Hard Knock Life: Violence against women, a guide for donors and funders, New Philanthropy Capital (April 2008)

residence arrangements. There are also many cases in which an abusing parent has used a contact visit to trace the mother's whereabouts, or to assault or otherwise abuse her further.

## **SECTION 5: DOMESTIC VIOLENCE- PUBLIC AWARENESS & EDUCATION**

Making domestic violence an issue of public concern does not provide protection to those who are affected. The House of Commons Home Affairs Select Committee (the "Committee") report on domestic violence<sup>40</sup>, together with the submissions to that report from individuals, NGOs and government bodies, acknowledges that recognition of the issue domestic violence is a key step towards addressing its causes and consequences.

The starting point is that not only that the perpetrators recognise that what they are doing is wrong, but also that the victims recognise that they have been wronged. Victims addressed the Committee in terms such as:-

*“I honestly thought it was normal for men to hit...I feel women need to know that even if they raise their voice it is not OK for a man to physically hit them”;*

*“I was not aware that I was a victim of DV. I was raped by my ex (but my line of thought there was, can a husband rape his wife?) surely they were his rights? I believed that what went on indoors was between a husband and his wife, for better or worse, unfortunately half the population agrees with me...until we recognise the abuse we are living in you are banging your head against the wall”;*

and as to the perpetrators:-

*“In my own experience I firmly believe that the perpetrator of the abuse towards me felt that it was his right as a man to control and dominate ‘his’ woman. Unfortunately that is still a commonly held belief and it needs tackling at the roots.”*

In relation to “honour”-based violence, Nazir Afzal, Director of the Crown Prosecution Service London West, said:

*“The main obstacle is the lack of awareness, the lack of education, around this issue. As much as I have been talking about it—and [others have] for many years—there are still people who are surprised by it. There is a need to make sure that everybody is familiar with the issues, everybody is aware that this is an issue not of honour, it is an issue of power and control”.*

The UK government has run three campaigns on domestic violence, focusing variously on victims and their children, the role of third parties, and on police enforcement. Previous multi-media information campaigns, nationally and locally, seem to have been effective in raising awareness.

British Crime Survey data<sup>41</sup> shows that over 60% of victims confide in their friends and family, making this group a key audience and those who may be best able to see warning signs of abuse.

Joint University of Bristol and Home Office research on perpetrators of domestic violence found that “perpetrators interviewed said that adverts in newspapers and on the radio for

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40 Domestic Violence, Forced Marriage and “Honour”-Based Violence- Sixth Report of Session 2007–08

41 Volume II Evidence at 250

services would be useful to highlight domestic abuse behaviour and direct them to services”.<sup>42</sup> The report recommended that further campaigns be carried out, but that any coordinated information campaign must ensure that phone-lines, support agencies and perpetrator programmes are allocated sufficient resources to deal with the corresponding surge in demand for their services.<sup>43</sup>

The Committee also emphasised the key role that schools could play, both in educating children about domestic violence and in providing opportunities for victims to come forward and access support. At present there is no explicit statutory requirement for schools to educate pupils about domestic violence. However, some individual schools have introduced domestic violence into the classroom, often in partnership with local voluntary organisations, many of which develop and deliver educative programmes, both in schools and in the community. Examples of good practice include the Newham Asian Women’s Project which carries out targeted work with young people, including sessions in schools, local youth centres and at the Project’s resource centre. Through working with five schools they reached 605 young women.

Despite this, there is also resistance to introducing teaching on domestic violence into schools. Teachers have appeared concerned that the parents might complain. The reluctance of schools to deal with such sensitive issues is still stronger with respect to forced marriage, an issue that remains more culturally sensitive in the UK than domestic violence in the broader sense. Nicola Harwin, Chief Executive of Women’s Aid, reported that

*“there is a lot of work being done on developing tools. That is not so much the problem. It is the will inside schools to deliver it and creating time for teachers”.*

The report welcomed the (governmental) initiative by the Department for Children, Schools and Families to design ‘school-friendly’ materials in relation to forced marriage. However, the Committee was alarmed by the evident resistance of some schools and local authorities to displaying information, particularly on forced marriage. Whilst schools should retain discretion about the most appropriate way to display materials, it is clear from accounts that schools can provide a lifeline to vulnerable pupils by providing information on support services.

## **SECTION 6: CONCLUSION**

Legislation in the UK is wide reaching in the area of domestic violence and the Domestic Violence Crime and Victims Act 2004 has introduced important measures to increase the criminal penalties that apply to domestic violence offences.

In terms of court procedure, specialist courts have shown that successful cooperation between the various actors (i.e. the support workers, the magistrates and judges and the court staff) increases the chance of successful convictions. Independent Domestic Violence Advisors (“IDVA”) have also increased the likelihood of conviction, however, there are not enough IDVAs for all the domestic violence cases that arise, meaning that some ‘lower risk’ cases do not receive adequate assistance.

Once a matter comes to trial, there are measures in place whereby victims are permitted to give evidence anonymously or in a protected manner.

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<sup>42</sup> University of Bristol and Home Office, *Domestic Violence Perpetrators: Identifying Needs to Inform Early Interventions* (April 2006), p16

<sup>43</sup> Volume II Evidence at 256 (Mayor of London); 382 (Men’s Advice Line)

Police, health professionals and social workers all play a role in identifying cases of domestic violence and helping to bring them to justice. Lack of education about domestic violence has been identified as an issue which may prevent victims being given the right support. In addition, police in some cases do not pursue breaches of non-molestation orders to the full extent allowable by law.

Various governmental and non-governmental groups are working to help abuse victims come forward and seek help and to provide accommodation and support services. However, funding issues restrict the resources available to these groups and in some cases lack of coordination between the various organisations acting to help women has limited their effectiveness.

Finally, as domestic violence primarily takes place in private homes, public education is required to encourage victims not to tolerate violence and to give them assurance that support is available, whether or not they leave the marital home.

## PART 2: DISCRIMINATION AND OTHER GENDER INEQUALITY ISSUES

### SECTION 1: LEGAL PROVISIONS

Prejudicial treatment that contributes to social inequalities tends to come from a combination of factors:<sup>44</sup>

- (a) negative stereotyping;
- (b) expectations of conformity to norms of behaviour that reflects the expectations and values of dominant groups, and which is frequently gendered; and
- (c) lack of understanding of the specific needs and perspectives of disadvantaged groups, combined with the failure to incorporate these needs in decision-making processes.

Legal protection of gender equality generally comes in two forms: either equality clauses, which are more the province of constitutions (and more commonplace in other countries with codified constitutions, e.g. the US Equal Protection Clause) or anti-discrimination legislation. There is a subtle but crucial distinction between the two. Equality clauses tend to be free-standing constitutional guarantees that are general and vague, whereas anti-discrimination legislation is much more specific and is what is relied on in day-to-day legal practice.

The main focus of the legislation is on "tackling discrete and abnormal acts of discriminatory treatment which produce prejudicial impact upon particular individuals."<sup>45</sup>

#### 1. International Treaties and Conventions

The right to be free from discrimination is echoed in Articles 2(1), 3 and 26 of the ICCPR and Article 141 of the (amended) EC Treaty.

The Council Directive 76/207/EEC<sup>46</sup> is the foundation of EU law and policy in the area of gender equality in employment. Moreover, the European Union has recently taken concrete steps to address sexual harassment in its Member States. In August 2006, EU Directive 2006/54/EC<sup>47</sup> on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (re-cast version) came into force. In September 2002, the European Parliament and Council adopted Directive 2002/73/EC<sup>48</sup> amending Council Directive 76/207/EEC as regards access to employment, vocational training and promotion, and working conditions.

European Union directives have a direct effect on Member States, but they require the adoption of implementing legislation on the Member State level.

#### 2. Equal Pay Act 1970

The short title of the Equal Pay Act 1970 ("**EqPA**") describes it as "an Act to prevent discrimination, as regards terms and conditions of employment between men and women",

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<sup>44</sup> Fredman, S. (2001) *Discrimination Law*, OUP, Oxford, 22-23

<sup>45</sup> O'Conneide, C. "Positive Duties and Gender Equality" [2005] *International Journal of Discrimination and the Law* 91-119

<sup>46</sup> [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31976L0207&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31976L0207&model=guichett)

<sup>47</sup> [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l\\_204/l\\_20420060726en00230036.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_204/l_20420060726en00230036.pdf)

<sup>48</sup> <http://www.ei-ie.org/payequity/EN/docs/EU%20Documents/2002%2073.pdf>

thus implementing the principle that men and women should receive equal pay for equal work, as set out in Article 141 of the EC Treaty, into the law of Great Britain.

It provides that a woman employed "at an establishment in Great Britain" is entitled to enjoy contractual terms that are as favourable as those of a male comparator in the "same employment", provided the woman and the man are employed on equal work (that is, like work, work rated as equivalent or work of equal value).

The EqPA achieves this by implying an "equality clause" into the woman's contract of employment, which operates so as to replace her less favourable term(s) with the equivalent more favourable term(s) of the man's contract. Each term of the contract must be considered separately.

However, the equality clause will not amend the woman's contract if the employer shows that the difference in contractual terms is due to a genuine material factor ("GMF") which is not the difference of sex (for example, performance-related reasons, seniority, historical reasons, different hours, different work, market forces, etc). "Not the difference of sex" implies that the GMF must be neither directly nor indirectly discriminatory: therefore a GMF that is ostensibly gender-neutral but which, in practice, has a disproportionate adverse impact on women's pay will need to be objectively justified by the employer.

The EqPA was amended in 2005 to introduce a number of specific provisions aimed at protecting women's pay during pregnancy and maternity leave. A woman who has taken maternity leave must not lose the benefit of any pay rise that she would otherwise have had, in calculating either her maternity pay or her pay on return to work. Furthermore, she must not lose out on any bonus that she would otherwise have received during her maternity leave, to the extent that it relates to the period before her maternity leave, any period of compulsory maternity leave, or the period after she returns to work. Again, these provisions operate by way of an implied equality clause to amend the woman's contract, but there is no need in such cases for a male comparator to be identified.

A claim under the EqPA can be brought in an employment tribunal, which can make a declaration of the claimant's rights and require payment of any arrears of pay or damages for breach of a non-pay term.

The EqPA was originally quite narrow in its scope, focusing only on employment contracts and ignoring all of the other employment-related issues where gender inequality could arise, for example promotion, recruitment, appraisals, maternity and paternity leave, etc. However, it was made clear in the case of *Peake v Automotive Products Ltd*<sup>49</sup> that for all extra-contractual matters, or those that don't relate to pay (eg the terms of a job offer, promotion, discretionary bonuses, etc), a disgruntled employee can rely on the wider Sex Discrimination Act 1975 ("SDA 1975"). More recently, the gender equality duty on public authorities and the Equal Pay Act 1970 (Amendment) Regulations 2003 have managed to plug this gap, but the legislation still only offers a patchwork of protection.

### **3. SDA 1975**

The SDA 1975 sets out the circumstances where a person can claim sex discrimination against an employer. Initially the Act only dealt with pre-employment activities such as the recruitment process, the terms on which a job is offered, and discriminatory activities once a person becomes an employee. The Sex Discrimination Act 1975 (Amendment) Regulations 2003<sup>50</sup> amended the Act to cover post-termination discrimination. This amendment was

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<sup>49</sup> [1977] ICR 480

<sup>50</sup> SI 2003/1657



preceded by the decisions in *Coote v Granada Hospitality Ltd*,<sup>51</sup> a case referred to the European Court Justice, which ruled that the Equal Treatment Directive No 76/207 did cover post employment discrimination. When the case reverted back to the Employment Appeal Tribunal, it was held that the SDA 1975 should be interpreted consistently with the Equal Treatment Directive, i.e. to include post-termination discrimination.

The Sex Discrimination Act 1975 (Amendment) Regulations 2008 came into force on 6 April 2008 and once again brought the SDA 1975 into line with the Equal Treatment Directive.<sup>52</sup> The regulations make a number of changes to the law on harassment and the rights of employees who are pregnant or on maternity leave.

#### **4. Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006**

The Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006 represents an important step forward in the area of enforcement of anti-discrimination laws in the UK. The order contains a schedule of "listed authorities" that had the obligation to introduce a gender equality scheme by 30 April 2007, as part of the public-sector gender equality duty. The list includes all governmental departments, county, borough and district councils, local education authorities, state school governing bodies, higher education establishments, police authorities, probation boards, NHS trusts and the armed forces.

The gender equality scheme must set out how the listed authority intends to meet its obligations under the general duty, and must be implemented following consultation with employees, service users and others (including trade unions) who appear to have an interest in the way it carries out its functions. The listed authority must report annually on the steps it has taken to implement the scheme, and must revise the scheme every three years. As well as the general statutory duty to promote gender equality, certain public sector bodies may also be bound by specific duties, including a duty to prepare and publish a gender equality scheme.

A case worth mentioning in the context of application of sex discrimination laws in employment is *R v Secretary of State for Employment ex p EOC and Day*.<sup>53</sup> The case was recognized as a constitutional landmark because it is a confirmation by a the House of Lords in a case which attracted public attention that provisions of a UK act of Parliament can, in effect, be illegal and the House of Lords held that it can be proper for applications for judicial review to be made in this type of case (i.e. where a declaration of public rights is looked for).

The case radically improved the rights of part-time workers who normally worked at least eight hours per week in one employment. The House of Lords decided that the 16 hour per week "threshold" was incompatible with EC law in so far as it relates to unfair dismissal and redundancy pay rights. The decision was based on the fact that the vast majority of part-time employees are female. Therefore a requirement that part-time employees must fulfill more onerous conditions than full-timers to qualify for rights under the redundancy and unfair dismissal legislation can be unlawful sex discrimination contrary to article 119 of the Treaty of Rome and EC/EU Council Directives 75/117/EEC (equal pay) (in the case of redundancy pay rights) and 76/207/EEC (equal treatment) (in the case of unfair dismissal rights).

#### **5. HRA**

The HRA came into force in October 2000 and it effectively incorporated the ECHR into UK law, essentially making the Articles of the ECHR binding upon public authorities and enforceable in the British courts.

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<sup>51</sup> Unreported, Employment Appeal Tribunal, 19<sup>th</sup> May 1999

<sup>52</sup> 76/207/EEC

<sup>53</sup> [1994] ICR 317, HL and [1994] IRLR 176

The ECHR does not contain a free-standing equality clause, however its Article 14 provides for protection from discrimination. The only stumbling block to its use is that a litigant must prove that their case comes within the ambit of another Convention right first (e.g. Article 8 on the right to respect for private and family life, or Article 6 on the right to a fair trial, etc) before Article 14 can be engaged. Therefore, cases in this area tend to be haphazardly pigeon-holed into another relevant Convention right rather than being characterised as a discrimination case per se. This is particularly true in the context of employment which does not get any specific stand-alone protection in the ECHR. For example, in the 2004 employment case *Sidabras v Lithuania*, the ECHR accepted in a rather convoluted way that "not being excluded from meaningful and gainful employment" could come within the ambit of Article 8, as there was sufficient interference with the claimants' way of life, and therefore Article 14 could be engaged. Discrimination cases through the HRA have therefore required the boundaries of other human rights to be stretched.

Article 14 has been described by commentators as the ECHR's weak link. One plan by the Council of Europe to remedy this problem has been Protocol 12 which introduces a free-standing equality clause. However, the UK continues to refuse to ratify it, mostly due to its uncertain impact and implications for the private sphere.

## 6. Gender Recognition Act 2004 ("GRA")<sup>54</sup>

The purpose of this Act is to provide transsexuals with legal recognition of their acquired gender. This recognition can be obtained by virtue of the issuance of a full gender recognition certificate by a Gender Recognition Panel. In order for such a certificate to be issued, an applicant must satisfy the Panel that he/she:

- (a) has, or has had, gender dysphoria,
- (b) has lived in the acquired gender throughout the preceding two years, and
- (c) intends to continue to live in the acquired gender until death.

Where an applicant has previously been recognized under the law of another country or territory as having changed gender, the Panel need only be satisfied that the country or territory in question has been approved by the Secretary of State.

In *Goodwin v The United Kingdom*<sup>55</sup> and *I v the United Kingdom*<sup>56</sup>, the Court found that the UK had breached the Convention rights of transsexuals under Articles 8 (right to a private life) and 12 (right to marry). It was held that the UK government has a positive obligation under international law to secure the Convention rights and freedoms and must rectify these and any ongoing breaches.

Furthermore, *Goodwin* reaffirmed that the legal sex of a post operative transsexual was the sex to which they had been medically reassigned.

This Act attempts to rectify the obvious deficiencies with the Matrimonial Causes Act 1973 which were highlighted in the case of *Bellinger v Bellinger*<sup>57</sup>. Here it was held that the 1981 marriage of a male to female transgender to a man was void due to section 11(c) of the Matrimonial Causes Act being incompatible with the HRA.

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<sup>54</sup> Incorporated by the *Gender Recognition Act 2004 (Commencement) Order 2005 SI 2005/54*

<sup>55</sup> [2002] IRLR 664

<sup>56</sup> (2002) 35 EHRR 18

<sup>57</sup> [2003] 2 All ER 593

The Act also allows a male to female transsexual to rely on pension rights attributable to a woman only whereby such a person had previously been denied any rights in this area.<sup>58</sup>

## **7. Sex Discrimination (Gender Reassignment) Regulations 1999 SI 1999 No. 1102**

Following the decision of the European Court of Justice in *P v S*<sup>59</sup> and other high profile cases, the SDA 1975 was amended by the Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102) to expressly include transsexuals where they suffer discrimination because they have undergone, or are undergoing gender reassignment.

Discrimination in the workplace as a result of a person's status as a transsexual is unlawful under the European Equal Treatment Directive/1976, and consequently the SDA 1975.

Although the implementation was restricted to Parts I and II of the SDA 1975 (covering employment and vocational education but not the provision of goods, service and housing), and although the implementation was limited with a number of "Genuine Occupational Qualifications", this legislation has an enormous effect on transsexuals because it forces employers to accommodate people undergoing gender transitions in the workplace.

The GRA amended and updated the Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102) by disapplying the aforementioned Workplace Genuine Occupational Qualifications in those circumstances. It also strengthened protection for those transsexuals who have obtained legal recognition through the granting of a Gender Recognition Certificate

## **8. The Equality Bill 2008**

There is "growing recognition that conventional EC and UK anti-discrimination law is inherently limited in respect of the impact it can have in shifting existing social norms."<sup>60</sup> The British government's response to this is the proposed Equality Bill.

According to the government's White Paper, "there are currently nine major pieces of discrimination legislation, around 100 statutory instruments setting out connected rules and regulations and more than 2,500 pages and statutory codes of practice." The proposed Equality Bill aims to consolidate, clarify, de-clutter and strengthen the existing laws, bringing them under one roof and introducing a standardised definition of indirect discrimination.

However, the most ambitious, and controversial, part of this proposed legislation is the British government's plan to introduce a new Duty of Equality on public authorities. This catch-all provision will bring together the three pre-existing equality duties on public bodies which were introduced in other regulations (on race in 2000, disability in 2005 and gender in 2006). So far, according to the White Paper, these duties have worked well and "resulted in public authorities considering more broadly the needs of women" and "brought about a positive culture change" by forcing public authorities to steer how their policies are implemented in an equality-friendly way. But the government claims that a single, streamlined duty of equality will be even more effective as public authorities will need to take a more holistic approach to equality. However, the concern with the proposed wider duty is that, whilst it has a seductive simplicity, it might be much too vague and open-ended to be effective.

Another major feature of the Bill is transparency – a word that appears frequently throughout the Bill, the White Paper and the Consultation Report – particularly in the areas of gender pay, ethnic minority employment and disability employment. This need for transparency

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<sup>58</sup> *Grant v United Kingdom* (App. No. 32570/03)

<sup>59</sup> [1996] All ER (EC) 397

<sup>60</sup> O'Conneide, C. *op.cit.*

extends to the private sphere, particularly in business, with the introduction of a new "kite-mark", and the government will gather and publish evidence on the effectiveness of equal pay audits in closing the gender pay gap. There is concern, however, as to how effective such inquiries into the private sector will be.

Other features of the Bill include:

- (a) Banning of secrecy clauses preventing people discussing their own pay;
- (b) The Equality and Human Rights Commission will conduct inquiries into particular sectors, including the financial services sector and the construction industry;
- (c) Extending positive action, allowing employers to take into account under-represented groups when faced with two equally qualified candidates. This, however, raises concerns about introducing positive discrimination through the back door;
- (d) Extending powers of tribunals and improving representation in discrimination cases;
- (e) Extending protection for women against discrimination during pregnancy and maternity; and
- (f) Non-exclusion of women from men's private clubs, though single-sex clubs will still be allowed for sports, and certain limitations can be retained.

## **SECTION 2: ENFORCEMENT OF LAWS AND ACCESS TO JUSTICE**

There is no doubt that equality initiatives are welcomed in principle but they are meaningless and have no impact unless they are backed by a strong enforcement mechanism and a clear set of legal requirements that compel action.<sup>61</sup>

As Fredman and other academics have noted, the effectiveness of anti-discrimination legislation depends mostly on the willingness and ability of individual litigants to bring actions. This seems an obvious point, but it has to be borne in mind that it is precisely the disadvantaged groups that are least able to bring complaints to the courts in the first place since they are so dependent on "financial and legal support from intermediary organisations such as trade unions, the equality commissions or community groups, who inevitably can only support a limited number of individuals, given their [own] limited funds."<sup>62</sup> Not only that but under the current law it is very difficult to establish a clear case. O'Conneide warns that, "even if reformed, these complexities will not all disappear: anti-discrimination legislation will always generate its own complexities and difficulties of proof, especially where discrimination does not take an overt form." We will look at each Act in turn, analysing how effectively they have been enforced and implemented, finishing with a discussion of positive duties under the new Equality Bill.

### **1. SDA 1975**

The gender equality duty implemented by the Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006 introduced the recognition of the need for a radical new approach to equality – one which places more responsibility on service providers to think strategically about gender equality, rather than leaving it to individuals to challenge poor practice.

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<sup>61</sup> McCrudden, C. (1996) *Mainstreaming Fairness? A Discussion Paper on Policy Appraisal and Fair Treatment*, Committee for the Administration of Justice, Belfast

<sup>62</sup> O'Conneide, C. (2002) *Single Equality Bodies: Lessons from Abroad*, Equal Opportunities Commission, London

Following the 2006 order coming into force, the EOC prepared a Code of Practice on Gender Equality Duty which gave practical guidance to public authorities on how to meet their new obligations. The Sex Discrimination Code of Practice (Public Authorities) (Duty to Promote Equality) (Appointment Day) Order 2007 put the Code of Practice into effect on 6 April 2007.<sup>63</sup>

## **2. GRA**

Prior to the Act coming into force, there was initial debate as to whether enforcement agencies would be able to enforce some provisions such as section 22; the prohibition on disclosure of information.<sup>64</sup> Section 22 prohibits disclosing any information relating to a person's gender status prior to his/her change.

Since the Act came into force over 2100 people have applied for legal recognition under the Act of which 1542 people applied using the "Fast Track" process that is focused on people who transitioned six or more years ago. Since the time the Gender Recognition Panel has been operating, applications have been made at a rate of roughly 50 to 80 per month, 98% of which have been successfully approved.<sup>65</sup> This implies that as of the date when these results were taken that people in need have had access and are making fair use of the Act.

## **3. Sex Discrimination (Gender Reassignment) Regulations 1999 SI 1999 No. 1102**

The way in which the GRA amended the Sex Discrimination (Gender Reassignment) Regulations 1999 SI 1999 No. 1102 appears to have improved the employment situation for transsexuals by increasing the availability of jobs once gender recognition is granted. Such a person is no longer limited by uncertainty with regards to Gender Recognition Qualifications.

## **4. The Equality Bill 2008 and Positive Duties**

Positive duties, such as the proposed Duty of Equality on all public authorities, go some way in solving some of the problems in the existing anti-discrimination legislation (at least in the abstract). Such duties are not intended to "prescribe fixed and definite types of positive action, or a set of socio-economic entitlements, or the delivery of particular services: instead, the duties are supposed to 'steer' how other duties and functions are performed and public powers are exercised."<sup>66</sup> Therefore, public authorities are encouraged to adopt more of a substantive equality approach aimed at remedying disadvantage rather than the formal equality approach which seeks to ensure sameness of treatment and procedure. However, "the jury remains out as to the ultimate effectiveness of this new model of equality duty" and there is concern that it might "just contribute to a growing 'tick-box' mentality and the bureaucratisation of equality."

There are both benefits and problems raised by positive duties, as identified by O'Cinneide. Some of the clear benefits of a positive duty of equality over soft-law approaches include:

- (a) Positive duties have a symbolic and educative impact, and for the first time in the UK there is a shift towards substantive equality;
- (b) Positive duties can serve as a vehicle to demand greater focus upon equality issues from public authorities; and

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<sup>63</sup> A complete list of statutory codes of practice drafted by the EOC can be found at <http://www.equalityhumanrights.com/en/foradvisers/codesofpractice/pages/codesofpractice.aspx>

<sup>64</sup> <http://hansard.millbanksystems.com/lords/2004/feb/10/gender-recognition-bill-hl>

<sup>65</sup> <http://www.wakefield.gov.uk/CouncilAndDemocracy/Policy/EqualityAndDiversity/Legislation/Default.htm>

<sup>66</sup> O'Cinneide, C. (2005) *op cit*

- (c) Compliance with soft-law measures is only really voluntary, backed up only, perhaps, by internal mechanisms that have no teeth. The implementation of such policies often only happens "when all the necessary ingredients of political goodwill, organisational capacity, sustained leadership and expert advice are in place. Even when initially implemented with some enthusiasm, mainstreaming policies tend to be vulnerable to fluctuating political will and competition from other priorities."<sup>67</sup> Such policies lack a statutory backbone. This is where positive duties can come in.

However, there are certain problems with positive duties that promote gender equality:

- (a) Some perceive such duties as introducing positive discrimination through the back door;
- (b) The dangers of tokenistic compliance, bureaucratic lassitude and deliberate neglect of the duty requirements in the absence of any external pressures on public authorities to comply with the duties;
- (c) Challenging public authorities may just result in judicial review which is both expensive and open to the possibility of negative judicial decisions actually diluting what is assumed to be required by the duty. Therefore, challenging how authorities comply with the duty requirements either has to be done via political and media criticism, or else via the equality commissions or the audit bodies; and
- (d) Under the current regime, compliance with the existing duties is monitored by the CEHR, but this remains geared towards assessing compliance with procedural goals and self-imposed public authority targets. The auditing bodies lack any real power, transparency or expertise in equality issues. One way of overcoming this issue of compliance is to rely on conventional legal routes, for example making evidence of compliance (or lack of compliance) admissible as evidence in court, giving courts and tribunals the power to draw inferences from such evidence. Courts and tribunals could also be given the power to order public authorities to take particular steps to strengthen the implementation of their duties, as part of the available range of remedies available in anti-discrimination cases. However, there is a danger that an excessive concentration upon the need for conventional legal remedies will blind practitioners and activists to the possibility of alternative regulatory methods. Feminist legal theory has warned of the dangers of being mentally confined within the expectations of conventional legal frameworks.<sup>68</sup>

### **SECTION 3: PUBLIC PERCEPTION, POLICY AND PUBLIC AUTHORITIES**

#### **1. Public perception of the legislation**

The Sex Discrimination (Gender Reassignment) Regulations 1999 were introduced to reflect the ruling of the European Court of Justice that discrimination on grounds of gender reassignment is contrary to the EC Equal Treatment Directive. The Directive applies only to the fields of employment and vocational training. These Regulations therefore do not impact on the existing provisions in the SDA 1975 relating to coverage of goods, services and facilities.<sup>69</sup> In spite of these advances, transsexuals in the UK are potentially still vulnerable to discrimination and harassment in many forms - most notably the continued absence of

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<sup>67</sup> O'Cinneide, C.. (2005) *op cit.*

<sup>68</sup> Smart, C. (1989) *Feminism and the Power of Law*, Routledge, London

<sup>69</sup> <http://www.transgenderzone.com/library/legal/2.htm#part2>

formal legal protection against discrimination in the provision of goods, services, facilities and housing.<sup>70</sup>

Some critics do not view the GRA as forward thinking as it was originally perceived. One of the reasons for this is the Act's inability to be applied retrospectively. It has been suggested that the government's reasons for this are that the *Goodwin* decision was intended to operate prospectively because (i) it could potentially affect rights and obligations acquired over a long period of time (such as pensions, social security entitlements, or tax liabilities) and require decisions on such matters to be reopened, (ii) it might be difficult to establish that a person would have met the requirements of the act many years ago, and (iii) it would mean retroactively validating marriages that were originally void.<sup>71</sup> In the Gender Recognition Bill [HL] Bill 56 of 2003-04, Liberty, described as one of the UK's leading civil liberties and Human Rights groups, stated concerns over the rigidity of the Act as it was then proposed.

Another criticism of the Act is its requirement that any transsexual person, who is married, must seek a divorce in order for their new status to be recognized. Notwithstanding the creation of the Civil Partnership Act 2004, affected people must still dissolve their marriage and reregister it under this Act once they have gained legal recognition of their status. This point raises a serious issue. A transsexual person is meant to be entitled to the same rights as any other person. The basis that he/she can only be married under the Civil Partnership Act 2004 immediately implies that such a person might be subject to different laws and could potentially raise questions about their gender status.

## **2. Public Authorities, Public Policy and Government Bodies**

### **(a) Government Equalities Office ("GEO"), Women and Equality Unit**

The GEO was recently set up by the UK government and is responsible for their overall strategy on equality. Its 'Women and Equality Unit' focuses specifically on women's issues and reports to the Ministers for Women and Equality.

In terms of equality in the workplace, one of its principal areas of concern has been closing what they call the "gender pay gap." Despite the inroads into equality brought by the Equal Pay Act 1970, the GEO is aware that this is still a problem in 2008. Indeed, in 2006/2007, there were as many equal pay claims as unfair dismissal claims. The GEO is trying to push for reforms to overcome the inadequacies in legislation. The gender pay gap is basically the percentage difference between the median hourly earnings of men and women, excluding overtime payments. According to the statistics in 2007, the gender pay gap for full time workers was 12.6%. Of course there are many complex socio-economic reasons to explain this gap. These include, amongst others, human capital differences (i.e. differences in educational levels and work experience), part-time work, travel patterns, traditional occupational segregation (e.g. there are still more women employed in caring, cleaning and catering), job grading practices, appraisal systems and pay discrimination. This is a problem as not only does discrimination remain but women's abilities are not being fully utilised in businesses and in the economy.

Since the Labour government came to power in 1997 there have been some efforts to redress the balance. For example, the government increased the flat rate for maternity pay from £55.70 in 1997 to £117.18 a week in 2008. The recommendations of the

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<sup>70</sup> <http://www.pfc.org.uk/node/234>

<sup>71</sup> Dickerson, Hollin K., Vindication Without Substance: Gender Recognition and the Human Rights Act (Texas International Law Journal) pp. 227 (<http://www.allbusiness.com/legal/international-law/1017319-1.html>)

2006 Women and Work Commission's report have also been implemented, namely to improve the prospects and career options of women in the labour market by developing a £500,000 fund to support initiatives to increase the availability of part-time work. The GEO has also recently launched a scheme called 'Post Your Pay Gap' whereby members of the public, from any sector, can reveal the differences in pay in order to encourage transparency.

However, the GEO's most recent work in closing the gender pay gap has been supporting the government's far-reaching and ambitious project, the Equality Bill.

### **The 'Women Take Part' Report 2008**

This research report was commissioned by the GEO in 2008 and it focused on the under-representation of women in public and civic life in particular. According to the report, "only 20% of MPs and 29.3% of local councilors are women. The picture is even worse when it comes to groups such as Black, Asian and minority ethnic women. They represent less than 1% of all councilors in England and 3.8% of women Chairs of Local NHS boards." In addition, "only 10% of directorships of FTSE 100 companies are held by women." Even in 2008, the current state of play for organisations and systems of governance in the UK remains founded on the "visions and needs of a small group of the population who had the right to vote – middle- and upper-class white men."

According to The Times<sup>72</sup>, however, there does seem to be some progress in the legal profession. "Women are finally breaking through the glass ceiling of senior judicial appointments. However, the point about the lack of ethnic minority women's involvement in public and civic life is also crucial. This in fact becomes an argument in favour of having a single, all-encompassing Duty of Equality since differing equality grounds (here gender and race) can overlap, but under the current law they are treated separately, which does not reflect the reality of the situation. Indeed, it is a major problem that "black and ethnic minority women slip through the cracks of a crude equalities accounting system which...focuses on either ethnic minorities or women at any one time, but rarely both at the same time."<sup>73</sup>

#### **(b) Equal Opportunities Commission ("EOC") and Commission for Equality and Human Rights ("CEHR")**

The EOC is an independent, non-departmental public body, funded primarily by the UK government. From 1 October 2007, the CEHR took over its role and functions.

The CEHR has extensive legal powers and a dedicated directorate of expert lawyers who are specialists in equality law. The Commission is equipped to take legal action on behalf of individuals, especially where there are strategic opportunities to push the boundaries of the law. Where there are chances to create legal precedents or to clarify and improve the law, the Commission will seek to do so. The CEHR has significant powers to enforce the equalities duties of organisations and authorities, including, ultimately, launching official inquiries and formal investigations.

In the past the EOC obtained considerable success in its role as a reformer of equality laws. Similarly, on 12 March 2007 the EOC challenged the Employment Equality (Sex Discrimination) Regulations 2005. Following judicial review initiated by EOC,

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<sup>72</sup> The Times, October 7, 2008 "Women make breakthrough to High Court bench" (by Frances Gibb)

<sup>73</sup> Mirza, H.S. and Sheridan, A. (2003) *Black and Ethnic Minority Women: Understanding Identity, Access and Equality in the Health Service*, EOC, Manchester



the High Court found that the 2005 Regulations, which amended the SDA 1975, did not adequately implement the Equal Treatment Directive (76/207/EEC) and ordered the Government to make further amendments to the provisions on harassment, discrimination on grounds of pregnancy or maternity, and rights of women on maternity leave. Such amendments have been put into force by the 2008 regulations.

Unless there is an equality dimension to the case, the Commission does not have the power to give legal assistance to individuals on human rights grounds. However, a section of the CEHR website<sup>74</sup> currently provides a resource for legal advisers and representatives who are conducting sex discrimination and equal pay claims in England and Wales. It covers employment-related sex discrimination and is intended for use by lawyers, Citizens Advice Bureau workers, union officials and representatives and lay advisers with knowledge of employment law. The CEHR also offers advice through their helpline and other online resources and contributes funds to external organisations that can provide legal help and advice.

### **The 'Sex and Power' Report 2008**

According to this report, commissioned by the CEHR, it is suggested that it will take up to 200 years to ensure the equal representation of women in the British parliament, 27 years to achieve equality in civil service top management, and 55 years to achieve an equal number of senior women in the judiciary.

To close this gap, the Women Take Part report suggests that "it is not enough to simply recruit, there is also a need to look at the positions [women] are recruited to and how people are retained." In short, we need to be a mindful of a three-step process: "getting there, being there and staying there." Only when legislation protects all three stages will we have a more coherent and fairer system of gender equality.

#### **(c) The Metropolitan Police Authority ("MPA")**

The MPA's Equality and Diversity Policy is a model example of a British public authority's approach to gender equality, both in the workplace and in the MPA's dealings with the public, further bolstering the protection of the HRA and perhaps attempting to overcome some of the weaknesses of discrimination legislation (as outlined elsewhere). But how useful or effective is such a policy for women who are discriminated against?

The MPA's Equality and Diversity Policy claims to go "wider than a traditional equal opportunities policy" which does not just follow but "exceed(s) legal requirements and good practice." It announces its scope as treating "everyone fairly and equitably whatever their gender, race or culture, disability, age, marital status, religious beliefs or sexual orientation." So far, this is relatively uncontroversial. It uses forceful language, for example, "the MPA will strive to become an organisation where the differences people bring to the workplace are valued" and "the promotion of an equality culture will be strongly encouraged." It also often refers to "personal dignity whilst at work" – the concept of dignity perhaps being borrowed from the German Constitution – and there is great emphasis on transparency of its equality practices and accountability to the public. In its section on sex discrimination it explicitly refers to the SDA 1975 and the Equal Pay Act 1970 (and amendments) but appears to go further by "valuing diversity" in its "business planning, performance management and appraisal process" as well as its recruitment procedures, selection processes and

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<sup>74</sup><http://www.equalityhumanrights.com/en/foradvisers/EocLaw/eoclawenglandwales/Pages/default.aspx>

ensuring that their recruitment and promotion panels receive training in equal opportunities.

None of this, however, has the force of law. Can this extra protection actually be relied on if a female employee – or even a female member of the public – wishes to make a complaint based on it? This is doubtful, in a court of law at least, as the document is not justiciable. It is nothing more than a soft law initiative which supplements the limited reach of anti-discrimination legislation. There are, however, enforcement and implementation mechanisms built into the Policy. In its clause 7 it sets out the various roles and responsibilities of various boards and units to implement and monitor the Policy, and there is a rigorous internal complaints procedure in place available to anyone who feels that the Policy has been breached. However, it does not explain what the remedies for redress are, and if there were any they wouldn't be legally enforceable. So a female employee who feels discriminated against can make her voice heard, it seems, but it is not clear what would be done about it. Whilst the MPA "treats acts of discrimination and harassment extremely seriously" it seems there is the risk of not being able to enforce perfectly good intentions, which is not entirely satisfactory.

#### **SECTION 4: CONCLUSION**

Since the Sex Discrimination Act 1975 was created over 30 years ago monumental changes have occurred with regards to equality of the sexes in terms of jobs, money and public perception. Yet there are still real disadvantages suffered by women and a range of legislation has been implemented to tackle these problems.

However, the effectiveness of legislation depends on the willingness and ability of individual litigants to bring actions. Often it is women in those economic sectors most likely to suffer discrimination who are least likely to bring actions.

The proposed introduction of 'positive duties' under the Equality Bill, while wide ranging, has been met with concern that it will lead to token compliance only and will not cause genuine change. Whereas legal remedies for individuals depend on claimants coming forward, the sort of changes envisaged by the Equality Bill will depend on the relevant bodies adopting a new mindset, as well as specific policies, in order to overcome discrimination.

A wide range of government initiatives and reports are available on this subject and there is evidence that, although improvements are needed, the issue of discrimination is taken increasingly seriously by many employers and by the public sector.

## PART 3: RAPE

### SECTION 1: UK AND INTERNATIONAL LAW

#### A. International Law

There is no commonly accepted definition of rape in international law. However, violence against women is an internationally and nationally recognised fundamental human rights issue. Freedom from violence and abuse is recognised in international law with respect to human rights and gender.<sup>75</sup> In the UK violence against women includes domestic violence, rape and sexual violence, sexual harassment, female genital mutilation, forced marriage, crimes in the name of honour, prostitution, trafficking and sexual exploitation.<sup>76</sup>

According to the United Nations, violence against women is defined as

*“violence that is directed against a woman, because she is a woman, or violence that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”.*

Rape is also recognised as an act of war. Article 27 of the Fourth Geneva Convention states that:

*“women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”<sup>77</sup>*

The Geneva Convention requires punishments for grave breaches by their national courts. Article 147 of the Fourth Geneva Convention includes in its definition war crimes:

*“Wilful killing, torture or inhuman treatment, including... wilfully causing great suffering or serious injury to body or health...”<sup>78</sup>*

Article 3 of the Geneva Convention prohibits *“violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture “as well as “outrages upon personal dignity, in particular humiliating and degrading treatment”<sup>79</sup>*.

With respect to armed conflicts that are not of an international nature, Article 4 of Protocol II Additional to the Geneva Conventions includes in its list of prohibited acts at any time or place murder as well as cruel treatment such as torture, mutilation and outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, as well as slavery and the slave trade in all their forms.<sup>80</sup>

Violence against women is recognised as a human rights issue within the European Community. The main Articles from the European Convention on Human Rights that apply are Article 2 the right to life, which is a fundamental right and Article 3 the prohibition against torture including the protection of individuals from inhuman or degrading treatment inflicted by another private individual.

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<sup>75</sup> The Crown Prosecution Service (2007), *Violence against women: Strategy and Action Plans (Draft)*, p.2

<sup>76</sup> *ibid.* p.8

<sup>77</sup> <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions>

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

## **B. Rape: Some Statistics**

### **1. Incidence**

- (a) At least 47,000 adult women are raped every year in the UK.<sup>81</sup>
- (b) Women are more worried about rape than any other crime<sup>82</sup>

### **2. Perpetrators**

- (a) Rape is associated with the most severe cases of domestic violence, and is a risk factor for domestic homicide.<sup>83</sup>
- (b) The majority of perpetrators are known to the victim.<sup>84</sup>

### **3. Cost to society**

Home Office research in 2005 estimated that each adult rape costs over £76,000 in costs to the health service resulting from long term health issues faced by victims, cost to the criminal justice system, lost output and physical and emotional impact.<sup>85</sup>

### **4. Support Services**

- (a) 40% of adults who are raped tell no one about it. This means that victims do not get the support they need to deal with the violence they have experienced.<sup>86</sup>
- (b) There are 19 Sexual Assault Referral Centres ("SARCs") in England and Wales for victims of rape, with 3 more based in London (The Havens).

### **5. Reporting and Conviction**

- (a) In England and Wales, the conviction rate for reported rape cases declined from 32 per cent in 1979 to around 6 per cent on current figures.
- (b) It is estimated that between 75-95% of rapes are never reported to the police.<sup>87</sup>

## **C. Domestic Legislation**

The Sexual Offences Act 2003 ("**SOA 2003**") came into force on the 1 May 2004 and was widely considered to be an overhaul of the sexual offences framework in place at that time.

### **1. Definition of Rape:**

Section 1 defines rape as the intentional penetration by the penis of person (A) of the vagina, anus or mouth of another person (B), without their consent. The slightest degree of

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<sup>81</sup> Fawcett Society (2007), *Rape: The Facts*

<sup>82</sup> HM Government (2007) *Cross- government Action Plan on Sexual Violence and Abuse*, Home Office: London, p.iii

<sup>83</sup> *ibid.*

<sup>84</sup> Kelly, L., Lovett, J., and Regan, L. (2005), *A gap or a chasm? Attrition in reported rape cases*, Child and Women Abuse Studies Unit. Home Office Research Study 293.

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

<sup>87</sup> HM Crown Prosecution Service Inspectorate (HMCPS) and HM Inspectorate of Constabulary (HMIC) (2007), *Without consent: A report on the joint review of the investigation and prosecution of rape offences*, p.34

penetration is sufficient to constitute the complete offence.<sup>88</sup> Under section 79(2) SOA 2003, penetration is a continuing act from entry to withdrawal. Thus, if A penetrates B with B's consent and B later withdraws consent, A must withdraw his penis. If A continues to penetrate B once consent has been withdrawn, this would amount to rape.<sup>89</sup> The law also covers transsexuals as section 79(3) provides that 'references to a part of the body include references to a part surgically constructed (in particular through gender reassignment surgery)'.

## 2. Consent:

The Act has three important provisions relating to consent<sup>90</sup>:

(a) A statutory definition of consent:

Section 74 of the Act defines consent: "a person consents if he agrees by choice, and has the freedom and capacity to make that choice."

(b) The test of reasonable belief in consent

The Defendant (A) must be seen to have taken steps to clearly ascertain that consent from (B) to the sexual activity was forthcoming in all the circumstances. The Defendant (A), therefore, is responsible for ensuring that (B) consents to the sexual activity at the time in question. The Act abolished the old defence of a genuine though unreasonably mistaken belief as to the consent of the complainant.<sup>91</sup>

(c) The evidential and conclusive presumptions about consent

The SOA 2003 created two sets of presumptions in order to provide assistance in determining whether or not B consented to the relevant sexual activity. These are conclusive presumptions and evidential or rebuttable presumptions.

Conclusive presumptions regarding consent include factual scenarios where it is proved that the defendant intentionally deceived the complainant, in which case the court will presume lack of consent. It has been questioned as to why the deceptions necessitate a conclusive presumption when arguably more heinous acts such as the use of violence to overcome a complainant's resistance do not give rise to such a conclusive presumption.<sup>92</sup>

An evidential presumption is a rebuttable presumption. Section 75 SOA 2003 provides a list of circumstances in which it is presumed that a complainant did not consent which includes: use or threat of violence; if the complainant was, and the defendant was not, unlawfully detained; if the complainant was asleep or otherwise unconscious; if, because of the complainant's physical disability she would not have been able at the time of the relevant act to communicate to the defendant whether she consented; or if any person had administered to or caused to be taken by the complainant, without consent, a substance which was capable of causing the complainant to be stupefied or overpowered at the time of the relevant act.

It should be noted that the circumstances listed in section 75 do not include circumstances where the victim was voluntarily intoxicated.<sup>93</sup> Nor does the Act define what is meant by

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<sup>88</sup> M. Allen, *Textbook on Criminal Law*, (2005, OUP), p.352

<sup>89</sup> Cooper v Schaub [1994] Crim LR 531

<sup>90</sup> <http://www.cer.truthaboutrape.co.uk/4.html>

<sup>91</sup> Old defence under *Morgan* [1976] AC 182

<sup>92</sup> M. Allen, *Textbook on Criminal Law*, (2005, OUP), p.357

<sup>93</sup> Criminal Justice System (2006), *Protecting Victims – Justice for Victims of Rape: A Consultation Paper*, p.13

'capacity' to give consent.<sup>94</sup> For example, where a complainant was rendered unconscious by drink, then it could be presumed that she had not consented. However, were the complainant severely intoxicated but conscious, it would be for the jury to consider whether or not the complainant had consented to sexual activity or not.<sup>95</sup>

### **3. Sentence:**

The maximum penalty for rape is life imprisonment.

The case of *R v Millberry*<sup>96</sup> set out the sentencing starting points in rape cases, namely:

- (a) 5 years without any aggravating or mitigating features
- (b) 8 years where there are some aggravating features such as rape of a child, or by a person in a position of trust or by a group
- (c) 15 years for serial rapes and those likely to remain a danger.

## **SECTION 2: IMPLEMENTATION AND MONITORING**

### **1. Government Delivery Agencies**

#### **(a) Police**

The police are regarded as being key partners in preventing sexual violence, victim care, undertaking investigations and dealing with offenders.<sup>97</sup> Specially Trained Officers ("STOs") are a vital part of the investigation team and have a range of responsibilities in relation to initial response, forensic medical examination, conducting victim interviews and maintaining contact with the victim in relation to case progress.<sup>98</sup> There are governmental guidelines in place for conducting investigations such as the Guidance in Investigating Serious Sexual offences published in 2005. Some forces also have Forensic Medical Examiners.

Project Sapphire is a Metropolitan Police Unit which was established in London to improve rape investigation and victim care. Each borough has a dedicated Sapphire team consisting of Specially Trained Officers to investigate rape and look after victims. It also has a small unit which reopens and investigates cold cases by utilising forensic advancements in DNA.<sup>99</sup>

There are many areas for improvement in police response, including tightening up the standards for recording and classifying reports across the forces in order to enable more accurate measures of levels of crime and comparisons across the forces. Also,

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<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*

<sup>96</sup> [2003] 2 Cr App R (S.) 142

<sup>97</sup> HM Government (2007) *Cross- government Action Plan on Sexual Violence and Abuse*, Home Office: London, p.17

<sup>98</sup> HM Crown Prosecution Service Inspectorate (HMCPS) and HM Inspectorate of Constabulary (HMIC) (2007), *Without consent: A report on the joint review of the investigation and prosecution of rape offences*, p.10

<sup>99</sup> <http://www.met.police.uk/sapphire/>

STO call out lists and rotas need to be up to date and regularly maintained in order for their work load to be equitable.<sup>100</sup>

(b) **CPS**

The CPS is responsible for making charging decisions and prosecuting sexual offences cases. In accordance with the CPS Rape Policy, serious sexual offences are prosecuted by Specialist Rape Prosecutors who are responsible for reviewing all cases involving rape allegations.<sup>101</sup> There is a need for the CPS to set a standard for the role of the rape specialist lawyer and to deliver training to achieve this and ensure continuous review of this specialist accreditation.<sup>102</sup>

Every CPS Area has nominated one of their specialist rape prosecutors to act as a rape coordinator, whose role involves monitoring rape cases within the area; networking and sharing good practice with other area rape coordinators and with HQ; liaising with external Criminal Justice System agencies and the voluntary sector and being a source of expertise. The rape coordinators liaise closely with the CPS domestic violence coordinators. Such a liaison is seen as particularly crucial when taking into account the fact that in many rape cases the offender is the partner (or other family member) of the victim.<sup>103</sup>

(c) **Courts**

Courts play an important role in ensuring that rape cases are dealt efficiently and effectively. They also have to ensure appropriate facilities for victims and witnesses, especially when they are classified as vulnerable or intimidated.<sup>104</sup>

(d) **National Offender Management Scheme ("NOMS")**

NOMS has the responsibility of managing and treating offenders both in prisons and in the community.<sup>105</sup> It comprises of HM Prison Services and the National Probation Service. NOMS and the police form the Responsible Authority for Multi Agency Public Protection Arrangements for managing offenders.<sup>106</sup> Under the probation service's statutory duty in respect of certain victims of sexual or violent crimes, NOMS also has the responsibility to inform and consult with victims.<sup>107</sup>

(e) **Primary Care Trusts ("PCTs")**

Given the high health-related costs (sexual and mental) of sexual violence, PCTs have an important role to play in victim care.<sup>108</sup> The services involve providing immediate and ongoing health care for victims of sexual violence directly or through services commissioned from the voluntary sector.

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<sup>100</sup> HM Crown Prosecution Service Inspectorate (HMCPS) and HM Inspectorate of Constabulary (HMIC) (2007), *Without consent: A report on the joint review of the investigation and prosecution of rape offences*, p.11

<sup>101</sup> HM Government (2007) *Cross- government Action Plan on Sexual Violence and Abuse*, p.17

<sup>102</sup> HM Crown Prosecution Service Inspectorate (HMCPS) and HM Inspectorate of Constabulary p.24

<sup>103</sup> The Report on the Joint Inspection into the Investigation and Prosecution of Cases involving Allegations of Rape: A CPSI and HMIC joint thematic inspection

<sup>104</sup> HM Government (2007) *Cross- government Action Plan on Sexual Violence and Abuse*, p.17

<sup>105</sup> *ibid.*

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.*

(f) **Sexual Assault Referral Centres ("SARCs")**

SARCs are one stop locations where victims receive medical care and counseling from expert practitioners and have an opportunity to assist police investigation, including undergoing a forensic examination.<sup>109</sup> The first SARC was opened in 1986 in Manchester. They are normally run in partnership by the police and health services working closely with the voluntary sector.<sup>110</sup> An important aspect of a SARC is that victims can make use of all the facilities whilst their anonymity is preserved. They accept self-referrals which means that people can access treatment without going to the police and they can make an informed choice about whether or not they want to report the offence.<sup>111</sup> There are 19 SARCs in England and Wales for victims of rape, with 3 more based in London (The Havens). Since SARCs are an important source of training and intelligence, they should be involved in the development of local strategies and action plans.<sup>112</sup>

**2. Voluntary and Community Sector Organisations:**

The voluntary and community sector groups are a crucial source in providing long term counseling and support for victims of recent and historical sexual violence.<sup>113</sup> As well as providing direct services, voluntary and community support organisations are also an important source of training and information for statutory agencies on preventing and responding to sexual violence. The expertise and knowledge of the sector can also provide useful intelligence to help solve crimes and inform local sexual violence profiling.<sup>114</sup>

The National Rape Crisis Network and The Survivor's Trust are two umbrella organisations that provide links between most local specialist organisations.<sup>115</sup> There are also organisations such as Victim Support which offer practical help and support.<sup>116</sup> Since these groups have first hand experience of victim needs and effectively meeting these needs, they are crucial to the delivery of support of these victims.

The first Rape Crisis centre opened in London in 1976. The aim of this centre was to provide a means to women and girls to talk with other women about their experiences, often for the first time.<sup>117</sup> They also provide long term support including advocacy and also do work on awareness raising and prevention.<sup>118</sup> Referrals to the Rape Crisis centres are made by agencies and individuals, many of whom do not want to report their assault to the police.<sup>119</sup> Rape Crisis (England and Wales) provides services in line with the concept of 'parallel justice' which focuses on both criminal justice and social justice.<sup>120</sup> The main concept under parallel justice is to make the goal of helping victims rebuild their lives the fundamental component of

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<sup>109</sup> *ibid* p.18

<sup>110</sup> *ibid* p.24

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.* p.17

<sup>114</sup> *ibid* p.18

<sup>115</sup> *ibid.* p.17

<sup>116</sup> *ibid.*

<sup>117</sup> Fawcett Society, *Not either/or but both/and: Why we need Rape Crisis Centres and Sexual Assault Referral Centres*, p.1

<sup>118</sup> *ibid.* p1

<sup>119</sup> *ibid.* p.3

<sup>120</sup> Women's Resource Centre (2008), *The Crisis in Rape Crisis: A Survey of Rape Crisis (England and Wales) Centres*, p.11



justice. Under a system of Parallel Justice the societal message to victims would be, “What happened to you is wrong and we will help you rebuild your life”.<sup>121</sup>

The main problem facing Rape Crisis centres today is a lack of funding and, as a knock-on effect, a lack of staffing and service provision. Lack of funding is causing these centres to close a fast rate: in 1984 there were 68 Rape Crisis centres in England and Wales whereas today there are only 38 centres affiliated to Rape Crisis.<sup>122</sup> Nine Rape Crisis centres have closed in the past five years.<sup>123</sup> Research has shown that the average annual income of a centre is £81,598, only marginally more than the cost of one rape to the state.<sup>124</sup> The average grant funding was £8,650 and, given this low value, Rape Crisis centres usually have to submit a disproportionate number of applications compared to the funding they receive.<sup>125</sup>

### SECTION 3: PUBLIC POLICY AND PUBLIC PERCEPTION

#### 1. Public Attitude:

A poll for Amnesty in 2005<sup>126</sup> found that;

- (a) a third of people believe women who flirt are partially responsible for being raped
- (b) a quarter of those asked thought a women was partially or totally responsible for being raped if she was wearing sexy or revealing clothing;
- (c) more than one in five held the same view if a woman has many sexual partners;
- (d) around one in 12 people (8%) believed that a woman was totally responsible for being raped if she has many sexual partners;
- (e) more than a quarter of people (30%) said that a woman was partially or totally responsible for being raped if she was drunk; and
- (f) more than a third (37%) held the same view if the woman had failed to clearly say “no” to the man.

#### 2. 'Drunken Consent'

Research indicates that a victim had consumed alcohol prior to the assault in a significant proportion of rape cases.<sup>127</sup> Since excessive amounts of alcohol may affect a person's capacity to consent to sexual intercourse, the relationship between alcohol and sexual violence is an important one. In making the ruling in the case of *R v Bree*<sup>128</sup>, Sir Igor Judge said: "However, where the Complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse,

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<sup>121</sup> Quoted in Women's Resource Centre (2008), *The Crisis in Rape Crisis: A Survey of Rape Crisis Centres*, p.11

<sup>122</sup> Women's Resource Centre (2008), *The Crisis in Rape Crisis: A Survey of Rape Crisis* p.8

<sup>123</sup> *ibid.* p 8

<sup>124</sup> *ibid* p.6

<sup>125</sup> *ibid.* p.6

<sup>126</sup> [http://www.amnesty.org.uk/uploads/documents/doc\\_16619.doc](http://www.amnesty.org.uk/uploads/documents/doc_16619.doc)

<sup>127</sup> HM Government (2007) *Cross- government Action Plan on Sexual Violence and Abuse*, Home Office: London, p.5

<sup>128</sup> [2007] EWCA Crim 804

and in drink agrees to do so, this would not be rape"<sup>129</sup>. He also added the "capacity to consent may evaporate well before a complainant becomes unconscious".<sup>130</sup>

In March 2007, the Home Office had proposed considering new laws to give a clearer definition of when a person had the capacity to consent to sexual activity. However, more recently it appears that the Government has dropped its plan to provide such a clarification. It was even said in the case of *Bree* that: "... the 2003 Act provides a clear definition of "consent" for the purposes of the law of rape, and by defining it with reference to "capacity to make that choice", sufficiently addresses the issue of consent in the context of voluntary consumption of alcohol by the Complainant. The problems do not arise from the legal principles. They lie with infinite circumstances of human behaviour, usually taking place in private without independent evidence, and the consequent difficulties of proving this very serious offence ".<sup>131</sup>

The impact of alcohol and rape also extends to rape victims seeking compensation. Their payouts are being reduced if they had been drinking before they were attacked. The application to the Criminal Injuries Compensation Authority contains a clause that says awards in all types of cases can be cut if consumption of alcohol "contributed to the circumstances that gave rise to the injury".<sup>132</sup> This has been negatively received it makes victims feel that they are culpable due to alcohol consumption.

### 3. Attrition

Attrition is the process by which rape cases drop out of the legal process. All UK studies of attrition in rape cases show that the highest proportion of cases is lost at the earliest stages of the criminal justice system, with victim withdrawal or lack of evidence being mainly responsible for between half and two-thirds dropping out at the investigation stage.<sup>133</sup> Research has shown that one-third of cases were lost at the investigative stage because of evidence issues and that in many cases victim credibility was linked to the decision not to proceed.<sup>134</sup> Over two-thirds of cases dropped out at the police stage and did not make it as far as the courts and one quarter of incidents initially recorded as rape were subsequently 'no-crimed' by the police.<sup>135</sup> Moreover, cases where the complainant and suspect were acquaintances were most likely to be 'no-crimed'.<sup>136</sup> There is also a large rate of attrition in the number of cases reported and the level of conviction rates.

The challenge with regard to this process is enhanced by police and prosecutors over-estimating the number of false allegations and thereby losing the confidence of complainants. The police's emphasis on the difficulties of prosecution and conviction discourages victims to proceed. Fear of the court process is also a disincentive.<sup>137</sup> Several recommendations have been made to address this issue including the possibility of inter-agency work between police and specialist support agencies being further explored with respect to providing support during statement taking and providing information on case status; providing guidance to police about the timing and content of providing complainants with information about the legal process and the likelihood of a conviction; having case conferences between police; CPS and counsel as early as possible to explore potential evidential weaknesses; having mechanisms within CPS to monitor court room prosecution advocacy, and learn lessons from

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<sup>129</sup> *ibid.*

<sup>130</sup> *ibid.*

<sup>131</sup> *ibid.*

<sup>132</sup> <http://www.guardian.co.uk/uk/2008/aug/12/ukcrime.law>

<sup>133</sup> HM Government (2007) *Cross- government Action Plan on Sexual Violence and Abuse*, p.29

<sup>134</sup> <http://www.crimereduction.homeoffice.gov.uk/sexual/sexual13.htm>

<sup>135</sup> <http://www.rapecrisis.org.uk/law.html>

<sup>136</sup> <http://www.cer.truthaboutrape.co.uk/3.html>

<sup>137</sup> <http://www.crimereduction.homeoffice.gov.uk/sexual/sexual13.htm>

convictions, acquittals and especially guilty pleas; and recognition of the significance of alcohol in rape and sexual assault and further research of the extent to which men target unknown women who are drinking and the strategies they use to make initial contact.<sup>138</sup>

#### **SECTION 4: CONCLUSION**

The SOA 2003 has provided a much needed overhaul to the previous legislation. Despite this the law still makes it difficult to successfully convict for rape, for example in instances where both the victims and the accused are intoxicated, and it is difficult to establish that there was no consent in the absence of any witnesses. While problems in proving a case of rape are partly due to the inherent difficulty in assessing evidence to a crime where there are unlikely to be any witnesses, it also appears that public perceptions of how women are expected to behave influence trial outcomes in many occasions (for example a jury might be less likely to believe that a women had been raped where she has acted or dressed in a flirtatious manner).

In addition to the issues that exist in successfully convicting rape cases that come before courts, reports indicate that the vast majority of incidents of rape that occur are never reported to the police in the first place. Further, once a report is made to the police, a large number of cases never proceed to trial as witnesses withdraw their evidence at some point during the investigations. Studies indicate that a higher degree of inter-agency cooperation and more victim support earlier in the process would assist in bringing cases to court successfully. In addition, societal perceptions will need to change before more victims are willing to report and prosecute cases of rape.

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<sup>138</sup> *ibid.*

## **PART 4: HUMAN TRAFFICKING IN THE UNITED KINGDOM**

### **SECTION 1: INTRODUCTION**

#### **1. Definition of trafficking**

In essence, human trafficking is when a person is moved by coercion or deception into a situation of exploitation. The definition the UK adheres to is that given by the protocol to the UN Convention against Transnational Organised Crime - the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. It states:

*"Trafficking in human beings [means] the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."*

#### **2. Scale and nature of trafficking in the UK**

The UK is primarily a destination country for human trafficking, the victims predominantly trafficked from Eastern Europe, China, South-East Asia, Africa or Brazil. The majority of these victims are duped into recruitment through deceptive techniques such as legitimate looking employment offers in advertisements or traffickers that pose as friends offering holidays abroad.<sup>139</sup>

Victims normally arrive by air with low cost airlines coming from Eastern and Southern Europe. Genuine or counterfeit travel documents are used to enter the UK where victims subsequently lose their freedom through removal of their documentation, unrealistic debt-bonds, threats of violence against them or their families, and physical, sexual or emotional abuse.<sup>140</sup>

Although studies do suggest trafficking for forced labour and the existence of child trafficking, there is an insufficient amount of evidence to confirm whether they pose a significant problem for the UK. The trafficking of women for sexual exploitation, however, is of particular concern and its growth has been contributed to factors including enlargement of the sex industry internationally and globalisation. Home Office research estimates that in 2003, 4000 women were trafficked into the UK for sexual exploitation, the size of the market was up to £275 million and the total economic and social cost was up to £1 billion.<sup>141</sup> Latest police estimates suggest that as many as 18,000 trafficked victims are forced to work as prostitutes in the UK.<sup>142</sup>

### **SECTION 2: UK AND INTERNATIONAL LAW**

#### **1. International Law provisions**

##### **(a) United Nations Convention against Organised Crime**

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<sup>139</sup> Home Office. *UK Action Plan on Tackling Human Trafficking*. London, 2007, 15.

<sup>140</sup> *Ibid.* p15

<sup>141</sup> *Ibid.*, 14.

<sup>142</sup> Police projections vary from between 6,000 and 18,000. Elliot, Francis & Ford, Richard. "Men Face penalties over paying for sex with trafficked victims." *The Times*, 20 September 2008.

On 15 November 2000 the United Nations General Assembly adopted the UN Convention against Transnational Crime 2000 (UNTOC), which calls upon countries to take appropriate measures within its means against organised crime and to cooperate together.

The Convention is supplemented by the optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Known as the Palermo Protocol, this was the first international instrument to define and address the human trafficking problem. By signing and ratifying this Protocol on 9 February 2006, the UK is obliged by international law to both introduce criminal offences to combat sex trafficking and consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking.

(b) **Council of Europe Convention on Action against Trafficking in Human Beings**

The most recent international instrument to combat human trafficking is the Council of Europe Convention on Action Against Trafficking in Human Beings. Adopted by the Committee of Ministers on 3 May 2005 and entered into force on 1 February 2008, the Convention provides measures to discourage the demand of all forms of exploitation of persons that leads to human trafficking. It also encourages countries to adopt or enhance existing arrangements for victims of trafficking for sexual exploitation, and create provision for victims of other forms of trafficking, such as trafficking for forced labour or organ removal.

The Convention is innovative in that it places a positive obligation on countries to strengthen legislative, administrative, educational, social, cultural or other measures to raise awareness about trafficking, identify the root causes of demand and target campaigns and measures against demand. By tackling demand, it hopes to prevent and combat the traffic itself. The Convention goes beyond other international instruments by seeking to protect the rights of trafficked persons by obliging all signatory parties to guarantee minimum standards of protection to all trafficked persons.

It is worth noting that Conventions by the Council of Europe are not binding on members but it is expected that by signing a Convention members will introduce the legislation into domestic law. The UK is a member of the Council of Europe and signed the Convention on Action Against Trafficking in Human Beings on 23 March 2007. It is still in the process of implementing the legislation.

(c) **Domestic Law provisions**

By signing and ratifying the Palermo Protocol, the UK is obliged by international law to implement and introduce criminal offences to combat sex trafficking. The Sexual Offences Act 2003, which came into force on 1 May 2004, established wide-ranging offences of trafficking of people into, within or from the UK for sexual purposes, with a maximum penalty of 14 years' imprisonment. This was recently amended to introduce powers of forfeiture and detention of vehicles, ships and aircraft used in trafficking for sexual exploitation. The Act goes further than the Palermo Protocol in that it does not require those committing the offence to use coercion, deception or force in the process of recruitment.

Under the Sexual Offences Act there had been 30 convictions in trafficking for sexual exploitation up until 2007.<sup>143</sup> Prison sentences imposed ranged from 2 to 9 years.

With regard to non-sexual exploitation, including trafficking for forced labour and the removal of organs, an offence of "trafficking for exploitation" was included in the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Exploitation is defined as slavery or forced labour, the use of threats or deception to obtain a service, or a request or inducement to get someone to undertake an activity that someone who was not young, disabled or a family member would be likely to refuse. This offence also carries a maximum penalty of 14 years' imprisonment and came into force on 1 December 2004.

By the end of 2006, there had been no convictions in trafficking for labour exploitation under this Act.<sup>144</sup> This could be due to the fact that guidance on interpretation of this legislation is limited and therefore implementation is unclear.

The offence of trafficking of children is included in the above two acts. A range of offences is covers the "abuse of children through prostitution or pornography" in the Sexual Offences Act 2003, the penalties ranging from 7 years to life depending on the committed offence and the age of the child.

### **SECTION 3: ENFORCEMENT OF LAWS/ACCESS TO JUSTICE**

Although the legal framework in the UK appears to be sufficient, those working in the field suggest its implementation is far from adequate.<sup>145</sup> To date, the protection of victims has taken a back seat to the prosecution of perpetrators and enforcement of immigration regulations. This is often to the prejudice of the protection of the rights of those who have been trafficked.<sup>146</sup>

#### **1. Operation Pentameter**

Operation Pentameter 1 was the first coordinated operation conducted by the Metropolitan Police to enforce legislation prohibiting trafficking. It took place in 2006 and focused not only on trafficking for sexual exploitation but also victim protection. The operation resulted in 84 victims of trafficking from 22 countries (primarily Eastern Europe, China/South-East Asia, Africa or Brazil) being recovered, 232 people arrested and 134 charged with a variety of offences.<sup>147</sup>

Although the operation was deemed to be a success, criticisms were directed at the lack of coordination on referrals to protect the recovered victims. Apart from a few reports suggesting they were in the care of NGOs or faith-based organisations, no concrete information was made public to indicate how many of the trafficked women recovered were provided with assistance or what happened to them afterwards.<sup>148</sup>

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<sup>143</sup> Skrivankova, Klara. *Collateral Damage*. Global Alliance Against Traffic in Women, 2007, 204.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.* 208.

<sup>147</sup> Gloucestershire. Constabulary *Operation Pentameter operational overview*. 2006

<sup>148</sup> Skrivankova, Klara. *Collateral Damage*, 208.

Pentameter 2, following on and learning from Pentameter 1, is currently an ongoing operation. As of July 2008, 167 victims were rescued and 528 suspected traffickers arrested.<sup>149</sup>

## 2. UK Human Trafficking Centre

Following Operation Pentameter 1, the United Kingdom Human Trafficking Centre (UKHTC) was set up in October 2006. A multi-agency anti-trafficking police-based centre, it is the first institution of its kind to address trafficking from a broader perspective. By adopting a multi-agency approach it aims to coordinate and harmonise UK law enforcement responses to all forms of trafficking, incorporate specialist personnel from a range of law enforcement agencies (such as the Immigration Service and prosecutors) and consult and utilise input from other stakeholders such as NGOs. One of the most promising features of the Centre is its intention to develop and promote a victim-centred human rights approach.

## 3. The Poppy Project

The Poppy Project is the only project in the UK funded by the Home Office that provides shelter and support to women who have been trafficked for sexual exploitation. If accepted onto the project, women are allocated a support worker and offered a range of specialist support services including provision of food, health assessments, registration with a GP in order to receive necessary medical treatment, access to counseling services, access to education and English classes, integration and/or re-settlement support, help contacting family and friends, and support accessing legal advice including information relating to immigration status and applications for asylum.

Originally the Home Office's criteria meant that only a woman who had been forced to make money for others in prostitution in the UK in the previous 30 days was eligible for support. This meant that a woman too scared to come forward to talk about her ordeal within 30 days would be too late to qualify for assistance and led to many cases of women being refused support. Between March 2003 and July 2004 a total of 43 women were provided fully supported accommodation services, while 126 others were not.<sup>150</sup> Upon evaluation, it appeared that this 30 day window was the main constraint preventing women from being accepted.<sup>151</sup> As a result, the time for referral has recently been extended to 3 months.<sup>152</sup>

Another recently amended prerequisite for acceptance was that "in order to be eligible for temporary protection within the Poppy Project, victims of trafficking must be prepared to give evidence to the police. They are also required to fully cooperate with the immigration authorities, including cooperating with arrangements for their removal."<sup>153</sup> This did not correspond with the principle that a reflection period should not be conditional on any form of cooperation with the authorities, so that during this period the person in question would be able to acquire information, as well as receive urgent support to be make an informed choice about whether or not to cooperate with the authorities.<sup>154</sup> The obligations under the Council of Europe Convention requires the granting of a reflection period to all trafficked persons on an unconditional basis. Hence the UK has now relaxed the restriction so that "in order to

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<sup>149</sup> Elliot, Francis & Ford, Richard. "Men Face penalties over paying for sex with trafficked victims." *The Times*, 20 September 2008.

<sup>150</sup> Skrivankova, Klara. *Collateral Damage*, 219.

<sup>151</sup> *Ibid.*

<sup>152</sup> As stated in the *Accommodation and Support* section of the *Poppy Project* website, [http://www.eaves4women.co.uk/POPPY\\_Project/Accommodation\\_and\\_Support.php](http://www.eaves4women.co.uk/POPPY_Project/Accommodation_and_Support.php)

<sup>153</sup> Richards, Sarah. *Hope betrayed: An analysis of women victims of trafficking and their claims for asylum*. Poppy Project, London, 2006, 21.

<sup>154</sup> As stated in the *Council of Europe Convention on Action against Trafficking in Human Beings*.

qualify for longer term assistance women are encouraged to co-operate with the authorities."<sup>155</sup>

#### **SECTION 4: PUBLIC POLICY/PUBLIC PERCEPTION/OTHER**

##### **1. UK Action Plan on Tackling Human Trafficking**

A UK Action Plan on Tackling Human Trafficking ("UKHTC") was published in March 2007. Confirming the government's commitment to taking action against human trafficking, the plan summarises activities that have been taken so far and proposes further action by way of 62 goals with a view to putting in place some of the missing structures and systems. In particular:

###### **(a) Protection of victims**

The Plan announced that a human rights approach would be applied arguing that "a strong enforcement arm is not effective unless the corollary victim protection and assistance is in place."<sup>156</sup>

###### **(b) Preventing Trafficking at Source**

The Plan reported that the Home Office, Foreign and Commonwealth Office (FCO) and the Department for International Development (DfID) support a number of projects which aim to tackle trafficking at source. The three components of this work are awareness raising measures, actions to address the factors that make poor people vulnerable to trafficking, and work designed to build capacity in source and transit countries to deal with organised crime.<sup>157</sup>

One of the aims of the UKHTC is to provide awareness raising campaigns both in the UK and identified source or transit countries. The UKHTC has recently conducted such campaigns in Romania and Bulgaria, in order to highlight to target groups some of the dangers posed by organised criminals.<sup>158</sup>

###### **(c) Reduction of Demand**

The current legislative framework creates a legal vacuum, where it is illegal for women to solicit for prostitution, however, police often tolerate sex work within a limited area as long as public complaints or political priorities do not demand a zero tolerance crackdown.<sup>159</sup>

In 2006 the Government published a coordinated strategy, "Paying the Price", to tackle prostitution. It provides a framework for action to be taken to challenge the existence of prostitution by preventing, tackling demand, developing routes out of prostitution, and tackling off-street prostitution. The policy specifically condemns zones of tolerance.

Although these policies have yet to be enacted, the Action Plan aims to undertake publicity and awareness raising measures targeted at reducing demand for sex

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<sup>155</sup> As stated in the *Accommodation and Support* section of the *Poppy Project* website, [http://www.eaves4women.co.uk/POPPY\\_Project/Accommodation\\_and\\_Support.php](http://www.eaves4women.co.uk/POPPY_Project/Accommodation_and_Support.php)

<sup>156</sup> Home Office. *UK Action Plan on Tackling Human Trafficking*. London, 2007, 8.

<sup>157</sup> Home Office. *UK Action Plan on Tackling Human Trafficking*. London, 2007, 22.

<sup>158</sup> *ibid*, 27.

<sup>159</sup> Matthews, R. "Policing Prostitution: Ten Years On." *British Journal of Criminology*, Vol 45 (2005): 1-20.



workers and therefore also trafficked persons.<sup>160</sup> Such publicity techniques include using advertisements in men's magazines, websites or other targeted media, which raise awareness of trafficking for sexual exploitation and warn of the risks involved.<sup>161 162</sup>

## **2. Other rights of trafficked victims**

### **(a) Compensation**

In 2005 some £5.5 million was seized from organised crime, some of which came from trafficking.<sup>163</sup> Despite this, no victims of trafficking have ever obtained compensation as a part of criminal proceedings against traffickers, nor through civil claims.<sup>164</sup> Unfortunately, the Action Plan fails to give any remit to whether trafficked persons have access to compensation via the routes available in the UK.

### **(b) Asylum**

Once prosecution proceedings against traffickers are completed, trafficked women are not entitled to any further protection. Many will not wish to return to their home countries for fear of reprisals from their traffickers and their only option to stay in the UK is to apply for asylum. However, most of the asylum claims of trafficked women have been refused in the first instance, with the Home Office sending them refusal letters that often demonstrate no understanding of the issue of trafficking.<sup>165</sup>

When the Poppy Project conducted an analysis into the refusals for asylum with its own samples, it was found that 80% of the cases were allowed on appeal – this being six times higher than the national average for all asylum claims in the UK in 2001 – 2004.<sup>166</sup> It is therefore concluded that support from the Poppy Project increases the chances of a trafficked woman receiving asylum, or at least makes it more likely that her claim will be considered credible by the Home Office.<sup>167</sup> Consequently, by relaxing the restrictions for acceptances to the Poppy Project, more applications for asylum by trafficked women should be accepted.

## **SECTION 5: CONCLUSION**

Human trafficking has become a significant issue in the United Kingdom and important changes in legislation and policy over the past six years confirm its place in the political agenda. A legal framework now exists in the UK to punish and prosecute traffickers. However, this framework has not always guaranteed protection or access to services to the actual victims of trafficking. There has been little information released as to the fate of

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<sup>160</sup> Home Office. *UK Action Plan on Tackling Human Trafficking*. London, 2007, 32.

<sup>161</sup> *Ibid.*, 31.

<sup>162</sup> Note: In September 2008 new measures were announced in which it would be an offence in England and Wales to pay for sex if the woman was being controlled by a pimp, had been coerced into the sex trade or was trafficked into Britain for sexual exploitation. Exact details of the new offence and penalties to be imposed are yet to be worked out. Ministers believe that the measure will act as a deterrent to international human trafficking. Elliot, Francis & Ford, Richard. "Men Face penalties over paying for sex with trafficked victims." *The Times*, 20 September 2008.

<sup>163</sup> Home Office. *Tackling Human Trafficking – Consultation on Proposals for a UK Action Plan*. London, 2006.

<sup>164</sup> Skrivankova, Klara. *Collateral Damage*. 206.

<sup>165</sup> *Ibid.*, 221

<sup>166</sup> *Ibid.*, 221.

<sup>167</sup> Taylor, Gina. *Evaluations of the Victims of Trafficking Pilot Project – POPPY*. Home Office (Research, Development and Statistics – RDS). London, 2005.

recovered victims through government actions such as Operation Pentameter. Moreover, trafficked women who manage to escape their plight themselves often remain in a situation of exploitation without the possibility of exercising their rights.

As the 62 UK Action Plan goals are implemented and legislation suggested by the Council of Europe Convention introduced, it is hoped there will be more of a balance to correct the unequal attention paid to enforcement and protection of trafficked persons. The UK is on route to having a comprehensive system in which it can further develop both its domestic and international work to help liberate more victims and punish those that seek to profit from the enslavement of others.

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