

**Department of Justice and Equality**

**Discussion Document on Future Direction of Prostitution Legislation**

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## **Foreword from the Minister**

I am pleased to publish this discussion document, which is being issued to assist a public consultation process on the future direction of legislation on prostitution.

The criminal law in this area is being reviewed primarily because of the changed nature of prostitution in Ireland. Prostitution in this country was once mainly a street-based phenomenon. That is no longer the case. The organisation of prostitution is now much more sophisticated, highly mobile and is easily facilitated by the use of mobile phones and the internet.

While there is a significant amount of criminal legislation in this area already, there is always scope for change and improvement. It is important to review the law periodically to ensure it is up to date and comprehensively responds to altered circumstances.

Prostitution is an issue which affects individuals, communities and society. There is, of course, already a clear consensus on the great evils of child prostitution and trafficking for the purposes of sexual exploitation. However, I am aware that there are differing and genuinely held views on the approach the criminal law should take to prostitution generally. It is only right therefore, that members of the public are given the opportunity to express their views and opinions on this important issue.

This discussion document does not favour any particular approach but simply tries to assist reflection. The arguments contained in the document are not exhaustive and the questions posed are not intended to limit in any way the range of questions readers might want to consider.

My Department will hold a conference in the autumn to discuss the document. The widest possible participation will be encouraged in order that we have an open and transparent discussion on all aspects of this very important issue.

This discussion document will now be referred to the Joint Oireachtas Committee on Justice, Equality and Defence. Interested groups and members of the public, I expect, will be invited to make submissions to the Committee which will hold such hearings as it deems appropriate. I am asking Mr. David Stanton T.D., Chairman of the Joint Committee, that it publish its report and recommendations by the 30th November 2012 and that the report be furnished to me together with any submissions received. I expect it is likely that the Committee's report will also be lodged in the Oireachtas Library and that a debate on it will subsequently take place in both the Dáil and the Seanad. The report received by me from the Joint Oireachtas Committee will be fully considered in the framing of any necessary new legislative proposals to be submitted to Government in due course.

**Alan Shatter TD**  
**Minister for Justice, Equality and Defence**  
**22 June 2012**

## **Chapter 1 Context and Purpose of the Consultation Process**

### ***Introduction***

The law on prostitution generally was last reviewed in 1993, though there have been some legislative amendments since then. The purpose of this discussion paper is to promote public discussion on the function of the criminal law in the area of prostitution and to identify possible legislative responses based on evidence-informed analysis and debate.

Prostitution is a subject that gives rise to intense debate, and people disagree on how to respond to the issues it raises. The subject gives rise to a wide spectrum of issues, including issues about the causes of prostitution, sexuality, organised crime, health and public safety, the exploitation of individuals including children, inequality between men and women, and human rights, among others. This paper does not take a position on what changes, if any, should be made to the criminal law. The idea is to assist public reflection on the issues and to gather views on what the approach of the criminal law should be in order to reduce, deter, detect and prosecute criminal activity and protect prostitutes from exploitation, with due regard to the principles of human rights.

In the course of this document both the term “prostitute” and the term “sex worker” are used. No offence is intended in the use of either term. While some readers will find the term “prostitute” objectionable and prefer to use the term “sex worker”, others will object to the term “sex worker” on the basis that it confers legitimacy on an activity which is unacceptable. It should be noted that the term “sex worker” is used in international discourse.

### ***Reasons for Review***

There are compelling reasons to review the criminal law on prostitution. The principal reasons include the following:

First, despite public disapproval of prostitution and substantial legal provisions criminalising prostitution related activities, individuals continue to sell and buy sex and it is an activity that has existed over the millennia. On the assumption that individuals will continue to engage in prostitution consideration needs to be given to how legislation might be framed to deal with the complex issues surrounding prostitution, to protect prostitutes from exploitation and the need to have effective laws to reduce, deter, detect and prosecute criminal activities.

Second, the law does not criminalise the exchange of sex for money but it does criminalise most prostitution-related activities. The effect of this law is that there are few ways to sell sex in Ireland without risking criminal punishment. Prostitutes cannot provide

their sexual services from an indoor premises that functions as a brothel.<sup>1</sup> Although providing sexual services to purchasers met on the street is not itself criminal, communicating the willingness to provide such services is prohibited.<sup>2</sup> Street prostitution is therefore indirectly or effectively illegal. The prohibition against living on the earnings of prostitution is extremely wide in its scope.<sup>3</sup> It encompasses not only pimps who exploit prostitutes for their own purposes, but anyone who derives profit from the prostitution of others. This makes it illegal for a prostitute to pay someone to protect her or him, or to assist in any aspect of her or his work as a prostitute. Some argue that the law creates the risk of harm to prostitutes; others argue that the risk to prostitutes inheres in the nature of prostitution itself. Do we need to reform the law? And if we do, how should we reform it? This Discussion Paper seeks to promote public reflection on these questions.

Third, the nature of prostitution in Ireland appears to be changing. Since the Criminal Law (Sexual Offences) Act 1993 was enacted, it is fair to say that prostitution in Ireland has largely moved indoors. This is facilitated by the use of mobile phones and the internet. These modern communication technologies make it easier for clients to contact prostitutes. Also, prostitutes and pimps use these same technologies to arrange their business, including the setting up of short-term brothels, e.g., in rented apartment buildings, which can quickly be moved from location to location. It is necessary therefore, to review our current legislation to determine whether it is sufficiently robust and flexible to address criminality in the environment in which prostitution currently operates.

### *Difficulties in Analysing the Issue of Prostitution*

There is a dearth of research into prostitution or commercial sex work. Research tends to focus on the people who sell sexual services on the street. Prostitution operates in various other ways and involves many other actors besides the sex worker or prostitute. There are customers, pimps, owners of premises used for trading sex and so forth. There is little research in relation to certain issues that are linked to prostitution, including the role of organised crime, and trafficking in persons for the purposes of prostitution. Moreover, discussion of adult prostitution tends to incorporate other issues, including human trafficking, sex tourism, and child prostitution. While important, none of these issues are directly relevant to assessing the issue of voluntary commercial sex.

Although hundreds of individuals are involved in prostitution in Ireland, it is difficult to obtain their opinions on the effects of the criminal law on their daily lives and quality of life. (It is much easier to obtain accounts of the experiences of residents who are exposed to the harmful aspects of street prostitution.) But first hand information about their experiences, the challenges they face and the solutions they propose to reduce exploitation, violence in prostitution, or trafficking would also be valuable. They are in the position that selling sex is not a crime but they have to bear the taint of criminality, stigma and social opprobrium.

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<sup>1</sup> See s 11 of the Criminal Law (Sexual Offences) Act 1993.

<sup>2</sup> See ss 7 and 8 of the Criminal Law (Sexual Offences) Act 1993.

<sup>3</sup> See s 10 of the Criminal Law (Sexual offences) Act 1993.

There is the question whether the rationale for current legislation remains sufficiently valid. A key objective of current legislation is to protect society from the nuisance and public-order problems associated with prostitution. Consequently, the solicitation and loitering offences in the 1993 Act do not, and were never intended to, address solicitation by clients or prostitutes in a private setting.

Existing policy, as reflected in legislation, does not directly regulate the sale or purchase of sexual services between consenting adults. The law recognises that prostitutes are vulnerable to exploitation and a number of offences in the 1993 Act are directly aimed at their protection. In addition, in recognition of their particular vulnerability, the law does not tolerate the prostitution of children. In considering how the criminal law might address the issue of exploitation or abuse of sex workers in a changed environment, it is necessary to consider the variety of circumstances in which prostitution occurs. There is prostitution which is of an organised nature. This involves third parties and is exploitative to varying degrees. Some prostitutes operating in networks are trafficked or coerced. Others are not. There are also prostitutes operating independently and who choose, whatever their reasons for doing so, to become involved in prostitution.

In devising policy responses, including legislative and enforcement measures, it is also crucial to clearly distinguish between human trafficking for sexual exploitation on the one hand, and prostitution on the other. While the two can sometimes overlap, human trafficking and prostitution are different phenomena requiring distinct policy responses, if each is to be targeted effectively, efficiently and in a manner which reflects the relative gravity of different types of criminal activity.

In addition to the activities of parties directly involved in prostitution, the current legislative review must consider the impact of prostitution on communities and more broadly, the interests of society in general.

### ***Prevalence of Prostitution and Trafficking***

Of its nature, organised prostitution is a clandestine activity and the scale of it is unknown. There are obvious difficulties in reliably estimating its extent. Unofficial estimates vary. Some such estimates suggest that more than 1,000 women, mainly migrants, are available or are made available for paid sexual services on a daily basis throughout Ireland. It is not known how many of these are coerced (by human traffickers or others) into prostitution or are voluntarily providing paid sexual services.

The table below contains data from the Central Statistics Office (based on Garda PULSE data) in relation to recorded and detected prostitution offences for the period 2004 to 2011.

#### **Recorded and Detected Incidents of Prostitution Offences 2004-2011**

<b>Year</b>	<b>Brothel Keeping</b>		<b>Organisation of Prostitution</b>		<b>Prostitution, including Soliciting</b>		<b>Total</b>	
	Recorded	Detected	Recorded	Detected	Recorded	Detected	Recorded	Detected
<b>2011</b>	57	50	16	10	174	170	247	230
<b>2010</b>	67	61	3	3	135	127	205	191
<b>2009</b>	26	25	7	7	60	59	93	91
<b>2008</b>	29	24	11	10	96	93	136	127
<b>2007</b>	13	10	34	29	62	60	109	99
<b>2006</b>	13	12	17	17	77	74	107	103
<b>2005</b>	8	4	19	19	57	52	84	75
<b>2004</b>	5	4	25	24	189	181	219	209

Figures are provisional and may be subject to further revision

#### ***Human Trafficking for Sexual Exploitation***

The Criminal Law (Human Trafficking) Act 2008 criminalises the trafficking of persons for sexual exploitation. For the purposes of the 2008 Act, “sexual exploitation” in relation to a person is widely defined. It includes the prostitution of the person. A person convicted of human trafficking for the purposes of sexual exploitation is liable to life imprisonment.

This legislation also made it a criminal offence to knowingly solicit or importune a trafficked person, in any place, for the purpose of prostitution.

In order to gain a greater understanding of the nature and extent of human trafficking in Ireland, the Anti-Human Trafficking Unit (AHTU) of the Department of Justice and Equality developed and implemented a data collection strategy which collates trafficking related data from a variety of organisations, including the Garda Síochána, the Irish Naturalisation and Immigration Service and several non-governmental organisations. The strategy has been operational since 2009 and annual reports for each of the years 2009, 2010 and 2011 have been published. These are available at [www.blueblindfold.gov.ie](http://www.blueblindfold.gov.ie)

Information collected by the AHTU using this data collection strategy indicates that, in the 3 year period to the end of 2011, reports made to the Gardaí alleged that 201 persons were victims of human trafficking. The majority, 134 (67%) were alleged victims of trafficking for sexual exploitation. Of these, 102 (76%) were adult females and 31 (23%) were minors. A significant proportion, 75 (56%) were applicants for asylum.



In the same 3 year period, a range of NGOs also encountered persons in respect of whom they believed indications of trafficking were present. In the majority of such cases, alleged victims were referred to the Garda Síochána for assistance.

While, in a significant proportion of cases of alleged trafficking for sexual and labour exploitation investigated since the Criminal Law (Human Trafficking) Act 2008 was enacted no evidence of human trafficking has been uncovered, there is strong criminal legislation in place to deal with those who traffic persons for the purposes of sexual exploitation.

### *Questions*

General questions arising from this chapter are:

- 1. Is the present rationale for criminal legislation on prostitution, i.e., the protection of society from a nuisance and public order perspective and the protection of prostitutes from exploitation, a sufficient basis for future legislation in this area?*
- 2. If not, what policy objectives should underpin future legislation?*
- 3. How should future legislation address the variety of circumstances in which prostitution occurs?*
- 4. In what way should the criminal law on prostitution address the rights of communities and society in general?*
- 5. What types of measures, if any, can be taken to address the use of modern technologies to facilitate prostitution?*



## Chapter 2 The Law on Prostitution and its History

### *What is the Law on Prostitution?*

It is important to point out that, in this jurisdiction, it is not an offence, in itself, to sell sex. In general, it is not an offence to purchase sex either.<sup>4</sup> Consequently, neither party to the transaction is currently criminalised. Our legislation does not seek to prevent sexual contact and adults who sell or purchase sexual services, in private, are not breaking any law.

Our legislative approach has two objectives. Firstly, it aims to protect society from the more intrusive aspects of prostitution from a public order perspective. Accordingly, under the Criminal Law (Sexual Offences) Act 1993, it is an offence to solicit in a street or public place for the purpose of prostitution. The offence can be committed by the prostitute, the client or a third party - a pimp, for example.

Secondly, the law seeks to protect prostitutes from exploitation. It is an offence under the 1993 Act to organise prostitution, coerce or compel a person to be a prostitute, knowingly live on the earnings of a prostitute, or keep or manage a brothel.

In addition, public order legislation prohibits the advertising of brothels and prostitution.

The Appendix to this document provides a summary of prostitution offences, including penalties, in Irish legislation.

### *Child Prostitution*

The Criminal Law (Sexual Offences) Act 1993 does not distinguish between adult and child prostitution. The offences in the 1993 Act apply to both. However, the 1993 legislation was amended in 1997 (Criminal Law (Sexual Offences) (Amendment) Act 1997) to specifically address child prostitution. Under the 1993 Act, as amended, a person who solicits or importunes a child - whether or not for the purposes of prostitution - to commit an act which would constitute carnal knowledge or sexual assault is guilty of an offence.

In addition to the solicitation offence, a person who engages, or attempts to engage, in a sexual act with the child can be charged with serious offences under sexual offences legislation (Criminal Law (Sexual Offences) Act 2006, as amended.) Under that legislation, a person who engages in a sexual act with a child under the age of 17 years is guilty of an offence and liable to imprisonment for up to 5 years (10 years, in the case of a subsequent conviction). A person who engages in a sexual act with a child under the age of 15 years commits a more serious offence and is liable to life imprisonment. In either case, the consent of the child is not a defence.

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<sup>4</sup> The Criminal Law (Human Trafficking) Act 2008 made it an offence to knowingly solicit or importune a trafficked person, in any place, for the purpose of prostitution.

The Children Act 2001 also contains offences related to prostitution. Under section 249 of that Act, a person having the custody, care or charge of a child under the age of 17 is guilty of an offence if, inter alia, he causes or encourages the prostitution of the child.

Section 248 of the Act provides that a person having the custody, charge or care of a child is guilty of an offence if s/he allows the child to reside in or to frequent a brothel.

Full particulars of these offences, including penalties, can be found in the Appendix to this consultation paper.

### ***History of Prostitution Legislation in Ireland***

The origins of our legislation on prostitution can be traced to the nineteenth century - the Contagious Diseases Acts of the second half of that century, the Vagrancy Act 1824 and the Criminal Law Amendment Act 1885.<sup>5</sup> Enactment of the 1993 legislation followed many years of inactivity in bringing prosecutions for public soliciting arising from the decision of the Supreme Court in the case of *King v the Attorney General* [1981] I.R. 233, which held that certain portions of section 4 of the Vagrancy Act 1824 were unconstitutional. The *King* case is important because the Supreme Court affirmed both the basic principle of legality, namely, that a person may not be punished unless his or her conduct was defined as a specific crime before he or she acted, and its corollary, namely, that a crime must not be vague or overbroad in its definition. Since this decision constrains how legislators may define offences, it is worth considering in a little more detail.

In *King*, the Supreme Court struck down the parts of section 4 of the 1824 Act that created the offence of 'loitering with intent'. The provision applied to every 'suspected person or reputed thief' proved to have been frequenting, or loitering in, various public places with intent to commit a serious offence. But to prove that intent the prosecution did not have to prove any overt conduct involving a serious offence; it simply had to prove that the accused person had previous convictions and was walking in a public place. The intent to commit a serious offence was inferred from these facts and nothing else. The court unanimously ruled that this offence was unconstitutional. Henchy J, with whom the other judges agreed, said the offence was self-evidently unconstitutional because

'the ingredients of the offence and the mode by which its commission may be provided are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct when engaged in by another person in similar circumstances would be free of the taint of

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<sup>5</sup> See, for example, *Sexual Offences – Law, Policy and Punishment* (Thomas O'Malley)

criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be ... branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof....<sup>6</sup>

The court also concluded that the impugned provision violated the constitutional guarantee of equality because it discriminated against a constitutionally impossible classification of persons – suspected persons or reputed thieves.

The decision in *King* had a knock-on effect on prostitution-related offences such as the offence of loitering for the purposes of prostitution under the Criminal Law Amendment Act 1935 and related nineteenth century statutes. This legislation also used constitutionally impossible categories such as “every common prostitute.” The practical consequence was that the Gardaí had to rely on other offences, such as breach of the peace, to deal with the public nuisance of soliciting for the purpose of prostitution. This was clearly unsatisfactory. The legislative choice at the time was either to make the law on soliciting workable or to decriminalise public soliciting.

The 1993 legislation implemented most of the recommendations of the *Law Reform Commission's 1985 "Report on Vagrancy and Related Offences" (LRC 11 - 1985)*. In the Commission's view there was “little or no case to be made for decriminalising the street activities of prostitutes.” It believed that freedom of operation for prostitutes on the street “would be highly offensive to the great majority of people and would lead to a marked deterioration in the quality of living in cities and towns”. It referred to the nuisance caused by noise, arguments and occasional violence. It was also concerned about the solicitation of women who are not prostitutes and the offence, annoyance and fear that this can cause.

The Oireachtas enacted an offence of soliciting or importuning another person in a street or public place for the purpose of prostitution (section 7 of the Criminal Law (Sexual Offences) Act 1993). The offence is gender neutral. It covers solicitation by either a male or female for the purpose of prostitution (which includes male prostitution). It also applies to all parties, i.e., the prostitute, the client and any third party, such as a pimp. Before the enactment of the 1993 legislation, one of the criticisms frequently made of the law was that it discriminated against the prostitute. Only the conduct of the prostitute, not the client, was penalised.

Section 8 of the 1993 Act gave the Gardaí powers to direct a person in a street or public place to leave the vicinity, where a member has reasonable cause to suspect that the person is loitering for the purpose of soliciting or importuning another person or persons for the purposes of prostitution. A person who fails, without reasonable excuse, to comply with a direction to leave commits an offence. In order to address “kerb crawling”, the definition of “loitering” includes loitering in a vehicle.

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<sup>6</sup> [1981] IR 233, 257.

In relation to any new legislation on prostitution, there are two important lessons that we can take from the reasoning of the judges in the *King* case. The first main point is that the decision in the case emphasises the constitutional requirement of reasonable statutory clarity when defining offences. This principle of legality is the first principle of our criminal law jurisprudence. It has several important rule-of-law rationales.

First, it prevents legislators from punishing citizens by enacting after-the-fact criminal offences. Second, it requires legislators to define offences so that they give fair warning of their meaning and effect to ordinary intelligent citizens. Without fair notice, a citizen has no opportunity to conform his or her behaviour to the requirements of the criminal law. Third, it prohibits delegating basic policy decisions to Gardaí, judges or jurors for *ad hoc* and subjective resolution. A vague criminal statute is susceptible to arbitrary or discriminatory enforcement. Finally, on a practical level, the criminal law could not achieve its deterrent function if offences were too vague. A person cannot be deterred from committing offences unless he or she has fair notice of the line separating illegal from legal behaviour.

The second main point is that it is clear from *King* that an offence may state explicitly and definitely what conduct is prohibited, but still fall foul of the constitution if it prohibits not only conduct that may legitimately be proscribed but also conduct that is protected by guarantees of constitutional rights. In *King*, for instance, the impugned statutory provision criminalised a person with a criminal record simply because he or she exercised his or her constitutional right to walk freely in a public place. It naturally follows from this analysis that any new criminal laws governing prostitution or prostitution-related activities must be drafted

- with reasonable specificity, and
- in a way that does not allow a sweep of constitutionally protected conduct into the net of criminality.

## Chapter 3 Legislative Approaches in Other Jurisdictions

This chapter provides a brief overview of prostitution legislation in other jurisdictions and is mainly based on internet sources.<sup>7</sup> It is not an in-depth examination and simply highlights different approaches. Further work is being undertaken by way of comparative legislative analysis in the context of the current review of prostitution legislation in Ireland. Some information on how various approaches are reported to be working in different countries is also provided.

### *Prostitution Legislation in the United Kingdom*

New UK legislation on prostitution came into force in April, 2010.<sup>8</sup> It includes provisions applicable in **England, Wales and Northern Ireland** making it an offence to pay for the sexual services of a prostitute subjected to exploitative conduct.

Section 14 of the Policing and Crime Act 2009 inserted a new section into 2003 legislation governing prostitution. This makes it an offence in England and Wales to pay for the sexual services of a prostitute who is subjected to force. An equivalent offence was created in Northern Ireland by section 15 of the 2009 Act. The offences are strict liability offences - the purchaser can be prosecuted even where he is unaware of exploitation of the seller by a third party - and exploitative conduct includes force, threats, any other form of coercion and deception. Also, as long as payment occurs in England, Wales or Northern Ireland, it is immaterial where in the world the sexual services are provided.

The 2009 legislation also introduced new soliciting offences in England, Wales and Northern Ireland. These prohibit soliciting a person in a street or public place to obtain sexual services from the person as a prostitute. They replaced the offence of kerb-crawling and persistent soliciting. The change in the law means it is not necessary for prosecution purposes to prove persistent behaviour or behaviour likely to cause annoyance or nuisance to others.

A number of provisions in UK legislation address exploitation by third parties. These include controlling prostitution for gain and keeping a brothel.

Also, a range of offences specifically address child prostitution. Under the Sexual Offences Act 2003, it is an offence to cause or incite child prostitution, control a child prostitute, or arrange or facilitate child prostitution. It is also an offence to pay for the sexual services of a child.

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<sup>7</sup> See Elaine Mossman, *International Approaches to Decriminalising or Legalising Prostitution* (Criminal and Justice Research Centre, Victoria University of Wellington 2007) for a useful overview of the law in various jurisdictions

<sup>8</sup> See Home Office Circular 006/2010, Provisions in the Policing and Crime Act 2009 that relate to prostitution (Sections 14 to 21)



## *The Swedish Approach*

In 1999, **Sweden** changed its prostitution laws to punish only purchasers or consumers and not sellers of sex, an approach that has been followed by **Norway** and **Iceland**. This legislative approach is intended to address the demand side of prostitution. The purpose of the law was to eliminate street prostitution and prevent new sex workers from entering prostitution. The Swedish legislation was part of a general initiative to end all barriers to the equality of women in Sweden. The law was based on the conviction that prostitution is, by definition, violence against women, and that no woman voluntarily decides to become a prostitute.<sup>9</sup> In other words, the premise is that prostitution is a human-rights violation similar to slavery and so consent is irrelevant. And prostitution and trafficking in human beings for sexual purposes are viewed as issues that cannot and should not be separated. Catherine Mac Kinnon and Andrea Dworkin were influential in putting the issue in these terms on the public agenda.<sup>10</sup> On this view, persons selling sex should be treated as victims of crime and should never be criminalised themselves. Society must therefore provide options for those engaged in sex work by introducing social and economic reforms and programmes making it easier for them to exit the trade and reintegrate into society.

A person who obtains, or attempts, a casual sexual relation (in any place) in return for payment commits the offence of *purchase of sexual service*. The legislation applies equally to men and women. Purchasing a sexual service on a single occasion is sufficient for criminal liability. A person, other than the person who avails himself or herself of the sexual service, who provides or promises the consideration also commits an offence. The penalties are a fine or imprisonment for a maximum term of 12 months.<sup>11</sup> The offences would appear to be strict liability offences as there is no specific legal defence available to defendants.

There are conflicting views about the effects of the Swedish law. The Swedish government and supporters of the law claim that prostitution and sex trafficking have decreased because of the new law. But sex workers and others have criticised the law as driving prostitution deeper underground. Statistics about commercial sex in Sweden are uncertain so it is not possible to form a precise picture of prostitution in Sweden.<sup>12</sup> Observers often seem to be advocates for one side or other of the controversy, and official reports attract criticisms of bias. So making an objective assessment is difficult. The sharp adversity of views among observers of the Swedish approach is obvious from the summary of evidence in the *Report of the Subcommittee*

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<sup>9</sup> *Purchasing Sexual Services in Sweden and the Netherlands Legal Regulation and Experiences, An abbreviated English version*, A Report by a Working Group on the legal regulation of the purchase of sexual services ([http://www.regjeringen.no/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216-purchasing\\_sexual\\_services\\_in\\_sweden\\_and\\_the\\_netherlands.pdf](http://www.regjeringen.no/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216-purchasing_sexual_services_in_sweden_and_the_netherlands.pdf)) (last accessed May 2012).

<sup>10</sup> Max Waltman, 'Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law' 33 *Michigan Journal of International Law* 133, 137 (2011).

<sup>11</sup> In 2011, the penalty was increased from up to six months in prison to up to twelve months in prison.

<sup>12</sup> Swedish National Board of Health and Welfare, *Prostitution in Sweden 2003: Knowledge, Beliefs & Attitudes of Key Informants* (2004) (<http://www.childcentre.info/projects/exploitation/sweden/dbaFile11751.pdf>) (last accessed May 2012).

on *Solicitation Laws*, which was part of a parliamentary study of the criminal law on prostitution in Canada.<sup>13</sup> The main points of difference are:

First, some see the law as an achievement; others see it as a backward step. Some support the policy of imposing punishment on individuals who offer to buy sex and not on individuals who offer to sell sex.<sup>14</sup> For them, prostitution is never a legitimate choice.<sup>15</sup> Others stress the importance of respecting women's choices about sexuality and sexual activity, including commercial sex, based on authentic consent. For them, criminalising commercial sex makes no sense. There is urgent need, they say, for policies and remedies to protect sex workers against coercion, violence and poor health. They claim that concerns about reducing the transmission of HIV do not justify a criminal prohibition of prostitution, and probably compounds the problem.<sup>16</sup>

Second, some claim that the law has resulted in a significant reduction in prostitution in the country. Gunilla Ekberg claimed that before the law was enacted there were 2,500 to 3,000 people selling sexual services in Sweden. By 2006, she said, this number had been reduced to about 1,500 individuals. She also suggested that the law had a chilling effect on the trafficking of people into Sweden.<sup>17</sup> One observer notes that in 1995 the government estimated that there were about 2500 to 3000 sex workers in Sweden, of whom 650 were on the streets, and that in 2008 a study estimated that about 300 women were selling sex on the streets, while 300 women and fifty men were found advertising sexual services online.<sup>18</sup> In July, 2010, Sweden published the findings from the first formal evaluation of its legislation criminalising the purchase of sexual services.

The Department of Justice and Equality prepared a report on the evaluation, including an assessment of the potential legal and constitutional implications of introducing a Swedish style ban in this jurisdiction. Published in 2011, the report is entitled "Report of Visit of Dignity Project Partners to Stockholm 14-16 September 2010."<sup>19</sup> The findings of the evaluation in Sweden include a finding that street prostitution has been

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<sup>13</sup> See Report of the Standing Committee on Justice and Human Rights, *The Challenge of Change: a Study of Canada's Criminal Prostitution Law* (2006), pp 71-76 (<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2599932&Language=E&Mode=1&Parl=39&Ses=1>) (last accessed may 2012).

<sup>14</sup> Julie Lefler, 'Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes', 10 *Hastings Women's Law Journal* 11 (1999); Margaret A Baldwin, 'Strategies of Connection: Prostitution and Feminist Politics', 1 *Michigan Journal of Gender & Law* 65 (1993); Minouche Kandel, 'Whores in Court: Judicial Processing of Prostitutes in the Boston Municipal Court in 1990', 4 *Yale Journal of Law & Feminism* 329 (1992);

<sup>15</sup> See Holly B Fechner, 'Three Stories of Prostitution in the West: Prostitutes' Groups, Law and Feminist "Truth"', 4 *Columbia Journal of Gender & Law* 26 (1994).

<sup>16</sup> Sylvia A Law, 'Commercial Sex: Beyond Decriminalization', 73 *Southern California Law Review* 523, 608 (1999-2000).

<sup>17</sup> Report of the Standing Committee on Justice and Human Rights, *The Challenge of Change: a Study of Canada's Criminal Prostitution Law* (2006), pp 73-74.

<sup>18</sup> Max Waltman, 'Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law' 33 *Michigan Journal of International Law* 133, 146 (2011). He cites in footnote 63: Charlotta Holmstrom, 'Prostitution och människohandel för sexuella ändamål i Sverige: Örnfattning, förekomst och kunskapsproduktion [Prostitution and Trafficking for Sexual Purposes in Sweden: Extent, Occurrence, and Knowledge Production]', in *Prostitution i Norden: Forskningsrapport [Prostitution in the Nordic: Research Report]* 303, 314 (Charlotta Holmstrom & May-Len Skilbrei eds, 2008).

<sup>19</sup> The report was published on 17 October, 2011 and is available on the Department's website ([www.justice.gc.ca](http://www.justice.gc.ca)).



halved since the ban and that this represents a real reduction in prostitution overall. The ban is also believed to act as a barrier to human traffickers and procurers establishing themselves in Sweden. Critics of the evaluation claim it is inherently biased. They also say it relied too heavily on data concerning street prostitution, which accounts for only a small part of the overall sex trade, and that there is no proof the ban on purchasing sexual services has had an impact on other forms of prostitution.

Others argue that the law has not reduced the numbers of people involved in prostitution, but has pushed the activity underground.<sup>20</sup> Prostitution, it is claimed, has adapted with an increasing reliance on mobile phones and the internet. This is consistent with the trend in other Western European and US cities toward conducting most sex-work transactions indoors.<sup>21</sup>

Third, the Swedish law is based on the view that prostitution is in itself violent. Although both sides of the issue agree that sex workers face a risk of violence, they disagree as to whether violence inheres in prostitution, or whether it may be regulated in a way that reduces the dangers sex workers face. A nine-country study suggests that, regardless of whether prostitution was legal or illegal, 68% of 840 sex workers studied met the clinical criteria for post-traumatic stress disorder (PTSD).<sup>22</sup> Others doubt the value of this conclusion as a generalisation. Some argue (for example, Yolande Geaddah) that the Swedish law has succeeded in protecting the safety of female sex workers.<sup>23</sup> Others argue that pushing prostitution underground has put sex workers in more danger from pimps and violent clients. They say that since sex workers have become more marginalised, it has become harder for social and health services to reach them.<sup>24</sup> There are fewer safe places to work, there is limited time for screening clients, and only the more dangerous clients — who are not afraid of the law — remain. Because there is more competition and less money to be made, individuals selling sexual services are also more willing to take risks, for example, no longer insisting on the use of condoms. This is compounded by the fact that police look for condoms as evidence of prostitution, so prostitutes are less likely to carry them. Witnesses commented that individuals selling sexual services are also apprehensive about the legal protections afforded them under the new law and are thus less likely to report abusive clients to police. Because prostitutes must remain hidden, some observers suggest, informal networks between persons selling sexual services have weakened, increasing opportunities for abuse from dangerous clients or exploitative pimps. The Working Group on the Legal Regulation of the Purchase of Sexual Services points out that there is no documentary evidence from the hospitals or

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<sup>20</sup> Report of the Standing Committee on Justice and Human Rights, *The Challenge of Change: a Study of Canada's Criminal Prostitution Law* (2006), pp 73-74.

<sup>21</sup> Don Kulick, 'Sex in the New Europe: The Criminalization of Clients and Swedish Fear of Penetration', 3 *Anthropological Theory* 199, 200 (2003).

<sup>22</sup> Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder* (<http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf>) (last accessed May 2012).

<sup>23</sup> Report of the Standing Committee on Justice and Human Rights, *The Challenge of Change: a Study of Canada's Criminal Prostitution Law* (2006), p 73.

<sup>24</sup> Jane Scoular, 'What's Law Got to Do with It? How and Why Law Matters in the Regulation of Sex Work', 37 *Journal of Law and Society* 12 (2010); Janet Halley et al, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, Sex Trafficking', 29 *Harvard Journal of Law and Gender*, 335 (2006).

police indicating more violence directed towards prostitutes, but there is significant evidence indicating that the market has become tougher and more prone to violence.<sup>25</sup>

Fourth, it is important to note difficulties with enforcement of the Swedish law. The Working Group on the Legal Regulation of the Purchase of Sexual Services noted that indoor prostitution is not a significant target of law enforcement in Sweden, as it is too resource intensive, although two thirds of prostitution in Sweden takes place indoors. Street prostitution has been a minor segment of the Swedish commercial-sex sector.<sup>25</sup> Other commentators have observed the difficulty of prosecuting clients who must essentially be caught in the act to be charged. Evidence against pimps is also elusive, as it necessitates the cooperation of clients and persons selling sexual services, neither of which party is usually willing to reveal their activities to the police. The 2010 evaluation of Sweden's legislation noted that police operations have "mainly targeted street prostitution and more organised forms of prostitution linked to procuring or human trafficking." It goes on to say that the "police have not ordinarily prioritised, or had the resources for, interventions against the purchase of sexual services via other forms of prostitution."

### *Other EU Approaches*

Across the EU prostitution legislation varies from country to country. In some countries prostitution is banned (**Lithuania, Romania**). In others (Ireland included) prostitution itself is not illegal, or is tolerated, but related activities such as pimping, running brothels, living off the earnings of prostitution, etc. are prohibited (**Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Italy, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain**). Solicitation is illegal in Finland and France (as well as in Ireland and the UK).

Prostitution is legal and regulated in the **Netherlands, Germany, Austria, Greece, Hungary and Latvia**. In these countries, prostitutes are recognised as workers and, subject to conditions, engaging in sexual activity is considered legitimate.

The approach in **Germany** has been to try to integrate prostitution services into the mainstream economy. An independent evaluation of the policy (Kavemann et al, 2007)<sup>26</sup> pointed to difficulties in distinguishing between voluntary and forced prostitution, monitoring the sex industry (including legal activity) and achieving economic integration. The evaluation concluded there was little evidence that legislation intended to bring the sex industry into the formal economy had improved the lives and working conditions of those working as prostitutes, or facilitated transparency and thus, better monitoring of the industry.

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<sup>25</sup> *Purchasing Sexual Services in Sweden and the Netherlands Legal Regulation and Experiences* An abbreviated English version A Report by a Working Group on the legal regulation of the purchase of sexual services ([http://www.regjeringen.no/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216-purchasing\\_sexual\\_services\\_in\\_sweden\\_and\\_the\\_netherlands.pdf](http://www.regjeringen.no/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216-purchasing_sexual_services_in_sweden_and_the_netherlands.pdf)) (last accessed May 2012).

<sup>26</sup> Kavemann B, Rabe H, Leopold B, and Fischer C 2007 *The Act Regulating the Legal Situation of Prostitutes - implementation, impact, current developments: Findings of a study on the impact of the German Prostitution Act*. SoFFL K.

Prostitution was legalised in the **Netherlands** in 2000. Prostitutes can work as regular employees, though the vast majority are said to work as independent contractors. Prior to 2000 brothels had been tolerated on the basis that enforcement of anti-prostitution laws would be counter-productive from a harm reduction perspective. However, this made it difficult to regulate brothels.

More recently the Dutch authorities have been clamping down on the prostitution business because of evidence it was out of control. The authorities became aware of violence and serious criminality associated with the industry, including human trafficking, drug crime, money laundering and killings. As a result, many prostitution businesses have been closed and licences for some brothels have not been renewed. These measures are aimed at regaining control and do not mark a legislative shift.

The Dutch authorities have conducted a number of evaluations of their prostitution policy. The most recent of these was in 2007.<sup>27</sup> This was quite positive with regard to the Dutch approach but, as in Germany, the evaluation reported:

- difficulties in monitoring the legal and illegal elements of the sex industry;
- difficulties in integrating prostitution into the formal economy in terms of work contracts and the payment of taxes;
- the existence of “small exploitation” in the legal sex industry making it difficult to distinguish between voluntary and involuntary prostitution; and
- a lack of improvement in terms of mental health outcomes for those working in the sex industry.

In **Greece**, brothels must have permits. Persons engaged in prostitution must register with the authorities and carry a medical card, which is regularly updated. Despite regulation, most prostitutes are reported to be engaged in illegal prostitution.

In **Latvia** also, prostitutes are required to carry a health card. They must undergo regular health checks. There are strict conditions attaching to how and where prostitutes can operate. While prostitution is regulated, brothels and procuring are illegal. The law prohibits any third party activity which promotes prostitution.

Child prostitution is illegal throughout the EU.

### ***Prostitution Legislation in Australia***

Prostitution is regulated in Queensland, Victoria and New South Wales. In the remaining states, prostitution itself is not illegal but brothels are prohibited. Nearly all states and territories have liberalised their laws, some with more success than others.

While brothels are legal in New South Wales, many other activities associated with prostitution, such as living on the earnings of prostitution (brothel owners being exempt), causing or inducing prostitution, advertising prostitution, etc., are illegal. Solicitation is also banned in many public places.

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<sup>27</sup> A.L. Daalder (2007). *Prostitution in the Netherlands since the lifting of the brothel ban*. The Research and Documentation Centre (WODC), the Hague, the Netherlands.

In Queensland, under the Prostitution Act 1999, as amended in 2001, brothels are required to be licensed. A sex worker can work either alone or in a licensed brothel. All other forms of sex work, including street work, are illegal and public solicitation is prohibited.

In Victoria, the Prostitution Control Act 1994 legalises and regulates brothels and escort agencies while proscribing street solicitation and child prostitution. Brothels are subject to local council planning controls and must have permits. A brothel owner is liable to up to five years imprisonment for forcing a worker to perform sexual services against his or her will. Prostitution is defined as "the provision by one person to or for someone else of sexual services in return for payment or reward." "Prostitution service providers" are defined as "person[s] carrying on business of a kind referred to as a brothel and/or an escort agency." They may do so only if they have a licence. Licensing facilitates criminal background checks and is considered important in breaking criminal links to the operation of brothels. Owner-operated brothels and private escort workers are not required to be licensed but they must be registered. Thus, one or two people wishing to work as prostitutes out of their homes or apartments are exempt from the requirement to have a licence. Sex workers have a degree of employment protection. Other restrictions include a ban on advertising and the prohibition of alcohol in brothels. In addition, brothels cannot have more than 6 rooms. Street prostitution is illegal.

There would seem to be a two-tiered commercial-sex industry in Victoria - one legal, one illegal.<sup>28</sup> Despite the Victorian government's intentions to reduce and control adverse influences of the commercial-sex industry, brothels earn large profits from illegal prostitution.<sup>29</sup> The requirement that women and men register with the government to work in licensed brothels is a factor in the growth of this illegal activity. Women do not want the State to record that they are sex workers. The result is that although many workers work in licensed brothels or for escort services, there is a concern that more sex workers work in illegal brothels and on the street. A woman or a man who works as a prostitute for an illegal brothel or who solicits sexual services in public is liable on conviction to a fine or imprisonment.

In South Australia, prostitution itself is not illegal. Brothels, soliciting in public places, receiving money from the prostitution of another, and procuring are all illegal.

Prostitution itself is not illegal in Tasmania. Also, while it is not illegal to be a sex worker and provide sexual services, it is illegal to employ, or otherwise control or profit from the work of individual sex workers. The commercial operation of sex businesses is prohibited and street prostitution is illegal. It is illegal to receive commercial sexual services, or provide or receive sexual services unless a prophylactic is used.

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<sup>28</sup> Roberta Perkins, *Working Girls: Prostitutes, Their Lives, and Social Controls*, The Australian Institute of Criminology (1991), (<http://www.aic.gov.au/publications/previous%20series/lcj/1-20/working.aspx>) (last accessed May 2012).

<sup>29</sup> Julie Bindel & Liz Kelly, *A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden*, Child and Woman Abuse Studies Unit, London Metropolitan University (2003), p15 (<http://www.glasgow.gov.uk/nr/rdonlyres/c19e010b-1a4f-4918-97bd-f96af7d7f150/0/mainreport.pdf>) (last accessed May 2012).



Brothels are illegal in the Northern Territory, as is street work. It is not illegal to act as a sole operator and such activity is not regulated. However, sex workers must register with the police. Licences can be issued for the operation of escort agency services.

In Western Australia, prostitution itself is not illegal. However, activities associated with prostitution, such as pimping and running brothels are banned.

### *The Approach in New Zealand*

New Zealand took a major change in direction during the last decade. There, the legislative approach is a mix of decriminalisation and regulation. Sex work is recognised as legitimate work.

Under the Prostitution Reform Act 2003, New Zealand decriminalised prostitution, promoting prostitution, owning a brothel or escort agency, and street solicitation. The state neither promotes nor prohibits the act of providing sexual services in exchange for money or its equivalent. The express purpose of the Act - a form of statutory plan - was to create a framework that safeguards the human rights of sex workers and protects them from exploitation, and to promote their welfare, occupational health, and safety in a way that was conducive to public health. The 2003 Act prohibits persons less than eighteen years of age from engaging in prostitution.

The 2003 Act provides for the human rights of sex workers. It states that adults engaged in prostitution shall not be forced to perform sex acts against their will. It also requires sex workers to adopt safe sex practices in the course of their employment. For the purposes of health-and-safety legislation, it classifies them as people "at work" while providing commercial sex. So they have a right to a safe working environment. The Act also prohibits employers from coercing or forcing a sex worker to engage in prostitution. Sex workers have the right to refuse a particular customer. The Act provides that an employment contract cannot be used to force a worker to engage in a sex act against his or her will. The Act contains a specific plan of action to prevent minors from entering the sex industry. It also provides remedies for unfair employment practices.

The 2003 Act creates a certification procedure for brothels, street prostitutes, and Single Operator-Owned Brothels. The procedure makes certification easy and inexpensive for brothel owners. It disqualifies anyone with a serious criminal record from becoming an employer of sex workers. Individual sex workers and single operator-owned brothels with four or fewer workers do not have to apply for a certificate. The easy certification process was designed to enable the government to monitor those engaged in commercial sex while preventing a second, illegal sector from developing. The perceived failure of legalised brothels in Victoria, Australia - which led to the development of an illegal commercial-sex sector - was a reason for making the certification process as simple, cheap, and convenient as possible.<sup>30</sup>

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<sup>30</sup> The Law Review Committee said: "The licensing system in Victoria has been criticised for being too restrictive, the application process too onerous, and the compliance costs too high. As a result, non-

An interesting feature of the 2003 Act is that it openly looks for the help of the New Zealand Prostitutes Collective ("NZPC"). It recommends that the NZPC keep a database of street based sex workers, as well as those working in brothels and single operator-owned brothels. The NZPC was formed in 1987 in response to the threat of an AIDS/HIV epidemic and the need for the health and education authorities to communicate with the sex industry. From the beginning, the New Zealand Department of Public Health supported and funded the NZPC because it provided safer sex programs to sex workers. The NZPC's membership alliance was also a major impetus for the passage of the 2003 Act. The employment provisions in the Act give sex workers direct legal redress against employers for violations of health-and-safety legislation so long as they are considered "employees." The NZPC, despite not being an official union, is contracted to the Ministry of Health to advocate for the rights, health, and well-being of sex workers. Its members provide general support and advice to sex workers. It helps with preparing curriculum vitae, and acts as a broker to other agencies who can assist further with alternative career options.

Because decriminalisation was a significant new step, the 2003 Act includes a provision appointing a Law Review Committee to produce a study of the law's effects.<sup>31</sup> It was also charged with assessing the nature and adequacy of the means available to assist persons to avoid or cease working as sex workers and consider[ing] whether any amendments to this Act or any other law are necessary or desirable and, in particular, whether the system of certification is effective or could be improved, whether any other agency or agencies could or should administer it, and whether a system is needed for identifying the location of businesses of prostitution. Further, the Committee must "consider whether any other amendments to the law are necessary or desirable in relation to sex workers or prostitution; and consider whether any further review or assessment of the matters set out in this paragraph is necessary or desirable; and report on its findings to the Minister of Justice; and carry out any other review, assessment, and reporting required by regulations made under this Act.

In 2008, the Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003 was published. The report - which presents an objective study of the sex industry conducted by government committees, NGOs, and foreign academics - allowed the New Zealand government to discover whether decriminalisation actually encourages vulnerable women to become prostitutes, increases commercial sex establishments, and creates a haven for sex traffickers. The Law Review Committee closely examined the effects of the law five years after it was put into effect. By interviewing those working in the prostitution industry, checking

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compliance is common and a two-tiered industry of legal (licensed) and illegal (unlicensed) brothels has developed." P 90.

<sup>31</sup> In 2007, the Department of Public Health and General Practice of the University of Otago, New Zealand prepared a report on the impact of prostitution legislation for the Prostitution Law Reform Review Committee. The report was commissioned by the Health Research Council and the Department of Justice. It examined the impact of the Prostitution Reform Act on the health and safety practices of sex workers. The report concluded that there were few, if any, negative consequences, as a result of decriminalising prostitution in terms of (a) the health and safety of sex workers or (b) numbers attracted to participate in the sex industry. However, it was accepted in the report that it was too soon to make a definitive assessment and that the full effects on health and safety might not emerge for a number of years.

certificates and examining advertisements, the Law Review Committee determined that there was not a significant increase in the sex industry in the five years after the 2003 Act was passed. The Committee also concluded that the main reasons for entrance into the sex industry remained financial, and that the most effective way to ensure people do not enter the sex industry is to help them find other ways of earning money. Thus, decriminalisation did not lead to a massive influx of women choosing to become prostitutes.

The Committee also states that, contrary to public perception, coercion into the sex industry is extremely rare in New Zealand, and that there is no link between the sex industry and human trafficking. New Zealand does not have a separate law specifically dealing with sex trafficking. Instead, the forcible movement of persons within the country is dealt with through kidnapping, slavery, and other related criminal laws. The New Zealand Department of Labour reported that since the enactment of the 2003 Act, no situations involving trafficking in the sex industry have been identified by the Immigration Service. While this does not mean that sex trafficking does not occur in New Zealand, the Committee argues that the prohibition on non-residents working in the sex industry, coupled with New Zealand's geographical isolation and robust legal system, provides a protection against New Zealand being targeted as a destination for human traffickers.

Despite these assertions, New Zealand was criticised by the United States Department of State in its 2009 Trafficking in Persons Report, which claimed that “[a]n assumption that all women engaging in prostitution in New Zealand do so willingly appears to underpin official policy and programs, and has inhibited public discussion and examination of indications that trafficking exists within both the decriminalized and illegal sex industries.” The Department of State report also claimed that New Zealand demonstrated “inconsistent efforts to prevent human trafficking” in 2009 because it did not run campaigns to increase public awareness of trafficking or “take steps to reduce demand for commercial sexual acts.” Nonetheless, New Zealand was given the highest ranking on the basis that it was among the most effective countries in the world at combating human trafficking. The legislation is reported to have been criticised by members of a UN women’s committee examining whether New Zealand was meeting its commitments under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

### *Recent Developments in Canada*

Canada’s prostitution prohibitions are generally the same as those in the UK and Ireland. Prostitution itself is not illegal but activities surrounding it such as public solicitation, running a brothel, communicating for the purpose of prostitution and living on the earnings of prostitution are prohibited. However, reports of a March, 2012 decision by Ontario’s Court of Appeal indicate that some of Ontario’s anti-prostitution laws have been struck down on the grounds that they place unconstitutional restrictions on the ability of prostitutes to protect themselves.

It’s been reported that as a result of the ruling, the ban on brothels must be struck out within 12 months, unless amended by Parliament.



Apparently, the prohibition against living on the earnings of prostitution was deemed partially unconstitutional because it criminalised non-exploitative commercial relationships between prostitutes and others. The court's re-worked provision limiting the prohibition to living off the earnings of prostitution only in circumstances of exploitation was to take effect within 30 days of the ruling.

The constitutional challenge was mounted by three sex trade workers who claimed the laws prevented them from taking basic safety precautions such as hiring a bodyguard and working indoors. The murder of street prostitutes by a serial killer and missing women across Alberta formed a backdrop to the debate. A paramount issue in the case was that anti-prostitution laws endangered sex workers and were a violation of the right to life, liberty and security of the person.

The decision is binding on Ontario only but is likely to prompt challenges in other provinces. An appeal to the Supreme Court of Canada is also expected.

### *Prostitution Law in the United States*

Prostitution in the United States is illegal in 49 of the 50 states, the exception being Nevada. The legality of prostitution is determined at state level. More serious offences such as coercing someone to be a prostitute can be prosecuted under federal law.

Prostitution is generally treated as a misdemeanour public order offence.

While street prostitution is illegal throughout the US, it does exist. Such prostitution is reported to be concentrated in certain areas known for solicitation.

Likewise, despite being banned, it is said that escort prostitution exists throughout the US. Escort services are provided independently and through escort agencies, and are increasingly advertised on the internet.

Generally, brothels are illegal. However, it is claimed they exist under the guise of massage parlours, etc. In Nevada, brothels are permitted in some rural counties but must be licensed. Prostitution is illegal in the state's main centres of population.

"John schools" are an educational intervention aimed at male purchasers of prostitution. They are usually a diversion programme offered as an alternative to prosecution but can also form an element of the criminal sentence for solicitation or related offences. Initially introduced in San Francisco in 1995, approximately 40 other communities throughout the US now have similar programmes. It's reported that in the first 12 years of the programme the recidivism rate amongst offenders was reduced from 8% to under 5%. A 2009 city audit of the San Francisco programme is said to have found that the programme's goals were ill-defined and there was no way of determining its effectiveness.

## Chapter 4 The Requirements of International Organisations

There is no international legal framework requiring domestic legislation to take a particular approach to adult prostitution. The UN Convention on the Elimination of All Forms of Discrimination Against Women requires State Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

A number of international legal instruments address prostitution in the context of deterring and punishing child prostitution. Other instruments require action on prostitution in the particular context of human trafficking for the purposes of sexual exploitation.

The various provisions are summarised below. Some information on UNAIDS guidelines and related analysis at the international level is also included.

***Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA***

This EU directive was adopted in December, 2011. Article 4 requires Member States to punish the following conduct:

- (a) causing or recruiting a child to participate in child prostitution, or profiting from or otherwise exploiting a child for such purposes;
- (b) coercing or forcing a child into child prostitution, or threatening a child for such purposes; and
- (c) engaging in sexual activities with a child, where recourse is made to prostitution.

Article 21 requires Member States to take appropriate measures to prevent or prohibit the advertising of child prostitution and the making of travel arrangements for the purpose of committing prostitution offences.

***Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA***

Under the heading of prevention, article 18 of the directive provides that Member States shall take appropriate action, including education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings.

It further provides that Member States shall consider taking measures to establish as a criminal offence the use of prostitution services, with the knowledge that the person providing such services is a victim of human trafficking.

***Council of Europe Convention on the Protection of Children against Sexual Abuse and Exploitation (Lanzarote Convention).***

***Open for Signature:*** 25/10/2007

***Signed by Ireland:*** 25/10/2007

Article 19 of the Lanzarote Convention requires State Parties to take the necessary or other legislative measures to ensure criminalisation of the following intentional conduct:

- (a) recruiting a child into prostitution or causing a child to participate in prostitution;
- (b) coercing a child into prostitution or profiting from or otherwise exploiting a child for such purposes; and
- (c) having recourse to child prostitution.

Article 8 requires State Parties to take the necessary legislative or other measures to prevent or prohibit the dissemination of materials advertising offences established by the Convention.

***Council of Europe Convention on Action against Trafficking in Human Beings.***

***Open for Signature:*** 16/05/2005

***Signed by Ireland:*** 13/04/2007

***Ratified by Ireland:*** 13/07/2010

To discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, article 6 requires each State Party to adopt or strengthen legislative, administrative, educational, social, cultural or other measures. A non-exhaustive list of specified measures includes research on best practice, awareness raising, and educational programmes for school children.

Article 19 provides that each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences the use of prostitution services, with the knowledge that the person providing such services is a victim of trafficking in human beings.

***Optional Protocol to the UN Convention on the rights of the Child on the Sale of Children, Child Prostitution and Child Pornography – 25 May 2000***

***Signed by Ireland:*** 07/09/2000

Article 1 of the optional protocol requires State Parties to prohibit child prostitution.

***UN Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) – 18 December 1979***

***Accession by Ireland: 23/12/1985***

Article 6 of CEDAW provides that State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

***Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organised Crime – 15 November 2000***

***Signed by Ireland: 13/12/2000***

***Ratified by Ireland: 17/06/2010***

Under the heading of prevention of trafficking in persons, article 9 of the protocol provides that States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

***UNAIDS Good Practice on HIV and Sex Work***

***Report of the UNAIDS Advisory Group on HIV and Sex Work Published December 2011***

The Report of the UNAIDS Advisory Group on HIV and Sex Work was published in December, 2011. It was prepared to complement the 2009 Guidance Note on HIV and Sex Work.<sup>32</sup> The Advisory Group includes representatives of organisations affiliated with the Global Network of Sex Work Projects, independent experts from academia and civil society organisations, representatives of UNAIDS co-sponsors and the Secretariat. It was constituted in 2009 by the Executive Director of UNAIDS to provide advice and guidance to UNAIDS on matters related to HIV prevention, treatment, care and support for sex workers.

The report refers to criminalisation of the buying of sex in Norway and Sweden, “based on the idea that the client may merit punishment, but the sex worker is a ‘victim’ .” It recommends that States remove criminal penalties for the purchase and sale of sex to establish legal and policy environments conducive to universal access to HIV services for sex workers.

The report expresses concerns about the conflation of sex work and trafficking and the impact that failing to clearly distinguish between the two has on sex workers.

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<sup>32</sup> Joint United Nations Programme on HIV/AIDS (UNAIDS) 2009 Published March 2009

Available from

[http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306\\_UNAIDS-guidance-note-HIV-sex-work\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf)

It states that “the approach of criminalising the client has been shown to backfire on sex workers.” It also expresses the view that “in general, demonising and marginalising clients are approaches that create major barriers to effective HIV programming with sex workers.” The report goes on to say that “these approaches are often adopted with the aim of reducing sex work and also trafficking, but they have not been shown to be effective in achieving these aims”, and “should be avoided, from both a public health and a human rights perspective.”

### *Prostitution and the Transmission of HIV*

The 2011 Report of the UNAIDS Advisory Group on HIV and Sex Work recognises that prostitution or sex work has important human-rights and public-health dimensions. Historically, coercive legal means intended to control and regulate prostitution were justified by public-health concerns, such as the concern to prevent the spread of sexually transmissible diseases.<sup>33</sup> It is important today to reflect on the connection between prostitution and HIV/AIDS with reference to the preferred global approach to addressing HIV/AIDS. The important questions are whether the criminal law on prostitution helps or hinders the prevention or treatment of HIV/AIDS, and whether other legislative approaches should be considered. Proposed responses to this issue have gathered around opposite poles: some have demanded stringent legal and regulatory measures to address the perceived connection between prostitutes and HIV transmission; others have called for the non-criminalisation of prostitution to enable more effective policy and programmatic interventions.

Prostitutes are often held responsible for the transmission of HIV, viewed as ‘vectors of disease’ transmitting infection to the general population.<sup>34</sup> This assumption lacks a proper evidential basis. Sex workers are more vulnerable to being infected by clients and others. Outdoor prostitutes are particularly vulnerable. Prostitutes with a drug addiction are also particularly vulnerable because of their willingness to engage in unsafe sex for drug money. Owing to physiology, female sex workers are more vulnerable than males to HIV infection. They are at least four times more vulnerable to sexually transmitted infections. The presence of untreated sexually transmitted infections is a risk factor for HIV. Another risk factor is injury caused by violence. Moreover, they are often powerless to insist on safer-sex practices, such as the use of condoms. Prostitution is a high-risk activity in relation to HIV transmission because it involves multiple partners. But female sex workers are generally more aware of the need for safer-sex practices than other groups in the population. And there is a lower transmission rate for HIV from women to men.

The use of condoms in sex work can reduce the transmission of HIV. Prostitutes who have appropriate health information use condoms more consistently than other populations similar in age, race and sex. But a sex worker’s ability to negotiate condom use is determined by context-specific factors. Their weaker social and economic status and vulnerability to arrest can impair the ability of prostitutes to

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<sup>33</sup> Coercive measures includes, for example, compulsory medical testing and periods of quarantine. The discovery of penicillin and antibiotics undermined the justification for such measures. See Kate Shannon & Joanne Ceste, ‘Violence, Condom Negotiation, and HIVSTI Risk among Sex Workers’, 304 *American Medical Association* 573 (2010).

<sup>34</sup> See Catherine Pirkle et al, ‘Female Workers in China: Vectors of Disease?’ 34 *Sexually Transmitted Diseases* 695 (2007).



insist upon safer-sex practices in the face of pressure from customers. The ability of sex workers to prevent HIV infection is also affected by their ability to access health-care services. Prostitutes do not always feel at ease visiting facilities providing health care.

### *Legal Responses and International Research*

The connection between sex work and HIV transmission has given rise to two main legal responses: those that call for more stringent legal control through regulation of prostitution and criminalisation of some forms of behaviour, and those that promote non-criminalisation and programmes to promote condom use and reduce exploitation. The punitive criminal-law response has relied on three kinds of measures: [1] mandatory testing requirements; [2] prohibiting persons who have tested positive for HIV from working as prostitutes; and [3] increasing the penalties for prostitution-related offences when committed by a person with HIV.

[1] Mandatory testing has been deployed in jurisdictions in which prostitution has been legalised and in jurisdictions in which prostitution is criminalised. Mandatory testing may take the form of testing as a condition for working in a legal brothel, periodic testing as a condition for continued work, and testing upon arrest for a prostitution-related offence. Those who favour mandatory testing argue that it is likely to reduce the transmission of HIV. Those who oppose mandatory testing point to the unreliability of tests, the creation of a false sense of security in both customers and prostitutes, the focus on after-the-fact detection rather than prevention, the focus on sex workers rather than customers, the interference with bodily integrity, privacy, and the right to medical confidentiality, and the aggravation of stigmatisation.

[2] Legal coercion whose objective is to deter people with HIV from engaging in sex work may force prostitutes to go underground if they think that they may be infected.

[3] A system of increased penalties upon conviction of prostitution-related offences may result in 'expanding' the prostitute's criminal record, further limiting the employment opportunities of persons wishing to leave prostitution.

These considerations raise the question whether criminal law measures, which are inherently punitive and coercive, are appropriate for addressing prostitution and HIV/AIDS. Beyond this question there is the question how the legal status of prostitution affects HIV/AIDS prevention. Research suggests that laws criminalising prostitution hinder HIV/AIDS education and prevention programmes. They also undermine the ability of sex workers to negotiate safer sex and to access helpful public health services. Prostitutes may be reluctant to carry condoms for fear of police, and services may similarly be reluctant to display safer sex material. Health and occupational safety standards cannot be enforced where prostitution is illegal.

Criminalisation drives prostitution underground. The result is that it becomes hard to reach sex workers and their customers with HIV prevention, treatment, care and support programmes. One of the major arguments for the non-criminalisation of prostitution is that this legal approach assists in reducing HIV transmission. The Australian Intergovernmental Committee on AIDS has suggested that

decriminalisation would alleviate the stigma associated with prostitution and encourage safer-sex activities in the sex trade. Commentators suggest that there are interventions such as peer-based education and condom-distribution initiatives that would give prostitutes the means to protect themselves against HIV. But they also caution that these kinds of programmes require being able to access prostitutes and their customers. Criminalisation impedes such health and education campaigns.

Prostitution takes places in a context of few or no rights: HIV vulnerability is high for all prostitutes and is significantly influenced by their working environment. Most sex workers find themselves working in unhealthy and unregulated conditions. Many settings offer little or no promotion of safer sex, encourage a high turnover of clients and provide little or no control over clients' behaviour. They often have poor access to: adequate health services and HIV prevention measures such as male and female condoms; post-exposure prophylaxis after rape, emergency contraception, management of sexually transmitted infections; and, drug treatment and other harm reduction services. Internationally, there are many barriers to providing services for prostitutes that need to be addressed, including the discrimination they face from health care and social services, and law enforcement officers.

### *Reform based on Human Rights*

The Report of the UNAIDS Advisory Group on HIV and Sex Work 2011 refers, as noted above, to the UNAIDS Guidance Note on HIV and Sex Work 2009. The 2009 Guidance Note makes the following statement relating to law, policy and law enforcement:

“In many countries, laws, policies, discriminatory practices, and stigmatizing social attitudes drive sex work underground, impeding efforts to reach sex workers and their clients with HIV prevention, treatment, care and support programmes.....Stigma and discrimination must be effectively addressed; violence and abuse of sex workers must be reduced; and legal barriers to participation should be revised. Achieving the changes in social and legal conditions that limit access to [HIV] services will take time, but it is critical to implement needed legal and policy reforms now.”

The Guidance Note advises, in Annex 2, that states can take many actions to establish legal and policy environments that are conducive to universal access to HIV services for sex workers. Among these are the following:

- States should move away from criminalising sex work or activities associated with it. Decriminalisation of sex work should include removing criminal laws and penalties for purchase and sale of sex, management of sex workers and brothels, and other activities related to sex work. To the degree that states retain non-criminal administrative law or regulations concerning sex work, these should be applied in ways that do not violate sex workers' rights or dignity and that ensure their enjoyment of due process of law.
- Whatever the legal regime, states should ensure that sex workers are not subjected to mandatory HIV testing or restrictions on their civil liberties, have unimpeded access to all HIV prevention, treatment, care and support



programmes and that they participate meaningfully in programme and policy decision-making affecting them. Prevention programmes should ensure access to lubricants as well as condoms. HIV-positive sex workers must be considered a high-priority population for uninterrupted access to treatment services.

- States should take all necessary measures to enable sex workers to enjoy work-related protections like other workers, including workplace safety and protection from violence, abuse and discrimination.
- Where criminal law applies, governments and donors should support sex workers' access to legal services, mechanisms of accountability for police abuse, information for sex workers on their rights, and removal of impediments to forming sex worker organisations. Reduction of sex work-related stigma should figure in public awareness and information programmes.
- Where governments have recognised the legality of sex work, health regulations related to sex work should not require mandatory medical procedures, should respect sex workers' right to meaningful participation in health services, and give priority to measures that empower sex workers to protect themselves from HIV and other sexually transmitted diseases.

## Chapter 5 Four Approaches for Discussion on Legislative Policy

There are four approaches for legislative policy on prostitution or sex work.<sup>35</sup> All of them criminalise underage or forced sex work. The approaches are as follows. [1] Under the *total-criminalisation approach*, the criminal law proscribes all aspects of prostitution or sex work illegal. The police have powers to enforce the laws. [2] Under the *partial-criminalisation approach* only some parts of sex work are criminalised. The criminal law may target only sex workers, or only customers. [3] The *non-criminalisation approach* requires sex workers and sex-work businesses to comply with legislation and regulations that apply to employment and business in general. Thus, they have to comply with legislation governing employment, health and safety, and human rights and equality. Legislation criminalises abuse, trafficking, forced and underage sex work. [4] The legalisation-regulation approach uses legislation at central and local-government levels to specify where, when and how sex work may be engaged in. It involves a balancing of rights and interests between those engaged in sex work and residents in local communities. People who breach the law or regulations are liable to criminal punishment.

**This chapter provides a for-and-against analysis of each of the four approaches. The ‘for’ part of the analysis identifies positive arguments for the approach while the ‘against’ part of the analysis identifies negative arguments against the approach.**

**This is intended to be as comprehensive as possible and inclusion of arguments on either side does not, of course, imply any acceptance of their validity.**

**The analysis does not favour any particular approach but simply tries to take an even-handed approach in order to assist reflection. In relation to each approach, the chapter sets out a number of questions to assist further reflection. The arguments are not exhaustive and the questions are not intended to limit in any way the range of questions readers might want to consider.**

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<sup>35</sup> See South African Law Reform Commission, *Sexual Offences- Adult Prostitution*, Discussion Paper 0001/2009, Project 107, pp 172ff.

## **[1] Total Criminalisation**

Under the total-criminalisation approach all aspects of prostitution, including the sale and purchase of sexual services, are proscribed. This is the approach taken in the United States and a small number of EU countries. The criminal law is enforced by the police or other law-enforcement agencies. A person found guilty of such a criminal offence will usually face punishment in the form of a fine or imprisonment, or both.

### *For*

- Total criminalisation would send a very strong signal that society is not prepared to tolerate prostitution under any circumstances. Buyers and sellers of sexual services would be equally culpable before the law.
- Prostitution is a social evil. Criminalisation is necessary to prevent the spread of HIV and sexually transmissible infections, social nuisances, and crime.

### *Against*

- Individuals may exercise their autonomy to sell or buy sex even if others think that doing so is wrong or unwise.
- Criminalisation causes social evils by forcing prostitution into the criminal underground. If prostitution were tolerated by the law in certain areas of the community the public visibility of prostitution would allow the police to deal more effectively with abuse, violence or fraud. Customers and sex workers would be more likely to report criminal incidents to the police.
- Criminalising prostitution endangers prostitutes' health and safety by creating an illegal, secret market that is conducive to abuse and exploitation and encourages the isolation of sex workers selling sexual services.

## Questions

1. *How should the criminal law define 'prostitution' and prostitution-related activities?*
2. *What objectives should the new law serve?*
3. *Why should the criminal law have a role in regulating the purchase and sale of sexual services where the transaction is conducted in private between consenting adults?*
4. *How will total criminalisation comply with (a) Ireland's international obligations, and (b) the Constitution?*
5. *How will this legislative approach:*
  - (a) reduce the numbers engaged in prostitution?*
  - (b) reduce the demand for prostitution?*
  - (c) reduce the abuse and exploitation of prostitutes?*
  - (d) help prostitutes to enforce their rights, including their rights to equality and access to health?*
  - (e) avoid the stigmatisation of and discrimination against prostitutes?*
  - (f) address issues regarding prostitution and crime?*
  - (g) address concerns regarding public health and HIV transmission?*
  - (h) help to create an environment in which prostitutes feel comfortable about leaving prostitution?*
  - (i) avoid driving prostitution further underground and making life more dangerous for sex workers?*
6. *How should the law deal with the issue of having a criminal record for prostitution in respect of sex workers who leave prostitution and seek alternative employment?*
7. *Could an outright ban on prostitution be enforced and would enforcement represent an effective use of scarce police resources?*
8. *Would enforcement of a ban on prostitution divert Garda resources from targeting organised crime, including human trafficking and gang-controlled prostitution?*

## [2] Partial Criminalisation

*There are different versions of partial criminalisation. Here we consider two versions – the form in force in Ireland and the form in force in Sweden.*

[A] In one version – the form in force in Ireland - activities related to prostitution such as soliciting, brothel-keeping and living off the earnings of prostitution are prohibited, while giving sex for money itself is not a crime.

### *For*

People who favour partial criminalisation invoke similar arguments to those who support total criminalisation. But they invoke the social-harm rationale for partial criminalisation rather than the argument that prostitution is a social evil. The principal objective of partial criminalisation is to reduce social nuisances arising from prostitution activities such as soliciting or brothel-keeping. In other words, this approach relies on a harm-reduction rationale.

- Prohibiting prostitutes and customers from soliciting in public prevents a serious public nuisance that accompanies public solicitation. It takes the activity off the streets and out of public view. It protects residents from noise, traffic congestion, street congestion, and offensive behaviour. It protects property owners from reduced property values. It protects members of the public from impeded pedestrian traffic. It protects adults from the offensiveness of being propositioned. It protects children from being exposed to unacceptable behaviour.
- It minimises public exposure to an activity that is degrading and socially unacceptable.
- It hinders the criminal activities that are often associated with prostitution.
- Prohibiting brothels is justified because it reduces harm to individuals. It discourages the involvement of organised crime in prostitution. And it reduces nuisance to neighbouring residents and businesses.
- Living off the earnings of prostitutes should remain an offence because it deters those who are willing to live parasitically off the earning of prostitutes and add to the exploitation of prostitutes. The pimp personifies abusive and exploitative maleficence.

### *Against*

- Prohibiting soliciting forces sex workers into dangerous isolation. Sex workers who sell sex on the street face a dilemma: to avoid police attention they must work in isolated areas but working in isolated areas increases the risk of being harmed by predators. Moreover, they have often to change location going from one isolated area to another isolated area. This has the effect of separating them from friends, co-workers, regular, dependable customers and familiar places. The lack of stability endangers prostitutes' health, safety and well-being. It is more difficult for them to work in teams, share information about bad customers, and to watch out for one another. They are unable to obtain help when they need it and are out of the reach of health or other support services that can provide help and information.

- It endangers street prostitutes by forcing them to conclude their negotiations with potential customers more quickly. This often has the result that they get into the customer's car too quickly. This screening phase is the most critical point for the sex worker to assess the customer's stability. If the sex worker is rushing to avoid the attention of the police, she or he may misjudge the safety of a client. Having the time to negotiate the terms of the transaction before getting into a car or going to a private location is important to all prostitutes.
- It puts sex workers at an economic disadvantage. Being forced to rush negotiations denies them a strong bargaining position when negotiating with customers. It is hard for them to negotiate prices and services once they are in a customer's car. Moreover, in order to avoid being arrested in sting operations by undercover police, they usually let the customer determine the prices and services.
- Proscribing the use of brothels leaves prostitutes with few options if they wish to sell their sexual services under safer conditions. Denying them the chance of creating a safer place to sell sex only serves to create unsafe places to do business. Although the prostitute can carry out sex work by going to the home of a customer, the uncertainty inhering in a home visit for the sex worker heightens the risks for him or her. He or she does not know whether the customer has any real connection to the address provided and therefore cannot be provided with security even if steps are taken to inform a friend or colleague where they are and who they are with.
- The law makes the lives of sex workers more unstable. It encourages landlords to rescind the lease of anyone suspected of committing acts of prostitution.
- Prostitutes can find themselves living every day with the fear of losing custody of their children, losing their lawful employment, being stigmatised and having to live with the devastating effects of the stigma of being a prostitute for their entire lives.
- The policy gives priority to punishment over health and safety of prostitutes and the general population. Those who organise prostitution are deterred from promoting condom use because doing so means that they incriminate themselves. The policy does little to suppress sex work but it does jeopardise public health.<sup>36</sup>

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<sup>36</sup> Linda Cusick, 2005 'Prioritizing punitive responses over public health: Commentary on the Home Office consultation document, "Paying the Price."' *Critical Social Policy* 25: 596–606; Christine Harcourt, Sandra Egger, and Basil Donovan 2005 'Sex work and the law' *Sexual Health* 2: 121–128; Rodrigo Marino, Jan Browne, and Victor Minichiello 2000 'An instrument to measure safer sex strategies used by male sex workers' *Archives of Sexual Behaviour* 29: 217–228; Kate Shannon, Thomas Kerr, Stephanie Strathdee, Jean Shoveller, Julio Montaner, and Mark Tyndall 2009 'Prevalence and structural correlates of gender based violence among a prospective cohort of female sex workers' *British Medical Journal* 339: b2939; Michael Smith and David Seal 2008 'Motivational influences on the safer sex behaviour of agency-based male sex workers' *Archives of Sexual Behaviour* 37: 845–853; Tamara O'Doherty 'Criminalization and Off-Street Sex Work in Canada' 2011 *Canadian Journal of Criminology and Criminal Justice* 217.

- The criminal law ensures that sex work remains in a risk-laden underground market requiring sex workers to break the law in order to work in safety in indoor locations or by having third parties to act as security or help.
- Enforcement of the law results in sex workers becoming alienated from police and social services and therefore reluctant to seek protection or report abuse or trafficking.



## Questions

1. *How must prostitution be defined?*
2. *How can the criminal law best protect the health, safety, human, civil and labour rights of sex workers, without undermining the rights of communities and society?*
3. *Should the current approach, whereby the purchase and sale of sexual services are not illegal be continued so as not to harm those who have made an informed choice to become involved in prostitution?*
4. *Would other measures that do not undermine the harm-reduction rationale underpinning the current approach be more appropriate?*
5. *For example, are the penalties for the public solicitation offence at section 7 of the 1993 Act adequate in terms of addressing demand?*
6. *Should the penalties for the public solicitation offence be restructured to impose higher penalties on third parties, such as pimps?*
7. *Should the penalties for organising prostitution be increased in line with the penalty for organising begging? Section 5 of the Criminal Justice (Public Order) Act 2011 created the offence of directing or organising begging. The maximum penalty for the offence is a fine not exceeding €200,000 or a prison term not exceeding 5 years, or both.*
8. *Should the penalties for living on the earnings of prostitution be increased in line with the penalties for living off the proceeds of begging - maximum fine of €5,000 or imprisonment for a term not exceeding 12 months, or both?*
9. *How will this legislative approach:*
  - (a) *reduce the numbers engaged in prostitution?*
  - (b) *reduce the demand for prostitution?*
  - (c) *reduce the abuse and exploitation of prostitutes?*
  - (d) *help prostitutes to enforce their rights, including their rights to equality and access to health?*
  - (e) *avoid the stigmatisation of and discrimination against prostitutes?*
  - (f) *address issues regarding prostitution and crime?*
  - (g) *address concerns regarding public health and HIV transmission?*
  - (h) *help to create an environment in which prostitutes feel comfortable about leaving prostitution?*
  - (i) *avoid driving prostitution further underground and making life more dangerous for sex workers?*

[B] Those who favour targeting those who buy or facilitate the buying of sexual services endorse the form of partial criminalisation in force in Sweden.

### *For*

- Some deny the legitimacy of commercial sex within what they see as the traditional structure of sexual relations. The argument is that all commercial sex is coerced.<sup>37</sup> It is, they suggest, indissolubly linked to the trafficking of girls and women.<sup>38</sup> They agree that women who sell sex should not be criminalised; genuine consent is the indispensable condition of legitimate sex; and sex workers are subject to economic exploitation and are often victims of violence. They support criminalising those who offer to buy sex.<sup>39</sup>

### *Against*

- Some argue that women should be treated as independent agents who have a right to control their own sexuality.<sup>40</sup> They argue that a perspective that holds that women can never consent to sex denies them independence as moral agents and makes the conditions of reform impossible.<sup>41</sup> Some suggest that commercial sex is not the sale of a body or a body part, but instead the sale of a service. They say that all of us, with the exception of the independently wealthy and the unemployed, take money for the use of our body in some way. Others suggest that sex workers challenge the tradition that confines female sexuality to either a choice between criminalised or maternalised sex or a choice between coerced or maternalised sex.<sup>42</sup> Some support time, place and manner restrictions of addressing the problems that commercial sex may present in the public space.
- Some say that criminalising those who offer to buy sex is unlikely to end commercial sex. It is likely to impose costs and burdens on women who sell sex for money.<sup>43</sup> The more peaceful buyers will be deterred while the more criminally inclined will not. Women who sell sex will have less time to rigorously to screen those who offer to buy sex. It will also drive sex workers deeper into the control of pimps and force them to face more abuse.
- Blurring the distinction between trafficking and voluntary prostitution is unhelpful.<sup>44</sup>

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<sup>37</sup> Ibid, at pp 15-27.

<sup>38</sup> Catherine A MacKinnon, 'Trafficking, Prostitution, and Inequality' 46 *Harvard Civil Rights-Civil Liberties Law Review* 211 (2011).

<sup>39</sup> Julie Lefler, 'Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes' 10 *Hastings Women's Law Journal* 11 (1999).

<sup>40</sup> Carol S Vance, *Pleasure and Danger: Exploring Female Sexuality* (1984).

<sup>41</sup> Drucilla Cornell, 'Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's *Toward a Feminist Theory of the State*' 100 *Yale Law Journal* 2263 (1990-1991).

<sup>42</sup> Mary Jo Frug, 'A postmodern Feminist legal Manifesto (An Unfinished Draft)' 105 *Harvard Law Review* 1045 (1992).

<sup>43</sup> Sylvia A Law, 'Commercial Sex: beyond Criminalization' 73 *Southern California Law Review* 523, 569 (1999-2000).sa

<sup>44</sup> Robert Uy, 'Blinded by the Lights: Why Trafficking Discourse Should Shift Away from Sex and the "Perfect Victim" Paradigm', 26 *Berkeley Journal of Gender, Law & Justice* 204 (2011)

## Questions

1. *Should the criminal law have a role, at all, in regulating the purchase (or sale) of sexual services where the transaction is conducted, in private, between consenting adults?*
2. *What social policy objective(s) would support such intervention by the criminal law?*
3. *Would such a policy be clearly justifiable on objective grounds? If yes, what are those grounds?*
4. *What benefits might ensue from a ban on purchasing sexual services?*
5. *Would it deter demand for sexual services?*
6. *Would a ban deter human trafficking?*
7. *Might a ban on the purchase of sexual services drive prostitution further underground and make life more dangerous for sex workers?*
8. *In view of the constitutional requirement to hold all citizens equal before the law, could the purchase of sexual services be criminalised without also criminalising the sale of such services? Would the law deny the purchasers of sex basic rights to a fair trial?*
9. *Would immunity from prosecution for sellers expose the purchasers of sex to a risk of blackmail?*
10. *Would a Swedish style ban impact on the rights and interests of persons who are voluntarily involved in selling sexual services and, if yes, how can those rights be protected?*
11. *Given the stigma associated with convictions for solicitation, could a Swedish style ban have undesirable social consequences for persons convicted of an offence (which would be minor) of purchasing sexual services?*
12. *Would it have unacceptable knock-on effects on innocent parties, for example, the spouses or children of defendants?*
13. *Would criminalising the purchase of sexual services discourage buyers from reporting suspicions that a sex worker has been trafficked or otherwise coerced into prostitution?*
14. *Would there be difficulties proving an offence of purchasing sexual services?*

- 15. Could a ban on the purchase of sexual services be comprehensively and consistently enforced by the Garda Síochána?*
- 16. Were it possible, would such enforcement be an efficient and cost-effective use of scarce Garda resources?*
- 17. Would enforcement of a ban on the purchase of sexual services divert the Gardaí from operations targeting serious and organised crime, including human trafficking and organised prostitution?*
- 18. How will this legislative approach:*
  - (a) reduce the numbers engaged in prostitution?*
  - (b) reduce the demand for prostitution?*
  - (c) reduce the abuse and exploitation of prostitutes?*
  - (d) help prostitutes to enforce their rights, including their rights to equality and access to health care?*
  - (e) avoid the stigmatisation of and discrimination against prostitutes?*
  - (f) address issues regarding prostitution and crime?*
  - (g) address concerns regarding public health and HIV transmission?*
  - (h) help to create an environment in which prostitutes feel comfortable about leaving prostitution?*
  - (i) avoid driving prostitution further underground and making life more dangerous for sex workers?*

### [3] Decriminalisation

International public health organisations have suggested that decriminalisation of prostitution be seriously considered by governments (see Chapter 4).

Decriminalisation refers to the policy of repealing laws that criminalise adult prostitution and related activities, for example, soliciting. The legal status of sex workers in New Zealand is an example of decriminalisation. On this approach, the supervision of prostitutes, other actors and businesses occurs through general legislation on employment, health-and-safety, and human rights. Decriminalisation preserves criminal penalties for abuse, trafficking or forced or under age prostitution. A feature of decriminalisation is a form of self-regulation. The various stakeholders in the community are involved in the system of regulation. This may involve the use of a monitoring institution, a code of practice, and regulation under the planning-and-development code.

Decriminalisation repeals legislation criminalising prostitution. But it does not involve the State approving or profiting from prostitution. It removes the criminal punishment and stigma from sex work. A decriminalised sex trade need not be a wholly unregulated industry because it becomes subject to the legislation and regulations that regulate other businesses.

#### *For*

- Decriminalisation would not condone prostitution but would recognise a certain reality - prostitution has been and will continue to remain a part of society. It would recognise the fact that criminalisation does not deter prostitution but stigmatises and marginalises prostitutes.
- Sex workers have a right of self-determination or autonomy. They can make the choice for themselves to use their bodies for commercial sex work. The commercial sex transaction is a private matter between consenting adults.
- A more guarded rationale also holds that sex workers have a right of self-determination or autonomy. But their choice to sell sexual services is often made in the face of economic pressures and in conditions of gender inequality. They also have a right to dignity, equality and freedom. Decriminalisation will assure them protection under employment law, health-and-safety law and anti-discrimination law and help to end the exploitative practices linked to prostitution. It would allow prostitutes to go into business for themselves.
- It would allow sex workers to remain anonymous since only those who control sex workers would have to be licensed. Anonymity is important because of the stigma and discrimination that results from being identified as a prostitute.<sup>45</sup>
- Decriminalisation is likely to promote the willingness of sex workers to identify themselves as part of the industry, and to report trafficking.

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<sup>45</sup> Tamara O'Doherty 'Criminalization and Off-Street Sex Work in Canada' 2011 *Canadian Journal of Criminology and Criminal Justice* 217, 240.



- Decriminalisation would allow issues such as health, welfare, employees' rights and protections and community concerns arising from the operation of the sex trade to be addressed more appropriately and effectively. Sex workers would be entitled to the same protections assured to other employees. They would be able to undergo voluntary health checks without fear of prosecution.
- In a decriminalised system, prostitutes would be able to organise into unions or representative groups.
- Although decriminalisation would not eliminate street prostitution, it would enable sex workers to work in less remote areas safely and would reduce violence towards prostitutes and their reliance on pimps.
- Decriminalisation would ease the burden on the criminal justice system. It would save police resources and court time.

### *Against*

- Decriminalisation would be seen to condone prostitution, normalise it as an occupation and increase prostitution generally. This would involve ignoring the fact that prostitution is a social evil.
- It would also result in increased exploitation of individuals, violence against sex workers, the involvement of organised crime, sex crimes and risk to the public health.
- Prostitution differs from other work and it is unlikely to become normalised as work. Moreover, prostitutes are unlikely to form or join unions.
- Decriminalisation would not end social nuisances to residents of urban neighbourhoods.
- It would be seen as a legislative endorsement of conduct that and deviates from societal norms.

### **Questions**

1. *What systems and procedures should be set up for regular consultation with all stakeholders on matters relating to prostitution?*
2. *Should there be a prostitution supervisory body, representing the stakeholders to review the prostitution regime and make recommendations to government on a regular basis?*
3. *How should the law protect the rights of prostitutes to at any time, refuse to provide or to continue to provide, a sexual service to any other person?*

4. *Should the law exclude persons from running a prostitution business if they have been convicted of specific offences?*
5. *Should the law provide an amnesty to prostitutes with a criminal record for prostitution and prostitution related offences who wish to leave prostitution?*
6. *How should law and policy promote safer-sex practices in prostitution?*
7. *How should the law ensure the enjoyment of human rights by prostitutes and their customers?*
8. *What would be the objectives of the new law?*
9. *To what extent can these objectives be achieved through the law?*
10. *Are there further matters that need to be addressed in such a law?*
11. *How will this option comply with (a) Ireland's international obligations, and (b) the Constitution?*
12. *How will this option*
  - (a) reduce the numbers engaged in prostitution?*
  - (b) reduce the demand for prostitution?*
  - (c) reduce harm and vulnerability to abuse and exploitation of prostitutes?*
  - (d) assist prostitutes to enforce their rights, including rights to equality and access to health?*
  - (e) avoid the stigmatisation and discrimination of prostitutes?*
  - (f) address concerns regarding prostitution and crime?*
  - (g) address concerns regarding public health and HIV?*
  - (h) assist to create an environment for prostitutes to exit prostitution?*

#### **[4] Legalisation and Regulation**

Whereas decriminalisation involves repealing the criminal laws relating to prostitution activities, leaving other laws to apply as they would to any trade or activity, legalisation involves both the repeal of criminal laws and the detailed regulation of the sex trade. Legalisation can take many forms. But regulation usually involves the requirement of health checks, registration of prostitutes, licensing of brothels and sometimes the zoning of urban areas in which prostitution is allowed. Breaches of the regulatory system are usually liable to criminal penalties, with enforcement by the police. Thus, criminalisation is an element of the legalisation approach. The legalisation-regulation approach may involve:

- The licensing of sex-work businesses;
- The registering of sex workers with the relevant authorities to ensure that they comply with legal requirements;

- The provision of control measures such as mandatory testing for sexually transmissible infections;
- The use of planning law to limit sex-work activities to specific areas but not residential areas;
- The criminalising of outdoor or street prostitution or allowing such activity subject to stringent legal controls.

People who support the legalisation-regulation approach often use similar arguments to those who support decriminalisation. Opponents of the approach fall into two categories - those who favour criminalisation and those who favour decriminalisation. Those who favour criminalisation argue that prostitution should not be legalised and regulated because it is a grave social harm. Those who favour decriminalisation argue that regulation under the legalisation approach tends to be too intrusive.

#### *For*

- Since prostitution is inevitable, regulation is a reasonable compromise.
- Regulation would actively promote the health, hygiene and safety of prostitutes.
- Regulation entails managing the problems that prostitution gives rise to whereas criminalisation or policies intended to abolish prostitution simply ignore them.
- Legalised prostitution can bring financial benefits to the state since it allows sex workers and brothel owners to be taxed on their earnings. The income could be used to fund programmes to help sex workers leave prostitution if they wish.
- Working in a regulated setting would rupture the links between prostitution and organised crime. And the link between prostituted women and men and their pimps would be broken.
- The abuse of sex workers would decrease. Prostitutes would be more inclined to report abuse to the police if they were not involved in criminal conduct when the abuse takes place.
- Regulation would improve sexual health of prostitutes, and by implication, their customers, because the activity would occur in a clean and safe setting.
- Regulation would ease the burden on the police and free time and resources for police to come to grips with the illegal sector, such as trafficking and child prostitution.

- Legalised brothels would improve the quality of life for people who live and work in areas currently affected by street or outdoor prostitution, since they would be located away from residential areas and schools.
- Sex workers could work flexible hours and earn more money.

### *Against*

- Legalisation will not reduce illegal prostitution. An illegal sector will exist alongside the legal sector. Some prostitution businesses would try to evade the requirements of regulation. Individuals who are serious drug users are seldom able to comply with rules. It is possible that a proportion of customers prefer to pay for outdoor prostitution. The real growth in prostitution after regulation is likely to be in the illegal sector.
- Regulation could lead to state-sanctioned exploitation and abuse of women and men under the authority of the legal requirements.<sup>46</sup>
- Mandatory testing of sex workers is intended to protect the customer from infection by a prostitute. It does nothing to protect the sex workers from infected customers. This is irrational because sex workers are more likely to be infectees and not infectors.
- Women and men are in prostitution because it is usually the only option available to them to survive economically. This means that regulation contributes to the exploitation of such individuals. It does not enhance their freedom of choice.
- It would be seen as a legislative endorsement of conduct that deviates from societal norms.
- Legalisation will not reduce trafficking. An increase in trafficking is likely to occur to supply the expanding sex-work sector in countries that regulate prostitution. Trafficked women are placed in both illegal and legal brothels.
- Repealing the criminal laws against prostitution will remove the legal barriers – and, in the result, the social and ethical barriers – to treating people as sexual commodities. Girls and boys will internalise the message that the human body is a marketable commodity.
- If government can treat sex work as a legitimate occupation they can abdicate their responsibility to create the conditions for decent and sustainable employment opportunities.

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<sup>46</sup> Melissa Farley, 'Prostitution, Trafficking, and Cultural Amnesia: What We Must *Not Know* in Order To Keep the Business of Sexual Exploitation Running Smoothly' 8 *Yale Journal of Law & Feminism* 109 (2006)

## Questions

1. *Would legalisation/regulation be appropriate in an Irish context and how far could such legalisation/regulation extend? Is there a demand for it?*
2. *What social policy objectives would underpin such an approach? What benefits would it bring?*
3. *Would legalisation/regulation create safer working conditions for prostitutes?*
4. *Would legalisation/regulation be acceptable to the public? What impact would such a policy have on communities and society?*
5. *Would such an approach lead to an expansion of the sex industry? In particular, would it attract the very young and vulnerable into prostitution?*
6. *In an expanded sex industry, would the line between legal and illegal prostitution become blurred? Could voluntary and involuntary prostitution be distinguished?*
7. *Would legalisation/regulation act as a magnet for organised crime and sex tourism?*
8. *Would such a policy enable human traffickers?*
9. *Which conditions should be imposed on prostitutes and prostitution-related businesses:*
  - *Licensing requirements?*
  - *Zoning under Planning and Development legislation?*
  - *Registration of individual prostitutes?*
  - *Mandatory health testing for HIV and other Sexually Transmissible Infections of all adult prostitutes?*
  - *Mandatory health testing for HIV and other Sexually Transmissible Infections of all customers of adult prostitutes?*
10. *If you are of the opinion that licensing requirements should be imposed, please indicate whether prostitution-related businesses should be subjected to the same requirements as other business establishments or should additional requirements specific to prostitution be imposed?*
11. *If additional requirements should be imposed what should these requirements entail?*
12. *Should the granting of licenses be dealt with on the level of local government or central government?*
13. *If you are of the opinion that zoning requirements should be imposed, please indicate:*



- *Should prostitution-related businesses be subjected to the same zoning requirements as other businesses or should prostitution be limited to specific streets or areas (so-called 'redlight' districts)?*
  - *Should outdoor prostitution be allowed within the demarcated zones?*
14. *If you are of the opinion that adult prostitutes should be subject to registration, please indicate:*
- *What the purpose of registration should be?*
  - *Which official body or institution should be responsible for the management of the registration system?*
15. *Should registration be conditional on compliance with specific requirements?*
16. *Which measures should be taken to protect the privacy of persons registered as prostitutes?*
17. *If you are of the opinion that mandatory health testing requirements should be imposed, please indicate:*
- *What the purpose of such testing requirements should be?*
  - *To whom such testing requirements should apply (the prostitute or the customer)?*
18. *Specify any additional conditions that should be imposed under a legalised system.*
19. *How will this option comply with (a) Ireland's international obligations, and (b) the Constitution?*
20. *How will this option:*
- (a) reduce the numbers engaged in prostitution?*
  - (b) reduce the demand for prostitution*
  - (c) reduce harm and vulnerability to abuse and exploitation of prostitutes?*
  - (d) assist prostitutes to enforce their rights, including their rights to equality and access to health?*
  - (e) avoid the stigmatisation and discrimination of prostitutes?*
  - (f) address concerns regarding prostitution and crime?*
  - (g) address concerns regarding public health and HIV?*
  - (h) help to create an environment for prostitutes to leave prostitution?*
21. *Must the following be criminal offences:*
- *selling and buying of unlawful prostitution?*
  - *procuring for the purposes of buying unlawful prostitution?*
  - *living on earnings of unlawful prostitution?*
  - *False imprisonment for purposes of unlawful prostitution?*
  - *non-compliance with the regulatory system?*

*22. How must the following be regulated:*

- *safe sex practices?*
- *sex education?*
- *advertising of prostitution?*
- *implementation by An Garda Síochána or other law enforcement agencies?*
- *Garda access to venues where prostitution takes place?*
- *legal mechanisms and procedures for the closing down of illegal venues?*

## Chapter 6 Summary of Questions Posed in Discussion Document

This chapter sets down the questions posed in the consultation document and is intended to assist groups and individuals making submissions to reflect on the issues raised by the current debate on prostitution. Members of the public and interested groups are invited to comment on the questions posed in this document. But submissions need not necessarily be structured using this question format. All views and ideas are welcome.

### Chapter 1 - General Questions

#### Questions

General questions arising from this chapter are:

- 1. Is the present rationale for criminal legislation on prostitution, i.e., the protection of society from a nuisance and public order perspective and the protection of prostitutes from exploitation, a sufficient basis for future legislation in this area?*
- 2. If not, what policy objectives should underpin future legislation?*
- 3. How should future legislation address the variety of circumstances in which prostitution occurs?*
- 4. In what way should the criminal law on prostitution address the rights of communities and society in general?*
- 5. What types of measures, if any, can be taken to address the use of modern technologies to facilitate prostitution?*

### Chapter 5

#### [1] Total Criminalisation

All prostitution and prostitution-related activities, for example, soliciting, are prohibited under the criminal law.

#### Questions

- 1. How should the criminal law define 'prostitution' and prostitution-related activities?*
- 2. What objectives should the new law serve?*
- 3. Why should the criminal law have a role in regulating the purchase and sale of sexual services where the transaction is conducted in private between consenting adults?*
- 4. How will total criminalisation comply with (a) Ireland's international obligations, and (b) the Constitution?*

5. *How will this legislative approach:*
  - (a) *reduce the numbers engaged in prostitution?*
  - (b) *reduce the demand for prostitution?*
  - (c) *reduce the abuse and exploitation of prostitutes?*
  - (d) *help prostitutes to enforce their rights, including their rights to equality and access to health?*
  - (e) *avoid the stigmatisation of and discrimination against prostitutes?*
  - (f) *address issues regarding prostitution and crime?*
  - (g) *address concerns regarding public health and HIV transmission?*
  - (h) *help to create an environment in which prostitutes feel comfortable about leaving prostitution?*
  - (i) *avoid driving prostitution further underground and making life more dangerous for sex workers?*
6. *How should the law deal with the issue of having a criminal record for prostitution in respect of sex workers who leave prostitution and seek alternative employment?*
7. *Could an outright ban on prostitution be enforced and would enforcement represent an effective use of scarce police resources?*
8. *Would enforcement of a ban on prostitution divert police resources from targeting organised crime, including human trafficking and gang-controlled prostitution?*

## **[2] Partial Criminalisation**

There are different versions of decriminalisation. [A] In one – Ireland, for example – activities related to prostitution such as soliciting, brothel-keeping and living off the earnings of prostitution are prohibited. But selling or buying sex voluntarily is not itself an offence. [B] another version – the Swedish approach – criminalises persons who solicit or facilitate sexual services but not the prostitutes themselves.

### **[A] Current Approach in Ireland**

1. *How must prostitution be defined?*
2. *How can the criminal law best protect the health, safety, human, civil and labour rights of sex workers, without undermining the rights of communities and society?*
3. *Should the current approach, whereby the purchase and sale of sexual services are not illegal be continued so as not to harm those who have made an informed choice to become involved in prostitution?*
4. *Would other measures that do not undermine the harm-reduction rationale underpinning the current approach be more appropriate?*
5. *For example, are the penalties for the public solicitation offence at section 7 of the 1993 Act adequate in terms of addressing demand?*

6. *Should the penalties for the public solicitation offence be restructured to impose higher penalties on third parties, such as pimps?*
7. *Should the penalties for organising prostitution be increased in line with the penalty for organising begging? Section 5 of the Criminal Justice (Public Order) Act 2011 created the offence of directing or organising begging. The maximum penalty for the offence is a fine not exceeding €200,000 or a prison term not exceeding 5 years, or both.*
8. *Should the penalties for living on the earnings of prostitution be increased in line with the penalties for living off the proceeds of begging - maximum fine of €5,000 or imprisonment for a term not exceeding 12 months, or both?*
9. *How will this legislative approach:*
  - (a) *reduce the numbers engaged in prostitution?*
  - (b) *reduce the demand for prostitution?*
  - (c) *reduce the abuse and exploitation of prostitutes?*
  - (d) *help prostitutes to enforce their rights, including their rights to equality and access to health?*
  - (e) *avoid the stigmatisation of and discrimination against prostitutes?*
  - (f) *address issues regarding prostitution and crime?*
  - (g) *address concerns regarding public health and HIV transmission?*
  - (h) *help to create an environment in which prostitutes feel comfortable about leaving prostitution?*
  - (i) *avoid driving prostitution further underground and making life more dangerous for sex workers?*

**[B] Swedish Approach – criminalising the purchasers of sexual services.**

1. *Should the criminal law have a role, at all, in regulating the purchase (or sale) of sexual services where the transaction is conducted, in private, between consenting adults?*
2. *What social policy objective(s) would support such intervention by the criminal law?*
3. *Would such a policy be clearly justifiable on objective grounds? If yes, what are those grounds?*
4. *What benefits might ensue from a ban on purchasing sexual services?*
5. *Would it deter demand for sexual services?*
6. *Would a ban deter human trafficking?*
7. *Might a ban on the purchase of sexual services drive prostitution further underground and make life more dangerous for sex workers?*



8. *In view of the constitutional requirement to hold all citizens equal before the law, could the purchase of sexual services be criminalised without also criminalising the sale of such services? Would the law deny the purchasers of sex basic rights to a fair trial?*
9. *Would immunity from prosecution for the sellers of sex expose buyers to a risk of blackmail?*
10. *Would a Swedish style ban impact on the rights and interests of persons who are voluntarily involved in selling sexual services and, if yes, how can those rights be protected?*
11. *Given the stigma associated with convictions for solicitation, could a Swedish style ban have undesirable social consequences for persons convicted of an offence (which would be minor) of purchasing sexual services?*
12. *Would it have unacceptable knock-on effects on innocent parties, for example, the spouses/children of defendants?*
13. *Would criminalising the purchase of sexual services discourage buyers from reporting suspicions that a sex worker has been trafficked or otherwise coerced into prostitution?*
14. *Would there be difficulties proving an offence of purchasing sexual services?*
15. *Could a ban on the purchase of sexual services be comprehensively and consistently enforced by the Garda Síochána?*
16. *Were it possible, would such enforcement be an efficient and cost-effective use of scarce Garda resources?*
17. *Would enforcement of a ban on the purchase of sexual services divert the Gardaí from operations targeting serious and organised crime, including human trafficking and organised prostitution?*
18. *How will this legislative approach:*
  - (a) *reduce the numbers engaged in prostitution?*
  - (b) *reduce the demand for prostitution?*
  - (c) *reduce the abuse and exploitation of prostitutes?*
  - (d) *help prostitutes to enforce their rights, including their rights to equality and access to health care?*
  - (e) *avoid the stigmatisation of and discrimination against prostitutes?*
  - (f) *address issues regarding prostitution and crime?*
  - (g) *address concerns regarding public health and HIV transmission?*
  - (h) *help to create an environment in which prostitutes feel comfortable about leaving prostitution?*
  - (i) *avoid driving prostitution further underground and making life more dangerous for sex workers?*

### [3] Decriminalisation

Decriminalisation means that prostitution and prostitution-related acts are not criminal. The emphasis is on self-regulation of prostitutes and prostitution.

1. *What systems and procedures should be set up for regular consultation with all stakeholders on matters relating to prostitution?*
2. *Should there be a prostitution supervisory body, representing the stakeholders to review the prostitution regime and make recommendations to government on a regular basis?*
3. *How should the law protect the rights of prostitutes to at any time, refuse to provide or to continue to provide, a sexual service to any other person?*
4. *Should the law exclude persons from running a prostitution business if they have been convicted of specific offences?*
5. *Should the law provide an amnesty to prostitutes with a criminal record for prostitution and prostitution related offences who wish to leave prostitution?*
6. *How should law and policy promote safer-sex practices in prostitution?*
7. *How should the law ensure the enjoyment of human rights by prostitutes and their customers?*
8. *What would be the objectives of the new law be ?*
9. *To what extent can these objectives be achieved through the law?*
10. *Are there further matters that need to be addressed in such a law?*
11. *How will this option comply with (a) Ireland's international obligations, and (b) the Constitution?*
12. *How will this option*
  - (a) reduce the numbers engaged in prostitution?*
  - (b) reduce the demand for prostitution?*
  - (c) reduce harm and vulnerability to abuse and exploitation of prostitutes?*
  - (d) assist prostitutes to enforce their rights, including rights to equality and access to health?*
  - (e) avoid the stigmatisation and discrimination of prostitutes?*
  - (f) address concerns regarding prostitution and crime?*
  - (g) address concerns regarding public health and HIV?*
  - (h) assist to create an environment for prostitutes to exit prostitution?*

#### [4] Legalisation and Regulation

This approach provides for legal and regulated prostitution. It may involve criminalised or strictly regulated outdoor prostitution. The law may also restrict prostitution to certain zones.

1. *Would legalisation/regulation be appropriate in an Irish context and how far could such legalisation/regulation extend? Is there a demand for it?*
2. *What social policy objectives would underpin such an approach? What benefits would it bring?*
3. *Would legalisation/regulation create safer working conditions for prostitutes?*
4. *Would legalisation/regulation be acceptable to the public? What impact would such a policy have on communities and society?*
5. *Would such an approach lead to an expansion of the sex industry? In particular, would it attract the very young and vulnerable into prostitution?*
6. *In an expanded sex industry, would the line between legal and illegal prostitution become blurred? Could voluntary and involuntary prostitution be distinguished?*
7. *Would legalisation/regulation act as a magnet for organised crime and sex tourism?*
8. *Would such a policy enable human traffickers?*
9. *Which conditions should be imposed on prostitutes and prostitution-related businesses:*
  - *Licensing requirements?*
  - *Zoning under Planning and Development legislation?*
  - *Registration of individual prostitutes?*
  - *Mandatory health testing for HIV and other Sexually Transmissible Infections of all adult prostitutes?*
  - *Mandatory health testing for HIV and other Sexually Transmissible Infections of all customers of adult prostitutes?*
10. *If you are of the opinion that licensing requirements should be imposed, please indicate whether prostitution-related businesses should be subjected to the same requirements as other business establishments or should additional requirements specific to prostitution be imposed?*
11. *If additional requirements should be imposed what should these requirements entail?*
12. *Should the granting of licenses be dealt with on the level of local government or central government?*

13. *If you are of the opinion that zoning requirements should be imposed, please indicate:*
- *Should prostitution-related businesses be subjected to the same zoning requirements as other businesses or should prostitution be limited to specific streets or areas (so-called 'redlight' districts)?*
  - *Should outdoor prostitution be allowed within the demarcated zones?*
14. *If you are of the opinion that adult prostitutes should be subject to registration, please indicate:*
- *What the purpose of registration should be?*
  - *Which official body or institution should be responsible for the management of the registration system?*
15. *Should registration be conditional on compliance with specific requirements?*
16. *Which measures should be taken to protect the privacy of persons registered as prostitutes?*
17. *If you are of the opinion that mandatory health testing requirements should be imposed, please indicate:*
- *What the purpose of such testing requirements should be?*
  - *To whom such testing requirements should apply (the prostitute or the customer)?*
18. *Specify any additional conditions that should be imposed under a legalised system.*
19. *How will this option comply with (a) Ireland's international obligations, and (b) the Constitution?*

20. *How will this option:*

- (a) reduce the numbers engaged in prostitution?*
- (b) reduce the demand for prostitution?*
- (c) reduce harm and vulnerability to abuse and exploitation of prostitutes?*
- (d) assist prostitutes to enforce their rights, including their rights to equality and access to health?*
- (e) avoid the stigmatisation and discrimination of prostitutes?*
- (f) address concerns regarding prostitution and crime?*
- (g) address concerns regarding public health and HIV?*
- (h) help to create an environment for prostitutes to leave prostitution?*

21. *Must the following be criminal offences:*

- *selling and buying of unlawful prostitution?*
- *procuring for the purposes of buying unlawful prostitution?*
- *living on earnings of unlawful prostitution?*
- *detention for purposes of unlawful prostitution?*
- *non-compliance with the regulatory system?*

22. *How must the following be regulated:*

- *safe sex practices?*
- *sex education?*
- *advertising of prostitution?*
- *implementation by the police or other law enforcement agencies?*
- *police access to venues where prostitution takes place?*
- *legal mechanisms and procedures for the closing down of illegal venues?*



## **Appendix**

### **List of Prostitution and Related Offence in Ireland**

#### **Soliciting**

Under section 7 of the Criminal Law (Sexual Offences) Act 1993, it is an offence to solicit or importune another person in a street or public place for the purposes of prostitution. That offence applies to all parties, whether male or female, prostitute or client, or third party (such as a pimp) and includes kerb crawling.

Offenders are liable, on summary conviction, to a class E<sup>47</sup> or class D<sup>48</sup> fine, depending on whether the conviction is for a first or repeat offence. In the case of a third or subsequent conviction, the offender is liable to a class D fine or imprisonment for a maximum period of 4 weeks, or both.

#### **Loitering for the purposes of prostitution**

Section 8 of the 1993 Act provides that a member of the Garda Síochána may direct a person in a street or public place to leave the vicinity if he or she has reasonable cause to suspect that the person is loitering in order to solicit or importune another person for the purposes of prostitution. It is an offence for a person without reasonable cause to fail to comply with such a direction.

The offence is tried summarily and the penalty structure is the same as for the solicitation offence at section 7 of the 1993 Act.

#### **Organisation of prostitution**

Under section 9 of the 1993 Act, any person who, for gain, controls or directs the activities of a prostitute in respect of prostitution, organises prostitution or compels or coerces a person to be a prostitute commits an offence.

A section 9 offence can be tried on indictment and the maximum penalty is a fine not exceeding €22,225 or a prison term of 5 years, or both.

#### **Living on earnings of prostitution**

Under section 10 of the 1993 Act, any person who knowingly lives, in whole or in part, on the earnings of the prostitution of another person and aids and abets that prostitution is guilty of an offence. The aiding and abetting provision protects innocent dependants of a prostitute, such as a spouse or child, from prosecution.

Offences are tried summarily and the maximum penalty is a class C<sup>49</sup> fine or imprisonment for a term not exceeding 6 months, or both.

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<sup>47</sup> A fine not exceeding €500

<sup>48</sup> A fine not exceeding €1,000

<sup>49</sup> A fine not exceeding €2,500

### **Brothel keeping**

Brothel keeping is an offence under section 11 of the 1993 Act. The offence applies to persons keeping or managing or assisting in the management of a brothel. It also applies to a tenant or landlord who knowingly permits the use of the leased/rented premises as a brothel.

The offence can be tried on indictment and the maximum penalty is a fine not exceeding €22,225 or a prison term of 5 years, or both.

### **Advertising prostitution**

Section 23 of the Criminal Justice (Public Order) Act 1994 makes it an offence to publish or distribute an advertisement which advertises a brothel or the services of a prostitute.

The maximum penalty for the offence following a conviction on indictment is a fine not exceeding €22,225.

### **Soliciting a child or vulnerable adult for the purpose of commission of a sexual offence**

The Criminal Law (Sexual Offences) (Amendment) Act 2007 amended the 1993 Act to provide that a person who solicits a child - whether or not for the purposes of prostitution - to commit an act which would constitute carnal knowledge or sexual assault is guilty of an offence. (In addition to being charged with such solicitation, a person who engages in a sexual act with the child can be charged with serious offences under sexual offences legislation.)

The 2007 Act also provides a similar offence in relation to the solicitation of vulnerable adults.

The maximum penalty for these offences, following conviction on indictment, is an unlimited fine, or imprisonment for a term not exceeding 5 years, or both.

### **Soliciting a trafficked person for the purposes of prostitution**

Under section 5 of the Criminal Law (Human Trafficking) Act 2008, it is an offence to knowingly solicit or importune a trafficked person, in any place, for the purpose of prostitution.

The maximum penalty, following conviction on indictment, is an unlimited fine, or imprisonment for a term not exceeding 5 years, or both.

### **Procuring**

Section 2 of the Criminal Law Amendment Act 1885, as amended, prohibits the procuring of any woman or girl to:

- become a prostitute in Ireland, or elsewhere;

- leave the country, with the intention that she become an inmate of a brothel;
- leave her usual place of abode intending that, for prostitution purposes, she become an inmate of a brothel in Ireland or in any other jurisdiction.

A person convicted of a section 2 offence is liable to imprisonment for a period of up to 2 years.

#### **Allowing child to be in a brothel**

Section 248 of the Children Act 2001 provides that a person who has the custody, charge or care of a child commits an offence if s/he allows the child to reside in or frequent a brothel.

The maximum penalty, on summary conviction, is a class C fine or imprisonment for a term not exceeding 12 months, or both.

#### **Causing or encouraging prostitution of a child**

It is an offence under section 249 of the Children Act 2001 for a person who has the custody, charge or care of a child to cause or encourage, inter alia, the prostitution of the child.

A person found guilty of this offence is liable, on conviction on indictment, to a fine not exceeding €31,750.