

*Developing an Understanding of
‘Compromised Consent’: How reconsideration
of consent as a legal concept may inform a
feminist theoretical framework for the
introduction of ‘Nordic Model’ prostitution
laws and did inform the motivations of
lawmakers in Ireland*

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ABSTRACT

The focus of this thesis is upon the development of prostitution law in Ireland leading up to and including the introduction of the so-called 'Nordic model' approach into Irish law through Part 4 of the Criminal Law (Sexual Offences) Act 2017, which criminalises the purchase of sex. The Irish law change is considered in the context of a highly polarised theoretical debate within feminism, between those who see prostitution as 'exploitation' and those who regard it as 'work'. Seeing prostituted sex as a necessarily exploitative 'gender regime' is a position usually associated with radical or socialist feminist theories. This approach offers a justification for targeting demand by making it an offence to buy sex, thereby criminalising the (almost invariably male) client, while decriminalising those (predominantly women) engaged in selling sex. By contrast, the 'sex work' approach, often deriving from liberal or postmodern feminist theoretical perspectives, seeks to offer a theoretical justification for legalising the buying and selling of sex.

While the 'sex work' perspective is currently dominant within academic discourse, policy-makers internationally are increasingly leaning towards the 'exploitation' approach, with laws criminalising sex purchase being adopted in a growing number of jurisdictions. Such laws have however been subject to criticism by those from the opposing perspective, who assert that they offend against women's agency and legal capacity to consent. In order to develop theoretical and ideological justifications for the introduction of a 'Nordic model' approach to prostitution law, this thesis reviews the legislative process leading to the passage of Part 4 of the 2017 Act in Ireland, and considers the aims and objectives of those engaged in policy-making. An Interpretive Policy Analysis (IPA) method is used, framed by an explicitly socialist feminist perspective, with a view to establishing whether a legal concept of 'compromised consent', which it is argued implicitly informed the motivation of those proposing and supporting the 2017 legal change, may be used to advance a feminist theoretical argument justifying the introduction of laws in Ireland criminalising the purchase of sex. Throughout, the thesis relies upon the tools of policymaking analysis; including documentary analysis of Oireachtas debates, parliamentary reports and academic commentaries, along with a number of 'elite interviews' carried out with key actors in the law-making process. The political and social context for the 2017 change is evaluated, and a review provided of the #MeToo movement and other relevant contemporary feminist campaigns, including that seeking a statutory definition of consent, which succeeded with the passage of section 48 of the 2017 Act.

It is argued that insights from these other campaigns, along with contemporary intersectional socialist feminist theorising and the analysis of parliamentary debates, all provide support for a feminist re-consideration of consent as a legal concept. Even prior to the introduction of the new statutory definition in section 48, consent in Ireland was already seen as capable of being legally compromised in certain contexts of structured gender inequality, such as under-age sexual intercourse, domestic violence or workplace sexual harassment. The legal understanding of consent in such exploitative contexts is antithetical to the conception of consent as 'freely and voluntarily' given within a mutual sexual relationship.

This understanding of consent, it is argued, should be applied within the context of prostituted sex and prostitution, which itself may be understood as constituting a 'gender regime'. It is argued that the legal change may therefore be justified from a feminist perspective through a reappraisal of 'consent' as capable of being legally compromised in certain contexts. This understanding of 'compromised consent', it is suggested, can provide

a robust feminist criminological basis for the introduction of the Nordic model approach into Irish law.

Thus, the key objective of this thesis is to examine critically whether a legal concept of 'compromised consent' may be helpful in informing a feminist theoretical argument justifying the introduction of laws criminalising the purchase of sex, with a specific focus upon the 'Nordic model' change in prostitution law enacted in Ireland through the 2017 Act.

INTRODUCTION

In this thesis, it is proposed that a legal concept of ‘compromised consent’ can be helpful in advancing a feminist argument justifying the introduction of laws criminalising the purchase of sex.¹ The primary objective of the research is to develop and articulate this legal reconceptualisation of consent, and to examine critically whether it may be helpful in informing a feminist theoretical argument justifying the introduction of laws in Ireland criminalising the purchase of sex through Part 4 of the Criminal Law (Sexual Offences) Act 2017, in keeping with the ‘Nordic model’ or ‘Equality model’ approach first introduced in Sweden.²

The ‘compromised consent’ concept that is proposed and developed through this thesis is derived from and draws upon other established and developing legal frameworks, based on the fundamental understanding that the law already recognises that ‘no means no’, but that a ‘yes’ can be conditional in certain coercive contexts. It is argued that this concept may be understood as implicitly informing the motivation of those proposing and supporting the 2017 legal change,

An apparent consent to sex may not always be legally valid in criminal law; where the person who appears to consent is under-age or has been trafficked, for example. This insight is applied in other legal settings too, notably in workplace sexual harassment cases where the legal framework is premised on the notion that consent can be compromised in circumstances where a power imbalance is exploited by the harasser. This more nuanced and victim-centred understanding of consent has developed over recent decades, largely generated by the work of feminist and victims’ rights campaigners. Through their activism, a concept of ‘affirmative consent’ has emerged and the need to make positive provision for defining consent in law has been recognised in many jurisdictions, including Ireland.

However, in the context of prostitution law debates, this new and more nuanced understanding of consent has been absent from much of the literature, particularly the writings which advocate for a ‘sex work’ approach. Instead, opponents of the Nordic model approach argue that the law should not presume that all women who sell sex are subject to exploitation; they assert that women should have the right to ‘consent’ to selling sex, and in a co-option of feminist language, they say that women are denied agency and choice where the law bans the purchase of sex.

By demonstrating that the concept of ‘compromised consent’ is both theoretically justifiable and the motivating force behind the legislation analysed here, this thesis seeks to expose the flawed premise of the ‘sex work’ position and counter the superficial conception of consent upon which it is based. Instead, it is argued that the more complex and nuanced understanding of consent, as derived from other feminist campaigns and established in other legal contexts, can be applied within the context of prostituted sex. This reappraisal of

¹ Throughout this thesis, the focus is upon women and girls, who represent the vast majority of those engaged in prostitution, both in Ireland and internationally. This includes transgender persons in prostitution who identify as women. Further, the terms ‘women engaged in prostitution’ or ‘women in the sex trade’ are used, rather than the term ‘prostitutes’ or ‘sex workers’. The term ‘prostitute’, while used in law, has justifiably been critiqued for many years as expressing a disempowering stereotype of women. The term ‘sex worker’ reflects a view of prostitution as ‘work’ that is strongly contested by many feminist writers, and by many who themselves are engaged in prostitution or were formerly engaged in prostitution.

² Hereafter in this Chapter, ‘the 2017 Act’.

‘consent’ sees it as capable of being legally compromised in certain contexts, including the context of an inherently unequal and gendered regime such as that of prostitution.

In particular, it is argued that this nuanced understanding of consent can be understood to have formed the basis of the feminist campaign to introduce a statutory definition of consent in Ireland in the context of sexual offence laws, a campaign which succeeded through the introduction of section 48 of the same 2017 Act which criminalised the purchase of sex. Section 48 defines consent in the context of sexual acts as being present where a person ‘freely and voluntarily agrees to engage in that act.’ The section also provides a range of circumstances in which consent may be deemed absent (for example where a person is incapable of consenting due to intoxication). Thus, section 48, modelled on other statutory definitions of consent in different jurisdictions, is premised upon an understanding that ‘consent’ may be legally compromised depending on circumstances.

It is argued that this conception of consent as capable of being legally compromised in different exploitative contexts may also be applied in considering the case of prostitution. Where sex is bought and sold under conditions of structural gender inequality, the seller’s consent may best be understood as legally compromised, an understanding that can justify the introduction of ‘Nordic model’ laws criminalising the purchase of sex.

Such laws are based on that originally introduced by Sweden in 1999 seeking to reduce demand for prostitution by targeting the buyers of sex, while decriminalising those engaged in selling sex. The Swedish law was passed following a feminist-led campaign for change, based on a view of prostitution as exploitative of the (predominantly) women who sell sex; a form of structural gender inequality in a context where the buyers are almost invariably men; a societal gender inequality.³

This view of prostitution as structurally exploitative is supported by the work of many feminist scholars writing from a socialist and critical race analysis perspective; and notably by Maddy Coy, who asserts that ‘prostitution as a gender regime reproduces gender as a hierarchy ... and thus undermines movements towards gender equality’, since it ‘disproportionately involves men buying access to women’s bodies’; enables men to exercise power over women’s bodies; involves emotional labour; and ultimately reproduces heteronormativity.⁴

Since the introduction of the first sex purchase ban law in Sweden, a growing momentum in support of this approach may be identified among policy-makers in different countries; similar laws have been passed in Norway, Iceland, Canada, France and Israel – as well as in Northern Ireland and Ireland.

Such laws have however been subject to sustained criticism from those who argue that a sex purchase ban offends against personal autonomy by denying the agency of the (mostly) women who choose to engage in selling sex. Many critics of Nordic model laws instead advocate for legal structures in which prostitution is decriminalised or legalised, as in jurisdictions like Germany, the Netherlands or New Zealand. Tellingly, scholars who oppose Nordic model laws have not sought to critique them from the basis of defending a man’s autonomous right to buy sex.

³ See for example Skilbrei, May-Len and Holmstrom, Charlotta, *Prostitution Policy in the Nordic Region: Ambiguous Sympathies*. England: Ashgate, 2013.

⁴ Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality: Theory, Research and Policy*. Ashgate, 2012 at 4-5.

The contrast between the two perspectives on the Nordic model has developed following the emergence of second-wave feminism, and over the decades since has become described as ‘the most divisive distinction in feminist thinking’,⁵ generating an immense body of academic literature.⁶ This literature however has become increasingly dominated by those who argue that women exercise agency by engaging in ‘sex work’.⁷

Arguments defending prostitution based on the language of agency and of women’s ‘right to choose’ have a powerful resonance among feminist campaigners, particularly in Ireland where the pro-choice movement has only recently succeeded in bringing about the legalisation of abortion through a referendum passed in 2018 – long after most other European jurisdictions.

The autonomy argument is thus superficially attractive, but it is argued throughout this thesis that it is fundamentally misconceived when applied to prostitution. In this context, particular reliance is placed upon the writing of Sylvia Walby, who has described the ostensibly feminist rhetoric of ‘agency’ and ‘choice’ in this context as emerging from a ‘neoliberal’ turn in the academy; she suggests that this rhetoric is used to mask the gendered exploitation upon which the global sex trade is founded.⁸

Indeed, in this thesis it is suggested that for feminists to suggest that the law should validate women’s ‘choice’ to sell sex is like suggesting that women should be free to ‘consent’ to being trafficked, or to being subjected to domestic or gender based violence; or workplace sexual harassment. The flawed premise of the autonomy argument is exposed, it is argued, when academic discourse on prostitution is considered alongside the gains achieved by feminist campaigns against rape, domestic violence and gender based violence; and by the #MeToo movement on sexual harassment.

This thesis examines the momentum for change in Ireland over recent decades, through feminist activism and successful campaigns to reform the law on sexual offences and women’s rights. It places the 2017 prostitution law change within this context, arguing that, through these campaigns, feminist activists and legislators have effectively challenged the ‘gender regime’ previously represented by Irish laws, which had over many decades post-independence remained notably repressive of women’s sexuality and which continued to deny women autonomy in reproductive health, maintaining strong censorship over sexual matters well into the twenty-first century.

Within the thesis, the assumptions, positions and views which influenced the introduction of the 2017 law are evaluated, and the conclusion drawn that the new law may be normatively justified by reference to a conceptual understanding of ‘compromised’ consent, derived from an Interpretive Policy Analysis of the debates around the introduction of the new law, and supported by analysis of other contemporary feminist legal campaigns and reforms.

In Chapter 1 of this thesis, the polarisation of the feminist criminological literature on prostitution is discussed and analysed. The literature on consent is also considered, with reference to the implications that different legal perspectives on consent can have for analysis of laws regulating prostitution.

⁵ Kingston, Sarah, *Prostitution in the Community: Attitudes, Action and Resistance*. Routledge, 2014, at 10.

⁶ Phoenix, Jo, ‘Prostitution and Sex Work’ in Liebling, Alison, Maruna, Shadd and McAra, Lesley, *Oxford Handbook of Criminology* (6th ed). Oxford University Press, 2017, 685-703 at 690-1.

⁷ Phoenix, Jo, *ibid*.

⁸ Walby, Sylvia, *The Future of Feminism*. Cambridge: Polity Press, 2011, at 23.

In Chapter 2, an account of the methodology used in the thesis is provided, including a discussion of the Interpretive Policy Analysis (IPA) approach taken to the evaluation of source material drawn from the parliamentary and policy-making processes; a review of ethical issues which arose during the research itself; and a consideration of the thesis as representing ‘insider research’.

In Chapters 3-6, an empirical analysis of relevant literature, documents, legal texts and debates is conducted in order to provide a sound evidence basis for the development of the concept of ‘compromised consent’; and to illustrate how it may be understood as forming the basis for the motivation behind the introduction of ‘Nordic model’ laws in general, and the Irish 2017 law in particular. Thus, in Chapter 3, an analysis is provided of the means through which laws and policies on prostitution may be framed, with reference to particular jurisdictions within which different models of regulation have been adopted.

In Chapter 4, the general context of Ireland’s gendered legal frameworks, both constitutional and legislative, is outlined and analysed, with particular emphasis on criminal law frameworks and the legal construction of ‘consent’ in Irish law.

In Chapter 5, the development of Irish law and policy on prostitution from 1922 until 2010 is critically evaluated and analysed, and it is considered whether prostitution in Ireland during those decades may be understood as a ‘gender regime’, in accordance with Coy’s model.

In Chapter 6, the post-2010 momentum for law reform is considered, and an analysis provided of the process leading to the introduction into the Oireachtas of what became Part 4 of the 2017 Act, with a focus upon the parliamentary debates and speeches on those statutory provisions, supplemented by a discussion of the responses provided in a number of ‘elite interviews’ with key actors in the legislative process. In particular, four specific sets of materials are analysed using an IPA approach (all accessible at the www.oireachtas.ie website), namely:

- (1) Oireachtas Justice Committee hearings;
- (2) Seanad debates on the Bill when it was first introduced, over 2015/2016;
- (3) Dáil debates over 2016/17;
- (4) Final Seanad debates when the Bill concluded there in 2017.

In Chapter 7, the provisions as enacted are discussed and analysed, and a critique provided of the literature that they have generated since enactment in 2017; and of the empirical research conducted since then into their impact on the sex trade in Ireland. An account of the statutory review process underway into the provisions themselves is outlined, and an assessment offered as to potential future developments in Irish prostitution law.

In Chapter 8, a series of conclusions is presented, based on the analysis developed through earlier chapters. It is argued by way of conclusion that the 2017 Irish sex purchase ban may be justified from a feminist perspective through a reappraisal of ‘consent’ as capable of being legally compromised in certain contexts.

Such an understanding, it is suggested, may be developed based upon three strands of analysis, developed through the empirical analysis presented in Chapters 3-6. First, it is supported by an examination of changing definitions of ‘consent’ in other legal settings based on campaigning by feminist and victims’ rights activists; such as the law reform campaigns around domestic violence, rape and sexual harassment. Secondly, it may be supported by reference to contemporary intersectional socialist feminist theorising; reliance in this regard

is placed upon Coy's conception of prostitution as constituting a 'gender regime'; and upon Monica O'Connor's use of a continuum framework for conceptualising consent.⁹ And thirdly, it can be understood as emerging from and underlying the parliamentary debates on the introduction of Part 4.

As outlined in Chapter 6, three prominent recurring themes are seen to emerge from this analysis; namely, themes of individualised agency premised upon the conception of consent as freely exercised choice ('Consent as Free Choice'); of consent as conditional in a viewpoint that recognises prostitution as 'work', but not always freely chosen work ('Conditional Consent: Prostitution as Work'); and of consent as capable of being coerced within structural power contexts and in conditions of gendered and intersectional exploitation ('Consent in a Coercive Context').

From these different strands, it is sought to provide an evidence-based premise for the development of the legal concept of 'compromised consent' proposed; and it is argued that the (re)conceptualisation of consent in this way as capable of being compromised within certain settings can be justified from an explicitly socialist strand of feminist theorising, communitarian and anti-individualist, rooted in an understanding of social and economic structural context as the framework within which individual choices are made. By contrast, the 'sex work' critiques of the 2017 change are critiqued within the thesis for their over-reliance on what is argued to constitute a neo-liberal perspective, emphasising individual rights over the public good and based on a very different understanding of the meaning of 'consent' in law.

Thus, it is argued that the 2017 prostitution law, like other recent changes to the laws on gender based violence and sexual offences, may be seen as a strategic use of legislation for social change towards greater gender equality in Ireland.

⁹ See O'Connor, Monica, *The Sex Economy*. Newcastle: Agenda Publishing, 2019.

CHAPTER 1 – Consent and Prostitution within Feminist Criminology

1.0 Introduction

In this chapter, a review is provided of feminist criminological scholarship, by way of context for the subsequent discussion within this chapter of the literature on legal conceptions of consent, and on prostitution itself. The polarisation of feminist discourse on prostitution will then be analysed, with reference to specific jurisdictions within which different models of regulation have been adopted.

There is an immense and growing academic literature on prostitution law, much of it based on different strands of feminist legal theory. Feminist legal theory or jurisprudence is the overarching term given to a range of feminist or gender theories analysing the law and the legal system. It contains many strands, in that it reflects the different elements of feminist thought, understood to include liberal feminism; radical feminist theory; socialist feminist thought, and more recently postmodern and deconstructionist feminist theories.¹⁰

Feminist theories began to impact upon the development of the Criminology discipline in the last three decades of the twentieth century, with the emergence of empirical, standpointist and postmodern feminist criminological method.¹¹ Different elements of feminist thought are reflected within Criminology and within these methodological approaches. But, as outlined in the previous chapter, nowhere are the theoretical differences more evident than in the feminist criminological literature on prostitution. Academic scholarship in this area now tends to be highly polarised, presenting opposing ‘perspectives of prostitution as either ‘violence against women/exploitation’ or ‘sex as work/sex work’’.¹² As Coy, Smiley and Tyler write, ‘All research and policymaking on the prostitution system is deliberated and decided in the shadows of fundamentally incompatible positions.’¹³

In an extensive review of relevant feminist scholarship, Phoenix asserts that the ‘two theoretical positions of prostitution as ‘victimization’ or as ‘work’, were never really as distinct as some have assumed’ because the ‘empirical realities of prostitution are far more complex than theoretical models.’¹⁴ Despite this claim, it is clear from any review of the literature that even those texts which claim to seek a middle ground tend to favour a particular perspective, often through their choice of language; Coy et al argue that it is ‘impossible, even disingenuous, to claim that an epistemological starting point (even if unacknowledged) does not influence research design, sampling strategies... and how data are presented in terms of the language used to describe the prostitution system and people involved in it (e.g., prostitution/sex work, prostituted women/sex workers, pimps/managers).’¹⁵

¹⁰ See for example Bridgeman, Jo and Millns, Susan (eds.), *Feminist Perspectives on Law*. London: Sweet and Maxwell, 1998.

¹¹ See Smart’s typology as set out in Smart, Carol, ‘Feminist Approaches to Criminology, or Postmodern Woman Meets Atavistic Man’ in Gelsthorpe, Lorraine & Morris, Alison (eds), *Feminist Perspectives in Criminology*. Bucks: Open University Press, 1990.

¹² Sanders, Teela, O’Neill, Maggie and Pitcher, Jane, *Prostitution: Sex Work, Policy and Politics*. London: Sage, 2009, at 1.

¹³ Coy, Maddy, Smiley, Cherry and Tyler, Meagan, ‘Challenging the “Prostitution Problem”: Dissenting Voices, Sex Buyers and the Myth of Neutrality in Prostitution Research’ (2019) 48 *Archives of Sexual Behaviour* 1931-35, at 1931; responding to arguments made by Benoit et al, ‘The “Prostitution Problem”: Claims, Evidence and Policy Outcomes’ (2018) *Archives of Sexual Behaviour*.

¹⁴ Phoenix, *op cit*, at 693.

¹⁵ Coy et al (2019), *op cit*, at 1932.

Indeed, those who take the ‘violence against women’ perspective and adhere to the view that prostitution is inherently exploitative speak of women as being ‘engaged in prostitution’, whereas those who take the ‘sex as work’ approach speak of ‘sex workers’.¹⁶ Those who see prostitution as exploitation are accused by their opponents of denying women agency and choice; those who perceive it as work are accused of denying the reality of exploitation and the structural context of intersectional gender inequality within which freedom to exercise individual agency is constrained by social circumstance.¹⁷ Robin West succinctly summarises the difference between these views:

liberals and liberal feminists hold the quintessentially liberal commitment to the private sphere as a realm of free individual choice, individuation and maturation, while radical feminists, echoing general themes in radical legal scholarship, contest the distinction between the public and private and even more sharply contest the freedom of choices made within the private sphere, focusing on the coercive impact of individuals or institutions who retain relative power over others in those spaces.¹⁸

Chao-Ju Chen similarly focuses on the different language used by those supporting each perspective:

Two main approaches to prostitution have been developed, advocated, and adopted: the sex work model, which understands prostitution as the oldest profession and favors the legal approach of decriminalization with various forms of legalization, and the sex exploitation or abolishment approach, which sees prostitution as the oldest oppression and seeks ways to abolish it. The choice of the term ‘sex workers’ or the term ‘prostituted people’ serves to reveal one’s affiliation with one or the other approach.¹⁹

Conceptualisations of ‘agency’ or ‘consent’ are thus central to each perspective. In this thesis, it is argued that seeing prostitution as inherently exploitative requires an understanding of consent/agency that is rooted in structural context – the contexts of patriarchy or of capitalism, for example. It is further argued that seeing prostitution as primarily a consensual choice exercised through individual agency, by contrast, requires a viewpoint focused on the personal, not the collective; an ideology that is more liberal or indeed libertarian, less communitarian.

Broadly speaking, and notwithstanding the difficulties with making clear distinctions between different feminist theoretical viewpoints outlined in the previous chapter, in this thesis it is posited that the perspective which views prostitution as ‘exploitation’ can most appropriately be associated with socialist feminist theory, and the ‘sex work’ approach with liberal or indeed neoliberal feminist theory.²⁰

¹⁶ See Phoenix, Jo, ‘Prostitution and Sex Work’ in Liebling, Alison, Maruna, Shadd and McAra, Lesley, *Oxford Handbook of Criminology* (6th ed). Oxford University Press, 2017, 685-703 at 690-1.

¹⁷ For an overview, see Phoenix, *ibid*, at 690-3.

¹⁸ Introduction, in West, Robin, and Bowman, Cynthia (Eds.), *Research handbook on feminist jurisprudence*. ProQuest Ebook Central, 2019, at 15.

¹⁹ Chao-Ju Chen, ‘Catharine A MacKinnon and Equality Theory’ in West and Bowman, *ibid*, at 56-7.

²⁰ Many feminist writers suggest that the ‘exploitation’ approach derives from a ‘radical feminist’ perspective; but Butler, among others, has argued that *both* liberal and radical feminists share a ‘sex work’ view of prostitution; see Butler, Cheryl Nelson, ‘A Critical Race Feminist Perspective on Prostitution and Sex Trafficking in America’ (2015) 27(1) *Yale Journal of Law and Feminism* 95-139, at 110.

Feminist advocacy for the ‘exploitation’ perspective has had significant impact for policy makers in different jurisdictions, following the adoption in 1999 of ‘Nordic model’ laws criminalising the purchase of sex in Sweden. The term ‘Nordic model’ refers to laws which criminalise those who buy people for sex through criminalising sex purchase; the terms ‘Swedish approach’ or ‘equality model’ are also used to describe such laws. This model also decriminalises those who sell sex and provides support packages for those seeking to exit from prostitution. Since 1999, a growing momentum in support of this approach may be identified among policy-makers in different countries; with similar laws now passed in Norway (2009), Iceland (2009), Canada (2014), France (2016) and Israel (2020) – as well as Northern Ireland (2015) and Ireland (2017).

In recent years, however, a very different momentum has become evident within academic writing, where the ‘sex work’ or liberal perspective has become increasingly dominant. This development has been attributed to a marked shift towards a libertarian perspective in scholarship generally. Sylvia Walby for example has identified a ‘neoliberal’ turn in the academy – ‘a shift in intellectual enquiry about systems of power to that of agency ... [which] functions in practice towards deflecting analytic interest away from the powerful and from systems of power.’²¹ She suggests that the celebration of individual agency within contemporary third-wave feminist writing effectively masks the way in which commercialised sexuality represents a new form of control over women.²² Referring to the same phenomenon, Coy writes in similar terms that ‘radical feminist perspectives which imagine an alternative world without prostitution are marginalized ... agency has become a dominant lens for theorizing prostitution.’²³ Drawing on Coy’s work, this author has suggested elsewhere that the dominant academic position on ‘agency’ ignores the structural contexts within which consent is ostensibly given in prostitution.²⁴

Within this thesis, as outlined in the previous chapter, it is therefore sought to explore and develop a theoretical feminist framework for understanding and challenging the currently dominant academic perspective, and for justifying the contrasting dynamic for reform among policymakers internationally. In developing this framework, reliance will be had upon Maddy Coy’s argument as to the framing of prostitution, based upon Raewyn Connell’s conception of a ‘gender regime’ as ‘the organization of gender within social institutions; ... [which are] formed by, and form, ‘gender relations’: ways in which individuals interact with each other, which are ‘always being made and re-made in everyday life’; Coy argues that prostitution may itself be framed as a ‘gender regime’, since it ‘reflects and reproduces unequal gender orders even though there may be variation at the level of everyday gender relations between women who sell, and men who buy, sex.’²⁵

In later chapters, this analysis of prostitution as a ‘gender regime’ will be applied to the recent process of law change in Ireland, where ‘Nordic model’ laws were introduced in 2017 to

²¹ Walby, Sylvia, *The Future of Feminism*. Cambridge: Polity Press, 2011, at 23.

²² This theme is reinforced in an Irish context by the research conducted by Rosa Senent Julian into the discourses of sex buyers in this jurisdiction, to be discussed further in later chapters; see Senent Julian, Rosa, ‘Tensions between feminist principles and the demand for prostitution in the neoliberal age: a critical analysis of sex buyers’ discourse’ (2019) 24(2) *RECERCA Magazine De Pensament I Anslisi* 109-128.

²³ Coy, *op cit*, at 3.

²⁴ Bacik, Ivana, “‘If consent is bought, it is not freely chosen’: Compromised consent in prostituted sex in Ireland’ (2020) 5(3) *Dignity: A Journal of Sexual Exploitation and Violence*, Article 6.

²⁵ Coy, *op cit*, at 4, referring to Connell, Raewyn, *Gender* (2nd ed). Cambridge: Polity Press, 2009.

criminalise the purchase of sex.²⁶ In this chapter, an examination of feminist criminological scholarship will be provided, followed by a review of the literature on feminist legal conceptions of consent, prior to considering the literature on prostitution and the application of different theoretical perspectives, including that of Coy, in a number of specific prostitution law frameworks.

It will be argued that Coy's theoretical framework may be relied upon in framing a view of consent as capable of being compromised in certain structured contexts; and that a legal concept of 'compromised consent' may offer a contextualised understanding of 'agency' that can justify increasing support for the 'exploitation' model among policy makers. Reliance will be placed upon the empirical work carried out in Ireland by Monica O'Connor establishing evidence of the 'coercive context' within which consent is given in prostitution.²⁷ Reference will also be made to US feminist legal scholar Mary Joe Frug's conceptual framework of prostitution laws, in arguing that 'agency' or choices as to consent may best be understood as being exercised in gendered settings, where gender has been legally constructed through the 'terrorisation', 'maternalisation' and 'sexualisation' of women in prostitution laws.²⁸

This analysis will then be developed further in order to consider the different legal approaches to regulation of prostitution in selected jurisdictions. It will be argued that Coy's perspective is valuable in seeking to understand the structural context for prostitution as a site of intersectional exploitation; not just the gendered exploitation of women, but also the exploitation of women in poverty and women from ethnic minority or migrant communities. First, however, the development of feminist criminological scholarship will be considered, in order to provide a context for discussion of the literature on legal conceptions of consent, and on prostitution itself.

1.1 Feminist Criminology

The subject of women and crime was neglected, or at least relatively neglected, by criminologists until the late twentieth century, although a significant body of research has been generated by feminist criminologists since then.²⁹ While an extensive literature now exists on women, gender and crime, central questions remain unresolved as to the connections between gender and criminality; and the extent to which social understandings

²⁶ Through passage of Part 4 of the Criminal Law (Sexual Offences) Act 2017. The term 'Nordic model' refers to laws which criminalise those who buy people for sex through criminalising sex purchase; the terms 'Swedish approach' or 'equality model' are also used to describe such laws, based upon Swedish legislation introduced in 1999 and adopted subsequently into other jurisdictions. This model also decriminalises those who sell sex and provides support packages for those seeking to exit from prostitution.

²⁷ O'Connor, Monica, *The Sex Economy*. Newcastle: Agenda Publishing, 2019.

²⁸ Frug, Mary Joe, 'A Postmodern Feminist Legal Manifesto (an unfinished draft)' (1992) 105 *Harvard Law Review* 1045 at 1049. Mary Joe Frug was murdered on 4 April 1991, at a time when she was working on this text. The editors of the Harvard Law Review arranged for it to be published posthumously. The text of this article is also published as the final chapter in another posthumous publication: Frug, Mary Joe, *Postmodern Legal Feminism*. NY: Routledge, 1992. Page numbers throughout this thesis referring to Frug's writings in the Manifesto are taken from the *Harvard Law Review* article.

²⁹ For an overview of feminist criminological theorising, see Burman, Michele and Gelsthorpe, Loraine, 'Feminist Criminology: Inequalities, Powerlessness and Justice' in Liebling, Alison, Maruna, Shadd and McAra, Lesley (eds), *Oxford Handbook of Criminology* (6th ed), 2017 213-238. See also Bacik, Ivana, 'Women and the Criminal Justice System' in O'Mahony, Paul (ed), *Criminal Justice in Ireland*. Dublin: IPA, 2002, 134-154.

of gender, of femininities and masculinities, have been constructed and shaped through the criminal law.³⁰

In this section, it is intended to provide an overview of contemporary writing on gender and crime, and on the construction of gender through criminal law, before going on to review particular constructions of gender through the law on prostitution and the pioneering feminist deconstructionist writing of Mary Joe Frug in her *Postmodern Feminist Legal Manifesto*.³¹ In particular, Frug's analysis of criminal laws on prostitution as terrorising, maternalising and sexualising female body will be examined.

After a long period where women were largely neglected in criminological literature, feminist theories began to impact upon the development of the discipline in the last three decades of the twentieth century, with the emergence of empirical, standpointist and postmodern feminist criminological method.³²

Different feminist theoretical perspectives have also had significant impact on criminology; Walklate describes these as: 'liberal feminism; radical feminism; socialist feminism; and postmodern feminism.'³³ She notes the emphasis within liberal feminism on the appearance of bias within criminological research which for so long excluded women from study; the focus within radical feminist criminology on sexuality as the key site of women's oppression; and the concern of socialist feminists to examine the 'complex ways in which variables such as sex, race and class might interact with one another.'³⁴ Messerschmidt describes a socialist feminist understanding of crime as being premised on the need both to 'consider simultaneously patriarchy and capitalism and their effects on human behaviour' and to see 'power (in terms of gender and class) [as] central for understanding serious forms of criminality.'³⁵

More recently, feminist criminologists from different ideological positions have applied postmodern deconstruction methods to theories of gender, overturning the notion of 'women criminals' as a unified category and adopting the concept first proposed by West and Zimmerman of examining the gendered practices engaged in by women and men in 'doing gender'.³⁶ Such theorists see challenge in the recovery of the 'fragmented subject' and the adoption of more humble projects in criminology.³⁷

These theorists are often associated with what has been described as 'third-wave feminism', a third stage of feminist theorising about crime which emerged from the 1990s onwards,

³⁰ See eg Messerschmidt, James, *Masculinities and Crime*. Lanham, MD: Rowman and Littlefield, 1993. For the purpose of this chapter, and throughout the thesis, 'sex' is taken to mean the biological category of 'male' or 'female', while 'gender' refers to the socially constructed characteristics attributed to each sex.

³¹ Frug, Mary Joe, 'A Postmodern Feminist Legal Manifesto (an unfinished draft)' (1992) 105 *Harvard Law Review* 1045 at 1049.

³² See Smart's typology as set out in Smart, Carol, 'Feminist Approaches to Criminology, or Postmodern Woman Meets Atavistic Man' in Gelsthorpe, Lorraine and Morris, Alison (eds), *Feminist Perspectives in Criminology*. Bucks: Open University Press, 1990.

³³ Walklate, Sandra, *Understanding Criminology: Current Theoretical Debates* (3rd ed). London: Open University Press, 2007, at 84-5.

³⁴ Walklate, *ibid*, 85-7.

³⁵ Messerschmidt, *op cit*, 56.

³⁶ West, Candace and Zimmerman, Don, 'Doing Gender' (1987) 1(2) *Gender and Society* 125-51.

³⁷ See for example, Carrington, Kerry, 'Postmodern and Feminist Criminologies: Fragmenting the Criminological Subject' in Walton, Paul and Young, Jock (eds), *The New Criminology Revisited*. London: MacMillan, 1998, at 93.

often associated with postmodernist or poststructural theorising and method.³⁸ Burman and Gelsthorpe say this third wave in feminist theorising about crime is best described as '*feminist deconstructionism*', since it draws on postmodern insights.³⁹ Theorists in this field have tended to focus upon discourses or processes, rather than on objects of study. They examine the way in which meanings are constructed through the workings of the criminal law; and how the law acts to en-gender both women's and men's bodies.

New directions in feminist criminology have thus been opened up over recent decades with a growing interest in deconstructionism; in exploring the gendering effect of the law, and the relationship between gender and crime. Thus the original feminist empiricist question has been reversed, so that instead of continuing to ask 'why do so few women commit crime?', many criminologists have argued instead 'why do so many men commit crime?' Male offending and masculinities are now being seen through the prism of gender, just as women's offending has always been. An approach to crime which analyses the social construction of gender, rather focusing upon sex difference, has clearly opened up new possibilities within criminology.⁴⁰

However, criminological theorists drawing on deconstructionist methods have also explored perspectives beyond gender, in seeking to develop an intersectional theory of crime. This perspective is shared by those engaged in cultural criminological research;⁴¹ and by those who define themselves generally as drawing from new directions in feminist theory. In her powerful defence of 'third-wave feminism', R. Claire Snyder argues that it generally

makes three important tactical moves that respond to a series of theoretical problems within the second wave. First, in response to the collapse of the category of "women", the third wave foregrounds personal narratives that illustrate and intersectional and multiperspectival version of feminism. Second, as a consequence of the rise of postmodernism, third-wavers embrace multivocality over synthesis and action over theoretical justification. Finally, in response to the divisiveness of the sex wars, third-wave feminism emphasizes an inclusive and nonjudgmental approach that refuses to police the boundaries of the feminist political. In other words, third-wave feminism rejects grand narratives for a feminism that operates as a hermeneutics of critique within a wide array of discursive locations, and replaces attempts at unity with a dynamic and welcoming politics of coalition.⁴²

The development of an intersectionality paradigm within feminism has meant that the connections between gender and other dimensions of inequality have become a current focus of challenge for theorists seeking to explore 'doing gender'. As Burman and Gelsthorpe write, 'Whilst second wave feminism dominated early feminist methodology, the influence of the third wave can now be discerned in relation to work on gendered violence for example, and, through an emphasis on intersectionality, on the impact of criminal justice

³⁸ See Snyder, R. Claire, 'What is Third-Wave Feminism? A New Directions Essay' (2008) 34(1) *Signs* 175-96. Snyder quotes Rebecca Walker as having 'reportedly kicked off the new movement in 1992 when she declared, "I am the Third Wave"' (Walker, Rebecca, Snyder, at 176).

³⁹ Burman and Gelsthorpe, *op cit*, at 224-5.

⁴⁰ Messerschmidt, James, 'From Patriarchy to Gender: Feminist Theory, Criminology and the Challenge of Diversity' in Hahn Rafter, Nicole and Heidensohn, Frances (eds), *International Feminist Perspectives in Criminology: Engendering a Discipline*. Open University Press, 1995, at 185. See also Messerschmidt, James, *Masculinities and Crime*. Maryland: Rowman & Littlefield, 1993; and Collier, Robert, *Masculinities, Crime and Criminology*. London: Sage, 1998.

⁴¹ See for example Ferrell, Jeff, Hayward, Keith and Young, Jock, *Cultural Criminology*. London: Sage, 2008.

⁴² Snyder, *op cit*, at 175-6.

on those who cross identities.⁴³ Thus, 'Consideration of the interlocking systems of oppression is now a crucial part of third wave feminist theorization.'⁴⁴ But they also warn that

Whilst there is a growing body of criminological research informed by the intersectionality paradigm, exploring the multiplicative (rather than simply additive) effects of varying (and messy) systems of oppression in the lives of victims and offenders,.. most criminological work has yet to accomplish fully an integration of gender with other axes of oppression, not least because feminist criminologists tend to afford gender primacy in their analyses.⁴⁵

Over a relatively short time, extensive literature has developed on women offenders, and more recently on gender and crime. As Snider writes,⁴⁶ the serious attention now devoted to women as offenders is not always welcome; however exciting developments are taking place with intersectional research focusing on ethnicity, sexuality and class issues as well as gender, sexuality; and the construction of genders.

Some decades ago, one of the best-known legal feminist theorists, Catharine MacKinnon, argued powerfully that the gendered nature of the legal system is apparent because:

... the law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender, through its legitimizing norms, relation to society, and substantive policies. It achieves this through embodying and ensuring male control over women's sexuality at every level, occasionally cushioning, qualifying or de jure prohibiting its excesses when necessary to its normalization.... the state, in part through law, institutionalizes male power. If male power is systemic, it *is* the regime.⁴⁷

MacKinnon's influential analysis presents what is usually posited as a radical feminist view of the way in which criminal laws contribute to the construction of gender and the understanding about different stereotypes of 'woman' and of female sexuality.⁴⁸ Her application of this analysis to legal conceptions of consent and prostitution will be explored further later in this chapter.

Leading feminist criminologist Carol Smart has similarly argued that the law in general, and the criminal law in particular, have been exposed by feminist theorists as operating so as to saturate women's bodies with codes of sexualised meanings. She illustrates her argument about the power of law to construct women's bodies through sexing and gendering practices with reference to the specific 'subjects constituted in and by legal and criminological

⁴³ Burman and Gelsthorpe, *op cit*, at 223. See for example Crenshaw, Kimberle, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 8 *University of Chicago Legal Forum*.

⁴⁴ Burman and Gelsthorpe, *op cit*, at 216.

⁴⁵ *Ibid*, at 216.

⁴⁶ Snider, Laureen, 'Constituting the Punishable Woman: Atavistic Man incarcerates Postmodern Woman' (2003) 43(2) *British Journal of Criminology* 354-78.

⁴⁷ MacKinnon, Catharine, 'Toward Feminist Jurisprudence' (1983) 8(41) *Signs: Journal of Women in Culture and Society* 635 at 644-5.

⁴⁸ MacKinnon is sometimes described as a proponent of 'dominance feminism'; see Butler, Cheryl Nelson, 'A Critical Race Feminist Perspective on Prostitution and Sex Trafficking in America' (2015) 27(1) *Yale Journal of Law and Feminism* 95-139, at 118-120, referring to Crenshaw, Kimberle, 'Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality' (2010) 46 *Tulsa Law Review* 151-55.

discourses': namely, 'the criminal woman, the prostitute, the raped woman, the sexed woman and the unruly mother'.⁴⁹ She says that when the law addresses 'Woman', it is 'almost inevitably in these forms.' Thus, 'even when law addresses Woman as worker, it is almost inevitably in terms of pregnancy (maternity rights) or some perceived disability (sex discrimination).' She argues that women are thus reduced to sex/bodies; an assertion that can be substantiated by an examination of specific areas of law.

Like MacKinnon and Smart, Mary Joe Frug also developed a theoretical framework through which to consider the way in which laws in general, and criminal laws in particular, contribute to specifically gendered constructions of women's bodies.⁵⁰ Frug, a pioneering feminist legal scholar who was tragically killed in 1991, made a major contribution to the early development of theories around construction of gender. She applied deconstructive methodology famously in a 'postmodern manifesto', focusing on the way in which laws contribute to the 'gendering' of women's bodies.⁵¹ Legal rules, Frug says, 'permit and sometimes mandate' the 'terrorisation', 'maternalisation' and 'sexualisation' of the female body. First, terrorisation is carried out

by a combination of provisions that inadequately protect women against physical abuse and that encourage women to seek refuge against insecurity. One meaning of "female body", then, is a body that is "in terror", a body that has learned to scurry, to cringe and to submit.⁵²

Secondly, legal rules encourage maternalisation of the female body, and legal discourse supports a meaning of the female body that it is 'for' maternity. Finally, legal rules also support a meaning of the female body that it is 'for' sex with men; this occurs, among other ways, in

the application of rules such as rape and sexual harassment laws that are designed to protect women against sex-related injuries. These rules grant or deny women protection by interrogating their sexual promiscuity. The more sexually available or desiring a woman looks, the less protection these rules are likely to give her.⁵³

Thus, Frug concludes that groups of legal rules and discourses

constitute a system that "constructs" or engenders the female body. The feminine figures the rules pose are naturalized within legal discourse by declaration – "women are (choose one) weak, nurturing, sexy" – and by a host of linguistic strategies that link women to particular images of the female body. By deploying these images, legal discourse rationalizes, explains and renders authoritative the female body rule network. The impact of the rules network on women's reality in turn reacts back on the discourse, reinforcing the "truth" of these images.⁵⁴

⁴⁹ Smart, Carol, *Law, Crime and Sexuality: Essays in Feminism*. London: Sage, 1995, at 220.

⁵⁰ Frug, Mary Joe, 'A Postmodern Feminist Legal Manifesto (an unfinished draft)' (1992) 105 *Harvard Law Review* 1045.

⁵¹ Frug, Mary Joe, *ibid*, at 1050.

⁵² Frug, *ibid*, at 1050-1.

⁵³ Frug, *ibid*, at 1050.

⁵⁴ Frug, *ibid*, at 1050.

Responding to Frug's work, Martha Minow has noted that by focusing on the female body, Frug joined other feminists like Judith Butler⁵⁵ in examining 'the allegedly most natural and immutable source of gender difference'.⁵⁶ Frug's publications, most of them posthumous,⁵⁷ have had an influential effect upon feminist legal scholarship, and have been cited, applied and analysed by numerous writers since her murder.⁵⁸ In particular, her work has inspired a number of conferences and publications in her memory.⁵⁹ In her contribution to one such publication, Laura Rosenbury writes about Frug's work has shaped her understanding of the ways in which law participates in the construction of gender, noting that Frug's work engaged with key contemporary questions around law and gender well before the publication of more recent feminist legal theory texts.⁶⁰

Building on the deconstructionist work of MacKinnon, Smart, Frug and others, feminist theorists have sought to develop strategies for challenging these constructions of gender through law. In one leading analysis, Martha Fineman has posited the concept of a 'gendered life'.⁶¹ She argues that while legal feminism tended originally to be an equality-based strategy, with a stress on the need to treat women the same as men, more recently concepts of difference have emerged; for example with pregnancy; or battered women's syndrome. Many feminist legal scholars in the US, she argues, now move away from 'equality' as an organising principle of legal thought because it still tends to be translated as 'sameness of treatment' and therefore too timid; instead feminists need to challenge the presumed neutrality of the law.

Fineman suggests that the sameness/difference debate can be resolved for feminist legal theorists through application of the concept of a 'gendered life', based on the premise that 'women share as a group the potential for experiencing a variety of situations, statuses and ideological and political impositions in which their gender is culturally relevant.' This

⁵⁵ Butler, Judith, *Gender Trouble: Feminism and the Subversion of Identity*. NY: Routledge, 1990.

⁵⁶ Minow, Martha, 'Incomplete Correspondence: An Unsent Letter to Mary Joe Frug' (1992) 105 *Harvard Law Review* 1096 at 1096-7.

⁵⁷ These publications, including Frug, Mary Joe, 'Progressive Feminist Scholarship: Can We Claim "A Different Voice"?' (1992) 15 *Harvard Women's Law Journal* 37; *Women and the Law*. US: Foundation Press, 1992, are listed in Frug, Gerald, 'Introduction: Mary Joe Frug' (2015-16) 50 (3) *New England Law Review* 273-276 at 274.

⁵⁸ See for example Kennedy, Duncan, *Sexy Dressing Etc: Essays on the Power and Politics of Cultural Identity*. Cambridge: Harvard University Press, 1993; Adler, Libby, 'An Essay on the Production of Youth Prostitution' (2003) 55 *Me. L. Rev.* 191; Higgins, Tracy, "'By Reason of their Sex": Feminist Theory, Postmodernism and Justice' (1995) 80 *Cornell L. Rev.* 1536; Knouse, Jessica, 'Using Postmodern Feminist Legal Theory to Interrupt the Reinscription of Sex Stereotypes through the Institution of Marriage' (2005) 16 *Hastings Women's L.J.* 159; cited in Rosenbury, Laura, 'Channeling Mary Joe Frug' (2015-16) 50 (3) *New England Law Review* 305-318 at 314.

⁵⁹ In 2001, a conference was held at New England School of Law in her memory on the tenth anniversary of Frug's death, with the theme: 'Transgressing Borders: Women's Bodies, Identities and Families', giving rise to a publication engaging with reflections on developments in feminist legal theory: See Austin, Regina and Schneider, Elizabeth, 'Mary Joe Frug's Postmodern Legal Manifesto ten years later: reflections on the state of feminism today' in Conaghan, Joanne (ed), *Feminist Legal Studies: Critical Concepts in Law*. London: Routledge, 2009, Vol IV, pp8-34. A further Memorial Symposium was held 25 years after Frug's death, again giving rise to the publication of a series of papers in the *New England Law Review* in which Frug's husband Gerald Frug, her former colleague Martha Minow and others assessed the legacy of Frug's work: Minow, Martha, 'Continually Re-Thinking: What Would Mary Joe Frug Do?' and Frug, Gerald, 'Introduction: Mary Joe Frug' (2015-16) 50 (3) *New England Law Review* 269-272 and 273-276.

⁶⁰ Rosenbury, Laura, 'Channeling Mary Joe Frug' (2015-16) 50 (3) *New England Law Review* 305-318 at 314, referring to Franke, Katherine, 'Theorizing Yes: An Essay on Feminism, Law and Desire' (2001) 101 *Colum. L. Rev.* 181; Halley, Janet, *Split Decisions: How and Why to Take a Break from Feminism*. Princeton University Press, 2006.

⁶¹ See Fineman, Martha, 'Challenging Law, Establishing Differences: the Future of Feminist Legal Scholarship' (1990) 42 *Fla. L. Rev.* 25-43.

concept, she argues, does not assume that women respond identically to an appreciation of gendered existence. But it allows a recognition of difference to be justified – to remedy socially and culturally imposed harms to women. This is an affirmative position, arguing for remedies and for differentiated treatment to rectify existing pervasive social and legal inequality. Difference can be used to divide women, but Fineman suggests that the ‘gendered lives’ concept offers potential for legal feminists to work with law.

In recent years, feminist legal theorists have indeed sought to engage with the law in new ways, notably through the inception and development of the ‘feminist judgments’ projects across common law jurisdictions such as Canada, England, Australia, the US and Ireland (both North and South).⁶² These projects consider how gender is shaped through judicial practices and how judiciaries have contributed to the construction of gendered identities. In seeking to re-imagine how feminist judges might have approached particular cases, these projects offer new possibilities for re-framing legal constructions of gender.⁶³ Indeed, they may be seen as opening up new potential for a ‘feminist jurisprudence.’ Writing in the Irish context, Enright et al suggest that

..feminist judgments are increasingly regarded not only as advancing critiques of legal judgment, rules and doctrine, but also as uniquely accessible and powerful models of alternative judicial practice. They suggest that other forms of judging, which have the potential to lead to different legal outcomes and potential social orders, are possible.⁶⁴

The method adopted in ‘doing feminist judgments’ also offers opportunity for collaboration between multiple feminisms. Thompson argues that, in this way, feminist judgments projects ‘exemplify how a wide range of feminist positions can find ways of working together so as to interrogate the law’s substance and structure.’⁶⁵ She notes that the emphasis of the projects is on the practicalities of judicial thinking; and suggests that the many individuals who have worked on these projects have engaged in a ‘pragmatic feminism’, ‘a loosely communitarian attitude that does not balk at an absence of consensus among feminist judges, or at the divergent forms of their practice: in other words, a pragmatic coalition.’⁶⁶

Thompson asserts that this approach could be seen as premised on the sort of pragmatic action that Ann Scales envisaged, grounded in women’s experiential continua as women, rather than in any sense of essentialism.⁶⁷ Thompson concludes optimistically that while legal

⁶² See: Hunter, Rosemary, McGlynn, Clare and Rackley, Erika (eds), *Feminist Judgments: From Theory to Practice*. Oxford: Hart, 2010; Douglas, Heather, Bartlett, Francesca, Luker, Trish and Hunter, Rosemary (eds), *Australian Feminist Judgments: Righting and Rewriting Law*. Oxford: Hart, 2015; Stanchi, Kathryn, Berger, Linda and Crawford, Bridget (eds), *US Feminist Judgments: Rewritten Opinions of the US Supreme Court*. Cambridge University Press, 2016; Enright, Mairead, McCandless, Julie and O’Donoghue, Aoife, *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity*. London: Bloomsbury, 2017. For the Irish project, see also www.feministjudging.ie

⁶³ For some further analysis, see for example Hunter, Rosemary, ‘The Power of Feminist Judgments?’ (2012) 20(2) *Feminist Legal Studies* 135-48; Fitzgibbon, Kate and Maher, JaneMaree, ‘Feminist Challenges to the Constraints of Law: Donning Uncomfortable Robes?’ (2015) 23(3) *Feminist Legal Studies* 252-271.

⁶⁴ Enright, Mairead, McCandless, Julie and O’Donoghue, Aoife, *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity*. London: Bloomsbury, 2017, at 5.

⁶⁵ Thompson, Mary Shine, ‘Doing Feminist Judgments’ in Enright, Mairead, McCandless, Julie and O’Donoghue, Aoife, *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity*. London: Bloomsbury, 2017, at 55.

⁶⁶ Thompson, Mary Shine, *ibid*, at 59.

⁶⁷ Scales, Ann, ‘Disappearing Medusa: The Fate of Feminist Legal Theory’ (1997) 20(1) *Harvard Women’s Law Journal* 36-46, cited in Thompson, Mary Shine, *ibid*, at 59.

history is grounded on 'silent presumptions about women judges, lawyers, administrators, litigators, victims of crime and defendants; about classes of women and girls, and about males excluded from patriarchal norms', there is great potential in the process of 'consciously engendering the law and thereby interrogating those certainties'.⁶⁸

Thus many feminist theorists have focused upon the way in which the law, and legal concepts, contribute to the construction of gender, and in particular to the construction of gendered stereotypes around women's bodies; gender identities and gender roles. While many now question MacKinnon's essentialist conception of 'woman', her critique of the way in which law contributes to a stereotype of women and of women's sexuality remains a powerful one, applicable in a range of settings.

More recently, Raewyn Connell's development of the 'gender regime' concept referred to above, like Fineman's 'gendered lives' model, can offer a similarly powerful analysis of the way in which gender becomes a social structure.⁶⁹ Connell's fourfold model is based on the different categories of: production and consumption; power; emotional and human relationships; and symbolic or cultural meanings, and Connell suggests that this 'fourfold model provides a template for analyzing any gender regime'.⁷⁰

It is argued in this thesis that the concepts of 'gendered lives' and 'gender regimes', like the feminist judgments project, provide a powerful basis for challenging traditional constructions of women through legal rules; and for enabling an affirmative re-formulation of gender constructions through law. It will be argued further that this affirmative re-formulation may be brought about, within the context of prostitution, by the introduction of 'Nordic model' laws which are premised upon an understanding of 'consent' as capable of being compromised in certain contexts involving structural power imbalance and a presumption of exploitation. This understanding, it is argued, derives from an explicitly socialist and intersectional feminist perspective, which sees 'power (in terms of gender and class) [as] central for understanding' the engagement of individuals in the sex trade.⁷¹

These arguments are outlined further below through a consideration of different legal conceptions of consent, following which a review will be provided of the theoretical development of feminist criminological writing on prostitution.

1.2 Consent as a Legal Concept in Feminist Criminology

Over the decades in which the literature on feminist legal theorising, feminist jurisprudence and feminist criminology has developed and expanded, changing conceptions of the significance of 'consent' or agency have been central to much of the analysis in different legal contexts. As women's 'personhood' and capacity for moral agency became recognised in law, and women's status moved from that of chattel to that of citizen/legal subject, so too did the concept of 'consent' become increasingly significant. Traditionally, as Chao-Ju Chen writes, different 'categories of consent' were assigned to women:

⁶⁸ Thompson, Mary Shine, *op cit*, at 74.

⁶⁹ Connell, Raewyn, 'Advancing Gender Reform in Largescale Organizations: A New Approach for Practitioners and Researchers' (2005) 24(4) *Policy and Society* 5-24.

⁷⁰ Connell, *ibid*, at 7, quoted in Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality: Theory, Research and Policy*. Surrey: Ashgate, 2012, at 4.

⁷¹ See Messerschmidt, *op cit*, 56.

In heterosexuality, women are assigned to different categories of consent in accordance with their relationship to men: virtuous daughters and young girls are unconsenting, virginal, and rapable; unvirtuous wives and prostitutes are consenting, whores, and unrapable.⁷²

However, as Robin West writes in her recent magisterial discussion of consent,

This [traditional] legal regime - the set of laws and practices rendering sex, pregnancies and childbirth mandatory within marriage, regardless of the absence of consent, and forbidden or stigmatised outside marriage, regardless of consent's presence - gave way, through the last quarter of the twentieth century and the first two decades of this one, to a regime of both maternity and sexuality premised largely upon consent, rather than marital status.⁷³

West argues that consent was central to the reform vision of both the feminist movement 'to criminalise nonconsensual sex within marriage, and the movement to decriminalise consensual sex outside it', thus instituting the 'very general idea that consent, rather than marriage, should be the demarcation of legal from illegal sex .. a momentous political and moral shift.'⁷⁴

Conceptions of consent have not always been straightforward, however. As one recent comparative study on consent in criminal law has found, while it might seem obvious that the presence or absence of consent can create a clear dividing line between a loving sexual act involving two persons, and a serious breach of the personal autonomy of one of those persons; nonetheless there remains a surprising lack of clarity as to the precise circumstances in which genuine consent is legally present.⁷⁵ The authors in that study undertook a comparative analysis of consent laws in Germany, and in Ireland and Britain, showing that English-speaking jurisdictions were more restrictive in their legal approaches to verify the presence of genuine consent. They found however that recent developments in German criminal law have rendered conceptions of consent less liberal, in keeping with a global tendency identified by the authors towards stronger protections for the weaker ('consenting') party in any relationship.

Increasingly, over recent decades, this tendency towards more restrictive approaches to legal conceptions of consent has been apparent, due largely to strong feminist campaigns internationally which have focused on the need to introduce statutory definitions of consent. Such definitions seek to clarify that consent must be freely and voluntarily given, and that the person providing consent has the capacity to do so. As West has written, historically women were presumed to give consent to sex within marriage, so that husbands were deemed legally incapable of raping their wives; the abolition of the marital rape exemption

⁷² Chao-Ju, Chen, 'Catharine A MacKinnon and Equality Theory', in West, Robin, and Bowman, Cynthia (eds), *Research handbook on feminist jurisprudence*. ProQuest Ebook Central, 2019, at 57.

⁷³ West, Robin, 'Consent, legitimation and dysphoria' (2020) 83(1) *Modern Law Review*, 1-34, at 7-8.

⁷⁴ *Ibid*, at 8.

⁷⁵ See O'Malley, Tom and Hoven, Elisa, 'Consent in the law relating to sexual offences', in Ambos, Kai, Duff, Antony, Roberts, Julian and Weigend, Thomas (eds), *Core Concepts in Criminal Law and Criminal Justice*. Cambridge University Press, 2020, at 135-171.

across different jurisdictions marked a first step towards implementing a feminist understanding of consent in law.⁷⁶

Thus, in some settings, legal rules have been developed to recognise that ‘no means no’, but that a ‘yes’ can be conditional in certain coercive contexts. For example, just as marriage no longer means a ‘blanket’ consent by the ‘wife’ in law, so too an apparent consent to sex may not always be legally valid in criminal law; it remains the case that ‘consent’ is legally invalid where the person who appears to consent is under-age or has been trafficked, for example.

Outside of legal frameworks, different understandings of consent also apply. As this author and others have explored previously in a public health context, ‘willing’ sex may be contrasted to ‘forced’ and ‘persuaded’ sex; and health outcomes have been found to differ depending on the nature of a person’s first sexual experience.⁷⁷ Indeed, that study, in focusing specifically on the first time that individuals had experience of sexual intercourse, illustrates that consent itself, like other human behaviours, cannot be understood independently of the context in which it is given or offered.

This insight that an apparent consent may be understood legally as being compromised by its context is applied in other settings too, notably in workplace sexual harassment cases where the entire legal framework is premised on the notion that consent can be compromised or indeed rendered null in circumstances where a power imbalance is exploited by the harasser.

These expanded understandings of consent have generated extensive feminist literature in recent decades. In this section, it is proposed to examine their application in the settings of rape and sex abuse; domestic violence; and sexual harassment laws. An examination into how the concept of consent is understood and applied in these settings can offer useful insights for prostitution law and policy, and a framework for understanding and analysing the introduction of Nordic model laws in different jurisdictions, including Ireland.

1.2.1 Consent and Rape Law

Following years of campaigning by feminist activists, survivors’ groups and rape crisis centres, extensive reforms of the criminal law on rape and on sexual offences have come about through legislation in different jurisdictions; statutory definitions of ‘consent’ have been introduced, sought and achieved due to the immense frustration experienced by feminist activists over the persistence of ‘rape myths’, the notion of the ‘idealised victim’; and difficulties with securing convictions for rape due to lack of clarity, typically among jurors, on the legal meaning of ‘consent.’⁷⁸

As Jennifer Temkin has written, where stated criteria as to this legal meaning are not provided for, ‘much oppressive behaviour is likely to go unpunished.’⁷⁹ Thus, O’Malley writes, citing examples drawn from legal definitions adopted in England and Wales, Scotland, Canada and Australia, that the ‘general thrust of statutory definitions, where they exist, is

⁷⁶ West, 2020, *op cit*.

⁷⁷ McCarthy-Jones, Simon, Bulfin, Ailise, Nixon, Elizabeth, O’Keane, Veronica, Bacik, Ivana and McElvaney, Rosaleen, ‘Associations between forced and “persuaded” first intercourse and later health outcomes in women (2019) 25(5) *Violence Against Women* 528-548.

⁷⁸ For an overview of the extensive literature on ‘rape myths’, see for example Leahy, Susan, ‘Sexual Offences Law in Ireland: countering gendered stereotypes in adjudications of consent in rape trials’ in Black, Lynsey and Dunne, Peter (eds), *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart, 2019, at 4-9.

⁷⁹ Temkin, Jennifer, *Rape and the Legal Process*. Oxford University Press, 2nd edition, 2002, at 93.

that consent must be freely and voluntarily given, that it must involve agreement by choice and must be sharply distinguished from submission (in the sense of allowing or acquiescing in activity in which a person does not genuinely wish to engage).⁸⁰

Thus, as West writes, new understandings about consent in the context of sex offence laws represent ‘a significant gain in women’s civil rights’ by challenging traditional patriarchal legal norms.⁸¹ Rules and policies around the need for ‘affirmative consent’ have become widespread, subject to critique by some who see such rules as evidencing a conservative trend, symptomatic of what has been called a ‘dominance feminism’; Janet Halley for example has argued that ‘the emphasis on punishment as the premier means toward the premier end of social control.. the reduction of the dazzling array of human sexualities into a model of (heterosexual) male domination and female subordination—all of these are strong markers of conservative social values.’⁸²

However, more usually, feminist theorists have been critical of the emphasis upon ‘consent’ for other reasons, namely that the emphasis upon the need to prove lack of consent in order to secure a conviction for rape has focused the legal lens upon the body of the woman complainant, rather than upon the behaviour of the perpetrator.

In her examination of the language around sexual consent used in rape trials, Susan Ehrlich argues that the gendered identities of accused and complainant amount to “coerced” performances of gender insofar as they are filtered through the cultural ideologies that circulate discursively within’ the institutional settings of the criminal justice system.⁸³ Similarly, Nicola Lacey has commented on the gendered contradictions that she says ‘inform contemporary discourses of feminine and masculine sexuality’, writing that the ‘rational male’ thus also becomes

.. that same poor creature who is so driven to rape by the urgings of his uncontrollable sexual drives and whose cognitive capacities are so fragile that he is at times incapable of recognizing the distinction between .. yes and no. Similarly, the poor, passive female.. ‘permits’ a man to have sexual intercourse with her [but] is also the calculating and deceptive seductress who uses her sexuality to entrap men.⁸⁴

This gendered practice has implications for the legal construction of women’s bodies, as Carol Smart has written:

Women are a problem because their bodies invite unlawful behaviour, or because their bodies escape the formal constraints that law attempts to impose upon them. So, for example, in the rape trial, the entire focus of enquiry is on the woman’s body and its emotions and responses... Rape, incest and unlawful sexual intercourse – as legal notions- are all premised upon the idea of acts performed on the female body. The man’s body (penis) is his instrument, the woman *is* her body. .. It is the latter which must be interrogated (physically and verbally). It is her body which is constructed as unruly, as outside the bounds of social and legal convention.⁸⁵

⁸⁰ O’Malley, Tom, *Sexual Offences*. Dublin: Round Hall Press, 2nd edition, 2013, at 3-06.

⁸¹ West, 2020, *op cit*, at 18.

⁸² Halley, Janet, ‘The Move to Affirmative Consent’ (2016) 42(1) *Signs: Journal of Women in Culture and Society* at 276.

⁸³ Ehrlich, Susan, *Representing Rape: Language and Sexual Consent*. London: Routledge, 2001, at 149.

⁸⁴ Lacey, Nicola, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*. Oxford: Hart, 1998, at 100.

⁸⁵ Smart, Carol, *Law, Crime and Sexuality: Essays in Feminism*. London: Sage, 1995, at 224.

The process of the rape trial, Smart argues, can be seen as a specific mode of sexualisation of a woman's body; she 'is required to speak sex, and figuratively to re-enact sex; her body and its responses become the stuff of evidence... The natural/sexed woman is always already known to be more emotional, less rational, more subjective, more mendacious and less reliable than man. The utterances of judges constantly reaffirm this.'⁸⁶

Similarly, Catharine MacKinnon has offered a powerful critique of the over-reliance upon the concept of consent within rape law. In noting that 'Feminists have reconceived rape as central to women's condition..',⁸⁷ she writes that the

law of rape divides the world of women into spheres of consent according to how much say we are legally presumed to have over sexual access to us by various categories of men. Little girls may not consent; wives must... The rest of us fall into parallel provinces: good girls, like children, are unconsenting, virginal, rapable; bad girls, like wives, are consenting, whores, unrapable.⁸⁸

However, she suggests that, in its framing of rape and consent definitions, the law merely reflects 'the male standpoint',⁸⁹ and says that,

Having defined rape in male sexual terms, the law's problem, which becomes the victim's problem, is distinguishing rape from sex in specific cases. The law does this by adjudicating the level of acceptable force starting just above the level set by what is seen as normal male sexual behaviour, rather than at the victim's, or woman's, point of violation.⁹⁰

Thus, she asks the question, 'Instead of asking, what is the violation of rape, what if we ask, what is the nonviolation of intercourse?'⁹¹ and concludes that, for women, rape is not prohibited; rather, it is merely regulated. Unlike the law, which distinguishes rape from heterosexual penetrative intercourse by the woman's lack of consent coupled with the man's knowing disregard of it, MacKinnon suggests that a feminist distinction between rape and intercourse would lie in

the *meaning* of the act from women's point of view... Under conditions of sex inequality, with perspective bound up with situation, whether a contested interaction is rape comes down to whose meaning wins... consent is a communication under conditions of inequality.⁹²

Therefore, although many men intentionally rape women, women

are also violated every day by men who have no idea of the meaning of their acts to women. To them, it is sex. Therefore, to the law it is sex... When a rape prosecution is lost on a consent defense, the woman has not only failed to prove lack of consent, she is not considered to have been injured at all. ... Sex itself cannot be an injury.

⁸⁶ Smart, Carol, *ibid*, at 84.

⁸⁷ MacKinnon, Catharine, 'Toward Feminist Jurisprudence' (1983) 8(41) *Signs: Journal of Women in Culture and Society* 635 at 646.

⁸⁸ *Ibid* at 648.

⁸⁹ *Ibid* at 652.

⁹⁰ *Ibid* at 649.

⁹¹ *Ibid* at 647.

⁹² *Ibid* at 652.

Women consent to sex every day. Sex makes a woman a woman. Sex is what women are *for*.⁹³

Developing this argument, more recently MacKinnon has proposed a radical re-consideration of consent-based laws, in asserting that ‘consent’ is a flawed standard upon which to base rape law, ‘an inherently unequal concept’.⁹⁴ She posits that rape, like sexual harassment, should be viewed as a crime of gender inequality because the concept of consent is ‘inconsistent with equality’; it implies subordination, and is antithetical to the concept of mutuality which is the basis for real sex.⁹⁵

In her commentary upon MacKinnon’s work, Chao-Jun Chen notes that ‘For both left and right, the dominant view is that consent draws the line between uncoerced and coerced sex and distinguishes sex from violence’; but that, for MacKinnon, ‘consent is a mechanism of sex inequality, not the answer to it. Defining consent in sexual relations as a concept that describes a disparate interaction between an active party and a passive party... presupposes the acted-upon person’s freedom, as if one can be free without being equal, and serves to disguise the actor’s hegemony by making the conditions of sex inequality invisible.’⁹⁶

Thus, MacKinnon’s criticism of consent is premised upon a conception of consent as only capable of being understood within a structural power context. Where a hierarchy of power exists, consent by the powerless is not freely given. MacKinnon’s argument has been subject to critique by those who say that it might universalise all heterosexual intercourse as coercive in conditions of general gender inequality, conflating a level of coercion that might justifiably be tolerated legally with a level that is appropriately criminalised.

Stephen Schulhofer, for example, argues for the introduction of a legal definition of consent that ‘would not reach various kinds of coercion and exploitation that could sometimes be prosecuted under .. MacKinnon’s proposal’; but suggests that the differences between his position and that of MacKinnon is ‘much less important than the disagreement between all of us on the reform side and the large group of people who want to make sure that prohibited forms of coercion .. are kept within narrow bounds.’⁹⁷ Indeed, he strongly defends those state laws in the US which require affirmative consent; he says that it is preferable to ‘assume *non-consent* unless there is clear affirmative permission’, because a ‘standard that treats silence or passivity as equivalent to consent- a standard that requires people to communicate their *unwillingness* – presents enormous dangers of sexual abuse.’⁹⁸

In this context, Robin West, while acknowledging the importance of MacKinnon’s work in establishing that ‘non-consensual, as well as consensual but unwanted sex has undermined women’s quest for equality, liberty, and human dignity,’ contends that ‘[u]nwelcome sex is often, perhaps even very often, non-consensual; when it is so, it is indeed rape. But unwelcome sex is not always non-consensual; thus, it is not always rape.’⁹⁹ She suggests more tentatively that consensual unwanted sex ‘ought to indeed be criticized and, if objectively (and convincingly) harmful, should be the predicate for legal recourse.’¹⁰⁰

⁹³ *Ibid* at 652-3.

⁹⁴ MacKinnon, Catharine, ‘Rape Redefined’ (2016) 10 *Harvard Law & Policy Review* 431-477 at 431.

⁹⁵ *Ibid* at 451.

⁹⁶ Chao-Ju, Chen, *op cit*, at 56.

⁹⁷ Schulhofer, Stephen, ‘Reforming the Law of Rape’ (2017) 35(2) *Law and Inequality: a Journal of Theory and Practice* 335-352, at 346-7.

⁹⁸ Schulhofer, *ibid*, at 344-5.

⁹⁹ West, Robin, ‘Law’s Nobility’ (2005) 17(2) *Yale Journal of Law and Feminism* 385-458 at 452, 448.

¹⁰⁰ *Ibid* at 456.

Statutory formulations offering clear definitions of consent offer a means to strengthen prospects of conviction for rape and may even address MacKinnon's feminist critique of consent as a standard for sexual activity. But the problem with, as West puts it, an over-reliance on the 'ethic of consent' as a legal standard is that it can wrongly legitimate all apparently consensual sex; even sex that is not desired, that is unwanted and unwelcome, and ultimately harmful to women.¹⁰¹

Feminist writers have thus been urging the need for a re-examination of the meaning of consent in the context of sex education programmes.¹⁰² And this point has recently been echoed by Katherine Angel, who suggests that contemporary 'consent culture' has effectively placed the burden of responsibility for prevention of sexual violence upon women, who must be sure of the nature of their desire throughout any sexual act; Angel proposes that 'desire' is more opaque and nuanced than this culture recognises.¹⁰³ Similarly, Amia Srinivasan, in examining the politics of desire, has recently argued that sex and sexual desire are subject to 'distortions of oppression'; what she calls 'fuckability' is constructed by sexual politics, and thus men may offer 'crazed justifications' to claim rights over another person's body, but 'no one has a right to be desired.. who is desired and who isn't is a political question.'¹⁰⁴

The over-emphasis within law and culture on a binary demarcation between consent/non-consent has clear implications for any consideration of the exercise of agency in prostitution. In her reflection on legal conceptions of consent cited above, West indeed concludes that while 'commodified sex' engaged in as a trade may be described as 'consensual', it is both unwelcome and unwanted, and likely to cause 'harms to physical, psychic and moral integrity'.¹⁰⁵ This amounts to recognition that so-called 'consensual' sex taking place in the context of the sex trade should not necessarily be legally understood as genuinely consensual.

This understanding is already well-established in the context of marital sex. Since the marital rape exemption referred to above was abolished in different jurisdictions, it is no longer presumed that sexual intercourse between a husband and wife is always consensual. To put it another way, a married woman is no longer *presumed* to be consenting to sex with her husband. West's critique of the 'ethic of consent' enables the development of an understanding that, similarly, a woman engaged in selling sex should not be *presumed* to have given consent to sex with a client or sex buyer just because she is engaged in the sex trade.

If sex is not desired by a woman, if it is unwanted and unwelcome, even harmful; then why should the law presume that woman's 'consent' within the context of the sex trade is legally valid? Such a presumption directly undermines the statutory formulae for consent and the principles of 'affirmative consent' that have been so hard-won by feminist activists. This argument will be developed further throughout this thesis.

¹⁰¹ West, 2020, *op cit*, at 21.

¹⁰² See for example Coy, Maddy, Kelly, Liz, Garner, Maria, Kanyeredzi, Ava and Vera-Gray, Fiona, 'From 'no means no' to 'an enthusiastic yes': changing the discourse on sexual consent through Sex and Relationships Education' in Sundaram, Vanita and Stauntson, Helen (eds), *Global Perspectives and Debates on Sex and Relationships Education: Addressing Issues of Gender, Sexuality, Plurality and Power*. London: Palgrave Macmillan, 2016, at 84-99.

¹⁰³ Angel, Katherine, *Tomorrow Sex will be Good Again: Women and Desire in the Age of Consent*. London: Verso, 2021.

¹⁰⁴ Zakaria, Rafia, 'A radical new feminist inquiry into sex and pornography examines the politics of desire', *The Guardian Review*, 21 August 2021, at 12, quoting Srinivasan, Amia, *The Right to Sex*. London: Bloomsbury, 2021.

¹⁰⁵ West, 2020, *op cit* at 27.

1.2.2 Consent and Domestic Violence

A nuanced, contextualised understanding of consent is well-established in other legal settings. In legal and policy frameworks addressing domestic violence, recognition that consent may be compromised is well-established. The interventions of courageous survivors have helped to debunk many of the problematic myths around violence in the home; and have fed into changes in the legal understanding of key concepts like ‘consent’. In particular, the passage of the Istanbul Convention, the first Council of Europe treaty to target violence against women specifically, has generated a great deal of domestic reform and has provided new momentum to advocates seeking progressive changes in laws on domestic violence.¹⁰⁶ The Convention sets out certain minimum standards for prevention and prosecution of domestic violence, along with protections for victims of such violence.

As a result of both national and international advocacy, positive legal changes have thus been introduced in some jurisdictions to create offences recognising the process whereby apparent consent may be coerced; offences such as that created in English law under section 76 of the Serious Crime Act 2015; ‘controlling or coercive behaviour in an intimate or family relationship’. In Ireland, as will be discussed in Chapter 4, a similar ‘coercive control’ offence has been introduced through the Domestic Violence Act 2018, which provides for a range of reforms in court processes and treatment of victims.

Coercive control is now a criminal offence in several jurisdictions; but legal interventions to address domestic violence are also frequently carried out through non-criminal means. In many jurisdictions, including Ireland, a network of family law mechanisms such as ‘barring orders’ (prohibiting an abuser from entering the family home) exist to protect victims, who must initiate civil proceedings through the family courts to obtain legal remedies; breach of such orders does carry a criminal sanction.

Both within the criminal and non-criminal legal setting, it is well recognised now that many abusers in a domestic setting use controlling behaviour to coerce their partner into apparent acquiescence or acceptance of the abuse, thus marking an important development in society’s understanding of domestic violence. As Dorchon Liedholdt writes:

Domestic violence has come to be understood not as a discrete series of violent acts but as a system of power and control the batterer institutes and maintains over his victim through the use of an array of interconnected strategies: isolation, intimidation, emotional abuse, economic abuse, sexual abuse, and threats ..¹⁰⁷

Further, scholars like Lenore Walker and Elizabeth Schneider have challenged traditional perspectives on the exercise of agency in domestic violence settings, questioning the focus on the ‘unreasonable’ behaviour of ‘battered women’ who stayed in or apparently ‘consented’ to remaining in abusive relationships.¹⁰⁸

¹⁰⁶ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, 12 April 2011; the Istanbul Convention, www.coe.int/en/web/conventions/full-list.

¹⁰⁷ Liedholdt, Dorchon, ‘Prostitution and trafficking in women: an intimate relationship’ (2003) 2(3) *Journal of Trauma Practice*, 167-183 at 174-5.

¹⁰⁸ See for example Walker, Lenore, *The Battered Woman*. NY: Harper, 1979; Schneider, Elizabeth, ‘Engaging with the State about Domestic Violence: Continuing Dilemmas and Gender Equality’ (1999) 1 *Georgetown Journal of Gender and Law* 173.

Dorchen Liedholdt applies these and other insights from domestic violence campaigns to develop an understanding of consent and acquiescence within the sex trade, arguing that ‘..prostitution often does not require overt physical coercion or verbal threat since the system of domination perpetuated and enforced by sex industry businessmen and buyers is intrinsically coercive’ and that

The power and control model used to understand the modus operandi of perpetrators of domestic violence is rarely applied to tactics of procurers, pimps, brothel owners, and other sex industry profiteers. This fact is likely the consequence of the success of the notion that prostitutes are sex workers who choose prostitution over other career options. The reality, however, is that the strategies of power and control used by battering husbands and boyfriends are identical to the strategies used by their counterparts in the sex industry.¹⁰⁹

She explicitly links the conception of ‘consent’ within prostitution to its conceptualization in domestic violence settings, writing that

Much prostitution is domestic violence, and many prostitutes are battered women. Across cultures, procurers and pimps are frequently abusive husbands and boyfriends..... The criminal justice system’s focus on the batterer’s violent acts rather than on his tactics of “coercive control” has hidden the fundamental harm of domestic violence—not physical injury but gender-based subjugation (Stark, 2000).¹¹⁰

Further, Liedholdt points out that few women enter prostitution as genuinely ‘sole traders’, noting that, according to research by O’Connell Davidson,¹¹¹ “Casual prostitution,” prostitution in which a woman with apparent options enters of her own apparent volition, accounts for only about one percent of the women in the sex industry.”¹¹²

Similarly, Kat Banyard has argued that agency-based arguments for ‘sex work’ ignore the parallels with the context of domestic violence, where feminist campaigners and survivors have

spent decades highlighting .. that exercising ‘agency’ [ie by remaining in an abusive relationship, rather than leaving it] is entirely consistent with the partner’s behavior continuing to be deeply harmful... What feminists have shown is that it is not only possible but a fundamental imperative to understand and respect a woman’s methods of dealing with abuse while at the same time not excusing the perpetrator and simply ignoring the danger he poses, nor ignoring the grave problem of domestic violence on a societal level... Conflating opposition to the sex trade with a wholesale denial of women’s autonomy and the possibility there may be a multiplicity of experiences and reactions within the trade is total bunkum.¹¹³

¹⁰⁹ Liedholdt, Dorchen, *op cit* at 170-1, 173-4.

¹¹⁰ Liedholdt, Dorchen, ‘Prostitution and Trafficking in Women: An Intimate Relationship’ (2003) 2(3) *Journal of Trauma Practice* 167-183, at 174-5.

¹¹¹ O’Connell Davidson, Julia, *Prostitution, Power, and Freedom*. Ann Arbor: University of Michigan Press, 1998.

¹¹² Liedholdt, D., ‘Prostitution and Trafficking in Women: An Intimate Relationship’ (2003) 2(3) *Journal of Trauma Practice* 167-183, at 177:

¹¹³ Banyard, Kat, *Pimp State: Sex, Money and the Future of Equality*. London: Faber, 2016 at 144.

These comparative analyses provides support for the understanding that in some situations of structured gender and intersectional disadvantage, consent may be regarded in law as compromised, whether in a domestic violence setting or in the context of prostitution.

1.2.3 Consent and Sexual Harassment

Just as with domestic violence law, the area of workplace sexual harassment is regulated through both criminal and civil procedures, as campaigns inspired by the #MeToo movement internationally, since its initiation by Tarana Burke, have established that harassment in the workplace is actionable, whether or not consent has apparently been given. It has become accepted that sexual advances can represent an unlawful abuse of power in certain contexts; for example where an employee believes that she has no option but to 'consent' to an unwanted advance by a manager if she wishes to keep her job.

Through the work of feminist theorists, the concept of the 'reasonable woman' has also been developed, a theoretical construct now used to guide decision-making in civil and criminal law.¹¹⁴ In particular, this concept has changed views of sexual harassment cases based on 'hostile environment.' Fineman suggests that the 'reasonable woman' standard applied in some cases for assessment of sexual harassment claims offers an example of the application of a 'gendered life' concept.

MacKinnon's work has been highly significant in developing this approach to sexual harassment; as Chao-Ju Chen writes, MacKinnon's 'theory of sexuality as a theory of power does not separate sexuality from women's material condition. Sexual harassment at work is considered one form of unequal sex, where economic power and sexual power interact so that a woman's employment position is used to coerce her sexually while also using her sexual position to coerce her economically.'¹¹⁵

The implications of this approach for feminist arguments on prostitution have been succinctly summarised by Sarah Ditum, in writing that

The #MeToo movement sparked by Weinstein's exposure has become a rallying point for contemporary feminism, but it's a movement still deeply divided over what gets called the sex industry. There are activists who will condemn sexual harassment in one breath and in the next defend pornography and prostitution, as though they believe that the industries that rely most of all on sexual commodification are somehow uniquely free from abusive practices. The false divide between sex and power enables this dishonesty: by convincing the world that its business is desire, the sex industry has won an exemption from having its abuses of power examined.¹¹⁶

In the aftermath of the horrific murder of Sarah Everard¹¹⁷ and the resulting public outcry and upsurge in feminist #ReclaimtheStreets campaigning, the 'false divide between sex and

¹¹⁴ For discussion of this concept, see Fineman, Martha, 'Challenging Law, Establishing Differences: the Future of Feminist Legal Scholarship' (1990) 42 *Fla. L. Rev.* 25-43.

¹¹⁵ Chao-Ju Chen, *op cit*, at 54.

¹¹⁶ Ditum, Sarah, 'After Weinstein, it's time to say no to the cliched line that rape is about power, not sex', *The Observer*, 1 March 2020.

¹¹⁷ Sarah Everard was a young woman who went missing after walking home from a friend's house in Clapham on 3 March 2021; her body was found on 10 March, and a police officer was arrested on suspicion of her murder; these events generated a huge public outcry and upsurge in feminist campaigning under the #ReclaimtheStreets banner; see for example Blackall, Molly and Brooks, Libby, 'Reclaim These Streets: Sarah Everard Vigil Evolves into Virtual and Doorstep Protest', *The Guardian*, 13 March 2021. In Ireland, a similar

power’ was explored further in a powerful polemic by Anne Enright, in writing that during a rape trial, the

courtroom discussion becomes all about the victim, her clothes, her “mistakes”, while the perpetrator remains a blank.... Men do not just disappear in court, they disappear from the discussion, they disappear from the language we use. Rape is described as “a women’s issue.”.. Male agency is routinely removed from descriptions of male violence, and this helps men get away with it.¹¹⁸

1.2.4 Consent and Prostitution

In the context of workplace sexual harassment, just as in certain circumstances within the legal frameworks on sex offences and domestic violence, it is thus clearly established that consent may be compromised or even nullified by reference to coercive contexts. These broader intersectional contexts for the giving of consent within prostitution must also be recognised; as they are for example in a 2014 EU Parliament report on prostitution across Europe, which noted that ‘On average 70% of the prostitutes in the EU are migrant women. Prostitution in the Member States is part of a globalized and transnational market’, and commented that

While some argue that the number of those entering the prostitution business deliberately is higher than assumed, it is mostly supposed that women would avoid the abuse of their bodies if they had a valid alternative. In this sense, poverty and bad economic and employment situations are seen as strong push-factors forcing women into prostitution, and which call into question whether their consent can be assumed to have been voluntarily given.¹¹⁹

Thus contexts and power relationships are vitally important in any consideration of prostitution, just as they are in the other gendered contexts considered above. Movements like #MeToo and #ReclaimtheStreets seek to assert the voice of victims and re-balance the power relationship between perpetrator and abused. It is argued that clear parallels may be drawn between these feminist movements, and the Nordic model or equality approach to prostitution. As Melissa Farley points out, ‘sexual harassment is what prostitution is. If you remove the sexual harassment (and) unwanted sex acts, there is no prostitution. If you eliminate paid rape, there is no prostitution.’¹²⁰

Farley’s argument recognises that bought consent cannot equate to consent freely given in law. To argue otherwise is to ignore the real lived experiences of survivors of prostitution, and the well- documented harms caused to women through engaging in prostitution; harms

eruption of public concern and outrage about the incidence and extent of violence against women was experienced in the wake of the murder of Ashling Murphy, a young woman out jogging in Tullamore, Co Offaly on 12 January 2022; see for example Wilson, Jade, ‘Killing of Ashling Murphy Triggers Debate on Women’s Safety’, *The Irish Times*, 13 January 2022, at <https://www.irishtimes.com/news/ireland/irish-news/killing-of-ashling-murphy-triggers-debate-on-women-s-safety-1.4775586>

¹¹⁸ Enright, Anne, ‘The Sound of Silence: It’s Time that Men Spoke Up’, *The Guardian*, 20 March 2021.

¹¹⁹ Schulze, Erika, Novo Canto, Sandra, Mason, Peter and Skalin, Maria, *Study on Sexual Exploitation and Prostitution and its Impact on Gender Equality*. Brussels: EU Parliament, 2014, at 27; and 7.

¹²⁰ Farley, Melissa, ‘#MeToo must include prostitution’ (2018) 3(1) *Dignity: A Journal on Sexual Exploitation and Violence* 2, at 2.

including pervasive experience of violence and sexual assault.¹²¹ These harms have indeed been exacerbated by the COVID-19 pandemic; as Boyer writes, 'Prostitution operates at the intersection of dispossessed women and privileged men and is an obvious crossing point for COVID-19.'¹²²

Others have also drawn parallels between the #MeToo movement and prostitution. For example, Hu *et al* have argued that the narrative of the global #MeToo movement has effectively served to reconstruct 'the cultural intelligibility of female subjects'.¹²³ Conversely, Yacoub suggests that 'consensual sex work' does 'not necessarily deprive sex workers of their inherent human dignity and autonomy, and thus does not deprive them of their basic human rights'; but is careful to limit the argument to 'consensual sex work', without interrogating this concept any further.¹²⁴ Yet, this phrase makes no more sense in law than the phrase 'consensual sexual harassment'.

It is argued in this thesis that laws which enable the buying of consent necessarily undermine laws which penalise 'non-consensual' sex. The #MeToo movement has established that consent is compromised when sexual harassment occurs within a corporate office or workplace environment (as in the Harvey Weinstein scenario); consent that is bought in a brothel or on a street corner should also be seen as compromised.

It seems extraordinary, from a feminist perspective, that feminist scholars extolling the need to respect the agency of 'sex workers'; or indeed activists running 'affirmative consent workshops' on campuses, cannot see the contradiction between their emphasis on the need for mutual agreement in sexual relationships; and their argument that the 'dignity' of 'sex workers' in selling consent must be respected in law.

MacKinnon's re-conception of consent is framed in the context of structural inequalities; it has brought about fundamental changes in sexual harassment law. Employers and harassers now have no defence against a claim of sexual harassment in the workplace based on apparent 'consent' given by the employee harassed; we understand that consent may be compromised by its power context. This understanding can have profound implications for prostitution law and policy, as MacKinnon argues:

Prostituted sex.. is considered consensual because it is paid. In fact, women are disproportionately bought and sold in prostitution by men as a cornerstone of combined economic, racial, age-based, and gendered inequality, in which money functions as a form of force in sex....layers of inequality [are] involved in this technically consensual sexual activity..¹²⁵

¹²¹ See for example Farley, Melissa, et al, 'Prostitution and Trafficking in Nine Countries: an update on violence and post-traumatic stress' (2002) 3(3/4) *Journal of Trauma Practice* 33-74. See also: Moran, Rachel, *Paid For: my Journey through Prostitution*. Dublin: Gill & Macmillan, 2013.

¹²² Boyer, Debra, 'Prostitution During the Pandemic: Findings Show Need for Nordic Model' (2020) 5(1) *Dignity: A Journal on Sexual Exploitation and Violence*, Article 7, at 7.

¹²³ Hu, Ying, Mu, Yang and Huang, Yaru, 'The #MeToo narrative: Reconstructing the cultural intelligibility of female subjects' (2020) 80 *Women's Studies International Forum* 102365, at 1.

¹²⁴ Yacoub, Amin, 'Consensual sex work: An overview of sex-workers' human dignity in law, philosophy, and Abrahamic religions' (2019) 76 *Women's Studies International Forum* 102274.

¹²⁵ MacKinnon, 2016, *op cit*, at 447-8.

By contrast, she writes approvingly that the Swedish model ‘breaks through this vacuum boundary by recognizing that sex under conditions of inequality .. a transaction between someone who pays and someone who is paid – is unequal sex....’¹²⁶

Even applying West’s modified approach, MacKinnon’s critique of consent-based sex crime laws exposes the limitations of the individual-agency based arguments made against the Nordic model. The dominance of this individualist perspective within academic discourse may be attributed to a marked shift towards a ‘libertarian’ perspective in academic scholarship, or a ‘neoliberal’ turn in the academy, as identified by Sylvia Walby.¹²⁷ What unites those arguing for legal prostitution or ‘sex work’ is at its core a neoliberal or individualised understanding of consent and choice, divorced from its structural context. Ultimately, many of the ‘standpoint’ arguments made in favour of legalising prostitution derive from a view that sex workers should essentially be free to trade in the market; a classic liberal or libertarian perspective.¹²⁸

Those who seek to tackle demand, by contrast, see the choices made and consents given by the majority of those engaged in prostitution within a broader context of profound intersectional inequalities based on gender, class and ethnicity; Moran and other survivors provide a graphic account of the coercive context within which ‘consent’ is given in prostituted sex.¹²⁹ Within this context, as within a workplace hierarchy, consent may be compromised. The sex in this context is not wanted, desired or mutual sex – and may be the predicate for legal recourse. This contextual view of consent in the workplace – the recognition that ‘it’s not just sex’ – should inform the view of consent in the commercial sex trade too.

Prostituted sex is ‘not just sex’; it’s not mutual sex, and ‘consent’ given by the bought party is not agreed ‘freely and voluntarily’ - as required by the new statutory definition of consent in section 48 of the same 2017 Act which now prohibits the purchase of sex in Ireland. As will be discussed later, the campaign to introduce section 48 was based upon the frustration experienced by feminist activists over difficulties with securing convictions for rape due to lack of clarity, typically among jurors, on the legal meaning of ‘consent.’ The language in the section is based upon that used in similar legislation in other jurisdictions, generally introduced following campaigns by rape crisis centres and feminists.

These statutory formulations offer a means to address MacKinnon’s feminist critique of consent as a standard for sexual activity. As West writes, new understandings about consent in the context of sex offence laws represent ‘a significant gain in women’s civil rights’ because they challenge traditional patriarchal legal norms.¹³⁰ However, as stated above, she argues that the problem with over-reliance on the ‘ethic of consent’ as a legal standard is that it can wrongly legitimate all apparently consensual sex; even sex that is not desired, that is unwanted and unwelcome, and ultimately harmful to women.¹³¹

¹²⁶ *Ibid* at 474.

¹²⁷ Walby, 2011, as discussed earlier.

¹²⁸ See for example the arguments in favour of decriminalisation of the sex trade proposed in Mac, Juno and Smith, Molly, *Revolted Prostitutes: the fight for sex workers’ rights*. London: Verso, 2018; and the critique of those arguments by Bacik, Ivana, ‘Book Review of *Revolted Prostitutes: the fight for sex workers’ rights*’ (2019) 114 *Dublin Review of Books* 1-4.

¹²⁹ See Moran, Rachel, 2013, *op cit*.

¹³⁰ West, 2020, *op cit*, at 18.

¹³¹ *Ibid* at 21.

The ‘individual agency’ arguments put forward by those opposed to the Nordic model, in an Irish context and elsewhere, fall within a classic liberal or libertarian theoretical framework. They fail to address the broader social, economic and power structures within which individual choices are made and consents apparently given. In particular, as Coy et al write, these pro-‘sex work’ arguments ignore the ‘foundational roles that racism and colonization play in the prostitution of women of color and Indigenous women. Intersecting with patriarchy and racism are the ways in which poverty funnels women into prostitution.. crucial social contexts that are central to feminist analyses of the prostitution system.’¹³² The context of age is also important; Coy and others have pointed out that the global sex trade is a market where youth is prized and priorities, and young girls and women are seen as the most valuable of commodities.¹³³

What makes this wilful omission of reference to structural contexts especially difficult to reconcile with feminist theory is the failure to align pro-prostitution arguments with the insights gained from the #MeToo movement against sexual harassment. Just as the #MeToo movement has established that consent may be compromised in a profoundly unequal workplace setting, Nordic model laws recognise that consent that is traded in the sex market is also compromised. In short, consent that is *bought* is not consent freely given. Indeed, a legal framework which supports the purchase of sex (laws decriminalising prostitution) cannot rationally be compatible with a legal framework based on a sexual ethics of mutual respect and desire (laws that define consent as that ‘freely and voluntarily’ given, and that prohibit non-consensual sexual acts).

In this chapter and subsequent chapters, legal frameworks for regulation of prostitution in different jurisdictions, including Ireland, will thus be reviewed in light of these arguments around conceptions of consent and agency, derived from feminist campaigns and scholarship on sex offences, domestic violence and sexual harassment. However, prior to consideration of specific models for regulation of the sex trade, an overview will be provided of theorising on prostitution within criminology.

1.3 Criminological Theories and Prostitution

While the focus of this thesis is on recent debates and divisions within feminist theory on appropriate models of regulation for prostitution, the historical context for prostitution laws is very different. Indeed, the treatment of prostitution within criminal laws and criminological theorising has undergone significant change over many decades. Many European countries saw prostitution as a risk factor in the spread of Sexually Transmitted Infections (STIs) in the nineteenth century and thus introduced legislation like the Contagious Diseases Acts which applied in Britain and Ireland for many years, as will be outlined in subsequent chapters. Thus, the prevalent discourses around prostitution regulation until the last decades of the twentieth century in most jurisdictions were those of public health, sexuality, gender and control. Prostitution was, then as now, seen as a highly gendered crime; the women engaged in prostitution were subjected to a strict control regime,

¹³² Coy, Maddy, Smiley, Cherry and Tyler, Meagan, ‘Challenging the “Prostitution Problem”: Dissenting Voices, Sex Buyers and the Myth of Neutrality in Prostitution Research’ (2019) 48 *Archives of Sexual Behaviour* 1931-35, at 1932.

¹³³ See for example Coy, Maddy, ‘Joining the Dots on Sexual Exploitation of Children and Women: Gaps in UK Policy Approaches’ (2016) 36(4) *Critical Social Policy* 572–59.

in the name of the public good; public health; or public morality. In criminal law, prostitution was largely treated as a public nuisance.¹³⁴

As discussed above, any consideration of prostitution or of women's criminality more generally was largely absent from early criminological writing. However, of those who did engage with the topic, many of the early writers focused on the conception of prostitution as the 'typical female crime;' and on the notion that women's criminality or deviance was expressed through sexuality.¹³⁵

One of the earliest expressions of this view of prostitution may be found in the writings of Cesare Lombroso, founder of the Italian school of positivism. Well-known for his theories of biological determinism, Lombroso was unusual in that he devoted an entire text to the study of women criminals.¹³⁶ In his famous text *La Donna Delinquente (The Female Offender)*, he described female criminality as being caused by a biological atavism in women, and argued that women make more ruthless criminals than men because their evil tendencies are more numerous and more varied. These tendencies usually remain latent, but when awakened, produce proportionately more terrible results. Despite the criminogenic characteristics he identified in women, Lombroso had to accept that they had a consistently lower crime rate than men. By way of explanation, he suggested that women had higher rates of undetected crime than men, mostly manifest as sexual crime.¹³⁷

It is notable that while Lombroso's research on male offenders has long been discredited, his work on female criminals still casts a long shadow over studies of women and crime. In particular, his focus on the role of biological factors in women's offending, and on the sexual deviance of women, was taken up by other writers, and has remained a dominant theme in this field until relatively recently.

In the early twentieth century, Freud and others asserted theories based upon the belief that women shared universal psychological traits. Like Lombroso, Freud saw sexuality as the foundation of women's being, and thus the root cause of female criminality.¹³⁸ Under the influence of these ideas, prostitution became seen as the 'typical female crime', since the view prevailed that women, defined as sexual beings, could only express deviance through their sexuality. Otto Pollak, in a major work on the criminality of women published in 1950, confirmed Lombroso's view of hidden deviance, arguing that most female crime goes undetected, because of women's inherent physiological capacity for deceit.

While men cannot, in Pollak's view, make any pretence about their sexual performance, 'Woman's body.. permits such pretence to a certain degree and lack of orgasm does not prevent her ability to participate in the sex act.'¹³⁹ Much female crime, he suggested, takes the form of sexual deviance or prostitution, hidden from public view by deceitful methods.

¹³⁴ For an historical overview, see Luddy, Maria, *Prostitution and Irish Society 1800-1940*. Cambridge University Press, 2007; considered further in later chapters.

¹³⁵ For further development of this theme, see Bacik, Ivana, 'Women and the Criminal Justice System' in O'Mahony, Paul (ed), *Criminal Justice in Ireland*. Dublin: IPA, 2002, at 137.

¹³⁶ Lombroso, Caesar and Ferrero, William, *The Female Offender*. London: Fischer Unwin, 1895.

¹³⁷ Lombroso and Ferrero, *op cit*.

¹³⁸ Cited in Klein, Dorie, 'The Etiology of Female Crime: a Review of the Literature' in Beirne, Piers (ed), *The Origins and Growth of Criminology*. Aldershot: Dartmouth, 1994, at 49.

¹³⁹ Pollak, Otto, *The Criminality of Women*. NY: Barnes, 1950, at pp. 10-11, quoted in Klein, *op cit*., at 52-3.

Later theorists developed this idea, placed within a social structural framework. Parsons¹⁴⁰ and Cohen¹⁴¹ asserted that since the focal concern of girls is sexual and marital, women are more likely to violate sexual mores than to express deviance in the more traditionally male delinquent activities. In his analysis of prostitution, Kingsley Davis¹⁴² also argued that women must depend on sex for their social position much more than men. Taking a structural-functionalist perspective, he saw prostitution as a structural necessity whose roots lie in the sexual nature of men and women.

A number of common themes may therefore be identified in the writings of those few criminologists who had actually conducted any research on female offending prior to the 1960s. Their work for the most part was based upon four assumptions; that women have lower rates of offending than men; that women's (mainly hidden) deviance is essentially different to men's; that women express deviance primarily through sexuality; and that prostitution is thus understood to be the 'typical female crime.'¹⁴³ While these assumptions have subsequently been challenged by feminist criminologists, it may be argued that the views underlying them have endured in underpinning the way in which women are treated in criminal justice policy. In particular, it is argued that the view of prostitution as an expression of women's sexual deviance and of 'the prostitute' as 'the criminal woman' has persisted in the framing of much later public policy and law on prostitution.

A change in approach, and a challenging of these assumptions, came about during the 1960s and since then. With the emergence of second-wave feminism, an increasing number of women began working as practitioners and academics in criminal law and criminology. As outlined in the previous section, theorists from a range of different perspectives within feminism began to question biologically determinist explanations for female offending. Thus, once feminist writers began to engage with criminological theory in the 1960s, their empirical studies on women and crime challenged fundamentally the assertion that prostitution is the 'typical female crime' by showing conclusively that the majority of crimes committed by women are crimes against property.

The empirical work carried out by early feminist criminologists demonstrated that if any crime can be described as 'typically female', it should be shoplifting, not prostitution.¹⁴⁴ However, despite this development, the criminal law continued to operate and be applied in a gendered way. Typically, only those working as prostitutes (mostly women) were penalised, while the (mostly male) customers remained outside the controls of the criminal law.

Other ideas about prostitution also began to be challenged among criminologists, in particular the view that women engaged in prostitution are 'criminal', with some suggestions that women engaged in prostitution should better be seen as victims of crime - reflecting a more general perception of women's criminality. As Barri Flowers writes, in general 'The lines have often been blurred between female criminality and victimization.... The same is no less true when examining female prostitution, where the perpetrator is at once also a victim.'¹⁴⁵

¹⁴⁰ Parsons, Talcott and Bales, Robert, *Family, Socialization and Interaction Process*. Glencoe, Ill: Free Press, 1955.

¹⁴¹ Cohen, Albert, *Delinquent Boys*. London: Free Press, 1955.

¹⁴² Davis, Kingsley, 'Prostitution' in Merton, Robert and Nisbet, Robert (eds), *Contemporary Social Problems*. NY: Harcourt Brace, 1961.

¹⁴³ See Bacik, Ivana, 'Women and the Criminal Justice System' in O'Mahony, Paul (ed), *Criminal Justice in Ireland*. Dublin: IPA, 2002.

¹⁴⁴ See for example Carlen, Pat, *Women, Crime and Poverty*. Milton Keynes: Open University Press, 1988.

¹⁴⁵ Barri Flowers, Ronald, *The Prostitution of Women and Girls*. US: McFarland, 1998, at 1.

The role of the criminal law in shaping or constructing understandings about the concept of 'woman' or gender also became subject to analysis by feminist theorists. In 1992, Mary Joe Frug in her postmodern manifesto, referred to above, devoted extensive consideration to prostitution law, arguing that they have a particular impact on the meaning of the female body. Like other legal rules, she wrote that laws criminalising women engaged in selling sex tend to sexualise, terrorise and maternalise the female body, penalising women who do not conform to a particular mode of dress and a particular type of behaviour and contributing to the conceptualisation of 'woman' as weak, sexy and nurturing. The sexualisation of the female body through prostitution laws, Frug argues, explains 'an experience many women have: an insistent concern that this outfit, this pose, this gesture may send the wrong signal – a fear of looking like a whore.'¹⁴⁶

In addition, Frug argues that laws controlling public display of prostitution have the effect of terrorising women's bodies, because they perpetuate among all women the fear of being mistaken for prostitutes.¹⁴⁷ She suggests that a network of cultural practices endanger the lives of women engaged in prostitution and make their work terrifying; thus forcing

many sex workers to rely on pimps for protection and security, an arrangement which in most cases is also terrorizing... The terrorization of sex workers affects women who are not sex workers by encouraging them to do whatever they can to avoid being asked if they are "for" illegal sex. Indeed, marriage can function as one of these avoidance mechanisms, in that, conventionally, marriage signals that a woman has chosen legal sex over illegal sex. .. Regardless of whether a woman is terrorized or sexualized, there are social incentives to reduce the hardships of her position, either by marrying or by aligning herself with a pimp. In both cases she typically becomes.. sexually dependent on and subordinate to a man.¹⁴⁸

However, despite her robust analysis, Frug remained uncertain about the appropriate 'feminist' model of regulation. Her uncertainty underlines the difficulty that has dominated debate on prostitution law reform; that there are at least two distinctly different 'feminist' approaches to regulation: '.. although the feminists I've read all agree that prostitution should be decriminalized, they disagree about *how* decriminalization should occur. ...'¹⁴⁹ Further, Frug notes that

Not all legal feminists believe that prostitutes are terrorized full time. Some feminists – I'll call this group the liberals – believe that at least some sex workers, occasionally, exercise sexual autonomy. But these feminists.. oppose legalization because they object to the kind of sexual autonomy legalization would support. That is, although they support the right of women to do sex work – even at the cost of reinforcing male dominance – they resist the commodification of women's sexuality.¹⁵⁰

Frug does not think that 'sex workers' claims for legalization constitute *the* postmodern feminist legal voice,' saying: 'I am also unsure whether I support their position on legalization.'¹⁵¹ However, she says that her analysis of the decriminalization dispute in which they are participating illustrates 'how postmodern legal feminism can seek and claim different

¹⁴⁶ Frug, *ibid*, at 1052.

¹⁴⁷ Frug, *op cit*.

¹⁴⁸ Frug, *ibid*, at 1054-5.

¹⁴⁹ Frug, *ibid*, at 1057-8.

¹⁵⁰ Frug, *ibid*, at 1058.

¹⁵¹ Frug, *ibid*, at 1059.

voices, voices which will challenge the power of the congealed meanings of the female body that legal rules and legal discourse permit and sustain.¹⁵²

In her response to Frug's *Manifesto*¹⁵³, Barbara Johnson notes that 'uncertainty' characterises Frug's position on prostitution; while she 'details several feminist positions on decriminalization and legalization, [and]emphasizes the promise of commonality, [she] does not choose...' and instead has 'recourse to a rhetoric of challenge'.¹⁵⁴ Colker also reviews Frug's discussion of prostitution law, adopting however a more critical perspective. She argues that Frug is insufficiently cognisant of lesbian experiences, and that her arguments about prostitution rules 'are premised on the assumption that all sex workers are heterosexual and that all women are sexualized into exclusive, monogamous heterosexuality'.¹⁵⁵

Further, Colker writes that 'Lesbians receive a different message from prostitution rules than do heterosexual women, because, for lesbians, these rules are part of a larger social order that disapproves of all of their sexual activity. If lesbians are sex workers, they are, like heterosexual women, criminals. Even if lesbians are not sex workers, their private sexual activities may violate criminal laws. No desired sexual activity is acceptable for a lesbian, regardless of whether she is a sex worker.'¹⁵⁶

Finally, she suggests that

Many of the rules that [Frug] describes have an opposing or enhanced effect on lesbians. Through a more complete exploration of the diversity of women's experiences, a sharper image of the actual operation of female socialization might emerge. Certain women are oversocialized as female whereas other women are excluded from the category altogether. It is through this combination of effects that socialization steers women toward femininity.¹⁵⁷

In her discussion of Frug's work on prostitution, Minow suggests that this is the case study which most powerfully achieves integration of the themes of terrorisation, maternalisation and sexualisation in Frug's work, since she 'effectively illustrates how anti-prostitution rules work in concert with other rules to communicate danger to and about women's bodies, the illegality of sexuality disconnected from marriage, and the disapproval of sexual activity remote from reproduction.'¹⁵⁸

Writing in 1992, Mary Joe Frug thus identified a clear division as having even then developed among feminists in their approaches towards the decriminalisation of women engaged in prostitution. This division has, since Frug wrote, become much more entrenched; and as new frameworks for prostitution law have been developed, abstract theoretical debates about how prostitution should be seen have become highly politicised as well as polarising feminist

¹⁵² Frug, *ibid*, at 1059.

¹⁵³ Johnson, Barbara, 'The Postmodern in Feminism' (1992) 105 *Harvard Law Review* 1076; Colker, Ruth, 'The Example of Lesbians: A Posthumous Reply to Professor Mary Joe Frug' (1992) 105 *Harvard Law Review* 1084; and Minow, Martha, 'Incomplete Correspondence: An Unsent Letter to Mary Joe Frug' (1992) 105 *Harvard Law Review* 1096.

¹⁵⁴ Johnson, Barbara, 'The Postmodern in Feminism' (1992) 105 *Harvard Law Review* 1076 at 1080-1.

¹⁵⁵ Colker, Ruth, 'The Example of Lesbians: A Posthumous Reply to Professor Mary Joe Frug' (1992) 105 *Harvard Law Review* 1084 at 1086.

¹⁵⁶ Colker, *ibid*, at 1087.

¹⁵⁷ Colker, *ibid*, at 1095.

¹⁵⁸ Minow, *op cit*, at 1098.

legal theorists. These debates will be analysed below in the context of shifting discourses in feminist criminology more generally.

1.4 Feminist Divisions over Prostitution: 'Exploitation' versus 'Sex Work'

Over the decades since Frug wrote, the disagreement within feminism has become more clearly evident, with a binary divide between what are often referred to as 'exploitation' and 'sexwork' approaches to prostitution. This division remains associated with different feminist ideologies: broadly speaking, the 'exploitation' approach with radical or socialist feminist theory, and the 'sex work' approach with liberal, postmodern or deconstructivist feminist theory. Similarly, each ideology is reflected in different models of regulation of prostitution; the 'exploitation' approach with a model of partial decriminalisation such as the Swedish law adopted in 1999, where the buyer of sex is criminalised while the seller is instead supported in leaving prostitution through welfare strategies. By contrast, the 'sex work' approach is most closely identified with full decriminalisation or legalisation models. Different regulatory frameworks will be examined below, following discussion of the theoretical divisions within feminism.

Even a cursory reading of relevant feminist texts on prostitution indicates the highly contentious nature of the division within feminism on this subject; clear partisanship is apparent even in texts which purport to adopt a neutral approach. This partisanship is based on a fundamental divergence in view as to what prostitution actually constitutes. As Jo Phoenix writes in her chapter on 'Prostitution and Sex Work' in the sixth edition of the *Oxford Handbook of Criminology*, 'new binaries [have] emerged that have constituted both the theorizing of prostitution as well as its politics. Prostitution [is] seen to be *either* a form of labour in a materially unequal society.. *or* an expression of male violence in a patriarchal society.'¹⁵⁹

Joyce Outshoorn argues however that the difference between the two positions in fact derives from their conflicting views of male sexuality – which is either deemed as a given in the 'sex-as-work' perspective, or problematised as being predicated on the domination of women, within the radical abolitionist perspective.¹⁶⁰

Whether based on a different view of the act of prostitution or of male (or indeed female) sexuality, Sarah Kingston describes this difference in view, simply, as 'the most divisive distinction in feminist thinking':

A division in attitudes can .. be observed in feminist thought. Debates about sex work have predominantly revolved around a polarized argument that constructs "sex work as either exploitive or liberating and sex workers as coerced victims or empowered whores" (Wahab 2002: 51). .. the most divisive distinction in feminist thinking is between those who seek the abolition of prostitution in any form and pro-sex workers' rights' feminists, who wish to improve prostitution as it is currently practiced – ie the abolitionist sex-as-work debate.¹⁶¹

¹⁵⁹ Phoenix, Jo, 'Prostitution and Sex Work' in Liebling, Alison, Maruna, Shadd and McAra, Lesley, *Oxford Handbook of Criminology* (6th ed), Oxford University Press, 2017, 685-703 at 690.

¹⁶⁰ Outshoorn, Joyce, *The Politics of Prostitution: Women's movements, democratic states and the globalisation of sex commerce*. Cambridge University Press, 2004.

¹⁶¹ Kingston, Sarah, *Prostitution in the Community: Attitudes, Action and Resistance*. Routledge, 2014, at 10.

These divisions have become more entrenched as different legal models have been adopted in particular jurisdictions. In Sweden, a new law on prostitution associated with the radical or socialist feminist view of prostitution as oppression was passed in 1999, under which the seller of sex (usually the woman) is decriminalised - but the act of purchasing sex (by the usually male client) is criminalised. As outlined previously, similar laws have since been adopted in Norway, Iceland, Canada, Northern Ireland, France and Ireland. By contrast, other jurisdictions like Germany, the Netherlands and New Zealand have adopted a policy of decriminalisation/legalisation of prostitution based on the premise that prostitution is work. These models will be examined further below.

The immense range of academic literature on prostitution which has been generated over recent decades reveals this stark division, premised on different feminist theoretical perspectives.¹⁶² As Lenore Kuo writes,

[t]he traditional opposing positions on prostitution not surprisingly tend to mirror the opposing positions in the feminist “sex wars”. In the United States, these perspectives are mainly represented by, on the one hand, the radical and socialist feminist perspectives... and, on the other hand, the feminist sex radical and liberal feminist approaches. In England, socialist feminists provide a third view, more purely focused on capitalism as the source of prostitution.¹⁶³

The contrast between the radical and socialist feminist perspectives, and the ‘sex radical’/liberal/postmodern feminist view, has implications not just for the debate on prostitution but also for broader conceptualisations of consent, choice and power, as Robin West suggests:

liberals and liberal feminists hold the quintessentially liberal commitment to the private sphere as a realm of free individual choice, individuation and maturation, while radical feminists, echoing general themes in radical legal scholarship, contest the distinction between the public and private and even more sharply contest the freedom of choices made within the private sphere, focusing on the coercive impact of individuals or institutions who retain relative power over others in those spaces.¹⁶⁴

There have been some attempts to forge a middle ground. In their general edited 2009 text on prostitution, Sanders *et al* begin their introductory chapter by stating that they seek to move beyond ‘the polarized perspectives of prostitution as either ‘violence against women’ or ‘sex as work’.¹⁶⁵ However, in outlining key theoretical positions on prostitution, they suggest in somewhat partisan language that the division of views within feminism is focused upon ‘victimhood and exploitation in contrast with agency and choice’ and further that the ‘rise of the ‘sex as work’ perspective is.. in relation to the advent of activism among sex workers and campaigns for rights.’¹⁶⁶ The body of literature on prostitution that they identify,

¹⁶² See for example the range of perspectives explored in Matthews, Roger and O'Neill, Maggie (eds), *Prostitution*. England: Ashgate, 2003; a comprehensive edited series on the history, sociology, politics and regulation of prostitution.

¹⁶³ Kuo, Lenore, *Prostitution Policy*. New York University Press, 2002, at 138.

¹⁶⁴ Introduction, in West, Robin, and Bowman, Cynthia (eds), *Research handbook on feminist jurisprudence*. ProQuest Ebook Central, 2019, =at 15.

¹⁶⁵ Sanders, Teela, O'Neill, Maggie and Pitcher, Jane, *Prostitution: Sex Work, Policy and Politics*. London: Sage, 2009, at 1.

¹⁶⁶ Sanders *et al*, *ibid*, at 1.

which they say includes philosophical, criminological and sociological writings, ‘results in a ‘sociology of sex work’ which has developed over recent years.’¹⁶⁷

In providing a more recent overview of this extensive literature, Jo Phoenix writes that ‘there is now such a rich body of academic literature on prostitution that it is possible to speak of a sub-field of ‘sex-work studies’ and that ‘The literature on prostitution is now so voluminous that there are textbooks provided to help students navigate their way through the empirical studies.’¹⁶⁸ But Phoenix also notes that ‘prostitution remains a subject of intense debate and there is little or no consensus amongst academics, politicians, policy-makers, or campaigners regarding definitional, explanatory, or regulatory questions.’¹⁶⁹ She charts the changing empirical realities of prostitution, with the move away ‘from street-based sex work to indoor work.. [to] a globally organized ‘sex industry’”,¹⁷⁰ and provides an overview of the evolution of criminological theory on prostitution, from the positivist concepts of prostitution as the typical form of women’s criminality, to the re-conceptualising of prostitution by feminist writers in the latter half of the twentieth century, followed by the emergence of the binary divide within feminist theorising about prostitution, as described earlier.¹⁷¹

She also provides an historical overview of the ways in which prostitution has been regulated, with a focus on Britain, from the laws focused on the concept of ‘public nuisance’ and the targeting of public manifestations of prostitution, to public health and welfare regulation, to increasing governmental intervention in prostitution. She concludes that, while feminist understandings of prostitution as violence may be used to ground ‘illiberal forms of regulation’, nonetheless decriminalisation of prostitution, as called for by many scholars, ‘will not in itself stop the governance and regulation of prostitution, it will merely mark a shift in the regulatory context from the criminal justice to the economic sphere.’¹⁷² She writes that, ultimately,

Selling sex places women at risk of violence, of exploitation, of poverty, and of criminalization. The history of prostitution shows that such women have often become the victims of regulatory practices that reinforce rather than ameliorate the wider social and economic opportunity structures that in turn shape the contours of prostitution itself.¹⁷³

Phoenix argues that, despite the acknowledged existence of a binary divide within feminism on prostitution, these two theoretical positions are ‘never really as distinct as some have assumed’, since ‘Women themselves often see their involvement in prostitution as both work *and* a form of gendered victimization’ and suggests that it may now be more methodologically meaningful to speak of ‘prostitutions’ rather than prostitution.¹⁷⁴

This approach may suggest some reconciliation of the opposing views taken within feminism. Indeed, some recent empirical research has also sought to achieve a more nuanced understanding of the real experiences of women engaged in selling sex. In one such study

¹⁶⁷ Sanders *et al*, *ibid*, at 1.

¹⁶⁸ Phoenix, Jo, ‘Prostitution and Sex Work’ in Liebling, Alison, Maruna, Shadd and McAra, Lesley, *Oxford Handbook of Criminology* (6th ed), Oxford University Press, 2017, 685-703, at 685 and 700. At 700, she notes that ‘The best of these [textbooks] is Sanders *et al*’s *Prostitution: Sex Work, Policy and Politics*.’ London: Sage, 2009.

¹⁶⁹ *Ibid*, at 685.

¹⁷⁰ At 686.

¹⁷¹ At 690.

¹⁷² At 700.

¹⁷³ At 700.

¹⁷⁴ At 693.

drawing on interviews with a number of adult women in the sex trade, Lara Gerassi has suggested that ‘women’s differing viewpoints of sex trading and experiences of racial prejudice impacted their access and engagement with [social] services.’¹⁷⁵

But other contemporary literature suggests the divide has become deeply entrenched, with open hostility expressed for alternative positions. Julie Bindel writes that

There is no issue as contentious between feminists, liberals and human rights defenders as the sex trade. Radical feminists tend to argue that prostitution is both a cause and consequence of male supremacy, and that if men and women were equal, prostitution would not exist; it also means that if women and men are ever to become equal, prostitution must not exist. But for liberals who believe in an essential freedom to buy and sell sex, or for human rights campaigners who see access to sex as a human right, abolition is simply not an option.¹⁷⁶

She refers to the familiar ‘[m]yths about the sex trade [which] include saying that prostitution is necessary, inevitable and harmless;’ but, from the 250 interviews she conducted in 40 countries, she seeks however to show ‘clear evidence that these beliefs, propagated by the ‘sex workers’ rights’ movement, are based on misguided neoliberalism and fallacious mythology.’¹⁷⁷ Commenting on the language used by proponents of opposing views, she suggests that

In recent years, despite the increasing numbers of women with direct experience of being prostituted coming out as ‘survivors’ of the sex trade, the dominant discourse is one of prostitution being about ‘choice’ and ‘agency’ for the women involved. The human rights abuse involved in the sex trade, according to the liberals, libertarians and many of those who profit from selling sex, is when men are deterred from purchasing sex, and not when they rent the orifices of a woman for sexual release. The women selling sex, according to this logic, are the victims of pearl-clutching moralists who wish to take away their right to earn a living.¹⁷⁸

Not only do some ‘sex work’ advocates argue that campaigners for Nordic model laws are motivated by a conservative or religious form of moralism, but some have devised the term ‘carceral feminism’ in order to disparage feminist strategies seeking increased state intervention in the private sphere – and in popular discourse, the term ‘SWERF’ has even emerged to describe those feminists who see prostitution as exploitation.¹⁷⁹ In an academic context, Elizabeth Bernstein, for example, proposes that feminists who seek stronger state intervention to tackle gender-based violence may be described as ‘carceral feminists’; she justifies this proposal by arguing that strategies criminalising the purchase of sex by

¹⁷⁵ Gerassi, Lara, ‘How Adult Women who Trade Sex Navigate Social Services: A Grounded Theory Study’ (2020) 15(2) *Feminist Criminology* 196-216, at 196.

¹⁷⁶ Bindel, Julie, *The Pimping of Prostitution: Abolishing the Sex Work Myth*. London: Palgrave Macmillan, 2017, at xxviii.

¹⁷⁷ Bindel, *ibid*, at xxx.

¹⁷⁸ *Ibid*, at viii.

¹⁷⁹ This stands for ‘Sex Worker Exclusionary Radical Feminist; described by Julie Bindel as ‘a fairly new insult brought to you by the nice folks that introduced Terf (trans-exclusionary radical feminist)’; see Bindel, Julie, ‘All Feminists should Deplore the Exploitation of Vulnerable Women. They Don’t’, *The Times*, 1 December 2019, at <https://www.thetimes.co.uk/article/julie-bindel-all-feminists-should-deprecate-the-exploitation-of-vulnerable-women-they-dont-hrspn8tbb>

individual men do not address structural inequalities.¹⁸⁰ Phillips and Chagnon rely on Bernstein's work to define 'carceral feminism' as closely aligned with 'penal populism', or 'a view that promotes state-based responses to sexual violence (and gender violence more generally), primarily through the traditional criminal justice system and other appendages of the carceral state.'¹⁸¹ They argue that this view, which they describe as 'rooted in liberal feminism', has been applied so as to 'corrupt' the concept of 'rape culture', which should be used as a theoretical tool for interrogating the ways that gendered oppressions encourage and/or excuse sexual violence and for theorizing how best to achieve "rape justice".¹⁸²

However, writers who use the term 'carceral feminism' tend not to consider the reality that feminist campaigns on gender-based violence have always emphasised the need to introduce preventative strategies along with and to complement criminal justice responses. Nor do they acknowledge that classic liberal/neo-liberal or libertarian perspectives seek to achieve less, not more, state intervention. But, as indicated in the previous chapter, it is often difficult to define clear parameters around different strands of feminist theorising, with many diverse terms used to describe those who hold particular viewpoints; Butler, for example, uses the terms 'abolitionist feminism' and 'dominance feminism' to describe those who see prostitution as a form of structural exploitation; she describes Catharine MacKinnon as 'one of the most renowned scholars on this side of the debate, [whose 'dominance feminism'] frames prostitution as a form of structural oppression through which men subjugate women'.¹⁸³

This brief summary of the extensive literature on prostitution illustrates the entrenched nature of the divisions within the literature and provides an introduction to a more detailed analysis of each of the polarised feminist perspectives. However, woven into the discussion below will be a consideration that presenting these approaches in terms of a binary divide misses the more subtle point that Frug made and that Phoenix implicitly recognised; that the divide may not be as polarized as some have suggested, since feminists from any ideological position can argue for a 'prostitution as exploitation' model with support for the necessary legal framework that may follow, while accepting that some or even many women may 'choose' to engage in prostitution through an expression of moral agency or sexual autonomy. Indeed, as Munro and Della Giusta argue, the polarised perspectives on prostitution are each problematic in different ways 'when presented as an abstract position that claims universal applicability to all women and all commercial sex'.¹⁸⁴

Despite attempts to bridge the divide between theoretical approaches to prostitution, the polarisation within academic writing has resulted in the dominance of the 'agency' or 'sex work' model; Coy argues that this dominance, and the marginalisation of the radical feminist perspective that has occurred, may (as previously mentioned) be due to the change identified by Sylvia Walby - the "neoliberal" turn in the academy - 'a shift in intellectual enquiry about

¹⁸⁰ Bernstein, Elizabeth, 'Carceral Politics as Gender Justice? The "traffic in women" and neo-liberal circuits of crime, sex and rights' (2012) 41(3) *Theory and Society* 233-59.

¹⁸¹ Phillips, Nickie and Chagnon, Nicholas, "'Six months is a joke: Carceral Feminism and Penal Populism in the Wake of the Stanford Sexual Assault Case' (2020) 15(1) *Feminist Criminology* 47-69, at 50.

¹⁸² *Ibid.*, at 50; 62-3.

¹⁸³ Butler, Cheryl Nelson, 'A Critical Race Feminist Perspective on Prostitution and Sex Trafficking in America' (2015) 27(1) *Yale Journal of Law and Feminism* 95-139, at 118.

¹⁸⁴ Munro, Vanessa and Della Giusta, Marina (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution*. UK: Ashgate, 2008, at 6.

systems of power to that of agency .. [which] functions in practice towards deflecting analytic interest away from the powerful and from systems of power.”¹⁸⁵

It is argued in this thesis that Coy’s analysis accurately reflects the real difficulty with seeing prostitution as work, freely engaged in by women exercising agency; this approach ignores the broader structural contexts within which prostitution is carried on, and portrays the act of prostitution in individualist terms, missing the collective reality of exploitation and harm. This is the problem with what Frug identified as a postmodern strength; in expressing the voices of sex workers, Frug wrote that postmodern feminist theory can ‘seek and claim different voices, voices which will challenge the power of the congealed meanings of the female body that legal rules and legal discourse permit and sustain’.¹⁸⁶

However, it is argued that the multiplicity of different individual voices thus expressed can obscure the structured context of gender exploitation within which prostitution operates as a ‘gender regime’, in the words of Maddy Coy.¹⁸⁷ And it is further argued that Frug’s own uncertainty as to whether she supported sex workers’ position on legalisation illustrates her unease with the absence of a broader structural analysis inherent in the claiming of ‘different voices.’ By drawing comparisons between the ‘husband’ and the ‘pimp’ in her manifesto, it is argued, Frug herself identified the structurally unequal nature of sexual relations in a way that should undermine ‘pro-sex work’ feminist arguments based upon concepts of ‘agency’ and ‘free choice’.

In reality, those arguments can more easily be reconciled with a liberal feminism than a postmodern one; as Walby argues, this reflects a shift generally towards a ‘neoliberal’ academic discourse. Within this neoliberal discourse, the intersectionality intrinsic to the exploitation of women in prostitution is often ignored, as arguments about ‘free choice’ and ‘agency’ are made in the abstract.

Yet the work of O’Connell Davidson, among others, has clearly identified that the approach taken by ‘pro-prostitution feminists’ is really only applicable to the experience of a small privileged minority of women in the sex trade, not to the vast majority of those exploited within it globally.¹⁸⁸

Similarly, Moran and Farley propose an intersectional approach to understanding the exploitation within prostitution, writing that

Prostitution exists because of the male demand for it, and racial and economic inequalities render women vulnerable to it. This means that prostitution is produced from an entwinement of sex, race, and economic inequalities....From a feminist abolitionist perspective, prostitution’s sex hierarchy is one of several inequalities that are intrinsic to prostitution. Economic inequality and race/ethnic inequality coexist with sex inequality.¹⁸⁹

Later in this thesis, the debates about different strands of feminism, and about conceptions of prostitution, are applied within the context of Irish policy-making and law reform on

¹⁸⁵ Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality: Theory, Research and Policy*. Surrey: Ashgate, 2012, at 3, citing Walby, Sylvia, *The Future of Feminism*. Cambridge: Polity Press, 2011, at 23.

¹⁸⁶ Frug, *op cit*, at 1059.

¹⁸⁷ Coy, *op cit*, at 3-4.

¹⁸⁸ O’Connell Davidson, Julia, ‘The Rights and Wrongs of Prostitution’ (2002) 17(2) *Hypatia* 84-98.

¹⁸⁹ Moran, Rachel and Farley, Melissa, ‘Consent, Coercion, and Culpability: Is Prostitution Stigmatized Work or an Exploitive and Violent Practice Rooted in Sex, Race and Class Inequality?’ (2019) *Archives of Sexual Behavior* 1.

prostitution. First, however, having acknowledged the problematic aspects identifiable with both of the two opposing perspectives on prostitution, each will be examined briefly, before consideration is given to the different legal frameworks deriving from these; and how they operate in practice in selected jurisdictions.

1.5 The 'Radical' or 'Socialist' Approach: Prostitution as Exploitation

In one of the best-known early examples of feminist writing on prostitution as exploitation, Catharine MacKinnon, whose immense contribution to feminist legal theory more generally has been discussed above and who is usually identified as a radical feminist theorist, described prostitution as another form of sexual violence against women: 'rape, battery, sexual harassment, sexual abuse of children, prostitution, and pornography ... form a distinctive pattern: the power of men over women in society.'¹⁹⁰

MacKinnon further suggested that:

Substantively, the way the male point of view frames an experience is the way it is framed by state policy. To the extent possession is the point of sex, rape is sex with a woman who is not yours, unless the act is so as to make her yours. If part of the kick of pornography involves eroticizing the putatively prohibited, obscenity law will putatively prohibit pornography enough to maintain its desirability without ever making it unavailable or truly illegitimate. The same with prostitution.¹⁹¹

More recently, as described in the previous section, MacKinnon has developed her analysis of consent and sex, making explicit her case for criminalisation of prostitution through critiquing the view that prostituted sex 'is considered consensual because it is paid.'¹⁹² Rather, she argues that '..women are disproportionately bought and sold in prostitution by men as a cornerstone of combined economic, racial, age-based, and gendered inequality, in which money functions as a form of force in sex because the women are not permitted to survive any other way... Thus is prostituted sex, the most multiply coerced sex on the planet, cherished as the ultimate example of consensual sex.'¹⁹³ She argues further that 'Commercial sex is sex in which the conditions of inequality between the parties, including sex and gender as well as frequently age, race, and class or caste, are blatantly exploited. The sex is unwanted for its own sake, coerced by the multiple circumstances of inequality on which the institution feeds.'¹⁹⁴

As discussed previously, parallels have been drawn between the emergence of the #MeToo movement and the development of the feminist approach to prostitution supportive of Nordic model laws. In applying Melissa Farley's argument referenced above, that 'sexual harassment is what prostitution is.. If you eliminate paid rape, there is no prostitution,'¹⁹⁵ it may be asked how a legal framework that supports the purchase of sex (laws decriminalising

¹⁹⁰ MacKinnon, Catharine, *Feminism Unmodified: Discourses on Life and Law*. Cambridge MA: Harvard University Press, 1987, p. 5.

¹⁹¹ MacKinnon, Catharine, 'Toward Feminist Jurisprudence' (1983) 8(41) *Signs: Journal of Women in Culture and Society* 635 at 644.

¹⁹² MacKinnon, Catharine, 'Trafficking, Prostitution, and Inequality' (2011) 46 *Harvard Law Review* 271; 'Rape Redefined' (2016) 10 *Harvard Law Review* 431, 447.

¹⁹³ MacKinnon, 2016, *Ibid*, at 448.

¹⁹⁴ *Ibid*, at 473.

¹⁹⁵ Farley, Melissa, '#MeToo must include Prostitution' (2018) 3(1) *Dignity: A Journal on Sexual Exploitation and Violence* 2.

prostitution) can rationally be compatible with a legal framework based on a sexual ethics of mutual respect and desire (laws that prohibit non-consensual sexual acts).

Applying this analysis, MacKinnon has thus argued forcefully in support of the Swedish model from a theoretical perspective, asserting that it recognises the reality that ‘sex under conditions of inequality – there, a transaction between someone who pays and someone who is paid – is unequal sex, criminal for the purchaser not the purchased, setting a global standard for what sexual violence against women includes. Commercial sex is one form of unequal sex. Consent is irrelevant.’¹⁹⁶

She asserts thus that:

Prostituted sex.. is considered consensual because it is paid. In fact, women are disproportionately bought and sold in prostitution by men as a cornerstone of combined economic, racial, age-based, and gendered inequality, in which money functions as a form of force in sex....layers of inequality [are] involved in this technically consensual sexual activity..’¹⁹⁷

The empirical work of Monica O’Connor, also referenced previously, further supports this re-conceptualisation of consent, based on her work within an Irish context.¹⁹⁸ O’Connor uses a continuum concept to describe how choice, agency and coercion can co-exist for women within prostitution, so that ‘consent’ is effectively compromised, as it may be for women experiencing domestic violence. She argues that women’s own accounts of the lived experience of prostitution sex contribute to recognition of the ‘coercive context in which consent is given and obtained in prostitution’ and of ‘the importance of differentiating between adult consensual sex, implying mutual, desired sex and prostitution sex described by women in [her] study which is better defined as buyers gaining acquiescence to commit unwanted sexual acts’.¹⁹⁹

Applying these radical feminist critiques and that of West in her recent treatise on consent considered above, it is argued that prostituted sex may best be categorised as falling between ‘non-consensual’ sex (rape) and ‘consensual’ sex (mutually desired, where consent is ‘freely and voluntarily’ given).²⁰⁰ In prostituted sex, consent is not ‘freely and voluntarily’ given. Rather, it becomes a commodity, bought and sold. The seller does not ‘desire’ the sex; their sexual gratification or pleasure is not the point of the transaction nor the concern of the buyer. Thus their consent may be understood, not as absent (as in rape) but rather as ‘compromised’ due to the structures of the exploitative ‘gender regime’ of the sex trade.

Within these structures, consent may be compromised in a number of different ways; including those where a woman is effectively controlled or coerced into prostitution by her partner or pimp; or those where a woman has been trafficked from another jurisdiction. Consent in prostitution is a complex concept – as it is more generally in sexual relations; context is everything. As described earlier, Moran, among others, has provided a graphic

¹⁹⁶ MacKinnon, 2016, *op cit*, at 464.

¹⁹⁷ *Ibid* at 447-8.

¹⁹⁸ O’Connor, 2018, *op cit*; O’Connor, Monica, ‘Choice, Agency, Consent and Coercion: Complex Issues in the Lives of Prostituted and Trafficked Women’ (2017) 62 *Women’s Studies International Forum* 8-16.

¹⁹⁹ O’Connor, 2017, *ibid* at 15.

²⁰⁰ West, 2020, *op cit*, at 27.

account of the particular coercive context in Ireland within which 'consent' is given in prostituted sex.²⁰¹

Placing prostitution firmly within this coercive context, Maddy Coy has thus argued that it can be seen to fit Raewyn Connell's definition of a gender regime.²⁰² First, it involves a gendered division of labour, since it 'disproportionately involves men buying access to women's bodies'; secondly, it enables men to exercise power over women's bodies; thirdly, it involves emotional labour, 'minimization of self and potential disruption to relationships with the body'; and it 'primarily relies on, and reproduces, heteronormativity'.²⁰³ Finally, she says at a symbolic level, 'stigmatization of women in prostitution persists. Gendered meanings attached to women who sell sex are reflected in derogatory language and practices of social marginalization,' but she also points out that 'Intersections with race/ethnicity, class/caste, and context/setting will inflect each dimension, and the ways in which prostitution as a gender regime is constituted and experienced across space and time'.²⁰⁴

Coy concludes that this analytical framework sees prostitution as causing harm both to individuals and in a systemic manner; 'prostitution as a gender regime reproduces gender as a hierarchy .. and thus undermines movements towards gender equality'.²⁰⁵ Her approach to analysing and discussing prostitution enables it to be seen in the context of 'systemic gendered power inequalities'.²⁰⁶

Carol Smart, whose writings on the construction of women through criminal law were also discussed above, argued in respect of prostitution that 'it is legislation and legal practice informed by specific ideologies of female sexuality which serves to construct prostitute women as mere 'sexual objects'; in turn this sexual objectification of prostitute women reinforces their special status as denigrated legal subjects and helps to preserve legislation which, by most standards, must be regarded as unusually harsh and repressive'.²⁰⁷

This objectification or 'othering' of those engaged in prostitution derives to some extent from the nature of prostitution itself. Bridgeman and Millns argue, in this context, that the 'privatised nature' of prostitution ensures that prostitutes have to work out of public view, and in conditions where they are constantly in danger of sexual violence; when they make allegations of abuse, they are frequently distrusted by the criminal justice system.²⁰⁸

More recently, Kate Sutherland has summed up the radical feminist position as follows:

Radical feminists characterize prostitution as an abuse of human rights, regardless of whether it is forced or voluntary, and have fought for its abolition. They have had a substantial impact on the development and adoption of anti-trafficking legislation and instruments in various countries and at the international level. Sex radicals have offered compelling opposition, shifting the focus from the abolition of sex work to the human rights of sex workers. Their legal interventions have been geared toward

²⁰¹ See Moran, 2013, *op cit*.

²⁰² Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality: Theory, Research and Policy*. Surrey: Ashgate, 2012, at 4, referring to the model developed by Connell, Raewyn, *Gender* (2nd ed). Cambridge: Polity Press, 2009.

²⁰³ *Ibid*, at 5.

²⁰⁴ *Ibid*, at 5.

²⁰⁵ *Ibid*, at 5.

²⁰⁶ *Ibid*, at 3.

²⁰⁷ Smart, Carol, *Law, Crime and Sexuality: Essays in Feminism*. London: Sage, 1995, at 53.

²⁰⁸ Bridgeman, Jo and Millns, Sue, *Feminist Perspectives on Law: Law's Engagement with the Female Body*. London: Sweet & Maxwell, 1998, p. 737-8.

self-determination for sex workers including decent working conditions and freedom of movement.²⁰⁹

Feminists such as Catharine MacKinnon, Kathleen Barry,²¹⁰ Sheila Jeffreys²¹¹ and Carole Pateman²¹² thus argue strongly for the ‘exploitation’ approach, derived from a radical or a socialist theoretical perspective. Kingston suggests that they ‘reject the notion that women freely choose to sell sex, as prostitution is considered as the institutionalization of women’s dependence on men and is therefore exploitative and inherently violent and oppressive.’²¹³ Marie Segrave suggests that radical feminist scholarship ‘perceives prostitution as gender-based violence, a practice that de-humanizes and objectifies women.’²¹⁴ Scholars such as O’Connell Davidson and Rijken consider that in such a context, ‘consent’ is irrelevant, locating prostitution in a wider understanding of violence against women as gender-based violence.²¹⁵

Barry defines prostitution as sexual exploitation because ‘when the human being is reduced to a body, objectified to sexually service another, whether or not there is consent, violation of the human being has taken place’ and she describes a four-stage process in which prostitution becomes sexual exploitation, through distancing, disengagement, dissonance and disembodiment. These stages, she argues, objectify the female body, distinguishing sex from the human being.²¹⁶ Such arguments reject the concept that women can ‘consent’ to prostitution when it effectively constitutes exploitation.

Sheila Jeffreys, similarly, argues forcefully that the language of ‘choice’, ‘agency’, entrepreneurship and empowerment in relation to prostitution

invisibilizes the material forces of male domination and the neo-liberal economics that underpin the expansion of the global sex industry, and create the gendered practices of prostitution... It obscures the degree of privation that underpins the ‘choices’ that women and girls who are prostituted make.. The language of choice and agency are not appropriate to an industry that stands in such stark contradiction to women’s equality.²¹⁷

This emphasis on the economic context for the global sex industry is made by those writing explicitly from a socialist feminist perspective who, as Messerschmidt suggests, must ‘consider simultaneously patriarchy and capitalism’ in understanding criminality and power; he argues that ‘the interaction of gender and class creates positions of power and

²⁰⁹ Sutherland, Kate, ‘Work, sex and sex-work: competing feminist discourses on the international sex trade’ (2004) 42(1) *Osgoode Hall Law Journal* 139-167, at 140.

²¹⁰ Barry, Kathleen, *Female Sexual Slavery*. NYU Press, 1984.

²¹¹ Jeffreys, Sheila, *The Idea of Prostitution*. Melbourne, Australia, Spinifex Press, 2008.

²¹² Pateman, Carole, ‘What’s Wrong with Prostitution?’ (1999) 27 *Women’s Studies Quarterly* 53-64. See also Pateman, Carole, *The Sexual Contract*. Oxford: Polity Press, 1988.

²¹³ Kingston, Sarah, *op cit*, at 10.

²¹⁴ Segrave, Marie, Milivojevic, Sanja *et al*, *Sex Trafficking: International Context and Responses*. Cullompton: Willan, 2009, at 3.

²¹⁵ O’Connell Davidson, Julia, ‘Will the Real Sex Slave Please Stand Up?’ (2006) 83 *Feminist Review* 4-22; Rijken, Conny, *Trafficking in Persons – Prosecution from a European Perspective*. The Hague: Asser Press, 2003.

²¹⁶ Barry, Kathleen, *Female Sexual Slavery*, cited in Sanders, Teela, O’Neill, Maggie and Pitcher, Jane, *Prostitution: Sex Work, Policy and Politics*. London: Sage, 2009, at 7.

²¹⁷ Jeffreys, Sheila, ‘Beyond ‘Agency’ and ‘Choice’ in Theorizing Prostitution’ in Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality*. Surrey: Ashgate, 2012, at 83.

powerlessness in the gender/class hierarchy, resulting in different types and degrees of criminality and varying opportunities for engaging in them'.²¹⁸

Susan Edwards similarly refers to economic power contexts in commenting on campaigns seeking recognition of the 'rights' of women to work as prostitutes; she says that this is rather like Plato's 'happy slave'; it is a 'flimsy embourgeoisment and cannot alter the fundamental exploitation that exists, nor the indisputable fact of commodity exchange, nor the enduring fact of patriarchy, however improved are the work conditions or social status of prostitutes'.²¹⁹

In her analysis of 'the sex of prostitution', Meagan Tyler argues further that 'the sex of prostitution demands that prostituted women are seen as less than fully human.. the sexual servicing of men by women.. is premised upon inequality and, by its very nature, requires objectification/derivatization'.²²⁰

Some radical and socialist feminist arguments suggest that states which legalise or facilitate the practice of prostitution may be portrayed as 'pimp' states.²²¹ This suggestion has been made forcefully by Kat Banyard, in a text entitled *Pimp State*, considered below. Like Banyard, Pateman and other proponents of the 'prostitution as exploitation' approach have also offered strong critiques of the 'sex as work' perspective. In her analysis of the 'work' position, Carole Pateman argues that perceiving prostitution as a job of work implicitly suggests that, '[a]t the very least, there is nothing wrong with prostitution that is not also wrong with other forms of work'.²²² This conclusion offered by many feminists, she suggests, is very much dependent on the same assumptions as the contract theory defence of prostitution, which 'appears to offer a convincing reply to well-known criticisms of and objections to prostitution', as '[c]ontract theorists argue that a prostitute contracts out a certain form of labor power for a given period in exchange for money. There is a free exchange between prostitute and customer, and the prostitution contract is exactly like – or is one example of – the employment contract'.²²³

This 'new contractarian' position, she notes, enables its proponents to argue that a 'sound prostitution'²²⁴ is possible; 'Freedom of contract and equality of opportunity require that prostitution should be open to everyone and that any individual should be able to buy or sell services in the market'.²²⁵ Taking this approach, Pateman writes, enables feminists like Alison Jaggar to focus on involuntary entry to the prostitution contract as the problem, rather than the contract itself; Jaggar states that 'it is the economic coercion underlying prostitution... that provides the basic feminist objection to prostitution'.²²⁶

²¹⁸ Messerschmidt, 1993, *op cit*, at 56.

²¹⁹ Edwards, Susan, 'Selling the body, keeping the soul: sexuality, power, the theories and realities of prostitution' in Scott, Sue and Morgan, David (eds), *Body Matters*. London: Falmer Press, 1993, at 89.

²²⁰ Tyler, Meagan, 'Theorizing Harm through the Sex of Prostitution' in Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality*. Surrey: Ashgate, 2012, at 98.

²²¹ See for example Jeffreys, Sheila, 2008, cited in Sanders *et al*, *ibid*, at 7.

²²² Pateman, 1999, *op cit*, at 54.

²²³ Pateman, *ibid*, at 54.

²²⁴ Pateman writes that the term 'sound prostitution' is used by Lars Ericsson in 'Charges Against Prostitution: an Attempt at a Philosophical Assessment' (1980) 90 *Ethics* 335-66.

²²⁵ Pateman, 1999, *op cit*, at 55.

²²⁶ Jaggar, Alison, 'Prostitution' in Soble, A. (ed), *The Philosophy of Sex: Contemporary Readings*. NJ: Rowman & Littlefield, 1980, at 360, quoted in Pateman, 1999, *op cit*, at 58.

But Pateman argues strongly that the comparisons between the employment contract and the prostitute contract are based on a number of false premises. In particular, in contrast to employers, ‘the men who enter into the prostitution contract have only one interest, the prostitute and her body...only through the prostitution contract does the buyer obtain unilateral right of direct sexual use of a woman’s body.. When a man enters into the prostitution contract, he is not interested in sexually indifferent, disembodied services; he contracts to buy sexual use of a *woman* for a given period.’²²⁷ Applying Pateman’s argument, it has been proposed more recently by Cantillon and O’Connor that a clear distinction can be made between prostitution and other sales of bodily services (like massages, for example), because:

Prostitution is not the buying of ‘sex’ as much as the buying of the right to the body of another person; it is the body of the person that is acted upon by the buyer who expects in the fulfilment of the agreed contract that bodily orifices are available for his use and sexual gratification. The prostitution contract does not simply involve the sale of sex or a sexual service as a commodity.²²⁸

Indeed, it is argued that the false equation by some writers of prostitution with ‘work’ is equivalent to the false equation of slavery with ‘work’. In both cases, the commodification of the human body is central to the ‘contract.’ Thus, Pateman concludes that when ‘women’s bodies are on sale as commodities in the capitalist market, the terms of the original contract cannot be forgotten; the law of male sex right is publicly affirmed, and men gain public acknowledgment as women’s sexual masters – that is what is wrong with prostitution.’²²⁹ Having posited a view of prostitution as ‘an integral part of patriarchal capitalism’, Pateman thus suggests that the ‘crucial question that is too rarely asked is why there is such an enormous global demand from men that women’s bodies be available for purchase, just like any other commodity in the market.’²³⁰

Moreover, strong anti-capitalist or socialist arguments are increasingly being made by many feminists against prostitution, based on analyses of the worldwide sex trade which expose the ‘big money’ behind this trade, and the organised crime network contexts within which it is carried out internationally. These analyses incorporate an intersectional approach, seeing gender and class, along with race and ethnicity, as sites of discrimination within the sex trade. The work of Malina Bhattacharya, for example, explicitly seeks to apply the writings of Marx and Engels in her argument that the ‘woman in the sex trade is only a cog in the wheel, caught in a vast network of a world-wide multi-billion dollar business which provides her with her bare livelihood...’.²³¹ Through her analysis of the evolution of commercial sex in human society and considerations of ‘choice’ for the woman involved in the trade and its links with trafficking networks, particularly in the neo-liberal era, she argues that

In Marxist thought.., the condition of the prostituted woman within the capitalist system is like that of a slave. It presupposes the alienation of the most intimate parts of her personality as well as near-total lack of freedom to choose employers and to bargain about wages. It is to some extent comparable with the conditions .. of many

²²⁷ Pateman, 1999, *op cit*, at 59-60.

²²⁸ Cantillon, Sara and O’Connor, Monica, ‘Gender, Equality and the Sex Trade’ (2021) 89 *Women’s Studies International Forum* at 6: <https://doi.org/10.1016/j.wsif.2021.102532>.

²²⁹ Pateman, *op cit*, at 62.

²³⁰ Pateman, *op cit*, at 63.

²³¹ Bhattacharya, Malina, ‘Neither ‘Free’ nor ‘Equal’ Work: a Marxist Feminist Perspective on Prostitution (2016) 1(1) *Indian Journal of Women and Social Change* 82-92, at 84.

migrant workers today in a globalized economy, being kept in an illicit state of semi-bondage to extract more profit. Nevertheless, sex trade is even more exploitative in so far as the woman in it has to alienate herself from any sense of private pleasure in what is considered to be an act of pleasure in order to satisfy the customer.²³²

From this perspective, Bhattacharya challenges the presentation by some of ‘commercial sex by choice’ as ‘an agreement between ‘free’ and ‘equal’ individuals’, pointing out that ‘those who may enjoy relative freedom and economic benefits by being in the top ranks of the trade are vastly outnumbered by those who belong to its bottom ranks’, and that ‘it is almost impossible for any woman, whatever might be her social background, to sell her sexual services on her own without becoming part of a vast partly invisible network of agents, touts, middlemen, owners of premises, sellers of drinks, drugs and other facilities that go with the trade, keepers of law and ultimately traffickers. It is a multi-million dollar criminal business..²³³ She concludes that, applying a Marxist analysis, prostitution is ‘comparable with forms of slavery or bonded labour in which the worker’s self-alienation reaches its nadir’; and that the sex trade is ‘systemic to capitalism’.²³⁴

In applying a critical race feminist perspective, Cheryl Nelson Butler, similarly, notes that ‘[i]n the United States, domestic sex trafficking and prostitution are in large part direct descendants of American slavery...sexual stereotyping and commercial sexual exploitation were fundamental tools for enforcing Black slavery and, later, racial segregation and apartheid in the United States.’²³⁵ She refers to ‘racial myths’ like the ‘Jezebel myth’, which represented ‘the pervasive stereotyping of female slaves and other Black women as sexually loose, seductresses, and prostitutes’, writing that such myths ‘fuel the racial subordination of women of color through prostitution.’²³⁶

Noting that ‘a disproportionate number of prostituted persons in various cities are people of color’, she suggests that this reality is not sufficiently acknowledged in public discourse on prostitution.²³⁷ Citing examples like the 1990 ‘blockbuster movie’ *Pretty Woman*, she writes that

Traditionally, the nexus between prostitution and racism has remained unaddressed within legal and policy debates .. in part due to broader misconceptions about prostitution in the United States. Traditionally, American society has romanticized prostitution as a "victimless crime," i.e., one with little harm to those who sell sex. Prostitution also is perceived by some as an empowering choice for women, one that evinces gender equality.²³⁸

Butler argues that, while ‘liberal feminist perspectives on prostitution have focused the policy and scholarly debates on the need to protect the rights of women to choose prostitution, alternative perspectives, which explore how racism and other factors obscure choice for women of color in the United States, are less prominent.’²³⁹ Through applying critical race

²³² Bhattacharya, Malina, ‘Neither ‘Free’ nor ‘Equal’ Work: a Marxist Feminist Perspective on Prostitution (2016) 1(1) *Indian Journal of Women and Social Change* 82-92, at 87.

²³³ *Ibid.*, at 89-90.

²³⁴ At 90-91.

²³⁵ Butler, Cheryl Nelson, ‘A Critical Race Feminist Perspective on Prostitution and Sex Trafficking in America’ (2015) 27(1) *Yale Journal of Law and Feminism* 95-139, at 125.

²³⁶ *Ibid.*, at 126-7.

²³⁷ At 133.

²³⁸ *Ibid.*, at 97.

²³⁹ At 101. As indicated earlier, Butler also describes ‘liberal’ feminists as ‘radical’ feminists; see 110.

feminist theory, she argues for an ‘alternative narrative about race and prostitution.. [which] recognizes how intersecting forms of race, gender, and class subordination obscure choice and trap many people of color in prostitution.’²⁴⁰ This narrative recognises how

racism intersects with other forms of structural oppression to obscure choice for people of color in America's prostitution industry. America's commercial sex industry perpetuates structural race, gender, and class-based inequalities. Racism and structural oppression trap a disproportionate number of women and girls of color into prostitution. Racism coerces women of color to engage in prostitution and obscures their consent.²⁴¹

For Butler, while ‘[n]arratives of women of color who view prostitution as a form of empowerment (as opposed to a system of oppression) have dominated the scholarly discourse on race and prostitution’, this viewpoint is being challenged by ‘abolitionist feminists and dominance feminists’, who, ‘in contrast to their liberal feminist counterparts, ...posit that structural inequality and intersectional oppression obscure alternative choices for some people of color.’²⁴² She writes approvingly that ‘Catherine MacKinnon's dominance theory offers a model for exploring the intersectional oppression that pushes women of color into prostitution’; drawing on the work of Kimberlé Crenshaw and Gerald Torres, she argues that ‘critical race feminism can draw upon abolitionist feminist critiques of prostitution to shed further light on how race and racism shape prostitution and trafficking in the United States.’²⁴³

Ultimately, Butler asserts the value of MacKinnon's work in ‘recognizing that, in the context of prostitution, .. structural oppression of women manifests itself as, and intersects with, racial subordination.’²⁴⁴ She concludes that ‘the modern day commercial sex industry perpetuates the racialized sexual exploitation of people of color that developed through slavery and colonization.’²⁴⁵

As Coy *et al* argue, the powerful socialist and critical race feminist analyses of Bhattacharya and Butler, among others, have highlighted prostitution as ‘an abusive element of white supremacist capitalist patriarchy, rooted in racism and colonization’.²⁴⁶

Indeed, this scholarship has undoubtedly strengthened the intersectional aspects of radical and socialist feminist critiques of prostitution as exploitation. In her forensic examination of the global sex trade, similarly, Kat Banyard sets out to expose what she describes as the dangerous myths behind the view that prostitution should be regulated as a form of work.²⁴⁷ She refers to six such myths; that demand for the sex trade is inevitable; that being paid for sex is regular service work; that porn is fantasy; that objections to the sex trade are based on a sexually conservative prudism; that decriminalisation of prostitution makes women safe;

²⁴⁰ Butler, Cheryl Nelson, ‘A Critical Race Feminist Perspective on Prostitution and Sex Trafficking in America’ (2015) 27(1) *Yale Journal of Law and Feminism* 95-139, at 97.

²⁴¹ At 101.

²⁴² At 116, 120.

²⁴³ At 119, citing Crenshaw, *op cit*; and Torres, Gerald, ‘Sex Lex: Creating a Discourse’ (2010) 46 *Tulsa Law Review* 45.

²⁴⁴ At 124.

²⁴⁵ At 127.

²⁴⁶ Coy, Maddy, Smiley, Cherry and Tyler, Meagan, ‘Challenging the “Prostitution Problem”: Dissenting Voices, Sex Buyers, and the Myth of Neutrality in Prostitution Research’ (2019)48 *Archives of Sexual Behaviour* 1931, at 1935.

²⁴⁷ Banyard, Kat, *Pimp State: Sex, Money and the Future of Equality*. London: Faber, 2016.

and that resistance to the ‘sex trade’s march into the mainstream’ is futile, because the trade is too powerful to stop. Banyard offers strong arguments to debunk each of these myths, asserting for example that the ‘oldest profession’ phrase must be challenged, because it is really used to convey a false sense of inevitability and permanence about the sex trade, thus suggesting there will always be buyers; and obscuring ‘the choices of the men who decide to become its ‘consumers’’.²⁴⁸ She also challenges the myth that prostitution is regular service work, articulating the consequences of this position. For example, if buying sex is like buying any other service, this would mean that sex buyers would have rights; to demand a particular service, and to sue a prostitute who did not deliver that service. Moreover, those engaged in selling sex would be required to pay tax on income earned through this ‘work’. However, as she says, even those jurisdictions which have legalised prostitution have not followed through on these logical consequences. In Germany, while those engaged in prostitution must pay tax on income, the contract they make with clients is not viewed as an ordinary consumer contract; rather, it is designated as a ‘contract with unilateral obligations’.²⁴⁹

Further, Banyard argues that the myth of prostitution as regular work is premised on a fundamental problem: ‘The whole *point* of the sex industry is that it offers men the chance to buy sexual access to women who do not want to have sex with them. That is the whole point. Otherwise they *wouldn’t have to pay*.’²⁵⁰ The argument that it is possible to commodify consent, that sexual consent may be bought and sold like any service, is in reality only a myth, she argues; if it were true, then the law on consent in sexual offences, on sexual harassment and on sexual abuse would be entirely undermined.

However, those who take a position like Banyard’s in opposing the view of prostitution as ‘sex work’ have, she points out, been deliberately painted as sexually conservative prudes. She writes about the organised targeting of those former prostitutes and others who have spoken out against decriminalisation, and the way in which the language of ‘agency’ and of feminism itself has been appropriated by sex trade advocates. Yet she says that ‘labelling feminist opposition to the sex trade ‘anti-sex’ is about as logical as saying that anyone who agrees votes shouldn’t be for sale is ‘anti-voting’ or that opposing a commercial trade in human organs means you must be anti-organ replacement.’²⁵¹ As she points out, those who argue that women in prostitution have freely chosen to enter the sex trade as moral agents ignore the studies that show many wish to use their ‘agency’ to exit the trade but feel unable to do so.²⁵²

Banyard also addresses the myth that decriminalisation of prostitution makes women safer, saying that it is again based on a denial that prostitution itself is violence against women, and that three of the countries which have led the way on a sex buyer law or ‘Nordic model’ (Sweden, Iceland and Norway) are highly ranked for gender equality internationally. This law ‘makes paying for sex a criminal offence, but decriminalises selling sex, and provides support and exiting services for people involved in the trade’; a ‘three pronged approach which

²⁴⁸ Banyard, *ibid*, at 17.

²⁴⁹ Banyard, *ibid*, at 65, quoting from *Report by the German Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitute Act)*. Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2007.

²⁵⁰ Banyard, *ibid*, at 66.

²⁵¹ Banyard, *ibid*, at 140.

²⁵² Banyard, *ibid*, at 142, quoting Farley, Melissa, ‘Prostitution and Trafficking in Nine Countries: an Update on Violence and Posttraumatic Stress Disorder’ (2003) 2(3/4) *Journal of Trauma Practice* 33-74; a study of prostitution in nine countries which found that 89% of persons involved in prostitution wanted to leave it.

recognises prostitution is a form of sexual exploitation'.²⁵³ In contrast, she argues that the 'sex trade' approach is based on

the wholesale denial of the sexual abuse and objectification inherent to the sex trade, the sexist roots of its demand, and its dire implications for the status of women and girls... [the] willingness of some men to pay for sexual access to another's body is manufactured by unequal power relations between women and men.²⁵⁴

Banyard concludes her account of the myths underlying 'sex trade' arguments by suggesting that

..the sex trade is a phenomenon entirely of our own creation: industrial-scale commercial sexual exploitation, born of sex inequality, and midwived by third-party profiteers – profiteers whose exploits get a helping hand from factors like abuse, neglect, racism and poverty. We made this. We can unmake it.²⁵⁵

Acknowledging the very powerful vested interests and organisations that have taken a position in support of the 'prostitution as work' principle, Banyard nonetheless argues that there are political strategies available to counter this power effectively. Moreover, she argues that it is not revolutionary to propose that the State should set limits to a particular market; she writes that

There is a panoply of items and activities that societies have decided cannot be bought or sold: human organs, votes, bonded labour, child labour and so on. And for a host of reasons: because of unavoidable harm to those involved, because of the risk of exploitation of the most vulnerable, because it clashes with the very principles of equality and democracy, let alone their practical realization. Paying a person for sex acts, and third-party profiteering from it, is commercial sex exploitation. And it's high time it took its place on the list of things labelled not for sale.²⁵⁶

Peter De Marneffe, similarly, suggests that the State may legitimately regulate and restrict prostitution in his political philosophy study, which argues that paternalistic policies can be justified within a liberal framework.²⁵⁷ He notes that prostitution is commonly characterised as a 'victimless crime', since it appears to be voluntary; and because not everyone who is engaged in prostitution appears to be harmed by it. However, he concludes that laws restricting prostitution are morally justified, even if most prostitution is voluntary and does not cause harm to everyone engaged in it. He writes that, historically, anti-prostitution laws were justified on a number of grounds: to protect or affirm traditional sexual morality; to protect wives from adultery; to reduce the incidence of sexually transmitted diseases. But he says in modern times, anti-prostitution laws may be justified on the grounds that prostitution causes harm to those engaged in it; and that such laws are defensible even if prostitution is freely chosen. Similarly, in his consideration of how 'unwanted sex' should be treated in law, published in 1998, Stephen Schulhofer had concluded that although 'a man who propositions a prostitute is not necessarily *coercing* her', nonetheless 'a society that values

²⁵³ Banyard, *ibid*, at 155.

²⁵⁴ Banyard, *ibid*, at 160.

²⁵⁵ Banyard, *ibid*, at 211.

²⁵⁶ Banyard, *ibid*, at 223-4.

²⁵⁷ De Marneffe, Peter, *Liberalism and Prostitution*. Oxford University Press, 2010.

autonomy might still prohibit voluntary commercial sex if it concluded that the harmful indirect effects were sufficiently serious.²⁵⁸

Indeed, extensive research points to the extent of harms associated with prostitution, based largely on testimonies about lived experiences from those currently or formerly engaged in the sex trade; EU-wide research by Schulze *et al* finding for example that those who sold sex were ‘at a heightened risk of violence, escalating to lethal violence’.²⁵⁹ Thus, Sonia Sodha has recently written that ‘Prostitution is laced with mortal peril’.²⁶⁰ Maddy Coy has outlined how the harms associated with the sex trade include ‘sexual and physical violence .. increased likelihood of murder.. and multiple negative consequences for sexual, physical and mental health..’; she argues that ‘This rich existing knowledge base reveals the complexity of women’s lived experience of prostitution, encompassing vulnerability and victimization as well as a sense of autonomy for some.’²⁶¹

Although only limited research has been conducted internationally on those who perpetrate violence against women in the sex trade, Schulze *et al* have noted international findings that ‘Men who buy sex from prostitutes have been found to share in common a higher likelihood to commit sexual coercive acts and violence against women’.²⁶² In one recent study into the arrest records of men who buy sex, for instance, Farley and Golding found that ‘sex buyers were more likely than non-sex buyers to commit felonies, misdemeanors, crimes associated with violence against women.. and to have been charged with violence against women’.²⁶³

Indeed, high levels of harm and risk for those engaged in the sex trade at the hand of clients and pimps are accepted and acknowledged even by those scholars who argue for decriminalisation; Cunningham *et al* note for example that ‘cis-gendered female sex workers in the United States are 18 times more likely to be murdered than women of the same age and race from the general .. and are often targeted by serial offenders.’²⁶⁴

De Marneffe argues that the extensive research into harms associated with the sale of sex can generate a defence to charges that anti-prostitution laws are ‘paternalistic’ and can even enable such a defence where prostitution is freely chosen. He notes that some forms of paternalism are consistent with liberal values; including some paternalistic prostitution laws, and thus suggests that paternalism may be defended, even while ‘choice’ is acknowledged. He notes that even Roger Matthews, while explicitly rejecting the characterisation of

²⁵⁸ Schulhofer, Stephen, *Unwanted Sex: the Culture of Intimidation and the Failure of Law*. Harvard University Press, 1998, at 165.

²⁵⁹ Schulze, Erika, Novo Canto, Sandra, Mason, Peter and Skalin, Maria, *Study on Sexual Exploitation and Prostitution and its Impact on Gender Equality*. Brussels: EU Parliament, 2014, at 8. See also Farley, Melissa *et al*, ‘Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder’ (2003) 2(3/4) *Journal of Trauma Practice* 20.

²⁶⁰ Sodha, Sonia, ‘Selling sex is highly dangerous: Treating it like a regular job only makes it worse’, *The Guardian*, 21 November 2021.

²⁶¹ Coy, Maddy, ‘I am a Person Too’: Women’s Accounts and Images about Body and Self in Prostitution’ in Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality*. Surrey: Ashgate, 2012, at 103. See also Coy, Maddy, ‘Invaded Spaces and Feeling Dirty: Women’s Narratives of Violation in Prostitution and Sexual Violence’ in Horvath, Miranda and Brown, Jennifer (eds), *Rape: Challenging Contemporary Thinking*. Portland, Oregon: Willan Publishing, 2009.

²⁶² Schulze *et al*, *op cit*, at 27.

²⁶³ Farley, Melissa and Golding, Jacqueline, ‘Arrest Histories of Men who Buy Sex’ (2019) 16(2) *Justice Policy Journal* 1-25, at 1.

²⁶⁴ Cunningham, Stewart, Sanders, Teela, Platt, Lucy, Grenfell, Pippa and Macioti, PG, ‘Sex Work and Occupational Homicide: Analysis of a UK Murder Database’ (2018) *Homicide Studies* 1-18 at 1.

prostitution as ‘free choice’, goes on to discuss the ‘decision’ to enter and leave prostitution.²⁶⁵

Clearly, some of the harmful effects of prostitution are due to the stigmatisation of those engaged in it (and this is a key argument made by those who favour decriminalisation as a harm reduction approach); but De Marneffe argues that, even in Germany and the Netherlands, where decriminalisation models have been adopted, prostitution remains stigmatised socially. He concludes that the debate represents a clash between civil libertarian and progressive principles. Progressives say the government is justified in limiting individual liberty to reduce harm, even where it is not necessary to protect anyone’s rights from being violated; thus, prostitution laws may be justified to protect individuals from self-inflicted harm. And he points out that many examples exist for such justified laws; for example, the Irish smoking ban, or legislation to restrict shop opening hours so as to protect workers’ rights. He also recognises the real political context for the prostitution law reform debates:

The most active opponents of prostitution and its legalisation today... are left-leaning feminists who see prostitution as a form of violence against women; they are not sexual traditionalists or religious conservatives.²⁶⁶

As De Marneffe suggests, the political impetus for the growing international movement for criminalisation of the buyers of sex is now derived from ‘left-leaning feminists’ and their allies. Indeed, as Banyard notes in her text, there is a growing feminist and socialist/social democratic movement internationally to introduce laws targeting sex buyers in different countries (she cites Ireland, the UK, France, and South Africa, among other places). She notes that in South Africa, campaigners remembered using the slogan ‘end apartheid in our lifetime’ and not believing that was possible, thus remaining hopeful that the campaign for abolition of prostitution could also succeed in future.²⁶⁷

Contemporary arguments in support of the ‘prostitution as exploitation’ position have been developed by Liz Kelly and others, who have argued that the theoretical framework of a continuum, applied to research ‘the complexity of sexual violence and consent and the multiple overlapping forms of non-consensual sex, sexual assault and rape that occur in women’s lives’ may also be useful as a means of understanding how prostitution and trafficking for sexual exploitation are inter-connected.²⁶⁸ Such contemporary arguments focusing on the economic and social context within which consent is apparently given in prostitution also emphasise the gendered nature of prostitution as a system; and the global nature of the international sex trade. Thus, Dorchon Liedholdt, whose work in comparing domestic violence and prostitution was considered earlier, has argued that

Prostitution is often addressed in the abstract, as a transaction unconstrained by social forces, in which one gender-neutral individual purchases an act of sex from another, exchanging sexual pleasure for compensation. Both parties to the exchange, in this way of thinking, benefit from it. It is conceivable that in a radically different

²⁶⁵ In Matthews, Roger, *Prostitution, Politics and Policy*. NY: Routledge, 2008.

²⁶⁶ De Marneffe, *op cit*, at 155.

²⁶⁷ Banyard, *ibid*, at 230.

²⁶⁸ Kelly, Liz, “‘You Can Find Anything You Want’: a Critical Reflection on Research on Trafficking in Persons Within and Into Europe’ (2005) 43 *International Migration* 235-65; Kelly, Liz, Coy, Maddy & Davenport, Rebecca, *Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries*. London: London Metropolitan University, 2009, cited in O’Connor, Monica, *Consent, Agency and Harm: A Phenomenological Inquiry into the Experience of Women in Prostitution and Women Trafficked for Sexual Exploitation in Ireland*. Dublin: Dublin City University PhD Thesis, February 2014, at 2.

social order—one of complete gender equity and equality—the exchange of sex for money might be just such a gender-free, benign transaction. However, prostitution exists squarely within cultures of gender-based inequality. Indeed, some have persuasively argued, it is the paradigmatic expression of male domination of women .. Far from being gender-neutral, prostitution is gendered to the hilt. The buyers are men whose goal is their sexual pleasure. The bought are largely women and girls whose purpose – if they are enough in control of their destinies to have a purpose—is often economic survival. The businesses are controlled by men, often assisted by women in their employ. Their goal is profit—and the profits figure in the billions.... pimps and sex industry profiteers have made prostitution into a system of domination that is remarkably consistent across cultures – one that mirrors the dynamics of power and control exerted by domestic violence perpetrators over the women they abuse. Like prisons or concentration camps, prostitution often does not require overt physical coercion or verbal threat since the system of domination perpetuated and enforced by sex industry businessmen and buyers is intrinsically coercive.²⁶⁹

The view of prostitution as explicitly gendered exploitation, carried out within a massive global sex industry has had greatly increased influence in recent years upon policy-makers, as Sutherland concludes:

Radical feminists ... have had a substantial impact on the development and adoption of anti-trafficking legislation and instruments in various countries and at the international level.²⁷⁰

This view is also supported by the writing and scholarship outlined earlier which has generated evidence that prostitution amounts to intersectional exploitation on grounds of class and ethnicity; not just of women and girls by reference to their gender, but of the most disadvantaged women and girls in every society. Thus, different jurisdictions have, like Ireland, introduced legal regimes which have moved from the traditional ‘public nuisance’ view of prostitution to an alternative perspective which emphasises the harm it causes to women, particularly women in poverty and drawn from ethnic minorities, and its impact upon gender relations in society.

By contrast with the international momentum among policy-makers towards the Nordic model, within academic writing, the alternative ‘sex work’ perspective has become dominant, with a clear marginalisation of the radical feminist perspective.²⁷¹ Coy suggests this may be due to what Sylvia Walby has identified as ‘a ‘neoliberal’ turn in the academy, as mentioned previously.²⁷²

Indeed, Walby suggests that the celebration of individual agency and of ‘raunch culture’ within contemporary third-wave feminist writing effectively masks the way in which

²⁶⁹ Leidholdt, Dorchon, ‘Prostitution and Trafficking in Women: An Intimate Relationship’ (2003) 2(3) *Journal of Trauma Practice* 167-183, at 170-1.

²⁷⁰ Sutherland, Kate, ‘Work, Sex and Sex-Work: Competing Feminist Discourses on the International Sex Trade’ (2004) 42 *Osgoode Hall Law Journal* 139, 140.

²⁷¹ See eg Bindel, Julie, *The Pimping of Prostitution: Abolishing the Sex Work Myth* (London, Palgrave Macmillan, 2017) ch 9.

²⁷² Coy, Maddy, *Prostitution, Harm and Gender Inequality* (2012) 3, citing Walby, Sylvia, *The Future of Feminism* (2011) 23.

commercialised sexuality represents a new form of control over women, an exploitative neoliberal gender regime.²⁷³

1.6 The 'Liberal' Approach: Prostitution as Sex Work

This 'neoliberal' turn is evident in much recent feminist academic writing, which has challenged the 'prostitution as exploitation' argument associated with radical or socialist (or critical race) feminism. The alternative approach, portraying prostitution as a form of work, and suggesting that the moral agency of those women who choose to enter it must be respected, is often associated with liberal feminist theorising; although Frug identifies it as a postmodern position. But Carole Pateman notes that these feminist defences of prostitution have a long history; back to when Mary Wollstonecraft referred to marriage as 'legal prostitution' in 1790,²⁷⁴ or when Emma Goldman wrote that 'it is merely a question of degree whether [a woman] sells herself to one man, in or out of marriage, or to many men.'²⁷⁵

Cicely Hamilton argued in 1909 that 'the prostitute class ... has pushed to its logical conclusion the principle that woman exists by virtue of a wage paid her in return for the possession of her person.'²⁷⁶ Simone de Beauvoir similarly wrote that the wife is 'hired for life by one man; the prostitute has several clients who pay her by the piece. The one is protected by one male against all the others; the other is defended by all against the exclusive tyranny of each.'²⁷⁷

Kingston notes that the view of sex as work has tended to be advocated by liberal feminists such as Valerie Jenness, who argue that most women who engage in prostitution do so out of a conscious choice to sell sex.²⁷⁸ Thus, although Frug identified the 'sex work' position as arising out of a postmodern or deconstructivist frame of reference, it is argued within this thesis that it may more clearly be identified with a liberal perspective, particularly in more recent discourse; as discussed above, Maddy Coy suggests that the marginalisation of radical/abolitionist feminist voices within academic discourse may be due to a 'neoliberal turn' in the academy.²⁷⁹

It is however often unclear which strand of feminist theory is adhered to by proponents of the 'sex work' approach. Many of its advocates, without explicitly adhering either to postmodern or liberal theory, instead take an explicitly standpointist position, arguing that they are just expressing the voices of those themselves engaged in prostitution. For example, Jill Nagle presents the voices of 'feminist sex workers' in her 1997 text,²⁸⁰ while in her history of the prostitutes' rights movement, Melinda Chateaufort argues that 'Sex workers have been fighting for their right to work, for respect and justice, for a very long time'.²⁸¹ Other

²⁷³ Walby, *ibid*, 19-20.

²⁷⁴ Wollstonecraft, Mary, *A Vindication of the Rights of Women*. NY: Norton, 1975, first published 1790, at 148; quoted in Pateman, *op cit*, at 54.

²⁷⁵ Goldman, Emma, 'The Traffic in Women' in Goldman, Emma, *Anarchism and Other Essays*. NY: Dover, 1969, at 179; quoted in Pateman, *op cit*, at 54. Notably, Bhattacharya uses a Marxist analysis to argue that *both* marriage and prostitution represent sites which are exploitative of women; see Bhattacharya, Malina, 'Neither 'Free' nor 'Equal' Work: a Marxist Feminist Perspective on Prostitution (2016) 1(1) *Indian Journal of Women and Social Change* 82-92, at 85-6.

²⁷⁶ Hamilton, Cicely, *Marriage as a Trade*. London: Women's Press, 1981, at 37.

²⁷⁷ De Beauvoir, Simone, *The Second Sex*. NY: Vintage Books, 1974, at 619; ; quoted in Pateman, *op cit*, at 54.

²⁷⁸ Jenness, Valerie, *Making It Work: the Prostitutes' Rights Movement in Perspective*. Aldine de Gruyter, 1993.

²⁷⁹ Coy, *op cit*, at 3.

²⁸⁰ Nagle, Jill, *Whores and Other Feminists*. NY: Routledge, 1997.

²⁸¹ Chateaufort, Melinda, *Sex Workers Unite: a History of the Movement from Stonewall to Slutwalk*. Mass: Beacon, 2013.

advocates of the 'sex work' approach similarly place their perspective in a rather rose-tinted historical context. In one noteworthy example of this, Sanders *et al* argue that

Prostitution was not always seen as deviant behaviour. The earlier records of prostitution show that it took place in temples: to visit a prostitute was to make paeans to the goddess.. resistance to prostitution began in around 1200 .. and, as time went on, the systematic denigration of sexuality, particularly female sexuality, engendered increasingly intolerant attitudes towards prostitutes. Since then... sex workers have been organizing for their rights and staging resistance to oppression sporadically throughout history.²⁸²

This romanticised notion of 'prostitution past' is contrasted with the stigmatising of 'prostitution present', so that, in the words of Sanders *et al*,

the current discourses and laws regulating sex work are framed by these puritanical campaigns that sought to regulate the morality and hygiene of prostitutes and led to the making of an outcast group.. Currently women working as prostitutes are perceived as 'bad girls', contravening norms of acceptable femininity, and increasingly criminalized by state, policing practices and the lack of effective action taken by policy-makers to address the complexities of women's and men's lives in the broader context of poverty, globalization and capitalism and an understanding that, in consumer capitalism, 'sex sells'.²⁸³

Sanders *et al* suggest that a positive alternative to this construction of prostitution was offered in emerging theoretical arguments from the 1970s onwards, which

spoke out against the 'victimization' of sex workers' perspectives but instead put forward a perspective that was based on human rights, sexual freedom and diversity among women's experiences.. The backlash against radical feminist ideas centres on the notion that by constructing women involved in prostitution as only 'victims', the objects of male oppression and passive in their own lives, the 'agency' of women is denied. This argument about 'agency' essentially refers to women's free will and their ability to make decisions about their circumstances and how they use their bodies.²⁸⁴

They write that the term 'sex worker' was coined to reflect this backlash approach, 'as a way of identifying that sexual labour could be considered work and that the woman's identity was not only tied up with the performance of her body'.²⁸⁵ In acknowledging that choosing to work in the sex industry is not the same as choosing 'a career as a beautician or nurse', they suggest that women may 'make an informed 'rational choice' to work in prostitution, rather than a 'free choice', available to few individuals in a society that is structured hierarchically by race, sex and class'.²⁸⁶

The argument that women exercise free moral agency in 'choosing' to enter prostitution does have a powerful resonance for many feminists. Thus, Jo Phoenix, cited above, who has written extensively on prostitution law, suggested in one of her earlier texts that women

²⁸² Sanders, Teela, O'Neill, Maggie and Pitcher, Jane, *Prostitution: Sex Work, Policy and Politics*. London: Sage, 2009, at 1-2.

²⁸³ Sanders *et al*, *ibid*, at 2.

²⁸⁴ Sanders *et al*, *ibid*, at 9.

²⁸⁵ Sanders *et al*, *ibid*, at 9.

²⁸⁶ Sanders *et al*, *ibid*, at 10.

become involved in prostitution because it ‘makes sense’ to them, within the social and material conditions in which they live.²⁸⁷ She argued that

whilst the law has constituted prostitutes as different from other women by virtue of the public nuisance it is assumed they cause, and by virtue of the supposed risk they present to public sexual health, and whilst academic literature has variously constituted prostitutes as either different from or similar to other women, prostitute women understand themselves as being, contradictorily, both the same as and different from other women.²⁸⁸

Phoenix also argued that those feminists who portray prostitution as violence perpetrated upon women by men thereby ‘close the theoretical space for a discussion of non-victimised prostitutes or prostitutes who do not see themselves as victims.’²⁸⁹ In subsequent publications, Phoenix has repeatedly articulated this view of prostitution and vehemently rejected the contention that prostitution necessarily constitutes exploitation. For example, writing with Sarah Oerton in 2005, she argued that when prostitution is constituted as ‘violence’, ‘abuse’ and ‘exploitation’, it is also constituted as a ‘threat to communities’ and this

explicit re-inscription of prostitution.. forecloses the space in which it is possible to recognize the poverty and social and material conditions that many individuals involved in prostitution experience... Fundamental to this process has been the construction of individuals involved in prostitution as having little or no individual agency. They are not individuals actively negotiating their social environment and circumstances. They are victims: passive, entrapped, forced and waiting to be rescued.²⁹⁰

She and Oerton suggested further that the rhetoric of victimhood deployed tends to rely ‘on an all too literal understanding of ‘consent’, ‘voluntarism’ and ‘coercion’... if individuals in prostitution are the victims of ‘abusers’ and ‘exploiters’, they have not voluntarily, rationally and actively engaged in prostitution.. ‘Force’ or ‘coercion’ is constituted as the absence of ‘voluntarism’, as the absence of choice.’²⁹¹ They argued that linking consent to voluntarism brings about an erasure of other forces, such as the forces of necessity; and causes the division of individuals in prostitution into either those who are victims, or those who made the choice and are not victims and therefore not in need of protection. Instead, they argued that recognition of individuals in prostitution as ‘victims’ is ‘an unstable category because much of the involvement in prostitution is conditioned not so much by a literal lack of choice, but by social and material conditions that funnel choices.’²⁹²

Subsequent to that publication, Phoenix returned to the subject in an edited collection of articles critiquing UK government plans for reform of prostitution, arguing that

Recognition of the very real and present risks of violence and exploitation faced by many sex workers has served to ignite debate about whether those

²⁸⁷ See for example Phoenix, Jo, *Making Sense of Prostitution*. England: Palgrave MacMillan, 1999; Phoenix, Jo (ed), *Regulating Sex for Sale: Prostitution, Policy Reform and the UK*. Bristol: Policy Press, 2009.

²⁸⁸ Phoenix, 1999, *ibid*, at 3.

²⁸⁹ Phoenix, 1999, *ibid*, at 67.

²⁹⁰ Phoenix, Jo and Oerton, Sarah, *Illicit and Illegal: Sex, Regulation and Social Control*. London: Willan, 2005, at 93.

²⁹¹ Phoenix and Oerton, *ibid*, at 97.

²⁹² Phoenix and Oerton, *ibid*, at 102.

involved in prostitution are forced or coerced into it or whether their involvement is chosen or voluntary. Such binary distinctions function in such a way that the question of economic necessity has been largely displaced in an endeavour to show that individuals selling sex are sex slaves, economic entrepreneurs or offenders and threats to community safety, stability and security.²⁹³

Those who, like Phoenix, advocate for a 'sex as work' approach, tend to be highly critical of what they describe as 'abolitionism'. They challenge the 'exploitation' approach in its application both in national and trans-national legal regulation (trafficking). For example, Jo Doezema challenges accepted international thinking on sex trafficking, arguing that the so-called 'white slave trade' is a modern myth.²⁹⁴

Munro argues similarly that the concept of exploitation has been misunderstood in debates on sex and labour trafficking, deployed to preserve dubious victim hierarchies; she argues that it is possible that a meaningful degree of agency is exercised in entering into such transactions which, while exploitative, may bring a level of advantage to both parties.²⁹⁵ In the same text, Fitzgerald suggests that a feminist perspective focused on campaigning against trafficking may become too closely aligned to a conservative anti-immigration agenda that itself would threaten and undermine female mobility and behaviour.²⁹⁶

Scoular and O'Neill are highly critical of what they describe as 'an abolitionist vision: one which understands prostitution as paradigmatic of male power and seeks its elimination by removing both the supply and demand of sexual services'.²⁹⁷ They argue that the radical approach to prostitution has created a rhetoric around victimhood of women who sell sex, which needs to be unpacked; a process they describe as 'de-Othering'.²⁹⁸ They say that this approach suggests that

The very act of selling sex makes victims of the women involved. However, if we loosen up this analysis and introduce the complex contexts in which sex is bought and sold cross-nationally then a different picture emerges. .. we can see that economic need, a lack of other viable options, poverty and conflict.. can create the motivating agents for entry into sex work. And, moreover, that women who sell sex do not always experience themselves as victims.²⁹⁹

They are also highly critical of the adoption of legal frameworks like that in Sweden, which seek to tackle demand for prostitution by criminalising the purchase of sex and which seek to tackle supply through strategies supporting women in exiting prostitution, stating that

²⁹³ Phoenix, Jo (ed), *Regulating Sex for Sale: Prostitution, Policy Reform and the UK*. Bristol: Policy Press, 2009, at 11.

²⁹⁴ Doezema, Jo, *Sex Slaves and Discourse Masters: the Construction of 'Trafficking'*. NY: Zed Books, 2010.

²⁹⁵ Munro, Vanessa, 'Exploring Exploitation: Trafficking in Sex, Work and Sex Work' in Munro, Vanessa and Della Giusta, Marina (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution*. UK: Ashgate, 2008.

²⁹⁶ Fitzgerald, Sharron, 'Putting Trafficking on the Map: The Geography of Feminist Complicity' in Munro, Vanessa and Della Giusta, Marina (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution*. UK: Ashgate, 2008.

²⁹⁷ Scoular, Jane and O'Neill, Maggie, 'Legal Incursions into Supply/Demand: Criminalising and Responsibilising the Buyers and Sellers of Sex in the UK' in Munro, Vanessa and Della Giusta, Marina (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution*. UK: Ashgate, 2008, at 13.

²⁹⁸ Scoular and O'Neill, *ibid*, at 25.

²⁹⁹ Scoular and O'Neill, *ibid*, at 25.

While at first glance efforts to exit women may seem like an important move in recognising the harm and social marginalisation experienced by women involved in sex work, our recent work shows that such ‘social inclusion’, when premised on responsibilisation to exit, may be more rhetorical than real.³⁰⁰

Indeed, much recent pro-sex work literature has sought to emphasise the marginalisation and stigmatisation by society of those engaged in the sex trade – and often to impugn or attack the motivations of those who see prostitution as exploitation. Writing in a US context, Ronald Weitzer, for example, suggests that ‘right-wing political and religious forces’ are ‘the dominant forces in the anti-trafficking, abolitionist crusade’ in the US and that their influence has resulted in the targeting of all sectors in the commercial sex industry for ‘repression’.³⁰¹

Other writers fall short of ascribing religious conservative motivation to pro-Nordic model campaigners but suggest that they are not serious about tackling gendered poverty. For instance, while acknowledging that ‘all sides in feminist prostitution politics highlight poverty as driving individuals into the sector’, Fitzgerald and McGarry argue that ‘some feminists never seem to fundamentally address ‘other’ women’s poverty beyond set-piece statements about the complexity of this issue’; they argue that their alternative approach is to put forward an ‘agenda for change’ to challenge what they term the ‘undemocratic practices [which] have long reinforced the inequalities sex workers face.’³⁰² They say that their collection aims to provide ‘a solid foundation for an effectual agenda for change for sex workers guided by a social justice frame.’³⁰³

As indicated earlier, even where the harms associated with prostitution are acknowledged in this literature, they are ascribed to the stigmatisation of the sex trade. For instance, in the study into homicides of those engaged in the sex trade by Cunningham *et al* referenced previously, it was found that ‘sex workers are, by a large margin, the occupational group at most risk of homicide in the United Kingdom and the United States’; yet - rather than acknowledging the inevitable risks inherent to engaging in the sex trade - the authors argue that ‘[e]xisting knowledge on occupational homicide and how to reduce vulnerability must be used in designing and implementing sex work policy..’ and that, ‘most important of all,.. work must be done to challenge and counter the pervasive stigma that exists against sex workers, making them so vulnerable to all forms of violence, including homicide.’³⁰⁴

A more nuanced approach to the question of harms associated with the sex trade was adopted in a recent survey by Hester *et al* seeking to establish the prevalence of prostitution in England and Wales, based on over 500 responses from those currently or formerly engaged in the sex trade, which found ‘recurrent patterns of experience or identity that mark some individuals’ entry into the sex industry.’³⁰⁵ The authors stated their recognition

that there are many individuals in prostitution who are subject to acute exploitation and serious and sustained harm. Some identify selling sex as a pleasurable and lucrative career choice, or as a therapeutic vocation. Our sense from the data that we

³⁰⁰ Scoular and O’Neill, *ibid*, at 21.

³⁰¹ Weitzer, Ronald, ‘The Movement to Criminalize Sex Work in the United States’ (2010) 37 (1) *Law and Society* 61-84, at 83-4.

³⁰² Fitzgerald, Sharron and McGarry, Kathryn (eds), *Realising Justice for Sex Workers: an Agenda for Change*. Lanham, MD, US: Rowman and Littlefield, 2018, at xxiii.

³⁰³ *Ibid*, at xxvii.

³⁰⁴ Cunningham *et al*, 2018, *op cit*, at 14-15.

³⁰⁵ Hester, Marianne, Mulvihill, Natasha, Matolcsi, Andrea, Lanau Sanchez, Alba and Walker, Sarah Jane, *The Nature and Prevalence of Prostitution and Sex Work in England and Wales Today*. UK: Bristol University, 2019.

have collected .. is that a substantial proportion of individuals (mainly women and trans women) are selling sex to get by financially, given different constraints in their lives .. Their situation is compounded by stigma and managing safety, and many find that the longer they sell sex, the harder it can be to leave completely. This moves beyond individual ‘choosing or ‘not choosing’ and recognises the structural economic and social context in which choices are narrowed: or in the case of those coerced in to selling sex, choices removed.³⁰⁶

However, other recent literature drawn from a pro-sex trade perspective has become increasingly hostile to the ‘exploitation’ perspective, tending to question and challenge the motivations of those who see prostitution as exploitation. As previously discussed, Elizabeth Bernstein has described feminists who seek stronger state intervention to tackle gender-based violence disparagingly as ‘carceral feminists’.³⁰⁷ This description and that of ‘penal populism’ is also used by Phillips and Chagnon.³⁰⁸ Applying this terminology, in a discussion of the ‘rise of the international sex workers movement’, Prabha Kotiswaran thus describes ‘anti-trafficking discourse’ as displaying a ‘carceral approach’; while Crystal Jackson writes about the ‘whorephobia of carceral politics’.³⁰⁹ Similarly, writing from a standpointist perspective, Juno Mac and Molly Smith also describe those who support Nordic model laws as ‘carceral feminists’, referring to supposed links between religious conservatism and campaigns seeking to criminalise the purchase of sex.³¹⁰

1.7 Conclusions

For much of the twentieth century, criminology was a men-only space, with scant attention paid to theories about women and crime. Similarly, theories of law and jurisprudence generally overlooked women. This began to change with the emergence of the second-wave feminist movement in the late twentieth century, as women began to enter legal practice and the legal academy in more significant numbers. Women writing about law began to generate a body of theorising referred to generally as feminist legal theory or feminist jurisprudence; the body of feminist scholarship on crime and criminal laws became known as feminist criminology. However, within these general terms, feminist theorising underwent different stages.

Within criminology, feminist writers moved from conducting empirical studies; to taking a standpointist approach to crime; and more recently, through the application of postmodernist method, to a feminist deconstructionist approach to crime, focusing on ‘doing gender’. This development has reflected new stages in feminist theorising about law more broadly, and is associated with the concept of a ‘third-wave feminism’, that critiques the concept of a unitary category of ‘woman’ and that attempts to bring in perspectives on

³⁰⁶ *Ibid*, at 11.

³⁰⁷ Bernstein, Elizabeth, ‘Carceral Politics as Gender Justice? The “traffic in women” and neo-liberal circuits of crime, sex and rights’ (2012) 41(3) *Theory and Society* 233-59.

³⁰⁸ Phillips, Nickie and Chagnon, Nicholas, “Six months is a joke: Carceral Feminism and Penal Populism in the Wake of the Stanford Sexual Assault Case’ (2020) 15(1) *Feminist Criminology* 47-69, at 50.

³⁰⁹ Kotiswaran, Prabha, ‘The Sexual Politics of Anti-Trafficking Discourse’ (2021) *Feminist Legal Studies* <https://doi.org/10.1007/s10691-020-09447>; Jackson, Crystal, ““Sex Workers Unite!”: U.S. Sex Worker Support Networks in an Era of Criminalization.” (2019) 47(3) *WSQ: Women's Studies Quarterly* 169-188.

³¹⁰ Mac, Juno and Smith, Molly, *Revolted Prostitutes: the fight for sex workers’ rights*. London: Verso, 2018. See critical review of this book in Bacik, Ivana, ‘Book Review’ (2019) 114 *Dublin Review of Books* 1-4.

class, sexuality, race and ethnicity as well as gender. Intersectional approaches are only beginning to have an impact on feminist theorising about crime; but already offering new challenges and insights.

One of the first feminist scholars to devise an explicitly postmodern perspective on law was Mary Joe Frug. Her *Postmodern Legal Manifesto* provides an analytical feminist framework for the examination of different aspects of law and the way in which they contribute to the construction of gender and the framing of stereotypes around women's bodies. In particular, her analysis of prostitution law suggests that many anti-prostitution rules serve to sexualise, terrorise and maternalise women's bodies. This theme is also developed by many feminist theorists who adopt a specifically 'sex work' approach to prostitution, arguing that it is the law that has 'problematised' prostitution, and that the criminalisation of prostitution represents an interference with the autonomy and agency of those women who choose to become 'sex workers'.

Theorists from this perspective, often describing themselves as representing the voices of women engaged in prostitution, tend to argue that state intervention is not justifiable in what should be seen as a matter of private morality, rather than a collective problem. They are critical of the approach to prostitution that sees it as inherently exploitative; an approach most closely associated with radical or socialist feminism. They argue that this approach, which underlies the Swedish law reform which decriminalised the seller of sex but criminalises the buyer, denies women agency and freedom of choice. They seek to present these arguments as being more truly 'feminist' and indeed progressive than those of the feminists who argue that prostitution is exploitative; and some even portray anti-prostitution feminists as representing a conservative or religious morality; or a form of so-called 'carceral' or punitive feminism.

This thesis however argues that the 'sex work' model of analysis does not represent a progressive form of feminist theorising, and should better be recognised as fitting within a liberal or libertarian philosophy than any postmodern or deconstructivist theoretical framework. Pro-sex work feminism emphasises the choices of the individual, divorced from any contextual analysis of structural discriminations against women – effectively 'de-gendering' what Coy calls the 'gender regime' of prostitution.

In addition, it is argued that this analysis undermines many of the key achievements of the feminist movement over many decades; that the personal/private must also be seen as political/public. Without the success of feminist campaigners in exposing realities around marital rape and 'domestic violence', for instance, these forms of violence would have remained outside the arena of the criminal law, as they had been for many centuries before.

Even in the area of reproductive choice, where feminist arguments for legalisation of abortion and contraception have often been based upon privacy rights discourses, it has become evident that, without state intervention to support access, many women will simply not have the means to exercise choices. It is not enough to argue that the state should not criminalise women who have abortions; it is argued that the state must also provide positive steps to enable access to abortion to those women who make that choice. This argument derives closely from a socialist feminist perspective, as outlined above, which sees individual choice within the context of social and economic power contexts. In this thesis, it is argued that such a perspective constitutes a more appropriate lens through which to view consent in prostitution than the more individualist lens focusing on choices and consent as abstract entities, divorced from context.

Drawing on the work of Walby and others cited above, thus, it is argued that this individualist lens applied to prostitution has generated an immense liberal 'sex work' discourse framed in ostensibly feminist language which seeks to justify engagement in the sex trade as an exercise in free agency, obscuring the reality of the global capitalist market in sex.

In recent years, this liberal 'sex work' discourse has undoubtedly become increasingly dominant in academic writing, - and so too has the pro-sex trade discourse become increasingly hostile to the 'exploitation' perspective, as detailed above. The strongly confrontational language previously outlined, remarkable in an academic context, is often focused on questioning the motivation of those who take an 'exploitation' perspective, and displays somewhat what might be described almost as contempt for the norms of rational democratic policy debates. The way in which this deeply polarised discourse has influenced the framing of laws and policies on prostitution in different jurisdictions will be reviewed in Chapter 3.

CHAPTER 2 - METHODOLOGY

2.0 Introduction

This chapter outlines the methodology used to conduct this study, commencing with an overview of the research design, including the epistemological view that guided the research. Next, the research methods are presented and the data analysis phase is described, with an overview of the progression of the analysis. Methodological issues are then explored, starting with relevant ethical considerations. Reflexive accounts of the impact of the researcher's personal status as an 'insider' and observations on the terminology and scope of the research are offered in conclusion.

2.1 Research Design

This thesis has the following research objectives. It sets out to examine critically whether a legal concept of 'compromised consent', which it is argued may be understood as having informed the motivation of those proposing 'Nordic model' laws, may be helpful in informing a feminist theoretical argument justifying the introduction of such laws to criminalise the purchase of sex. The specific focus of the analysis is upon the change in prostitution law enacted in Ireland through passage of the Criminal Law (Sexual Offences) Act 2017, Part 4 of which criminalised the purchase of sex while decriminalising its sale, in keeping with the 'Nordic model' approach.³¹¹

The thesis examines the factors influencing the development of the 2017 reforming the Interpretive Policy Analysis (IPA) approach, framed by an explicitly socialist feminist perspective, in order to conduct an analysis of reports, original policy documents, parliamentary debates and elite interviews, with a view to establishing whether a legal concept of 'compromised consent' may be understood as informing the motivation behind the law reform; and whether this can also be used to advance a feminist theoretical argument supporting the introduction of laws criminalising the purchase of sex.

A blend of approaches is used in this process. In Chapters 3-6, an empirical analysis of relevant literature, documents, legal texts and debates is conducted in order to provide a sound evidence basis for the development of the concept of 'compromised consent'; and to illustrate how it may be understood as forming the basis for the motivation behind the 2017 law. In Chapter 3, an empirical analysis is undertaken on how to frame laws and policies on prostitution within different jurisdictions. In Chapter 4, conceptions of gender and consent within Irish feminist criminological writing are analysed, while in Chapter 5, an historical criminological approach is taken to considering and analysing the development of laws and policies on prostitution in Ireland between Irish Independence in 1922 and the year 2010, when the campaign to change the law was initiated.

In Chapter 6, the campaign process itself, along with the legislative debates on the 2017 Act, are analysed. Original policy documents, parliamentary debates and elite interviews are analysed through application of an Interpretive Policy Analysis (IPA) approach, framed by an explicitly socialist feminist perspective.³¹² Thus, a manual analysis is conducted to identify those sections of text relating specifically to the prostitution-related provisions of the Bill,

³¹¹ Hereafter in this Chapter, 'the 2017 Act'.

³¹² Dvora Yanow writes that a 'frame' 'sets up an interpretive framework within which policy-related artifacts make sense.' *Conducting Interpretive Policy Analysis*. California: Sage, 2000, at 11.

and then to find numbers of speakers, breakdown by gender and by position on the legislation. Following that process, certain representative excerpts from particular speeches were extracted and reproduced in the text; and the analysis was supplemented by a small number of ‘elite interviews’ with three key players identified during the debates, as outlined in further detail below. Through analysis of the parliamentary debates culminating in the passage of the legislation, accompanied by several qualitative interviews conducted with some of the leading proponents for its adoption, the question is considered as to whether the process may be seen as having depended upon a particular understanding of consent as capable of being compromised in certain coercive contexts; an understanding which may be supported by feminist theorising around structural contexts for the exercise of individual agency.

The approach used in Chapter 6 was selected with reference to the under-researched nature of the study topic in Ireland. Interpretive Policy Analysis is a relatively new academic field, which seeks to explore the motivations behind policy making, to excavate or investigate the process by which laws and policies are adopted, in order to see what values, ideologies or motivations may have underpinned particular legal changes. This field of analysis may be limited in some respects, since it generally avoids taking a particular theoretical approach; whereas in this thesis, an explicitly socialist feminist perspective, discussed further below, is adopted in seeking to analyse recent prostitution policy-making processes in an Irish context.

Thus, this research constitutes a combination of policy analysis and feminist deconstruction of policy development and parliamentary debates; the analysis of the law reform amounts to a qualitative assessment, premised upon a recognition of the importance of discourse, meaning making, interpretation and the performance of social practices both in devising and in enacting policy.

Interpretive policy analysts have investigated mechanisms through which knowledge becomes the central device of power, creates institutions and governs them and/or legitimizes agendas of policy actors. Specifically, this thesis draws upon the method deployed by Harry Annison in his study into the process of introducing the indeterminate sentence of imprisonment for public protection (IPP) in England and Wales.³¹³

Annison’s analysis is underpinned by the interpretive political analysis framework developed by Mark Bevir and Rod Rhodes³¹⁴, who have argued that such approaches ‘concentrate on meanings [and] beliefs’, reflecting a view that ‘beliefs and practices are constitutive of each other’; they argue that change arises ‘as situated agents respond to novel ideas or problems. [Change] is a result of people’s ability to adopt beliefs and perform actions through a reasoning that is embedded in the tradition they inherit.’³¹⁵

IPA methodology is particularly appropriate for a study of this kind because it enables a focus upon the meanings, beliefs and values underlying the adoption and implementation of particular policies. An interpretive approach to policy analysis ‘is one that focuses on the meanings of policies, on the values, feelings, or beliefs they express, and on the processes by which these meanings are communicated to and “read” by different audiences.’³¹⁶

³¹³ Annison, Harry, *Dangerous Politics: Risk, Vulnerability and Penal Policy*. Oxford University Press, 2015.

³¹⁴ Bevir, Mark and Rhodes, Rod, *Interpreting British Governance*. London: Routledge, 2003.

³¹⁵ Bevir, Mark and Rhodes, Rod, *Governance Stories*. London: Routledge, 2006, 1-3, 5.

³¹⁶ Yanow, Dvora, *op cit*, 14.

Interpretive methods, as Yanow writes, are premised on the understanding that policies and political actions ‘are not *either* symbolic or substantive: they can be both at once.’³¹⁷

Such methods ‘are based on the presupposition that we live in a social world characterized by the possibilities of multiple interpretations. ... [they assume] that it is not possible for an analyst to stand outside of the policy issue being studied, free of its values and meanings and of the analyst’s own values, beliefs and feelings.’³¹⁸ Using such an approach, for example, Kristen Luker concluded that debates over abortion policy were ‘less disagreements about facts than they [were] contests over the threatened loss of public sanctioning of a set of values, beliefs and feelings.’³¹⁹

Yanow contends that meanings may be identified by researchers through ‘focusing on policy or agency artifacts as the concrete symbols representing more abstract policy and organizational meanings’; these artifacts can include ‘language.. patterns of action and interaction, written texts.. All language, objects, and acts are potential carriers of meaning, open to interpretation by legislators, implementors, clients or policy “targets”, concerned publics, and other stakeholders. At the same time, in their use, they are tools for the re-creation of those meanings and for the creation of new meanings. Through artifactual interaction, we re-embody them with meaning at the same time that we use them to communicate those meanings and to create extensions of those meanings.’³²⁰

The IPA approach was thus selected for its epistemological premise, based on the need to gain an understanding of the meanings attached to the adoption of the particular policy on prostitution embodied in the 2017 Act. Moreover, throughout the thesis the IPA approach is explicitly informed by a socialist feminist theoretical method. In positing the application of feminist methodology generally, Mary Hawkesworth writes that ‘feminist scholars share a critical orientation linked by the conceptualization of gender as an analytical category... a research guide or heuristic that illuminates new questions for research’.³²¹ By using gender as an analytical category, she asserts that ‘women and politics scholarship makes it clear that neither legislative priorities nor the standard operating procedures of legislative institutions are either gender inclusive or gender neutral.’³²² She argues that feminist analysis thus offers crucial insights, and in particular that ‘Feminist interpretive strategies suggest that a political commitment to struggle against systems that subordinate and denigrate women can enhance the truth content and deepen the insights of academic accounts of the world.’³²³

However, it must be acknowledged that the meanings behind the Nordic approach to policy are so strongly contested within the feminist academic literature on prostitution that no analysis of the law is possible without gaining an understanding of the motivations and meanings held by the key actors in driving the processes through which the law was enacted; and without explicitly clarifying precisely *what type* of feminist theoretical approach is being adopted.

³¹⁷ Yanow, Dvora, *Conducting Interpretive Policy Analysis*. California: Sage, 2000, x.

³¹⁸ Yanow, Dvora, *ibid*, 5-6.

³¹⁹ Luker, Kristin *Abortion and the Politics of Motherhood*. Berkeley: University of California Press, 1984, cited in Yanow, *ibid*, at 8.

³²⁰ Yanow, Dvora, *ibid*, at 14-17.

³²¹ Hawkesworth, Mary, in Bevir, Mark and Rhodes, R. (eds), *Routledge Handbook of Interpretive Political Science*. London: Routledge, 2016, at 354-5.

³²² At 357.

³²³ At 362.

As was outlined in Chapter 1, feminist theoretical and empirical research into prostitution has become deeply polarised between those scholars who see prostitution as ‘exploitation’ and those who regard it as ‘work’. Portraying prostituted sex as a necessarily exploitative ‘gender regime’ is a position usually associated with radical or socialist feminist theories, which offer a justification for targeting demand by making it an offence to buy sex, thereby criminalising the (almost invariably male) client, while decriminalising those (predominantly women) engaged in selling sex. By contrast, the ‘sex work’ approach, often deriving from liberal or postmodern feminist theoretical perspectives, seeks to offer a theoretical justification for those legal frameworks within which both the buying and selling of sex are legal. To complicate matters further, it is often difficult to make clear distinctions between different feminist theoretical frameworks; some scholars suggest that *both* ‘radical and liberal feminists advocate that women who consent to prostitution be respected as “sex workers.”’³²⁴

Whether deriving from a ‘liberal’, ‘postmodern’ or indeed ‘radical’ strand of feminist theorising, the ‘sex work’ perspective is currently dominant within academic discourse on prostitution; but by contrast, policy-makers internationally are increasingly leaning towards the ‘exploitation’ approach, with laws criminalising sex purchase being adopted in a growing number of jurisdictions.

Throughout this thesis, therefore, an explicitly socialist feminist perspective on prostitution is adopted. The analysis undertaken, it is argued, provides the basis for a robust theoretical feminist framework for justifying the introduction of the Nordic model approach into Irish law. This perspective is adopted explicitly because within this highly polarised field of research, as Coy et al have written, there can be ‘no hope for moving forward .. if the aim continues to be a misleading and unattainable ‘objective’ approach’; instead, we ‘must acknowledge that there are multiple possible readings of the available evidence and .. these occur through a particular lens.’³²⁵ Indeed, they point out that

Those who argue for the complete decriminalization of the sex trade as a form of labor – a model the sex industry businesses tend to prefer – come from a particular ideological position as do those researchers, like us, who argue for the Equality/Nordic Model based on the understanding that prostitution is both a cause and consequence of women’s unequal social, economic and political status in relation to men.³²⁶

In recognition of the need to incorporate a specific type of feminist critique within IPA in a study of this kind, the thematic framework for analysis adopted throughout this thesis therefore has particular regard to Maddy Coy’s work, in which she has depicted prostitution as constituting a ‘gender regime’, which ‘reproduces gender as a hierarchy .. and thus

³²⁴ Butler, Cheryl Nelson, ‘A Critical Race Feminist Perspective on Prostitution and Sex Trafficking in America’ (2015) 27(1) *Yale Journal of Law and Feminism* 95-139, at 110. Butler uses the terms ‘abolitionist feminism’ and ‘dominance feminism’ to describe those who see prostitution ‘as a form of gendered subordination against women regardless of the circumstances’; at 118.

³²⁵ Coy, Maddy, Smiley, Cherry and Tyler, Megan, ‘Challenging the “Prostitution Problem”: Dissenting Voices, Sex Buyers and the Myth of Neutrality in Prostitution Research’ (2019) 48 *Archives of Sexual Behaviour* 1931-35, at 1934.

³²⁶ *Ibid.*, at 1935.

undermines movements towards gender equality;’ she argues that prostitution may thus be seen in the context of ‘systemic gendered power inequalities’.³²⁷

2.2 Research Methods

This section outlines the research methods utilised in this study. The IPA method used in this thesis, described above, represents a distinct approach particularly appropriate to the focus upon legislative reform processes. Yanow points out that

Because of the abstract, less accessible, and less observable nature of meanings, interpretive research proceeds from an identification and analysis of the more concrete, more observable, and more accessible artifacts which embody the more abstract meanings.... Interviews, observation, and document analysis constitute the central interpretive methods for accessing local knowledge and identifying communities of meaning and their symbolic artifacts. Interpretive policy analysis often begins with document analysis... transcripts of committee hearings, various reports, legislation, or agency documents... These provide background information for conversational interviews with key actors ..identified through these documentary source.. Document analysis and conversational interviews may be preceded by or supplemented with observation of (with varying degrees of participation in) legislative debates, interest group meetings...³²⁸

Yanow concludes that using interpretive methods in this way can facilitate ‘not just a gathering of facts, but an insight into what those “facts” mean’.³²⁹

Despite the relevance of this approach for a study of prostitution policy, IPA methodology has not been used previously in an Irish context for the study of prostitution policy. Indeed, in general, prostitution policy is a markedly under-researched area in Ireland. However, a similar approach has been taken in a study into the adoption of Swedish prostitution policy conducted by Josefina Erikson, discussed in Chapter 3.³³⁰ Erikson’s study of the process of adopting the original Nordic model prostitution law in Sweden was based upon an analysis of legislative and public debates and literature.³³¹

Erikson describes her method as a ‘dynamic frame analysis’, premised, like IPA methodology, on a view of the policy production process as ‘a struggle of meaning in which some ideas are institutionalized and others ignored.. [involving] a range of actors who are actively deconstructing and reconstructing understandings and discourses’.³³² She says that policy process should be analysed as ‘a dynamic process in which actors and socially dominant ideas interact...’; thus, she adopts a ‘constructivist framework developed to allow exploration of this interaction between actors and ideas and the implications of different problem constructions’.³³³ Erikson’s ‘dynamic frame analysis’ approach, like the IPA method

³²⁷ Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality: Theory, Research and Policy*. Surrey: Ashgate, 2012, at 4, referring to the model developed by Connell, Raewyn, *Gender* (2nd ed). Cambridge: Polity Press, 2009.

³²⁸ Yanow, Dvora, *ibid*, 31.

³²⁹ Yanow, Dvora, *ibid*, 93.

³³⁰ Erikson, Josefina, ‘The Various ‘Problems’ of Prostitution – A Dynamic Frame Analysis of Swedish Prostitution Policy’, in Coy, Maddy (Ed), *Prostitution, Harm and Gender Inequality: Theory, Research and Policy*. Surrey: Ashgate, 2012.

³³¹ Erikson, Josefina, ‘The Various ‘Problems’ of Prostitution – A Dynamic Frame Analysis of Swedish Prostitution Policy’ in Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality*. Surrey: Ashgate, 2012.

³³² Erikson, *ibid*, 160.

³³³ Erikson, *ibid*, 160-1.

itself, is particularly appropriate for the detailed study of legislative processes being conducted in this thesis.

The focus of this research, upon the genesis or origin of the recent prostitution law reform in Ireland, and the process leading to its adoption, is different to that of much legal or criminological research, in Ireland and elsewhere. In general, as Coen has recently pointed out, there are few examples of academic legal scholarship in Ireland or other common law jurisdictions in which legislative debates and processes are subject to scrutiny or analysis.³³⁴ Coen says however that this methodology is sometimes used in legal history research.³³⁵ He cites Voermans, who has argued that academic lawyers overlook the importance of the legislative process and are overly ‘judge-centred’, and that ‘legislative process is not a black box or a no go area for lawyers.’³³⁶

Similarly within criminological scholarship, as Jones and Newburn point out; ‘Criminologists have traditionally focused more upon the content and consequences than upon the genesis of criminal justice and penal policy’.³³⁷ However, they point out that in recent years ‘a number of highly influential writers have addressed the question ‘what shapes criminal justice and penal policy?’ and two different perspectives have emerged in attempts to answer this question.³³⁸

The first approach suggests that crime policy is most strongly influenced ‘by national, and sub-national, political institutions, cultures and historical traditions’; thus focusing upon ‘continuing contrasts and divergences between penal policies in different nation states.’³³⁹ The second approach focuses instead upon ‘the convergence of penal policy across different national contexts’; and this is the perspective taken in their exploration of US influence over British crime control policy.³⁴⁰ They note the ‘relative dearth of empirical studies of the policy-making process in the sphere of criminal justice and penal policy’, commenting that ‘Political scientists, unsurprisingly, have shown greater interest in the details of the policy-making process... [but] there has been remarkably little interest shown by political scientists in the sphere of crime policy.’³⁴¹

Jones and Newburn have sought to address this absence of literature in their research, recognising that ‘public policy represents the outcome of a set of processes, rather than an event in itself.’³⁴² They have explicitly investigated the process of ‘policy transfer’ in the realm of criminal justice and penal policy, using the seven key questions highlighted by Dolowitz and Marsh in framing the study of policy transfer; these include ‘Who are the key actors

³³⁴ Coen refers to a number of articles in which parliamentary debates in different jurisdictions are scrutinised; see Coen, Mark, ‘“Radical reforming legislation” or “the politics of illusion”? Enacting the Criminal Evidence Act 1992’ in Heffernan, Liz (ed), (2021/22) 43(1) *Dublin University Law Journal*.

³³⁵ Coen refers to: Kha, Henry and Swain, Warren, ‘The Enactment of the Matrimonial Causes Act 1857: The Campbell Commission and the Parliamentary Debates (2016) 37(3) *Journal of Legal History* 303.

³³⁶ Voermans, Wim, ‘In the Law we Trust. Some Thoughts on the “Legislative Gap” in Legal Studies’ in Oliver-Lalana, Daniel (ed), *Conceptions and Misconceptions of Legislation*. US: Springer, 2019, 295, at 297 and 295.

³³⁷ Jones, Trevor and Newburn, Tim, *Policy Transfer and Criminal Justice: Exploring US Influence over British Crime Control Policy*. London: Open University Press, 2007, at 3.

³³⁸ *Ibid*, at 3.

³³⁹ *Ibid*, at 3.

³⁴⁰ *Ibid*, at 7.

³⁴¹ *Ibid*, at 20.

³⁴² *Ibid*, at 21. They note that the work of Paul Rock (eg Rock, Paul, ‘The Opening Stages of Criminal Justice Policy-Making’ (1995) 35(1) *British Journal of Criminology* 1-16) ‘stands out as an important exception.’

involved in the process?’ and ‘Why do actors engage in policy transfer?’.³⁴³ In carrying out their research, Jones and Newburn engaged in documentary analysis (collation and content analysis) of government and opposition publications, parliamentary debates, newspapers, pressure group and thinktank publications; and also conducted a series of interviews with key actors in the policy-making process.³⁴⁴

The analysis used in this study draws on the insights offered by Jones and Newburn, in particular noting the need to investigate the processes resulting in a particular public policy outcome and the further need to acknowledge the concept of convergence or the role of policy transfer; in this case the transfer of policy from Sweden and other jurisdictions in which a variation of the ‘Nordic model’ has been adopted, to Ireland. Throughout, the reality is recognised that in Ireland, as in every other jurisdiction where Nordic model laws have been introduced, some national variations or adaptations will have been made. As McMenzie et al suggest in their examination of prostitution law in Northern Ireland,

while the Swedish model is often presented as being a coherent package ‘made in Sweden’, it has actually been transformed on its travels, adapted to local contexts and brought into wider assemblages when it ‘lands’. So, in Northern Ireland, there are clear Swedish resonances in the [2015 Act] .. Yet there is a distinctive Northern Ireland ‘flavour’ to its take on the Swedish model that also incorporates influences from other parts of Ireland and the United Kingdom as well as wider ideas (such as those in radical feminism) whose geographical origins are difficult to pinpoint.³⁴⁵

In an historical criminology context, Loader and Sparks have similarly explored the origins of particular national crime policies in their historical sociology of crime policy.³⁴⁶ In this publication, they specifically investigated the social and historical formation of what they term a ‘liberal elitist’ style of criminal justice rule, a ‘prudent liberal paternalism’, based upon an understanding that ‘the government ought to respond to public concern about crime .. in ways that seek to preserve ‘civilised’ values’; and also the multiple ways in which since the 1970s this style has been challenged politically from both left and right.³⁴⁷ Their effort to uncover the historical sociology of particular policies is based in understandings of the social context and cultural norms expressed in those policies; it is sought to undertake a similar effort in this thesis.

In Irish criminological research, Mary Rogan has also explored historical penal policy-making processes from a policy analysis perspective, in her comprehensive publication on prison policy in Ireland.³⁴⁸ This publication, based upon Rogan’s doctoral thesis, employed discourse analysis, textual and documentary analysis techniques in drawing upon the many sources, including primary sources, used in the research.³⁴⁹ Archival material, governmental

³⁴³ *Ibid*, at 28; quoting Dolowitz, David and Marsh, David, ‘Learning from Abroad: the Role of Policy Transfer in Contemporary Policy-Making’ (2000) 13(1) *Governance* 5-24.

³⁴⁴ *Ibid*, at 36.

³⁴⁵ McMenzie, Laura, Cook, Ian and Laing, Mary, ‘Criminological Policy Mobilities and Sex Work: Understanding the Movement of the ‘Swedish Model’ to Northern Ireland’ (2019) 59 *Brit. J. Criminol.* 1199, at 1212.

³⁴⁶ Loader, Ian and Sparks, Richard, ‘For an Historical Sociology of Crime Policy in England and Wales Since 1968’ (2004) 7(2) *Critical Review of International Social and Political Philosophy* 5-32.

³⁴⁷ *Ibid*, at 20-21.

³⁴⁸ Rogan, Mary, *Prison Policy in Ireland: Politics, Penal-Welfarism and Political Imprisonment*. Oxford: Routledge, 2011.

³⁴⁹ Rogan, Mary, *Prison Policy in Ireland 1922-1972: Subversion, Stagnation and Social Change*. Trinity College Dublin, PhD Thesis, 2008.

papers, media commentary, academic materials and other sources were all examined. Discourse analysis was undertaken by Rogan ‘with the aim of exploring the motivating impulses behind’ statements and policy papers, a technique she describes as involving the ‘reading’ of texts and documents ‘in order to explore, *inter alia*, both hidden and overt meanings of communication in their social context.... Such a method was employed to assess the way in which prison policy was represented in official documents, but also in the statements made by key policy makers from the period.’³⁵⁰

In seeking to establish both the nature of prison policy in Ireland between 1922-1972, and the factors which operated upon the policy decisions taken during that period, Rogan drew explicitly upon the work of Jones and Newburn, and that of Loader and Sparks, referenced above, in engaging closely with the policy-making process and in seeking to identify the influences that contributed to shaping that process.

The IPA method used herein draws upon the methods discussed above as adopted by Rogan, Jones and Newburn, and Loader and Sparks, as well as relying upon insights derived from a reading of Harry Annison’s study, referenced above. In his study, Annison drew upon the approaches adopted by Hay, Jessop, and Loader and Sparks, using Hay’s notion that ideas provide ‘the point of mediation between actors and their environment’.³⁵¹ Annison presents findings from a series of interviews with those involved in devising and operating the IPP sentence project, in order to trace ‘the genesis, development, amendment and eventual abolition’ of the sentence, which itself represented ‘one of the most important developments in British sentencing law and penal policy in recent decades.’³⁵²

His approach seeks to explore ‘the ways in which interest groups, parliamentarians, and other concerned organizations attempted to ‘have an effect’ .. on politicians’ and officials’ thoughts and actions as regards the unfolding problems relating to the IPP sentence.’³⁵³ Reviewing the process by which the IPP sentence was introduced through the passage of the Criminal Justice Act 2003, Annison discusses the input from pressure groups and provides an overview of the parliamentary process, listing specific interventions from MPs and members of the House of Lords. He augments this discussion with insights gained from the interviews he conducted, explaining that these interviews ‘with senior ministers, officials, and other ‘powerful’ individuals are generally termed ‘elite interviews’’, drawing from Richards’ description of elite interviewees as

A group of individuals who hold, or have held, a privileged position in society and, as such, as far as a political scientist is concerned, are likely to have had more influence on political outcomes than general members of the public.³⁵⁴

Annison quotes Richards as having stated the purpose of elite interviews, to gain an ‘insight into the mind-set of the actor/s who have played a role in shaping the society in which we live and an interviewee’s subjective analysis of a particular episode or situation.’³⁵⁵

³⁵⁰ Rogan, *ibid*, at 126-128.

³⁵¹ Hay, Colin, *Political Analysis*, Basingstoke: Palgrave, 2002, 208; Jessop, Bob, ‘Interpretive Sociology and the Dialectic of Structure and Agency’ (1996) 13 *Theory, Culture and Society* 119-28; Loader, Ian and Sparks, Richard, *op cit*.

³⁵² Annison, Harry, *Dangerous Politics: Risk, Vulnerability and Penal Policy*. Oxford University Press, 2015, at vii, xi.

³⁵³ Annison, *ibid*, at 77.

³⁵⁴ *Ibid*, at Appendix, 207; quoting from Richards, David, ‘Elite Interviewing: Approaches and Pitfalls’ (1996) 16 *Politics* 199-204, at 199.

³⁵⁵ *Ibid*, at 297, quoting from Richards, *ibid*, at 199-200.

While Annison points out that the ‘value of the interpretive analysis of ‘elite interviews’ is increasingly being recognized within political science... the sustained exploration of ‘elite’ criminal justice policymaking remains a comparatively minor endeavour, notwithstanding the breadth and catholic nature of the criminological enterprise’ and he argues that this is ‘unfortunate, given the important insights that have been provided by research that has utilized elite interviews or related methods’.³⁵⁶ Annison argues that within criminological research, it is ‘essential’ to undertake ‘in-depth, sustained, and detailed considerations of the aims, beliefs and perceived constraints of criminal justice policymakers’.³⁵⁷ Further, he argues that criminological researchers ‘can draw on their own perceived ‘elite’ status in order to obtain important insights into penal policy-making. While challenges remain, the potential rewards are considerable.’³⁵⁸

Annison’s approach is adopted in this thesis, recognising the merits of applying policy analysis to the process of introducing prostitution law reform in Ireland, and in particular, the merits of conducting a series of ‘elite interviews’ in order to gain a real insight into motivations and meanings behind particular political actions in the law reform process. In other words, the focus is not just on how particular individuals or interest groups may have influenced policy formation, but also to uncover the nature and source of their motivations in doing so.

2.2.1 Prior Research into Prostitution in Ireland

Finally, it should be emphasised that the area of prostitution policy is, as previously stated, significantly under-researched in Ireland. Two relevant previous studies have been undertaken in recent years. First, an interpretative phenomenological analysis methodology was used by Monica O’Connor in her thesis, the only other recent substantial research at doctoral level on prostitution in Ireland. O’Connor’s findings were drawn from a series of interviews she conducted with women engaged in prostitution. The focus within her thesis, as she writes, is on ‘capturing the lived experience of participants and staying true to their narrative accounts.’³⁵⁹ However, that method would not be appropriate for a study seeking to examine the meanings and motivations behind legislative reform processes; and thus a very different approach is taken in this thesis.

The method used herein is also very different to that utilised by Eilís Ward, whose analysis of policy debates on prostitution in Ireland carried out before the passage of the 2017 law through the Oireachtas, focused specifically upon the public consultation process undertaken by the Joint Oireachtas Committee on Justice, Defence and Equality; she suggests that process was a ‘neo-abolitionist shoe-in’,³⁶⁰ Ward’s conclusions are contested in this thesis, based on a more comprehensive analysis, not just of the Committee proceedings, but of the entire process leading up to and following enactment of the 2017 law using IPA methodology informed by socialist feminist theory. Thus, this thesis analyses the campaign around the introduction of the legislation and the pre-legislative process before the Committee, along with the lengthy parliamentary debates themselves and the findings from a number of ‘elite interviews’ with key players in the reform process. In addition, an

³⁵⁶ Annison, *ibid*, at 217.

³⁵⁷ *Ibid*, at 217.

³⁵⁸ *Ibid*, at 217.

³⁵⁹ O’Connor, *op cit*, at 204.

³⁶⁰ Ward, Eilís, ‘The Irish Parliament and Prostitution Law Reform: A Neo-Abolitionist Shoe-In?’ in Ward, Eilís and Wylie, Gillian, *Feminism, Prostitution and the State: The Politics of Neo-Abolitionism*. Routledge, 2017, at 86.

analysis is presented of the research conducted to date into the operation of the new legislation, in the context of the ongoing statutory review into its provisions on prostitution.³⁶¹

2.3 Data Collection

As stated above, the tools of interpretive policy analysis (IPA), framed by a socialist feminist theoretical lens, were applied to the data collected in the course of researching this thesis. The data collection and analysis technique used involved identifying, reading and analysing relevant official reports of Oireachtas debates and parliamentary Committee hearings, along with considering the many submissions from individuals, non-governmental organisations (NGOs) and others which fed into the law-making process. All of the relevant reports, debates and hearing transcripts were accessed online via the highly searchable www.oireachtas.ie website. Due to the advantage of the researcher's 'insider' status as a legislator involved in the introduction of the new law, as discussed further below, all relevant documents were easily identifiable online. However, they are all also publicly accessible via the same website.

In summary, using Yanow's approach as discussed above, a combination of methods deriving from IPA approaches was used to analyse four specific sets of materials all publicly accessible via www.oireachtas.ie, namely:

- (1) Oireachtas Justice Committee hearings;
- (2) Seanad debates on the Bill when it was first introduced, over 2015/2016;
- (3) Dáil debates over 2016/17;
- (4) Final Seanad debates when the Bill concluded there in 2017.

In addition, a text analysis methodology was also deployed in the discussion of the Oireachtas debates, first by identifying manually those sections of text relating specifically to the prostitution-related provisions of the Bill, and then by conducting a further manual analysis to find numbers of speakers, breakdown by gender and by position on the legislation. Following that process, certain representative excerpts from particular speeches by those Oireachtas members who contributed most to the debate were extracted and reproduced in the text of the thesis through a manual analysis. The text analysis was supplemented by a small number of 'elite interviews' with three key players identified during the debates, as outlined in further detail below.

Overall, the texts were examined to find evidence of positions on prostitution taken by actors as identified in the literature (either pro or anti-Nordic model laws); and to identify what motivated individual actors to take one or other of these polarised positions. Through the application of this IPA approach, three prominent recurring themes were seen to emerge; namely, themes of individualised agency and choice premised upon the conception of consent as freely exercised choice ('Consent as Free Choice'); of consent as conditional in a viewpoint that recognised prostitution as 'work', but not always freely chosen work ('Conditional Consent: Prostitution as Work'); and of consent as capable of being coerced within structural power contexts and in conditions of gendered and intersectional exploitation ('Consent in a Coercive Context'). It is argued that a particular understanding of consent may be seen as underlying each of these three themes; and that, drawing on the

³⁶¹ Section 27(1) of the Criminal Law (Sexual Offences) Act 2017 requires 'a report to be prepared on the operation of the new provisions on prostitution within three years of their coming into effect. See further Chapter 5.

literature analysed in preceding chapters, individual legislators engaged in the process may be seen as motivated by one or other of these three perspectives on consent, based on their express statements made during the process.

For example, in October 2015, Senator Mary White (Fianna Fáil) stated that ‘women are often infantilised regarding their choice to sell sex, as something that they have been coerced into through circumstances;’³⁶² a view clearly compatible with the theme of seeing consent as free choice.

By contrast, several other contributors to the debate expressed uncertainty as to the appropriate model to be adopted, even where they described prostitution as ‘work;’ their words reflecting an ambivalence to the conceptualisation of consent to sell sex as genuinely being freely or unconditionally provided, in keeping with the theme identified of ‘conditional consent’. For example, in November 2016 Deputy Catherine Martin (Green Party) expressed her concern that

.. by criminalising the client, the more marginalised sex workers who continue to engage in prostitution will have to take on the burden of ensuring that the buyer of sex does not get arrested.³⁶³

However, those who expressed views most supportive of Nordic model laws during the legislative debates referred frequently to the exploitation they saw as inherent in the sex trade; often displaying an implicit or explicit understanding of ‘consent’ as rooted in its structural context, and as capable of being coerced by intersectional power imbalances. In October 2011, for example, Minister Kathleen Lynch commented that women involved in prostitution

are often vulnerable to manipulation and exploitation by others. It is hardly credible to believe they are providing sexual services for a commercial return as a result of a free choice and the physical and emotional consequences they suffer make this clear.³⁶⁴

The focus of the analysis throughout was upon the statements made and positions taken by particular players at a particular time in order to, in Annison’s words, gain an ‘insight into the mind-set of the actor/s who have played a role in shaping’ the legal reform, and to enable an analysis of ‘the aims, beliefs and perceived constraints of criminal justice policymakers’.³⁶⁵

2.3.1 Elite Interviews and Ethical Considerations

As the IPA method prioritises examining the motivations of key actors, and making sense of how they interpret their actions and the meanings behind those actions, interviews can constitute a key methodological tool. As a result, it was decided to invite key participants in the policymaking process to engage in interviews.

³⁶² Seanad Second Stage debate, 6 October 2015:

<https://www.oireachtas.ie/en/debates/debate/seanad/2015-10-06/14/>

³⁶³ Dáil Second Stage debate resumed, 2 November 2016:

<https://www.oireachtas.ie/en/debates/debate/dail/2016-11-02/29/>

³⁶⁴ Debate on first Seanad motion, 12 October 2011:

<https://www.oireachtas.ie/en/debates/debate/seanad/2011-10-12/7/>

³⁶⁵ Annison, *op cit*, at 297, 217.

Three elite interviews were thus conducted with the following individuals; former Minister Frances Fitzgerald, former Chairperson of the Oireachtas Justice Committee David Stanton TD; and former Senator (and later Minister) Dr Katherine Zappone.³⁶⁶ All three were key players engaged in the law reform process, including government Ministers or former Ministers (two women and one man). All three were also personally and professionally known to the researcher.

The relevant interviewees were identified based on their central and leading role in the legislative change process, based upon matters on the public record and upon the researcher's own personal knowledge of the process.

Prior to the initiation of the interviews, ethical approval was sought from the Research Ethics Committee of the Faculty of Arts, Humanities and Social Sciences, Trinity College Dublin. The documents supplied to the Committee by the researcher in support of the application by way of email dated 21 May 2018 were as follows: a general application form and support document setting out the purpose of the project and the academic rationale for conducting the interviews; a draft Participant Information form; and a draft Participant Consent form.

Ethical approval was granted by the Faculty Committee on 5 June 2018, subject to two minor clarifications, which required changes to be made to the participant information and consent forms to clarify: (a) that due to the context for the interviews and the status of the interviewees, the interviews would not be conducted anonymously; and (b) that participants be informed of their right to withdraw from the study.³⁶⁷ The Faculty Committee's decision was communicated to the researcher by email on 11 July 2018, and on 16 July 2018 the researcher sent back the forms to the Faculty Administration office, revised to take account of these points.³⁶⁸

During the approval process, three primary ethical considerations were identified as potentially arising, as follows:

(i) Confidentiality

The first ethical consideration or risk identified related to potential breaches of confidentiality. Participants were offered the option of not providing their names, prior to having interviews conducted with them. However, it was acknowledged that, given their high profile positions and the visibility of their involvement in this process, confidentiality could not be guaranteed.

³⁶⁶ Frances Fitzgerald (now an MEP) was Minister for Justice between 2014-2017; David Stanton (now a TD) was Chairperson of the Oireachtas Justice Committee between 2011-2016; and Dr Katherine Zappone (formerly a TD and Minister for Children and Youth Affairs 2016-20) was the Independent Senator from 2011-2014 who instigated the motion on prostitution which paved the way for the law reform. Frances Fitzgerald and David Stanton are both members of Fine Gael, the majority party in government in both the 2011-2016 and 2016-2020 terms. Katherine Zappone was an Independent Senator from 2011-2016, and then became a Minister (albeit still Independent) in the Fine Gael-led government from 2016-2020.

³⁶⁷ It was clarified that, given the nature of the study, it was not only not necessary for interviewees to be anonymous, it was also not desirable.

³⁶⁸ All the relevant documents are included in the Appendix to this thesis, namely: (1) the application form for approval to the Faculty Committee; (2) the support document accompanying the application, setting out the purpose of the project and the academic rationale for conducting the interviews; (3) the Faculty Committee decision dated 5 June 2018; (4) the Participant Information form (revised to take account of Faculty Committee decision, July 2018); and (5) the Participant Consent form (revised to take account of Faculty Committee decision, July 2018).

It was also acknowledged that as ‘elite’ interviewees, such individuals were in a good position to be able to decide if they wished to proceed on the basis of being identified.

To manage the confidentiality issue, the researcher provided participants in advance of each interview with an Information form which stated that

You will be asked questions about the factors you think influenced and motivated key policy-makers and legislators like yourself in the debates on change to Irish law on prostitution. I would like to record your interview on an audio file, but only with your consent. I would also like to be able to attribute quotes to you, but again only with your consent.

Participants were also provided in advance of the interview with a Consent form which again stated that ‘I understand that quotes may be attributed to me, with my consent.’ Each participant was thus informed that if they were not happy to have any or any particular quotes attributed to them, their wishes would be respected. Moreover, the voluntary nature of participation was emphasised at every step. Participant options were clearly explained in both the Participant Consent form and the participant information sheet, and again orally before the interview commenced; participants were also given time in advance of the interview to review the Information form before deciding if they wished to be identified.

In addition, steps were also taken to ensure against any breach in confidentiality of the responses provided during the interviews. Participants/interviewees were also informed explicitly in both the Information form and the Consent form of their right to withdraw from the study at any time.³⁶⁹

(ii) Data Storage

The second ethical issue concerned data storage. This was addressed through informing each interviewee in advance on the Participant Information form that the interview would be audio recorded and later transcribed by the researcher present. Following conclusion of the interviews, participants were informed that original recordings would be stored securely and then destroyed following transcription. Data storage, retention and disposal was at all times in accordance with regulations as set out by Trinity College Dublin and as required under the Data Protection Acts.

As participants were informed, the transcript and notes of each interview are stored on an encrypted computer in Trinity College Dublin Law School in a password-protected file for five years following the end of the project; the hard copy notes and transcripts are kept in a locked cabinet in a locked office to which only the researcher and supervisor have access.

(iii) Status of Researcher

The third key ethical consideration related to the status of the interviewer/researcher as an activist and academic. As discussed further below, this PhD is explicitly ‘insider research’, that is it constitutes research conducted by an individual who, alongside the three participants interviewed through the ‘elite interview’ process, was directly involved in the law reform process as an activist and legislator. Other examples in Irish scholarship of ‘insider’ criminological research are outlined below. However, the researcher acknowledged in her

³⁶⁹ See both documents, revised to take account of Faculty Ethics Committee concerns, attached in the Appendix.

application to the Faculty Committee that ethical considerations arise, due to having worked closely with the relevant interviewees in the process of law reform; and committed to including with the thesis a specific declaration that this is ‘insider research’. A commitment was also made to acknowledge this point directly with each interviewee at the commencement and conclusion of each interview. In addition, the researcher committed to keeping a reflective journal throughout the process of the research in order to ensure a continued focus upon the issue of insider status. Throughout the process, the researcher has also engaged in peer debriefing with the supervisor, with a particular focus on the ethical issues that can arise through engagement in ‘insider research’. In particular, the concern was raised during debriefings that elite interview participants might feel pressurised to take part in the research, in light of the researcher’s position and connection with them; this was addressed through ensuring an emphasis was placed on the voluntary nature of participation through careful wording of the forms provided to interviewees in advance of each interview.

Once ethical approval had been obtained, contact was made with the three interviewees by way of formal letter, along with follow-up emails and telephone communications. Interviews were scheduled with each of them between October-December 2018.

Prior to the holding of the interviews themselves, an ‘interview template’ was developed by the researcher with input from the supervisor, containing a list of eight questions, devised and presented in order to ascertain which factors each interviewee considered had influenced and motivated them individually, and other key policy-makers and legislators like themselves in the debates on changes to Irish law on prostitution.³⁷⁰ This interview template was supplied by email to each interviewee in advance of the scheduled interview.

In particular, the following topics were covered in these eight questions:

- The interviewee’s involvement in the law change process
- The interviewee’s views on the proposed change to prostitution law in advance of the policy-making and legislative process and the influences that shaped or motivated these particular views
- The interviewee’s views on the proposed change to prostitution law following conclusion of the process and the influences that shaped or motivated these particular views

Interviews were conducted with the three interviewees who had responded positively at a venue of the interviewee’s choice, their ministerial or parliamentary offices in each case, and were conducted on a one-to-one basis.³⁷¹ In this context, the safety of the researcher and interviewee were considered, and any health and safety issues arising had been considered and found to be negligible.

Given the nature of the interviews, their subject matter (related only to the interviewees’ professional roles) and the status of the interviewees, formal debriefing arrangements were not required by the Faculty Committee; nor was anonymity of interviewees required.

³⁷⁰ The interview template, dated October 2018, is also included in the Appendix.

³⁷¹ The interviews were conducted on the following dates: (1) Interview with former Minister Frances Fitzgerald on 24 October 2018; (2) Interview with former Minister Katherine Zappone on 27 November 201; and (3) Interview with former Minister David Stanton on 4 December 2018.

As had been outlined during the process of seeking ethical approval, a Participant Information Sheet was provided to each interviewee prior to the commencement of the interview, and prior to their being asked to sign the Participant Consent Form. The researcher's personal contact details were included on the information sheet which was left with the interviewee post-interview. Each participant interviewee was asked to sign the consent form in order to give consent to participating in an interview with the researcher present lasting approximately one hour, and was also informed that their interview would be audio recorded and later transcribed. The interviews were then audio recorded and later transcribed by the researcher present.

The transcripts of each interview were analysed using IPA methodology, informed by a socialist feminist perspective, in order to identify the factors which influenced and motivated key policy-makers and legislators in their contribution to the debates on legal change; and the underlying constructions of 'woman', gender and 'the prostitute' associated with those factors. These elite interviews were thus used to provide another layer of analysis, beyond that undertaken through the documentary and text analysis work, to assist in understanding the mind-set, beliefs and motivations of key players in the change process.

2.4 'Insider' Research

As indicated above, this thesis is explicitly 'insider research', conducted by a person directly involved in the law reform process under academic investigation. . There are other examples in Irish scholarship of 'insider' criminological research, for example the doctoral thesis exploring the practice of sentencing to community service among District Judges conducted by serving District Judge David Riordan.³⁷² Specifically in the context of prostitution and sex trafficking, the doctoral research conducted by Monica O'Connor into the experiences of women in prostitution,³⁷³ and that conducted by Nusha Yonkova into the experiences of trafficked, sexually exploited women and the policy responses to those experiences, may also both be described as constituting 'insider research'.³⁷⁴ Yonkova's research is, she writes, strongly informed by her subjective positioning as 'a feminist, migrant woman, translator, advocate, support provider and researcher'.³⁷⁵

In O'Connor's thesis, she similarly provides a 'Reflexive piece on the research journey', noting that she came to the thesis with 'many years of experience of the issue,' but wishing to explore and understand 'at a theoretical level why the issue of prostitution had resulted in such a bitterly contested debate amongst feminists who on so many other areas of women's lives were in agreement.'³⁷⁶ She further notes that she has 'spent a good deal of my life campaigning for the right to sexual freedom and reproductive choices and.. cannot but believe that sexual and bodily integrity has a unique value and meaning.'³⁷⁷ O'Connor's 'reflexive piece' provides a useful template, and it is proposed to follow her example in clarifying the positionality of this researcher, based on personal, political and activist

³⁷² See Riordan, David, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective*. University College Dublin, Unpublished PhD Thesis, 2009, at <https://cora.ucc.ie/handle/10468/734>.

³⁷³ See O'Connor, Monica, *Consent, Agency and Harm: A Phenomenological Inquiry into the Experience of Women in Prostitution and Women Trafficked for Sexual Exploitation in Ireland*. Dublin City University, Unpublished PhD Thesis, 2014.

³⁷⁴ Yonkova, Nusha, *A Study of gender-specific approaches to assistance of trafficked, sexually exploited women in Ireland, Bulgaria, UK and Croatia*. University College Dublin, Unpublished PhD Thesis, 2019.

³⁷⁵ *Ibid*, Abstract.

³⁷⁶ O'Connor, *op cit*, at 204, 206.

³⁷⁷ At 207.

experience. Thus, a reflexive piece on the individual research journey that shaped this thesis is presented below in the first person.

2.4.1 Positionality and Reflexivity in Research

As a lifelong feminist activist who, like O'Connor, has a long history in campaigning on reproductive rights and abortion law reform in Ireland, I shared her puzzlement at the divisions among feminists on the issue of prostitution, and this too was a motivational force in coming to undertake this research. However, I am also a socialist activist, as a longstanding Labour Party member and public representative; and I am a feminist who has changed my own position on prostitution. If I had been embarking upon this thesis twenty years ago, I would have suggested then that prostitution should be seen as a matter of agency; that in a patriarchal society, whether women sell their bodies to men through marriage or prostitution was a question of oppression on a spectrum.

Over the years since, my own view on prostitution has changed, based on experiences in my personal and professional life. As a resident over some years of one of Dublin's red light zones, I saw daily on the streets the reality of engagement in prostitution. As a practising barrister, I represented women engaged in prostitution on related criminal charges. As a political activist with the women's section of the Labour Party (Labour Women), I worked with others on developing policy on prostitution law. And as a legislator, I participated in many hearings with NGOs working with women in prostitution, with trade unions and with other organisations seeking to adopt a new legal approach to prostitution, based upon decriminalising the seller of sex but criminalising the client specifically.

In particular, I was influenced in changing my views by the advocacy work of the Turn Off the Red Light Committee (TORL); the increasingly strong evidence about the numbers of migrant women being exploited and trafficked into prostitution in Ireland; and above all by the evidence presented before us at the Oireachtas Justice Committee hearings from those who had formerly engaged in prostitution and who strongly advocated for a Nordic model approach. It seemed to me, then, coming back to the academic literature on prostitution after these engagements, that there was an increasing disconnection between the principled reasons being offered by those advocating a decriminalisation/sex work approach in academic writings, and the real lived experiences of those women actually engaged in prostitution themselves.

Ultimately, it was the realisation that prostitution causes real harm to women, and that this harm may be seen as justifying legislators in adopting Nordic model laws; yet its existence is not sufficiently acknowledged in much of the pro-sex work academic discourse in this field that compelled my undertaking this research.

Since embarking on the research, the disconnection between the academic 'sex work' discourse and the lived realities of women in the sex trade has become even more starkly clear for me. Over recent years, the language of 'sex work' proponents has become ever more antagonistic and hostile towards those putting forward a view of prostitution as exploitative. Indeed, the view of prostitution as 'sex work' is now perceived to be a more radical position politically than the perspective on prostitution as exploitation; for example, pro-Nordic Model policies adopted by Labour Women and other sections in my own political party are now being opposed from within.

Yet, over the course of carrying out this research, my review of the extensive literature has confirmed my conclusion that, despite the superficial attraction of the agency-based academic arguments in favour of seeing prostitution as ‘work’, such arguments are only justified ultimately by reference to a liberal or indeed neo-liberal conception of ‘agency’ and ‘consent’; a conception based on an underlying ideological position that fails to take account of structural inequalities and power dynamics in different societies.

My activist background in working on the campaign to generate support for the continuance in force of Nordic Model laws in Ireland has further confirmed this position. I endorse the view of Malini Bhattacharya, in writing that as ‘an activist in the women’s movement’ in India, she ‘felt alarmed by the initiative .. by a number of international and national agencies to present prostitution as a free transaction between individuals.. as ‘work’ not more exploitative than other kinds of work within the capitalist system.’³⁷⁸

As was explored in the previous chapter, by contrast, a feminist position that takes greater account of lived realities and structural contexts enables an understanding of agency, choice and consent as capable of being compromised in certain settings. Such a feminist position, informed by socialist theory, is put forward in this thesis. It is argued that this theoretical framework is the most relevant to understanding the lived realities of women in prostitution, and that it can offer a robust justification for the introduction of Equality/Nordic Model legislation. Thus, a socialist feminist position has guided my choice of subject, my research instruments and methodology, and my analysis. In keeping with the positionality adopted by other researchers in this deeply polarised field, my own personal, political and activist experience as outlined above has shaped me as a researcher and thus infuses this research. Being so close to the policymaking process has undoubtedly affected the manner and output of my research to the point where I often experienced frustration in reading analysis of debates in which I had participated, the findings about which I disagreed; but I have endeavoured at all times, ably supported by my supervisor, to retain an analytical approach that is not overly influenced by my own view or role in the process.

2.5 Gender

The polarisation of the literature extends to choices about the terminology used in writing on prostitution. One such issue relates to the overwhelmingly gendered nature of prostitution.³⁷⁹ Throughout this thesis, the focus is upon women and girls in prostitution, since they represent the vast majority of those engaged in the sex trade, both in Ireland and globally;³⁸⁰ this includes transgender persons in prostitution who self-identify as women.³⁸¹ Recent UK research suggests that transgender persons may be over-represented in the sex trade.³⁸² In an Irish context, O’Connor and Breslin found in 2020 that 5.8% of profiles

³⁷⁸ Bhattacharya, Malini, ‘Neither ‘Free’ nor ‘Equal’ Work: a Marxist Feminist Perspective on Prostitution (2016) 1(1) *Indian Journal of Women and Social Change* 82-92, at 82.

³⁷⁹ As indicated in Chapter 1, ‘sex’ is taken to mean the biological category of ‘male’ or ‘female’, while ‘gender’ refers to the socially constructed characteristics attributed to each sex.

³⁸⁰ ‘Prostitution and sexual exploitation are highly gendered issues with in most cases women and girls selling their body.. to men or boys who pay for this service’; see Schulze, Erika, Novo Canto, Sandra, Mason, Peter and Skalin, Maria, *Study on Sexual Exploitation and Prostitution and its Impact on Gender Equality*. Brussels: EU Parliament, 2014, at 9.

³⁸¹ Breslin, Ruth, Latham, Linda and O’Connor, Monica, *Confronting the Harm: documenting the prostitution experiences and impacts on health and wellbeing of women accessing the Health Service Executive Women’s Health Service*. Dublin: University College Dublin Sexual Exploitation Research Programme (SERP), October 2021, at 7: less than one per cent of profiles on Ireland’s largest online prostitution advertising platform are advertised as ‘male’.

³⁸² See Hester, Marianne, Mulvihill, Natasha, Matolcsi, Andrea, Lanau Sanchez, Alba and Walker, Sarah Jane, *The Nature and Prevalence of Prostitution and Sex Work in England and Wales Today*. UK: Bristol University, 2019.

advertised on Ireland's largest online prostitution advertising platform were described as 'Transsexual' or 'TS'.³⁸³ Although it is acknowledged that men, boys and transgender/intersex persons can and do engage in selling sex, so that male prostitution does of course exist, it is well-established that women and girls represent the vast majority of those engaged in prostitution, both in Ireland and internationally.³⁸⁴ So the vast majority of those who sell sex are women or identify as women – and crucially, it is indisputable that almost all of those who buy sex are men.³⁸⁵ Thus, it can be argued that prostitution 'is not simply a private sexual transaction; it is a public institution which constructs, re-inforces and promotes a model of sexuality based on the subordination and degradation of women'.³⁸⁶

In her doctoral study, O'Connor similarly pointed out that 'This study recognises that boys and young men are also exploited in prostitution, but the focus of this thesis is on girls and women, reflecting international evidence and figures which consistently indicate that the vast majority of people in prostitution and those trafficked for sexual exploitation are female'.³⁸⁷ She developed this theme in a later publication, saying 'Whilst acknowledging the presence of young men and transgender people in prostitution, this book focuses on the primary purpose of the global commercial sex trade which is the supply of girls and women to meet male demand'.³⁸⁸ Further, as Skilbrei and Holmstrom write in a Nordic context, 'In addition to the fact that there is very little research on prostitution where men sell sex, the perspective in such research is also very different. Sexual experimentation and desire are given as explanations for men's prostitution in a way not done in relation to women's'.³⁸⁹

Throughout this thesis, the broad and inclusive terms 'women engaged/involved in prostitution' or 'women in the sex trade' are used, rather than the term 'prostitutes' or 'sex workers'. The term 'prostitute', while used in law, has justifiably been critiqued extensively as expressing a disempowering stereotype of women. However, the term 'sex worker' reflects a view of prostitution as 'work' that is strongly contested in this thesis, and is challenged by many of those who themselves are or were formerly engaged in prostitution. Recent empirical research indicates that only a small minority of women in the Irish sex trade self-identify as 'sex workers'.³⁹⁰ As Breslin *et al* write, the terms 'sex work' and 'sex worker' are regarded by survivors of the sex trade as 'attempting to frame prostitution as a form of

³⁸³ O'Connor, Monica and Breslin, Ruth, *Shifting the Burden of Criminality: an analysis of the Irish Sex Trade in the Context of Prostitution Law Reform*. Sexual Exploitation Research Programme (SERP), University College Dublin, 2020, at 36.

³⁸⁴ See for example Breslin, Ruth, Exploitation as 'Usual': Emerging evidence on the impact of Covid-19 on Ireland's sex trade. Dublin: SERP UCD, December 2020, at 7. In this thesis, the term 'women' includes transgender persons in prostitution who identify as women.

³⁸⁵ Although some recent scholarship has focused upon the small number of women who buy sex; see Kingston, Sarah, Hammond, Natalie and Redman, Scarlett, *Women Who Buy Sex: Converging Sexualities?* Oxford: Routledge, 2020.

³⁸⁶ O'Connor, *The Sex Economy*. Newcastle upon Tyne: Agenda Publishing, 2019, at 6 (quoting Coy, Maddy, 'I am a person too: women's accounts and images about body and self in prostitution' and Jyrkinen, Marjut, 'McSexualisation of bodies, sex and sexualities', both in Coy, Maddy (ed), *Prostitution Harm and Gender Inequality: Theory, Research and Policy*. Aldershot: Ashgate, 2012.

³⁸⁷ O'Connor (2014), *op cit*, at 4.

³⁸⁸ O'Connor (2019), *op cit*, at 6.

³⁸⁹ Skilbrei, May-Len and Holmstrom, Charlotta, *Prostitution Policy in the Nordic Region: Ambiguous Sympathies*. England: Ashgate, 2013 at 52.

³⁹⁰ Breslin, Ruth, Latham, Linda and O'Connor, Monica, *Confronting the Harm: documenting the prostitution experiences and impacts on health and wellbeing of women accessing the Health Service Executive Women's Health Service*. Dublin: University College Dublin Sexual Exploitation Research Programme (SERP), October 2021, at 6.

regular work’, and thus are ‘exclusive and deeply problematic terms that serve to obscure and obviate the profound harms of sexual exploitation that they have endured.’³⁹¹

2.6 Terminology and Scope

A question also arises as to the nature of ‘prostitution’ itself. Maddy Coy, borrowing from Joyce Outshoorn’s work, defines ‘prostitution’ as ‘commercial sex’ or ‘heterosexual sexual exchanges, with men buying the sexual services of women, within a set of social relations implying unequal power relationships between the two sexes’.³⁹²

Elsewhere, Kelly, Coy and Davenport clarify that this definition is ‘a narrower concept than ‘sex work’ that includes lap dancing, phone sex and pornography.’³⁹³ Thus, when they refer to ‘prostitution/selling sex or commercial sex’, they write that this means ‘face to face contact, in which some form of sexual/bodily contact takes place, most commonly penetrative sex’; they also do not use the terms ‘prostitute’ or ‘punter’, instead preferring ‘those who sell and buy sex’, arguing this approach is preferable because it signifies that they see women who sell sex as remaining ‘in the category women, rather than ‘otherising’ them’.³⁹⁴ The definitions proposed by Outshoorn, Coy, Kelly *et al* are adopted throughout this thesis in analysing feminist discourse on prostitution.

As Skilbrei and Holmstrom suggest, it is difficult deciding upon terms to apply in any academic discussion on prostitution. They write that in ‘a Nordic context, naming prostitution work, calling people involved in prostitution sex workers and using a market language to describe the relations within prostitution (“selling”, “buying”, “seller”, “buyer”, “prostitution market” etc) are often seen as problematic as it entails a specific interpretation of what prostitution is.’³⁹⁵

Thus, in this thesis the language used will not be that of ‘work’; rather, the phrase ‘engaged in prostitution’ will generally be used to describe those (mainly) women who carry out the sale of sex. This is the same approach to terminology adopted in an earlier study of prostitution in Ireland with which this author was involved, where we wrote that ‘prostitution was not viewed in terms of employment rights and we eschewed the term ‘sex-worker’ throughout this report.’³⁹⁶ The more neutral term ‘engaged in prostitution’ was also used throughout that report.

This is not a thesis about trafficking nor about the experiences of women (or men) engaged in prostitution; in an Irish context, Monica O’Connor has recently carried out extensive experience-based research based on interviews with women engaged in prostitution, and her findings will be referenced in this thesis.³⁹⁷ It is also acknowledged that an immense literature now exists on trafficking in human beings for the purpose of sexual exploitation, beyond the

³⁹¹ Breslin *et al*, *ibid*, at 6.

³⁹² Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality: Theory, Research and Policy*. Surrey: Ashgate, 2012, at 1, referring to Outshoorn, Joyce, ‘Introduction: Prostitution, Women’s Movements and Democratic States’ in Outshoorn, Joyce (ed), *The Politics of Prostitution*. Cambridge University Press, 2004, at 3.

³⁹³ Kelly, Liz, Coy, Maddy and Davenport, Rebecca, *Shifting Sands: a Comparison of Prostitution Regimes across Nine Countries*, Report. Child and Woman Abuse Studies Unit, London Metropolitan University, 2009, at 7.

³⁹⁴ Kelly *et al*, *ibid*, at 7.

³⁹⁵ Skilbrei, May-Len and Holmstrom, Charlotta, *Prostitution Policy in the Nordic Region: Ambiguous Sympathies*. England: Ashgate, 2013, at 2.

³⁹⁶ Trinity College Dublin Centre for Gender and Women’s Studies, *Interdisciplinary Report on Prostitution in Ireland*. Dublin: TCD, 2009, at 8.

³⁹⁷ See O’Connor, *op cit*, at 104: ‘this doctoral thesis aims to explore the lived experience of prostituted and trafficked women.’

scope of this thesis, which will instead focus upon prostitution specifically. Some reference to the literature on trafficking will be made however in the literature review. The focus of the thesis will be upon adult prostitution, rather than upon child prostitution or trafficking. The ideological debates about prostitution have had this focus, as patently very different considerations apply to prostitution involving children or trafficked persons, and there is not the conflict in terms of ideological approaches that applies in debates concerning adult prostitution.

2.7 Conclusions

As outlined in Chapter 1 and as will be seen in subsequent chapters, there is an abundance of highly contested literature on the different legal frameworks for regulation of prostitution. However the focus of this thesis is on an analysis of the process of Irish prostitution law reform, in order to examine the mind-set and motivations of those who made the policy decision to adopt a law criminalising the purchase of sex but decriminalising its sale – based essentially on the so-called Equality/Nordic Model which sees prostitution as exploitation. In examining this policy decision, the motivation of legislators in rejecting an alternative approach is also reviewed; that is, the approach seeing prostitution as a form of work (the ‘sex work’ model), leading to the decriminalisation or legalization of the sale and purchase of sex (as in the Netherlands and New Zealand, for example). Thus, the study focuses upon the ‘meanings [and] beliefs’ that underpinned the introduction of the Nordic model law in Ireland.³⁹⁸

In analysing the construction of key gendered concepts like that of ‘consent’ embedded in this decision-making process, the view of the ‘sex work’ position as the more radical approach is contested. Instead, it is argued that, once the meanings underlying this approach are critically evaluated through IPA methodology, this approach may more accurately be depicted as a neo-liberal model associated with free market theory. The ‘exploitation’ model, it is argued, is in fact more closely identifiable with a socialist feminist ethos that resists the commodification of sex, as well as with the radical feminist ethos with which it is most frequently portrayed as being associated. As will be seen in the following chapters, within the debates on law reform in Ireland, since the ‘exploitation’ model has been adopted into legislation, there has been much academic critique of that model, with some critics who favour the alternative ‘sex worker’ approach suggesting that the 2017 Act reform was based on an alliance between radical feminists and a conservative Christian/religious movement which is opposed to women exercising moral agency or choice.

A central question for the analysis within this thesis, thus, is whether the ‘exploitation’ model can be reclaimed and justified as a progressive feminist model, and conversely the ‘sex work’ model identified as a neoliberal, conservative model. If the Irish law reform is seen in those terms, then the question must be addressed as to what it may tell us about the construction of gender, how women are seen as a collective group facing structural discrimination in Irish society. It is argued that the reform may best be seen as a progressive reform, particularly in the context of other feminist campaigning around, for example, reproductive rights; certainly, it is clear that the same progressive feminist actors are and were engaged in both campaigns.

The relevance of positions taken by individual political actors on different policy issues may be questioned by advocates of the ‘sex work’ approach who see the Nordic model as

³⁹⁸ Bevir, Mark and Rhodes, Rod, *Interpreting British Governance*. London: Routledge, 2003, at 1.

inherently conservative in denying women's moral agency, whatever the motivation of those leading the campaign for its implementation. But it is argued here, based on the methodology used by Annison and others, as outlined earlier in this chapter, that this is a very relevant consideration, and that it is important to understand the mind-set, beliefs and motivations of policy-makers in the bringing about of any radical change in law, in order to uncover the meanings attached to the adoption of the particular policy on prostitution embodied in the 2017 Act. As Peter de Marneffe has argued, a significant impetus for Nordic model laws internationally derives from a progressive 'left-leaning feminist' movement; he asserts that the 'most active opponents of prostitution and its legalisation today... are left-leaning feminists who see prostitution as a form of violence against women; they are not sexual traditionalists or religious conservatives.'³⁹⁹

Through the analysis of the Irish law-making process undertaken in this thesis, it is argued that, in the mind-set of the key actors who steered through the 2017 Act, its meaning was based upon what is identifiably a 'left-leaning feminist' understanding of 'consent' as capable of being compromised by certain structural contexts.

³⁹⁹ De Marneffe, Peter, *Liberalism and Prostitution*. Oxford: Oxford University Press, 2010, at 155, previously discussed in Chapter 1. De Marneffe reviews the empirical evidence that prostitution causes harm (including harm of stigmatisation, even where it is legalised) to most of those engaged in it; and argues that 'paternalistic' anti-prostitution laws may be philosophically justified on the grounds that prostitution causes harm to those engaged in it; even if it is freely chosen and even if harm is not caused to all of those so engaged. He gives other examples of justified paternalistic laws; for example, the Irish smoking ban, or laws to restrict shop opening hours to protect workers' rights (at 155).

CHAPTER 3 - Framing Laws and Policies on Prostitution

3.0 Introduction

As discussed in Chapter 1, many attempts have been made to categorise different policy approaches to prostitution and to identify particular ideological justifications for these. In this chapter, the question of how to frame laws and policies on prostitution will be considered, with reference to the international context of laws on 'sex trafficking', and to two specific EU jurisdictions within which different models of regulation have been adopted. As has been indicated in the previous two chapters, an abundance of highly contested literature exists on the different legal frameworks for regulation of prostitution. Much of the literature focuses upon Sweden, where the 'prostitution as exploitation' model originated; and the Netherlands, the first jurisdiction to adopt an alternative model involving the decriminalisation or legalization of the sale and purchase of sex. The legal frameworks in these two jurisdictions will be considered and analysed in the context of the literature considered in previous chapters.

First, however, the categorisation of different prostitution law frameworks will be examined. This is done before presenting empirical findings, because the various positions found in the literature and analysis cannot be understood without considering how they have been viewed elsewhere.

In their comparative review of prostitution frameworks in nine different countries, Kelly *et al* suggested four different models for prostitution legal frameworks: the two traditional positions of 'abolitionist' (seeking to abolish prostitution) or 'regulatory' (seeing prostitution as inevitable and seeking to regulate it), along with two more recent types of framework which seek to bring prostitution into mainstream social and economic policy; that of 'legalisation' and 'decriminalisation'.⁴⁰⁰ A similar method of categorisation was used in a 2014 EU Parliament study of prostitution in different European countries, which referred to the 'abolitionist' law in Sweden as compared to 'regulatory' frameworks adopted in Germany and the Netherlands.⁴⁰¹

Skilbrei and Holmstrom rely on a different approach to categorization, proposing that the three broad models of regulation are: criminalisation, legalisation or decriminalisation.⁴⁰² They suggest that the first of these models refers to a system of legal regulation based on criminal law, whereas the second treats prostitution as primarily a contractual matter, often using a licensing code to regulate it. The third model of decriminalisation is more difficult to define precisely, and there may be overlap between it and legalisation; Weitzer argues that some form of decriminalisation is necessary before prostitution may be legalised, although Phoenix has argued that legalisation and decriminalisation may be seen as opposed to each other.⁴⁰³ Jane Scoular offers yet another structure for categorising policies on prostitution,

⁴⁰⁰ Kelly, Liz, Coy, Maddy & Davenport, Rebecca, *Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries*. London: London Metropolitan University, 2009, at 5. The study concluded that only two countries studied could be 'unproblematically slotted in' to one of the clearly defined typology categories: Sweden (abolitionist) and New Zealand (decriminalized).

⁴⁰¹ Schulze, Erika, Novo Canto, Sandra, Mason, Peter and Skalin, Maria, *Study on Sexual Exploitation and Prostitution and its Impact on Gender Equality*. Brussels: EU Parliament, 2014, at 7-8.

⁴⁰² Skilbrei, May-Len and Holmstrom, Charlotta, *Prostitution Policy in the Nordic Region: Ambiguous Sympathies*. England: Ashgate, 2013, at 9.

⁴⁰³ Weitzer, Ronald, *Legalizing Prostitution: From Illicit Vice to Lawful Business*. New York University Press, 2012; Phoenix, Jo, 2009, *op cit*, cited in Skilbrei and Holmstrom, 2013, *ibid*, at 9.

namely prohibitionist, regulationist and abolitionist, but she also argues that ‘the frequently drawn distinction between apparently diametrically opposed positions, such as prohibitionism and legalization, is certainly less significant than is often assumed and may, in fact, be illusory.’⁴⁰⁴

In Jo Phoenix’s approach, four models for categorization are offered: partial criminalisation, decriminalisation, abolition and legalisation.⁴⁰⁵ However, she argues that the ‘legal approach favoured in the UK and most of Western Europe can be characterized as negative regulationism or partial criminalization. Prostitution-related behaviours that are seen as harmful or injurious to individuals are criminalized, whilst the actual act of selling and (for the most part) buying of sex is not.’⁴⁰⁶

However, in their comprehensive review of prostitution and trafficking laws across many European states, Walby *et al* concluded that the traditional dichotomy between different prostitution law regimes is now

.. out of date and lacks European specificity since it underestimates the extent to which most EU Member States combine the de-criminalisation of the selling of sex, the criminalisation of profit-taking from the prostitution of others, some criminalisation of the purchase of sex, and the complex mobilisation of welfare and exit services for prostitutes. The extent to which the selling of sex has been decriminalised across Europe between 1950 and 2000 has been underestimated.... This majority European model might be summarised as ‘tolerate and contain’. It allows prostitution but does not encourage it; it attempts a balance between the right to do what you want with your body while discouraging institutions that have an interest (profit) in encouraging the prostitution of others. It includes increasing access to welfare and exit services and a decrease in gender inequality, including in employment. This majority EU model is flanked by two variations. One extends the criminalisation of the purchase of sex from minors to specific circumstances such as the street and from those who have been coerced or trafficked, to all people in all circumstances. The second provides for the limited decriminalisation of some third-party profit-taking from prostitution. Much has been made of the difference between these latter two models, and little attention has been paid to the overlaps between them and to the emerging EU majority model. The policy environment is fluid with continuing experimentation: by Germany and the Netherlands as to how far they can permit limited profit-taking without excessive exploitation and trafficking; and by other EU Member States in incremental (e.g. the United Kingdom in England and Wales), and not so incremental (as in Sweden and the United Kingdom in Northern Ireland), increases in the criminalisation of the purchase of sex.⁴⁰⁷

⁴⁰⁴ Scoular, Jane, ‘What’s Law Got to Do With It? How and why law matters in the regulation of sex work’ (2010) 37 (1) *Journal of Law and Society* 12-39 at 12.

⁴⁰⁵ Phoenix, Jo, *Regulating Sex for Sale: Prostitution, Policy Reform and the UK*. Bristol: Policy Press, 2009.

⁴⁰⁶ Phoenix, Jo, ‘Prostitution and Sex Work’ in Liebling, Alison, Maruna, Shadd and McAra, Lesley, *Oxford Handbook of Criminology* (6th ed), Oxford University Press, 2017, 685-703 at 694.

⁴⁰⁷ Walby, Sylvia, Apitzsch, Birgit, Armstrong, Jo, Balderston, Susie, Follis, Karolina, Francis, Brian, Kelly, Liz *et al*, *Study on the Gender Dimension of Trafficking in Human Beings – Final Report*. Luxemburg: European Commission, 2016, at 191.

Despite the diversity of different terms used, in general there is agreement that traditional criminalisation frameworks which targeted those (mostly women) selling sex and did not criminalise the act of buying sex are not associated with any feminist theory, but rather are best seen as the expression of repressive patriarchal views around women's sexuality.

By contrast, the models of full decriminalisation or legalisation are associated with feminist theory which takes a 'sex work' approach; jurisdictions exemplifying these approaches include New Zealand and the Netherlands. Partial decriminalisation, meaning the decriminalisation of those (mostly women) selling sex and the criminalisation of (the almost invariably men) engaged in sex purchase, the model first introduced in Sweden and now adopted or adapted in many other jurisdictions, including Ireland, is more closely identified with the 'exploitation' approach. The term 'abolitionism' is also sometimes used to describe the feminist perspective that sees prostitution as exploitation, thus favouring a policy approach focused on criminalising the (male) clients with a view to reducing or eliminating prostitution through tackling demand, while supporting women to exit prostitution through a series of welfare-based strategies.

Rather confusingly, 'sex work' advocates often use the term 'abolitionism' disparagingly; as referenced in previous chapters, they frequently argue that 'abolitionism' is a movement based on a puritanical alliance between radical feminists and right-wing or religious conservatives. Writing in a US context, Ronald Weitzer, previously cited, refers to the emergence of 'a powerful moral crusade' which has 'advocated a strict abolitionist orientation towards all forms of commercialized sex, which are increasingly conflated with sex trafficking'.⁴⁰⁸ Other critics use similarly hostile language to describe 'abolitionism' as a type of 'carceral feminism', a term discussed earlier.⁴⁰⁹

This view is however strongly contested by others like Hoigard and Finstad, who reject outright the notion that abolitionists represent a 'new puritanism' – a common accusation in the Norwegian debates around law reform there. Rather, they say that 'prostitution narrows and stifles sexuality', saying that it is wrong to present it as a liberating form of sexual expression for women.⁴¹⁰ Peter De Marneffe, similarly, contests this view of abolitionism, pointing out that those who most actively oppose legalisation of prostitution 'are left-leaning feminists who see prostitution as a form of violence against women; they are not sexual traditionalists or religious conservatives'.⁴¹¹ De Marneffe's argument is supported by the critical race theorising of Cheryl Nelson Butler and the Marxist analysis put forward by Malini Bhattacharya; both writers strongly advocate for seeing prostitution as exploitation.⁴¹²

Moreover, in defending the Nordic or equality model of partial decriminalisation based on a view of prostitution as exploitation, Coy explicitly seeks to 're-engage an 'analytic gaze' on systemic gendered power inequalities with respect to prostitution', arguing that prostitution

⁴⁰⁸ Weitzer, Ronald, 'The Movement to Criminalize Sex Work in the United States' (2010) 37 (1) *Law and Society* 61-84, at 61.

⁴⁰⁹ See eg Phillips, Nickie and Chagnon, Nicholas, "Six Months is a Joke: Carceral Feminism and Penal Populism in the Wake of the Stanford Sexual Assault Case" (2020) 15(1) *Feminist Criminology* 47-69.

⁴¹⁰ Hoigard, Cecilie, and Finstad, Liv, 'The Fight Against Prostitution' in Matthews, Roger and O'Neill, Maggie (eds), *Prostitution*. England: Ashgate, 2003, at 174.

⁴¹¹ De Marneffe, *op cit*, at 155.

⁴¹² Bhattacharya, Malina, 'Neither 'Free' nor 'Equal' Work: a Marxist Feminist Perspective on Prostitution' (2016) 1(1) *Indian Journal of Women and Social Change* 82-92; Butler, Cheryl Nelson, 'A Critical Race Feminist Perspective on Prostitution and Sex Trafficking in America' (2015) 27(1) *Yale Journal of Law and Feminism* 95-139.

is a 'gender regime' and that it is possible to envisage an 'alternative world': 'a social order that is altered in the sense that it is without prostitution.'⁴¹³

Disagreements like these reflect the highly polarised nature of the debates over appropriate legal and policy frameworks for prostitution. This polarisation has contributed to an absence of clarity over terms of reference for such debates; and disputes over accuracy of data also form a serious impediment to meaningful policy discussions over prostitution. Wagenaar and Altink say that the politics around devising prostitution policy may best be understood as 'an instance of morality politics', that is a politics that is 'highly emotionally charged', gives rise to adversarial policy debates, and is 'resistant to facts'.⁴¹⁴

But despite the fractious divisions within feminism over the accuracy of relevant data, and the appropriate legal responses to prostitution, attempts have been made to discuss and research prostitution, and to frame relevant laws and policies, without appearing to adopt a perspective identified with either the 'exploitation' or 'work' positions. Hoigard and Finstad, for example, in writing about Norwegian law reform debates and pioneering projects to support exit from prostitution, argue that even those advocates of legalisation who seek an end to regulation of 'voluntary' prostitution agree with those who seek to criminalise clients on one point: 'prostitutes do not 'get enjoyment from it'.⁴¹⁵

In Ronald Weitzer's edited text on prostitution, he states that he seeks neither to demonise nor to glorify 'sex work'.⁴¹⁶ He notes however that most academic work displays bias, either condemning prostitution (like Hoigard and Finstad) or romanticising or celebrating it (like Shannon Bell⁴¹⁷). Even an approach that seeks to normalise prostitution work displays a bias, he argues, because while laudable, it ignores the fact that 'sex work is still regarded as highly *stigmatized* work, and most of those involved in the buying and selling of sex feel compelled to remain in the closet. It is work, but *not* just like any other kind of work'.⁴¹⁸ Indeed, this critique might be met with the comment that the use of the term 'work' is favoured by those who see it not merely as descriptive, but rather as a way of achieving greater normalisation and less stigmatization.

In her analysis of the differing feminist approaches to prostitution law, Outshoorn compares the politics of prostitution in a range of different jurisdictions, covering 12 countries in her text, based on a collaborative research project conducted with the Research Network on Gender Politics and the State.⁴¹⁹ The focus of this research was on whether women's policy agencies have an impact in influencing state policy, specifically upon prostitution law. Having reviewed reform debates across these different countries, Outshoorn concludes that 'The re-emergence of the prostitution issue seems to coincide with the emergence of the second wave of feminism, ...however... the picture is more complicated'.⁴²⁰ She argues that in many countries, such as Canada, the Netherlands and Sweden, the new women's movement had

⁴¹³ Coy, *op cit*, at 2-3.

⁴¹⁴ Wagenaar, Hendrik and Altink, Sietske, 'Prostitution as Morality Politics or Why It Is Exceedingly Difficult to Design and Sustain Effective Prostitution Policy' (2012) 9 *Sex Res Soc Policy* 279-292, at 279.

⁴¹⁵ Hoigard and Finstad, *op cit*, at 174.

⁴¹⁶ Weitzer, Ronald (ed), *Sex for Sale: Prostitution, Pornography and the Sex Industry*. NY: Routledge, 2000. Weitzer has elsewhere provided trenchant critiques of the 'exploitation' model and of legal reforms associated with it; see Weitzer, 2010, *op cit*.

⁴¹⁷ Bell, Shannon, *Reading, Writing and Rewriting the Prostitute Body*. Indiana University Press, 1994.

⁴¹⁸ Weitzer, *op cit*, at 5-6.

⁴¹⁹ Outshoorn, Joyce, *The Politics of Prostitution: Women's movements, democratic states and the globalisation of sex commerce*. Cambridge University Press, 2004.

⁴²⁰ Outshoorn, *ibid*, at 277.

already consolidated itself when the first significant debates on prostitution law reform took place around the mid-1980s; and she notes that

within the broader women's movement, prostitution was never an issue where consensus has been reached, with often sharp controversy between warring factions... This makes complicated the assessment of whether the goals of the various women's movement actors were met.⁴²¹

When one views the history of the debates on law reform over the three decades since the 1970s, Outshoorn suggests that in fact the prostitution issue never really took much priority for many women's movement actors and groups; and that over those three decades, Sweden was the only country 'where the issue had high priority.'⁴²² Indeed, as will be explored further below, the substantive equality approach developed by Catharine MacKinnon was instrumental in the formation of the Swedish prostitution law passed in 1999, which has become known as the Swedish or Nordic model; or the Equality model.

While as previously described, 'sex work' discourse is currently dominant within academic feminist writing, arguments are increasingly being proposed from a radical and socialist feminist perspective in favour of the exploitation approach or Nordic/Equality model. Moran and Farley, for example, recognise the intersectional nature of exploitation involved in prostitution, stating that 'prostitution is produced from an entwinement of sex, race, and economic inequalities... prostitution's sex hierarchy is one of several inequalities that are intrinsic to prostitution. Economic inequality and race/ethnic inequality coexist with sex inequality.'⁴²³

In Senent Julian's work cited above, she points out in similar terms that the 'roots [of prostitution] are firmly entrenched in socially and economically non-egalitarian, gendered conditions', thus justifying a perspective that sees it clearly as exploitation.⁴²⁴ Chao Ju Chen, similarly, writes that the Nordic approach, in recognising the conditions within which prostitution takes place, represents a manifestation of how substantive equality and formal equality differ.⁴²⁵ The Nordic approach is an asymmetrical model, criminalising the buyer but not the seller of sex; while a symmetrical model imposing sanctions on both buyer and seller (as in the traditional full criminalisation frameworks) might exemplify a formal equality approach, this fails to recognise the context of immense power imbalance within which the sexual trade takes place. Thus, she asserts that the asymmetrical Nordic model is clearly associated with a substantive equality framework; it targets the hierarchy by punishing those on the top, not those at the bottom, and therefore eliminates the criminal status of prostituted people.

Thus, arguments for a Nordic model approach are increasingly being made by those who recognise prostitution as intersectional exploitation, 'an abusive element of white supremacist capitalist patriarchy, rooted in racism and colonization.'⁴²⁶ Conditions associated with the COVID-19 pandemic over 2020-21 have, it is argued, made the case for the Nordic

⁴²¹ Outshoorn, *op cit*, at 277.

⁴²² Outshoorn, *op cit*, at 279.

⁴²³ Moran, Rachel and Farley, Melissa, 'Consent, Coercion, and Culpability: Is Prostitution Stigmatized Work or an Exploitive and Violent Practice Rooted in Sex, Race, and Class Inequality?' (2019) 48(9) *Archives of Sexual Behaviour*, [10.1007/s10508-018-1371-8](https://doi.org/10.1007/s10508-018-1371-8) at 1.

⁴²⁴ Senent Julian, *op cit*, at 124

⁴²⁵ Chao Ju Chen, *op cit*, at 98-100.

⁴²⁶ Coy et al, 2019, *op cit*, citing Bhattacharya, M., 'Neither 'free' nor 'equal' work: a Marxist-Feminist Perspective on Prostitution' (2016) 1(1) *Indian Journal of Women and Social Change* 82-92.

model even stronger. For example, Debra Boyer asserts that since prostitution ‘operates at the intersection of dispossessed women and privileged men’, it is ‘an obvious crossing point for COVID-19’ and that the Nordic model ‘offers the social justice framework we need to lift women out of their position of inequality, poverty, and social disparities, through non-criminalization and services.’⁴²⁷

The Swedish law reform will be discussed further below as the original and clearest example of the application of the Equality model. Following that discussion, the approach to regulating prostitution most closely associated with the ‘sex work’ approach, that of legalisation, will be considered as it is applied in the Netherlands, the European jurisdiction in which it is longest established and with which it is most closely associated. First, however, a brief overview of the international law context will be provided.

3.1 International Context: Sex Trafficking

Forming an increasingly important backdrop to any ideological discussion about the regulation of prostitution in particular jurisdictions, and the levels of exploitation in the sex trade, is the international context of sex trafficking. Indeed, over recent decades, growing concern internationally about the phenomenon of trafficking in human beings across borders has resulted in the adoption of a series of international instruments to combat trafficking of persons for sexual or labour exploitation or for the removal of organs. While a vast literature has now developed on trafficking itself and on international legal frameworks regulating trafficking, which is beyond the scope of this thesis, it is useful by way of context to provide a brief overview of certain themes emerging from the literature and relevant international laws and instruments in this area.

Indeed, although the focus of this thesis is not upon trafficking, the debate on trafficking internationally has had a significant impact upon the development of prostitution laws and policies at national level. Internationally, as Coy writes, over recent years, ‘the trafficking of women and children for sexual exploitation has attracted particular international attention over the last couple of decades.’⁴²⁸

However, while those who see prostitution as inherently exploitative argue for an integrated approach that understands prostitution and trafficking as related forms of exploitation, a highly influential alternative view has become internationally prominent, arguing from a ‘sex work’ position that any regulation of the international sex trade should address only ‘coerced’ and not ‘voluntary’ prostitution.⁴²⁹ Thus, many of those calling for legalisation of the sex trade also explicitly endorse penalising traffickers and those who knowingly buy sex from a person whom they know to have been trafficked. They argue that a distinction should be made between ‘voluntary’ and ‘non-voluntary’ or ‘coerced’ prostitution; the argument being

⁴²⁷ Boyer, Debra, ‘Prostitution During the Pandemic: Findings Show Need for Nordic Model’ (2020) 5(1) *Dignity: A Journal on Sexual Exploitation and Violence* 1-11 at 7.

⁴²⁸ Coy, Maddy, 2012, *op cit*, at 33-5.

⁴²⁹ This latter view found influential expression in a Guidance Note adopted in 2012 by the UNAIDS Advisory Group on HIV and Sex Work: *UNAIDS Guidance Note on HIV and Sex Work*. UN: 2012, at http://www.unaids.org/sites/default/files/sub_landing/files/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf. This document was prepared by academic and NGO experts to advise UNAIDS on matters concerning HIV prevention, treatment, care and support for those engaged in selling sex. It essentially recommended a harm-reduction approach; decriminalisation of prostitution as a means of promoting public health and rights of sex workers, in particular to promote universal access to HIV services. The Note recommended that human trafficking be treated as a distinct phenomenon not necessarily related to prostitution.

that ‘voluntary prostitution’ is entered into as a matter of choice, the free exercise of moral agency by the individual.

The influence of this approach at international law-making level has meant that it has now become the accepted norm to draw a distinction between ‘voluntary’ and ‘coerced’ prostitution; and similarly between the prostitution of adult women (capable of being tolerated legally) and the prostitution of minors (to be condemned).⁴³⁰

Some go even further than making such a distinction, critiquing the conceptualisation of trafficking as exploitation, and arguing from a more extreme position that the numbers of those alleged to be trafficked internationally are falsely inflated; and that growing international concern about trafficking is merely a ‘moral panic’.⁴³¹ In an Irish context, for example, Gillian Wylie has argued that there is only ‘shaky evidence’ upholding the ‘global edifice’ of laws against trafficking; she speaks critically of ‘anti-trafficking moral entrepreneurship’ as part of the wider agenda of the feminist movement transnationally since the 1970s.⁴³² She says that the ‘embedding of the trafficking norm’ has led to the ‘reinforcement of the securitization of migration that states achieve by reference to trafficking discourses’; ultimately, she suggests that establishing human trafficking ‘norms’ does little to help those whom it is supposed to benefit.⁴³³

However, the more widely accepted international approach that has emerged is based on the view that a clear binary distinction may be drawn legally between ‘forced’ prostitution, child prostitution and trafficking, all of which are clearly identified as representing exploitative practices, on the one hand; and so-called ‘voluntary’ or ‘non-exploitative prostitution’ involving adults, on the other.

This binary approach is evident in a range of different international instruments and treaties. Thus, the UN Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW) calls on State Parties to take appropriate measures to suppress trafficking and exploitation of women in prostitution (without designating prostitution itself as exploitative).⁴³⁴ In 2000, adopting similar terminology, the UN adopted a key Protocol to the UN Convention Against Transnational Organised Crime (the Palermo Protocol) calling on State Parties to adopt appropriate measures to discourage demand that fosters exploitation that leads to trafficking, particularly of women and children.⁴³⁵ A series of

⁴³⁰ For a similar perspective, see for example UNDP, *HIV and the Law: Risks, Rights and Health*. UNDP, 2012; UNWomen, *Note on Sex Work, Exploitation and Trafficking*. UNWomen, 2013.

⁴³¹ See for example Doezeema, Jo, *Sex Slaves and Discourse Masters: the Construction of Trafficking*. London: Zed Books, 2010, at 57.

⁴³² Wylie, Gillian, *The International Politics of Human Trafficking*. London: Palgrave Macmillan, 2016, at 3, 181.

⁴³³ Wylie, *ibid*, at 184.

⁴³⁴ As Walby *et al* write, the ‘definition of “the exploitation of the prostitution of others”.. contains ambiguities’: Walby *et al*, 2016, *op cit*, 28.

⁴³⁵ The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2000 (the Palermo Protocol). Similar language is used in other international instruments. In 2005, the Council of Europe adopted a Convention on Action against Trafficking in Human Beings; and in 2007 a Convention on the Protection of Children Against Sexual Abuse and Exploitation. These Conventions require State Parties to criminalise child prostitution and related activities. Article 19 of the 2005 Convention recommends the criminalisation of the use of services of a victim of trafficking only where the user knows that the person is a victim of trafficking, and the explanatory note to this Article states that it is not concerned with ‘using the services of a prostitute as such’. More recently, EU Directives against sexual exploitation of children and human trafficking respectively (Directives 2011/92 and 2011/36) have been adopted. These Directives require Member States to (among other things) punish child prostitution, provide education and training to reduce demand for human trafficking, and propose that Member States criminalise the purchase of sex from a person known to have been trafficked.

relevant cases before the European Court of Human Rights have established that trafficking constitutes a breach of Article 4 of the European Convention, which prohibits slavery and forced labour.⁴³⁶

The binary approach is also predicated on a view that, while international legal norms may target ‘forced’ prostitution, ie trafficking, ‘voluntary’ prostitution should remain a matter of national competence. So, within an EU context the European Court of Justice has found that the activity of prostitution may in some circumstances be regarded as a service provided for remuneration within the meaning of Article 52⁴³⁷ of the EC Treaty.⁴³⁸ The Court noted that prostitution is not prohibited as such in most EU Member States, but ‘tolerated, even regulated, by most’ and that ‘prohibitions relate more to certain wider phenomena such as soliciting, white-slaving, prostitution of minors...’⁴³⁹

The existence of a binary distinction between prostitution and trafficking is however challenged by many. For example, in her overview of the development of trafficking norms in international law, Jackie Turner argues from an historical perspective that the notion that a distinction exists between ‘voluntary’ and ‘forced’ prostitution ‘came at the cost of abandoning wholesale the earlier position which found prostitution to be ‘incompatible with the dignity and worth of the human person’.⁴⁴⁰ Turner points out that even framing of trafficking as violence against women is highly contested, because the oppositional approaches to prostitution ‘have migrated into discourse on trafficking, where the violence against women agenda is particularly critiqued as ‘amenable to neo-liberal agendas of control’.⁴⁴¹ She argues that a contradiction is inherent within the Palermo Protocol, which ‘criminalizes [the] delivery and distribution system [for prostitution industries] but is silent, like all international law, on the very institution which is the *raison d’être* of the trade’, and

⁴³⁶ See for example *Rantsev v Cyprus and Russia*, 7th January 2010, finding that trafficking constituted a breach of Article 4 of the Convention; *LE v Greece*, 71545/12, 21st January 2016, finding a breach of Article 4 where undue delays in the legal process were experienced by the applicant, a victim of trafficking for sexual exploitation.

⁴³⁷ Now after amendment, Article 43 EC.

⁴³⁸ In *Jany v. Staatssecretaris van Justitie* Case C-268/99, 20 November 2001, six Polish and Czech women who were engaged as ‘window prostitutes’ in Amsterdam challenged the Dutch government for refusing them the residence permits they needed to continue working as self-employed prostitutes. The Court decided that EC law allowed the Dutch authorities to insist that, in order to obtain residence permits, Polish and Czech citizens would have to show that they genuinely intended to become self-employed in the Netherlands and had sufficient financial resources to be able to do so successfully.

⁴³⁹ Para 52. In the circumstances, the Court concluded (para 70) that the applicants could obtain residence permits if the national court decided that they were carrying on prostitution as ‘an economic activity pursued by a self-employed person’; but prostitution could only be categorised as such, if it was carried on: (a) outside any relationship of subordination regarding the choice of activity or conditions of work and remuneration, (b) under that person’s own responsibility, and (c) in return for remuneration paid to that person directly and in full. There has been no further judgment from the EU court on prostitution itself, although a prostitution law case is currently before the European Court of Human Rights, arising from a February 2019 decision by the highest court in France, the *Conseil Constitutionnel*, which upheld the French sex purchase ban law against challenge, ruling that it amounted to a proportionate response to a legitimate public policy aim of ‘aiming to strengthen the fight against prostitution and to help people working as prostitutes’: *Médecins Du Monde Association and others* [Punishment of clients of persons working as prostitutes], *Conseil Constitutionnel* (conseil-constitutionnel.fr), Decision no. 2018-761 QPC of 1 February 2019. The case is currently before the European Court of Human Rights (no judgment issued as of 10 January 2022).

⁴⁴⁰ Turner, Jackie, ‘Means of Delivery: The Trafficking of Women into Prostitution, Harms and Human Rights Discourse’ in Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality*. Surrey: Ashgate, 2012, at 46. Turner refers here to the text of the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.

⁴⁴¹ Turner, Jackie, *op cit*, at 41.

concludes that the human rights approach may have to be transformed in order to address the causes and consequences of the wrongs perpetrated against trafficked women.⁴⁴²

In similar terms, Liedholdt argues powerfully that ‘Creating distinctions between prostitution (or “sex work”) and trafficking protects business as usual in the sex industry.’⁴⁴³ She writes that

The truth is that what we call sex trafficking is nothing more or less than globalized prostitution. ..The brothels of the United States, Canada, the Netherlands, Germany, Austria, and Australia are filled with women trafficked from Asia, Latin America, and Eastern Europe ...⁴⁴⁴

Indeed, clear linkage between trafficking and prostitution is readily evident from a significant body of empirical research. In their 2013 study, for example, Jakobsson and Kotsadam found that ‘the trafficking of women for commercial sexual exploitation is least prevalent in countries where prostitution is illegal, most prevalent in countries where prostitution is legalized, and in between in those countries where prostitution is legal but procuring illegal.’⁴⁴⁵ They noted that ‘Trafficking is intimately linked to organized crime.. the United Nations estimate that criminal groups earn approximately seven billion US dollars a year on trade with people.’⁴⁴⁶

In the same year, in a review of the evidence across 150 countries, Cho et al found that where prostitution was legalised, increased trafficking resulted.⁴⁴⁷ More recently, the major comparative report into trafficking authored by Walby et al discussed above, investigated ‘the extent to which the different forms of prostitution, which are associated with different probabilities of trafficking, are increased or decreased by different forms of regulation of prostitution.’⁴⁴⁸ Their conclusions strongly support the argument that trafficking and prostitution are inherently connected, arguing that this is self-evident and based on economic models. Ultimately, their report concluded:

.. .. the changes in the legal regulation of specific forms of profit-taking from prostitution have resulted in less trafficking in this sector than in the non-regulated and illegal sectors. The best statistics available suggest the overall scale of prostitution is larger in Germany and the Netherlands than in Sweden. This correlation between the decriminalisation of profit-taking in prostitution and its scale is consistent with the claim that this aspect of decriminalisation, however well-regulated, is causally connected to a larger proportion of prostitution in the population. .. The evidence does not support the claim that innovations in the regulation of the exploitation of the prostitution of others in Germany and the Netherlands that allow specific and regulated profit-taking have reduced overall levels of trafficking for purposes of sexual exploitation in these countries. Our conclusion is that the criminalisation of

⁴⁴² Turner, *ibid*, at 48.

⁴⁴³ Liedholdt, Dorchen, ‘Prostitution and Trafficking in Women: An Intimate Relationship’ (2003) 2(3) *Journal of Trauma Practice* 167-183, at 178.

⁴⁴⁴ Liedholdt, *ibid*, at 177.

⁴⁴⁵ Jakobsson, Niklas and Kotsadam, Andreas, ‘The law and economics of international sex slavery: prostitution laws and trafficking for sexual exploitation’ (2013) 35 *Eur J Law Econ* 87-107, at 90.

⁴⁴⁶ *Ibid*, at 90.

⁴⁴⁷ Cho, Seo-Young, Dreher, Axel and Neumayer, Eric, ‘Does Legalized Prostitution Increase Human Trafficking?’ (2013) 41 *World Development* 67-82.

⁴⁴⁸ Walby *et al*, 2016, 185.

the exploitation of the prostitution of others, of profit (rent and fee) taking from prostitution, remains an important legal instrument to reduce the demand that drives trafficking.⁴⁴⁹

A 2014 report for the EU Parliament, while acknowledging the difficulty with obtaining reliable data on the extent of both prostitution and trafficking in different jurisdictions, similarly found linkages between both, noting that

The most conservative official statistics suggest that 1 in 7 prostitutes in Europe are victims of trafficking, while some Member States estimate that between 60% and 90% of those in their respective national prostitution markets have been trafficked. Moreover, the data available confirm that most trafficking in Europe is for the purposes of sexual exploitation, principally of women and girls.⁴⁵⁰

Yet this clear and established linkage between prostitution and trafficking is not acknowledged in international legal instruments; nor is it accepted by many international human rights organisations that have taken positions on trafficking. In her powerful text addressing the limitations of international law and international bodies in addressing trafficking, Kat Banyard writes critically about why this is so, and how the language of ‘sex work’ and the ideology behind it has taken over within the work of international organisations like Amnesty International.⁴⁵¹

The story of how this has happened, she writes, reveals a story ‘of catastrophic failings to identify and address violence against women; an ignominious part of history when humanitarian institutions would up advocating for a ‘clean safe place’ for women to be abused in.’⁴⁵² She asserts that it is largely due to the influence of an international lobby group called NSWP (Global Network of Sex Work Projects).⁴⁵³ Banyard writes of the extensive lobbying carried out by this group in influencing the drafting of UNAIDS guidance notes in the years prior to the adoption of the report in 2012, and notes that

That report is now a go-to reference for groups lobbying governments to make the prostitution trade entirely legal. Both the report and the NSWP itself were cited by Amnesty International in its draft policy detailing why the organisation should back full decriminalisation of the sex trade.⁴⁵⁴

The influence of the ‘pro-sex trade’ lobby at international level is being challenged by Banyard and others, and the pro-prostitution positions adopted by Amnesty, WHO and others have been strongly opposed by some prominent international voices. In particular,

⁴⁴⁹ *Ibid*, 10.

⁴⁵⁰ Schulze, Erika, Novo Canto, Sandra, Mason, Peter and Skalin, Maria, *Study on Sexual Exploitation and Prostitution and its Impact on Gender Equality*. Brussels: EU Parliament, 2014, at 6.

⁴⁵¹ Banyard, *op cit*, at 62; 186. See Amnesty position on prostitution at <https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/>

⁴⁵² Banyard, *ibid*, at 186-7.

⁴⁵³ The logo of this organisation is on the front cover of the 2012 WHO report which advocated full decriminalisation of prostitution: Banyard, *ibid*, at 188, referring to WHO, *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries*, 2012.

⁴⁵⁴ Banyard, *ibid*, at 190. This, she writes, is despite the fact that Alejandra Gil, vice-president of the NSWP, was convicted of sex trafficking in Mexico City in 2015 and sentenced to fifteen years in prison (see 187). For a similar argument exposing the influence of organised global lobbying, based on her examination of prostitution laws in 40 countries, see Bindel, Julie, *The Pimping of Prostitution: Abolishing the Sex Work Myth*. London: Palgrave Macmillan, 2017.

former US President Jimmy Carter has written powerfully in support of the Nordic approach to prostitution law reform. In 2016, he argued that the ‘sex as work’ position

ignores the power imbalance that defines the vast majority of sex-for-cash transactions, and it demeans the beauty of sexual relations when both parties are respected. Sex between people who experience mutual enjoyment is a wonderful part of life. But when one party has power over another to demand sexual access, mutuality is extinguished, and the act becomes an expression of domination.⁴⁵⁵

In expressing this view, former President Carter cited the documented experience of Rachel Moran, a well-known Irish prostitution survivor,⁴⁵⁶ along with the testimony of other prostitution survivors, as illustrative of the lack of choice really inherent in the prostitution exchange, concluding that prostitution is not ‘the oldest profession’, but the ‘oldest oppression’. He argued that legalising prostitution would be regulating a form of abuse, and that the ‘empowered sex worker’ would not become the norm as a result; rather the norm would become ‘... the millions of women and girls needed to fill the supply of bodies that an unlimited market of consumers will demand.’⁴⁵⁷

Yet, as Miriam has noted in drawing on the work of Carole Pateman discussed above, the key question for international policy-makers in reviewing laws on trafficking is ‘why men have the right to demand that women’s bodies are sold as commodities in the capitalist market’; Coy *et al* point out that, currently, the ‘growing momentum of the Nordic/Equality model shows that this question is one that policymakers are grappling with.’⁴⁵⁸ This growing momentum stems from the original passage by Sweden of a law decriminalising the sale of sex but criminalising its purchase; now generally described as the ‘Nordic’ or ‘Equality’ model.

3.2 Prostitution as Exploitation: the Swedish Approach

In 1999, with the passage of the Sex Purchase Act, Sweden became the first country in the world to adopt a model of regulation of prostitution in which only the purchase of sex was criminalised; a model explicitly based on a theoretical approach that sees prostitution as exploitation, and as a feature of gender inequality in society.⁴⁵⁹ As Walby *et al* state, ‘The origins of the law are rooted in Swedish feminist and gender politics, in which prostitution has been a live issue for over a century: unlike in some European countries it remained a

⁴⁵⁵ Carter, Jimmy, ‘To Curb Prostitution, Punish Those who Buy Sex rather than Those who Sell it’, *Washington Post*, 31 May 2016; see also Carter, Jimmy, *A Call to Action: Women, Religion, Violence and Power*. US: Simon & Schuster, 2014.

⁴⁵⁶ Moran, Rachel, *Paid For: My Journey Through Prostitution*. Dublin: Gill & MacMillan, 2013.

⁴⁵⁷ Carter, 2016, *op cit*.

⁴⁵⁸ Coy *et al*, 2019, at 1934, citing Miriam, Kathy, ‘Stopping the Traffic in Women: Power, agency and abolition in feminist debates over sex-trafficking’ (2005) 36(1) *Journal of Social Philosophy* 1-17.

⁴⁵⁹ See the Swedish government’s explicit definition of prostitution as gender-based violence (Regeringskansliet 2012), cited in Skilbrei, May-Len and Holmstrom, Charlotta, *Prostitution Policy in the Nordic Region: Ambiguous Sympathies*. England: Ashgate, 2013, at 138. Skilbrei and Holmstrom refer to a comment made to a journalist at the time of the law reform by then Minister for Equality Mona Sahlin, to the effect that ‘If you are a feminist, you cannot relate to prostitution in any other way than to see it as male domination’ (Skilbrei and Holmstrom, at 138). See also Svanstrom, Yvonne, ‘Criminalising the John – a Swedish Gender Model?’ in Outshoorn, Joyce, *The Politics of Prostitution: Women’s movements, democratic states and the globalisation of sex commerce*. Cambridge University Press, 2004.

core principle that women's equality was not possible whilst prostitution existed.⁴⁶⁰ Indeed, intersectional inequalities were recognized as 'foundational' to the Swedish law; as Moran and Farley write, quoting Minister for Gender Equality Margareta Winberg as having asked at the law's implementation: 'Shall we accept the fact that certain women and children, primarily girls, often those who are most economically and ethnically marginalized, are treated as a lower class, whose purpose is to serve men sexually?'.⁴⁶¹

Following adoption of this law in Sweden, as noted above, similar laws have been passed in Norway, Iceland, Canada, France and Israel – as well as in Northern Ireland and Ireland. Thus it has become possible to speak of a 'Nordic model' or 'Equality model' for prostitution law.⁴⁶²

As Skilbrei and Holmstrom write in their comprehensive analysis of prostitution policy in the Nordic region, 'Few, if any, changes in legislation on prostitution have attracted so much attention and caused so much debate, both within and outside the Nordic countries, as the unilateral criminalisation of the purchase of sex'.⁴⁶³ The reason this change was made in the first place, they suggest, was because 'In the Nordic countries the issue of prostitution has been high on the public agenda for several decades, and in most debates it is taken for granted that the countries share the goal of wanting to abolish prostitution'.⁴⁶⁴ In addition, across the region prostitution is not only governed by criminal laws, but also to a very extensive degree by a network of social services; prostitution is effectively regulated, they argue, through social welfare policies as much as criminal justice policies or penal codes.

However, Skilbrei and Holmstrom find that, despite the similarities between jurisdictions in the region, 'prostitution policies in the Nordic countries are multifaceted and dynamic, and cannot be represented as following a straight path detached from empirical contexts'.⁴⁶⁵ They write that there are many differences between the approaches adopted in each country; and the literature on Swedish law and policy is much more extensive than on the other Nordic countries. They conclude that there is great diversity between and within the Nordic countries, in reality, and that there can therefore be 'no such thing as a Nordic prostitution policy regime or a Nordic model of prostitution policy'; although they assert that 'the 'Nordicness' rests on the way prostitution carries cultural meanings and symbolic implications'.⁴⁶⁶ Indeed, since they posit that 'Nordic countries are marked by comparably generous welfare provisions while at the same time being marked by a low degree of punitivism',⁴⁶⁷ much of their focus is necessarily upon the regulation of prostitution through social welfare policies in Nordic countries. It should be noted that their benign view of the Nordic welfare model has been contested by Vanessa Barker, in her examination of the concept of 'penal nationalism', punishment and the Swedish welfare state.⁴⁶⁸

⁴⁶⁰ Walby, Sylvia, Apitzsch, Birgit, Armstrong, Jo, Balderston, Susie, Follis, Karolina, Francis, Brian, Kelly, Liz *et al*, *Study on the Gender Dimension of Trafficking in Human Beings – Final Report*. Luxembourg: European Commission, 2016: see Chapter 7, 'Demand Reduction: Sweden', at 125.

⁴⁶¹ Quoted in Moran, Rachel and Farley, Melissa, 'Consent, Coercion, and Culpability: Is Prostitution Stigmatized Work or an Exploitive and Violent Practice Rooted in Sex, Race and Class Inequality?' (2019) *Archives of Sexual Behavior* 1.

⁴⁶² 'The Nordic countries are Denmark, Finland, Iceland, Norway and Sweden... The term 'Scandinavian' refer (*sic*) only to Denmark, Norway and Sweden': Skilbrei, May-Len and Holmstrom, Charlotta, *Prostitution Policy in the Nordic Region: Ambiguous Sympathies*. England: Ashgate, 2013, at 1.

⁴⁶³ Skilbrei and Holmstrom, *ibid*, at 143.

⁴⁶⁴ Skilbrei and Holmstrom, *ibid*, at 1.

⁴⁶⁵ Skilbrei and Holmstrom, *ibid*, at 5.

⁴⁶⁶ Skilbrei and Holmstrom, *ibid*, at 8.

⁴⁶⁷ Skilbrei and Holmstrom, *ibid*, at 71.

⁴⁶⁸ Barker, Vanessa, *Nordic Nationalism and Penal Order: Walling the Welfare State*. London, Routledge, 2019.

In Sweden, where the law criminalising the purchase of sex also provided for a range of social service supports to help enable those engaged in prostitution to exit, a unique feature of the law reform process was the early emergence of a consensus among feminist activists and political actors as to the need to prioritise legal reform of prostitution; and as to the appropriate theoretical and legal model on which such reform should be based. In Yvonne Svanstrom's account of the process through which the Swedish law reform was carried out, she documents the emergence of this consensus, writing that 'there was more or less unanimous support among the feminists in the established political parties for seeing prostitution as patriarchal oppression of women.'⁴⁶⁹

Further, Joyce Outshoorn suggests that between the 1970s and the new millennium, prostitution policy was not a priority for many women's movements in different countries; whereas, over those three decades, Sweden was the only country 'where the issue had high priority.'⁴⁷⁰

Svanstrom examines the three debates on prostitution law reform at national government and parliamentary level that took place in Sweden between 1981-1999 (when the legal change was finally passed), noting that women's policy agencies had a marginal position in the first debate, but an insider's role in the second and third debates, resulting in the successful passage of the reform at that stage as an explicitly stated gender-equality measure. Svanstrom's analysis of the debates leading to the introduction of the 1999 law are particularly useful in developing an analysis of the Irish parliamentary debates, as in subsequent chapters of this thesis.

By contrast, in her analysis of the Swedish law reform, Josefina Erikson suggests that 'the idea of prostitution as violence against women was not, at least initially, the predominant problem framing in the policy process'; rather, she argues, 'an abolitionist frame of prostitution in which prostitution is conceived of as a problem per se that needs to be abolished' was adopted 'before the institutionalization of the problem in terms of gender inequality' and that this was 'decisive for the final outcome.'⁴⁷¹ Erikson uses a dynamic frame analysis to trace the trajectory of the law reform process within Sweden, dividing it into five periods from the 1970s onwards. During the 1980s, she argues, abolitionism became the dominant frame or discourse within which prostitution was discussed; normalisation became unacceptable as a policy goal, largely due to the framing of prostitution as a problem. It was only during the 1980s that a gendered analysis of prostitution became more prominent; and in the 1990s, prostitution became seen as a criminal problem. During this period, those policy makers with a 'right wing moral agenda rather than that of gender inequality' advocated total criminalisation as a policy response.⁴⁷² However, in the late 1990s left-wing policy makers moved to support client criminalisation; but the women's sections of all the political parties worked together on this model for reform.

Ultimately, the Social Democratic Party in government introduced the reform bill in 1998 proposing criminalisation of the purchase of sexual services, within a package of measures to fight violence against women, prostitution and sexual harassment at work. The bill was supported by a majority of MPs, 'consisting of Social democrats, the Left party, the Centre

⁴⁶⁹ Svanstrom, Yvonne, 'Criminalising the John – a Swedish Gender Model?' in Outshoorn, *op cit*, at 225.

⁴⁷⁰ Outshoorn, *op cit*, at 279.

⁴⁷¹ Erikson, Josefina, 'The Various 'Problems' of Prostitution – A Dynamic Frame Analysis of Swedish Prostitution Policy' in Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality*. Surrey: Ashgate, 2012, at 160.

⁴⁷² Erikson, *ibid*, at 169.

party and the Green party.⁴⁷³ Some MPs opposed the bill, Erikson notes; but the Christian Democrats, who had supported total criminalisation from a right-wing moral agenda, abstained from voting – an interesting illustration of the flaws in the critique of the Nordic model, which suggests that it is always promoted or supported by those with a conservative religious agenda.

Since the reform was introduced in Sweden, its application has been closely monitored both by those who seek to adapt it for their own jurisdictions; and by those who contest the principle on which it is based; that of ‘exploitation’. Much positive data has emerged showing that its introduction has been successful in reducing levels of prostitution and sex trafficking within Sweden; as a leading Swedish government minister asserted in 2003, ‘The danger of prosecution coupled with a diminished demand made Sweden an unpromising market for global sex traffickers.’⁴⁷⁴

In 2010, the Swedish government published its own review of the legislation, known as the *Skarhed Report*.⁴⁷⁵ This Report found, *inter alia*, that since the introduction of the Sexual Purchase Act,

- street prostitution had declined by approximately 50%;
- while the number of people advertising on escort sites aimed at Swedish buyers had increased, the rate of increase was less than half that in neighbouring Norway and Denmark;
- there had been no overall increase in the number of people involved in prostitution in Sweden, while numbers in Norway and Denmark had increased significantly;
- despite initial public opposition to the law, recent surveys showed that support for the ban had risen to more than 70% of the Swedish public generally and even higher among young people;
- telephone surveillance and other forms of intelligence led the Swedish police to believe that traffickers and pimps no longer considered Sweden an attractive destination;
- the decriminalised status of sex workers had allowed them to maintain contact with support services and avoided prostitution being driven underground;
- there was no evidence that the law had increased violence or worsened the conditions of those exploited in prostitution;
- demand for prostitution had fallen, with 7.8% percent of men in 2008 reporting use of prostitutes, compared with 13.6% in 1996;
- the decline in demand increased incentives to exit prostitution.⁴⁷⁶

⁴⁷³ Erikson, *ibid*, at 171.

⁴⁷⁴ Speech by Sweden’s Deputy Prime Minister Wimberg at 47th Session of the United Nations Commission on the Status of Women, UN Headquarters, New York City, March 5, 2003; cited in Leidholdt, Dorchon, ‘Prostitution and Trafficking in Women: An Intimate Relationship’ (2003) 2(3) *Journal of Trauma Practice* 167-183, at 180.

⁴⁷⁵ Skarhed, Anna *et al.*, *State Public Enquiry 2010:49 Förbud Mot Köp av Sexuell Tjänst: En Utvärdering 1999– 2008*. Stockholm: Government of Sweden, 2010. Selected extracts in English published by The Swedish Institute at <http://www.government.se/sb/d/13420/a/151488>.

⁴⁷⁶ Findings of *Skarhed Report* as summarised by Oireachtas Committee on Justice, Defence and Equality, 2013, *op cit*, at 60.

Despite the emphatic nature of these findings, data on the practical implementation of the Swedish law have been subject to extensive critique. Skilbrei and Holmstrom note that the Report was ‘met with criticism in Sweden for its lack of new and sound data’, stating further that ‘This is an example of how politicisation and polarisation of research on prostitution make scholars susceptible to accepting research that has conclusions they agree on, while discarding research that concludes differently.’⁴⁷⁷ Thus, they assert that ‘It is difficult to evaluate both the conclusions of the evaluation and its criticism’; they refer to an array of other sources to conclude that ‘the Swedish prostitution market is more dispersed than the one in Denmark, Finland and Norway and more difficult to estimate the size of’, but ultimately they suggest that ‘the prostitution markets of today are highly differentiated, and this poses a challenge to any attempts to estimate their size.’⁴⁷⁸

In their concluding analysis of the Swedish law, Skilbrei and Holmstrom refer to critiques that it was introduced not only because it was seen as a gender equality measure, but also for ‘other less noble causes... fears of certain forms of migration and of moral decay and of a wish to sanitise public space.’⁴⁷⁹ Somewhat conversely, they point to other critiques that saw the explicitly feminist normative basis of the law as problematic. However, they acknowledge that, overall, ‘The conclusions on what has happened in Sweden diverge so greatly and attract so much attention that it is tempting to conclude that much seems to be at stake in the evaluation of ‘the Swedish model’.’⁴⁸⁰ They note the international influence of the ‘welfare-oriented approach to prostitution’ which they say has developed in Nordic countries over a period of 40 years, and which can be described as a ‘specifically Nordic approach’, but they say that lumping all Nordic prostitution policies together under the heading of ‘neo-abolitionism’ is not helpful; it is important to study each jurisdiction closely to understand better how these policies operate in practice.⁴⁸¹ Indeed, this comment could also be applied to critiques of Irish prostitution law which do not seek to identify the unique features of the Irish law reform process. As outlined in the previous chapter, Jones and Newburn have contended that ‘policy transfer’ studies should examine the process by which policies associated with one jurisdiction are adopted in any others, in order to answer the question ‘what shapes criminal justice and penal policy?’ in a particular jurisdiction.⁴⁸²

Not surprisingly, upon publication Skilbrei and Holmstrom’s text generated much comment and interest among other scholars working in the area. Summing up her view of it, Phoenix asserted that its importance lies in the fact that ‘it cuts through much of the contemporary rhetoric to provide (the first) comprehensive description of the last four decades of prostitution and prostitution policy development in Sweden, Norway, Finland and Denmark.’⁴⁸³ However, her conclusion that the book establishes a different meaning for ‘gender inequity’ in Nordic countries than that used in the UK, and thus that the Swedish model ‘does very little to address gender inequality as we would understand it this side of the North Sea’⁴⁸⁴ must be questioned. She suggests that in the UK, dealing with gender inequity in prostitution means addressing the violence of prostitution; whereas in Nordic countries it

⁴⁷⁷ Skilbrei and Holmstrom, *op cit*, at 67-8.

⁴⁷⁸ Skilbrei and Holmstrom, *ibid*, at 68-9.

⁴⁷⁹ Skilbrei and Holmstrom, *ibid*, at 139.

⁴⁸⁰ Skilbrei and Holmstrom, *ibid*, at 143.

⁴⁸¹ Skilbrei and Holmstrom, *ibid*, at 143-4.

⁴⁸² Jones, Trevor and Newburn, Tim, *Policy Transfer and Criminal Justice: Exploring US Influence over British Crime Control Policy*. London: Open University Press, 2007, at 3.

⁴⁸³ Phoenix, Jo, ‘Book Review of Skilbrei and Holmstrom’, (2014) 18 (4) *Theoretical Criminology* 578-80, at 579.

⁴⁸⁴ Phoenix, Jo, *ibid*, at 580.

tends to mean state intervention to protect individuals in the private sphere, and the development of social welfare measures to keep sex from becoming commercialised.

This argument can be contested on the basis that it sets up a false dichotomy; gender equality (not equity) measures in the UK and indeed Ireland, where applied to prostitution, should be understood as justifying state intervention in the private sphere to address the violence of prostitution and the inherent exploitation involved. Just as it is now considered permissible for the state to intervene in the otherwise private sphere to address domestic violence (including new laws on coercive control introduced in Ireland through section 39 of the Domestic Violence Act 2018) and marital rape, it is argued that so too should it be legitimate and indeed desirable from a feminist perspective that the state should intervene to address the exploitation involved in the commercial sex exchange.

This perspective is supported by other, including more recent research into the application of the Swedish law.⁴⁸⁵ Writing in 2011, Max Waltman for example noted the ‘strong deterrent effect of the law’ and its success in reducing trafficking.⁴⁸⁶ In 2013, Jakobsson and Kotsadam again noted the causal link between harsher prostitution laws targeting demand; and reductions in the incidence on trafficking, based on their research in Norway and Sweden.⁴⁸⁷ They pointed out that ‘Trafficking is an economic activity in which organizations try to make profits. Traffickers will only sell persons for sexual exploitation when market conditions make it profitable.’⁴⁸⁸ Thus, they say it is not surprising to find that ‘... slacker prostitution laws make it more profitable to traffic persons to a country and that the amount of trafficking will rise accordingly.’⁴⁸⁹

A 2014 EU Parliament comparative study on prostitution laws in different jurisdictions noted in the chapter on Sweden that the Swedish sex trade ‘seems to have significantly changed’ since the adoption of the 1999 law, noting also the ‘wide public support’ for it, and its effect in creating ‘an increased awareness about the harmful effects of prostitution and that prostitution could be considered a form of gender-based violence.’⁴⁹⁰ On a similar note, writing in 2017, Mansson argued that the 1999 sex purchase ban is best understood within a broader framework of policy areas such as gender, sexuality, and social welfare, dating back in Sweden to the mid-1970s, a period when gender norms and sexual mores were being renegotiated in that jurisdiction; a process which led to a radical reconsideration of men’s role and responsibility in heterosexual prostitution.⁴⁹¹

However, in his review of the sex purchase ban, published in 2016 and based upon some years of fieldwork in Sweden, Jay Levy expressed strong criticism of its introduction, asserting that the ‘abolitionist radical feminist discourse’ which led to its passage was

⁴⁸⁵ See for example Erikson, Josefina, *Criminalising the Client. Institutional Change, Gendered Ideas, and Feminist Strategies*. New York: Rowman and Littlefield International, 2017.

⁴⁸⁶ Waltman, Max, ‘Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law’ (2011) 33 Michigan Journal of International Law 133-157 at 149, 157.

⁴⁸⁷ Jakobsson and Kotsadam, *op cit*.

⁴⁸⁸ *Ibid* at 88.

⁴⁸⁹ *Ibid* at 102.

⁴⁹⁰ Schulze, Erika, Novo Canto, Sandra, Mason, Peter and Skalin, Maria, *Study on Sexual Exploitation and Prostitution and its Impact on Gender Equality*. Brussels: EU Parliament, 2014, at 55.

⁴⁹¹ Mansson, Sven-Axel, ‘The History and Rationale of Swedish Prostitution Policies’ (2017) 2(4) *Dignity: A Journal of Analysis of Exploitation and Violence*, Article 1, DOI: 10.23860/dignity.2017.02.04.01.

‘mainstreamed in an environment of moral panic’ within a background of ‘paternalistic top-down control and governance.’⁴⁹² Levy seeks to contradict government data in writing that the 1999 law in fact demonstrably failed to decrease levels of prostitution; and in arguing that supports and service provision for those engaged in the sex trade have been characterised by ‘Exclusions, disciplining and conditionality of assistance and services’.⁴⁹³

Indeed, in 2018, a further study on the impacts of the Swedish law emphasised the need for a range of improved support measures to be implemented to ensure that women in the sex trade could be facilitated in exiting.⁴⁹⁴ But in 2019, Erikson and Larsson provided a more positive comprehensive review of the way in which the Swedish law had been implemented, not through focusing on policing but rather through ‘collaborative activities’ with public agencies, NGOs and private actors, who ‘work together in the implementation of governing strategies that diverge from the correctional rationality of criminal justice and punishment.’⁴⁹⁵ They use the term ‘collaborative governance arrangement’ to ‘identify a broad range of networks and forms of collaboration that have come to be used to create and implement policies for combating prostitution and trafficking.’⁴⁹⁶

This approach is explicitly endorsed in the Swedish government’s 2018 Action Plan, which states that ‘Collaboration is imperative for success in the work against trafficking.’⁴⁹⁷ Contrary to the critiques discussed earlier which portray Nordic model laws as examples of a ‘punitive’ or ‘carceral’ form of feminism, this approach focuses much less upon prosecutions and convictions, and more upon social support frameworks and cross-agency work with those exploited through prostitution. As the authors conclude, ‘Sweden today is one of the leading nations in the fight against prostitution and trafficking, and the notion that it relies primarily on a client criminalization model in this regard needs to be corrected by a broader understanding both of its collaborative governance arrangements, and of the alternative strategies that have been implemented for reaching the various target groups affected.’⁴⁹⁸

A 2016 EU-commissioned comparative study on the gender dimension of human trafficking across different jurisdictions provides additional support for the effectiveness of the Swedish legislation in tackling the incidence of trafficking and of exploitation; in a detailed review of the implementation of the Swedish law, Walby *et al* found that the law had decreased the legitimacy and likelihood of men paying for sex, and had most likely led to reductions in trafficking for the purposes of sexual exploitation.⁴⁹⁹ They noted that ‘The willingness to purchase sex is one of the drivers of prostitution and thus of trafficking, because of the link between prostitution and trafficking. Reducing the number of those (usually men) seeking

⁴⁹² Levy, Jay, *Criminalizing the Purchase of Sex: Lessons from Sweden*. London: Routledge, 2016, at 8-9.

⁴⁹³ *Ibid*, at 9.

⁴⁹⁴ Ekberg, Gunila, *Swedish Laws, Policies and Interventions On Prostitution And Trafficking in Human Beings: A Comprehensive Overview*. Stockholm: Official Publications, 2018. See further Ekberg, Gunila, ‘The Swedish Approach to Prostitution and Trafficking in Human Beings Through a Gender Equality Lens’, in Winterdyk, John and Jones, Jackie (eds), *The Palgrave International Handbook of Human Trafficking*. London: Palgrave Macmillan, 2019.

⁴⁹⁵ Erikson, Josefina and Larsson, Oscar, ‘Beyond Client Criminalization: Analyzing Collaborative Governance Arrangements for Combatting Prostitution and Trafficking in Sweden’ (2019) *Regulation and Governance*, doi.org/10.1111/rego.12259 at 1.

⁴⁹⁶ *Ibid* at 4.

⁴⁹⁷ Swedish Government, Action Plan Against Prostitution and Trafficking in Human Beings, 2018, at 10.

⁴⁹⁸ *Ibid* at 17.

⁴⁹⁹ Walby *et al*, *op cit*, 2016: see Chapter 7, ‘Demand Reduction: Sweden’.

to purchase sex is thus potentially a significant form of demand reduction.⁵⁰⁰ An alternative model of regulation, as referred to above and discussed further below, is however well-established in other EU jurisdictions such as the Netherlands, based upon the legalisation or decriminalisation of the sex trade.

3.3 Prostitution as Sex work: the Netherlands Approach

The models of regulation of prostitution most closely identified with the liberal or postmodern feminist language of ‘sex work’ are those of legalisation or decriminalisation; European examples may be found in the Netherlands and in Germany.⁵⁰¹ Skilbrei and Holmstrom write that in these jurisdictions, regulation ‘includes decriminalisation of third-party involvement in prostitution and the issuing of licenses for establishments that organise and promote prostitution.’⁵⁰² In some other jurisdictions internationally, a similar approach is taken, for example in New Zealand, where the Prostitution Reform Act passed in 2003 has decriminalised prostitution-related activities; the government stated its aim in introducing this reform was ‘not to legitimise prostitution but to offer to those who worked in that industry an improved level of protection and to eradicate the barriers to women’s exiting prostitution, which may be created by a criminal conviction.’⁵⁰³ Indeed, in their comparative study of prostitution legal frameworks, Kelly *et al* identified New Zealand as having the regime most accurately described as ‘decriminalised’.⁵⁰⁴

The focus of this chapter however is upon the approach adopted in the Netherlands as the European country most closely associated with the ‘sex work’ model, and indeed the first country to recognise prostitution as sex work.⁵⁰⁵ Summarising Dutch prostitution law, Munro and Della Giusta write that ‘since the lifting of the ban on brothels in 2000, prostitution is permitted in licensed brothels, in toleration zones, and in other places that cause no disturbance to public law and order’.⁵⁰⁶

Joyce Outshoorn presents an overview of the historical development of Dutch prostitution law, noting that, while brothels were permitted in the nineteenth century, ‘[f]ollowing a long abolitionist campaign of feminists and protestants’, the Morality Laws of 1911 were passed, criminalising brothels, along with homosexuality, contraception and abortion.⁵⁰⁷ Prostitution itself, and those engaged in it, were not criminalised. By the 1960s, demands for reform of the Morality Laws had succeeded, and calls for reform of prostitution law were led by feminists. Outshoorn writes that

⁵⁰⁰ At 190.

⁵⁰¹ In Germany, the Civil Code was changed in 2002 to legalise the sale of sex, subject to conditions to be imposed by local authorities as to the areas in which prostitution may take place. See further Pates, Rebecca, ‘Liberal Laws Juxtaposed with Rigid Control: an Analysis of the Logics of Governing Sex Work in Germany’ (2012) 9 (3) *Sexuality Research and Social Policy* 212-22.

⁵⁰² Skilbrei, May-Len and Holmstrom, Charlotta, *Prostitution Policy in the Nordic Region: Ambiguous Sympathies*. England: Ashgate, 2013, at 2.

⁵⁰³ Munro, Vanessa and Della Giusta, Marina (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution*. UK: Ashgate, 2008, at 2.

⁵⁰⁴ Kelly *et al*, *op cit*, at 33.

⁵⁰⁵ As Outshoorn writes; see Outshoorn, Joyce, *Legalizing Prostitution as Sexual Service: the Case of the Netherlands*. ECPR Paper, 2000, at <https://ecpr.eu/Filestore/PaperProposal/8cededd9-302d-4870-8d0b-618c34524ef4.pdf>

⁵⁰⁶ Munro and Della Giusta, *op cit*, at 1.

⁵⁰⁷ Outshoorn, Joyce, ‘Policy Change in Prostitution in the Netherlands: from Legalization to Strict Control’ (2012) 9 (3) *Sexuality Research and Social Policy* 233-243 at 234.

In contrast to the feminist discourse in many other countries, Dutch feminists moved from a radical feminist discourse framing all prostitution as sexual violence to a pro-sex work position in the early 1980s, a framing familiar to them since the First World Whores Congress in Amsterdam in 1975. They distinguished ‘forced’ and ‘voluntary’ prostitution; only the latter was to be legalized, recognizing it as work.⁵⁰⁸

She writes that the feminist discourse behind the decriminalisation campaign stressed the agency of women and also ‘drew on widespread liberal ideas about individual rights.’⁵⁰⁹ Outlining the progress of the parliamentary debates, she notes that the 2000 law passed by parliament was seen to ‘fit into the progressive Dutch discourse about tolerance, an ‘enlightened nationalism’ which included respect for gay rights, permissive drugs policy, a liberal abortion regime, legal euthanasia and since 2001 same-sex marriage.’⁵¹⁰

However, a 2007 report into the operation of the law by Daalder found that initially, after the lifting by parliament of the general ban on brothels, which came into force on 1 October 2000, and the delegation of administrative responsibility for issuing prostitution licences to local authorities, ‘the decentralisation of prostitution policy caused the introduction of both the law and its enforcement to work out unevenly and irregularly throughout the country.’⁵¹¹ The report found further, as Banyard notes, that ‘pimping was ‘still a very common phenomenon’ and ‘does not seem to have decreased’.⁵¹²

In addition, a series of government evaluations carried out during the 2000s found that, despite the existence of an active legal prostitution sector, abuses, trafficking and poor working conditions persisted. As Outhoorn writes,

consecutive evaluations of the new act in the 2000s showed that the new system did not solve a number of serious problems in the sex industry. Although there was now a licensed sector where few minors or undocumented workers worked, there was considerable displacement to the footloose escort service branch and evidence that abuse of sex workers and human trafficking was still around ... The ‘numbers’ question is unsolved and remains contentious in public debate.⁵¹³

As a result of these evaluations, Dutch policies have been changing in recent years. As Daalder writes, ‘while the former prohibition of the exploitation has changed into a legalisation, prostitutes and sex business owners now feel that the regulations have become stricter, whereas in practice it is a matter of a stricter enforcement, which has replaced the former policy of tolerance.’⁵¹⁴ Indeed, since 2011, authorities in Amsterdam have introduced a series of measures to tackle abuses of women in the sex trade, for example through initiatives like raising the minimum age for engagement in prostitution; and through the so-called ‘Project 2012’, aimed at reducing the numbers of ‘windows’ in the city through which

⁵⁰⁸ Outhoorn, *ibid*, at 234.

⁵⁰⁹ Outhoorn, *ibid*, at 235.

⁵¹⁰ Outhoorn, *ibid*, at 235.

⁵¹¹ Daalder, A.L., *Prostitution in The Netherlands Since the Lifting of the Brothel Ban*. The Hague: Boom Juridische uitgevers, WODC, 2007, at 83.

⁵¹² Banyard, *op cit*, at 165, quoting from Daalder, *ibid*.

⁵¹³ Outhoorn, *ibid*, at 242.

⁵¹⁴ Daalder, *op cit*, at 84.

women may visibly advertise sex for sale.⁵¹⁵ Currently, the Dutch government is engaging in a process of law reform to ‘give prostitutes better protection and change their lives’.⁵¹⁶

However, the 2014 EU Parliament comparative study by Schulze *et al* on prostitution laws in different jurisdictions noted that the legalisation model has to date failed to reduce the extent of prostitution in the Netherlands and indeed also in Germany, also finding that high levels of organised crime and violence against women remained persistently present even within the regulatory frameworks adopted in both countries.⁵¹⁷ Overall, the report noted that the best estimates suggest that the sex trade in the Netherlands was worth between €400 and €600 million; and in Germany, worth €14.5 billion per year.⁵¹⁸ Similarly, Banyard writes that six years after the German government legalised prostitution in 2007, a review found no firm evidence that trafficking had declined.⁵¹⁹ Indeed, rates of prostitution have been recently found to be much higher in jurisdictions following a ‘decriminalisation’ or ‘legalisation’ model; in 2019, O’Connor and Yonkova noted that the Netherlands has an estimated the rate of prostitution nine times that in Sweden; and in Germany, the rate of prostitution is between 30 and 40 times that of Sweden.⁵²⁰

3.3 Analysis of Different Legal Approaches

As with the Nordic model, assessments of the Netherlands approach to prostitution law are highly contested. Although the Dutch government evaluations suggest that their legal model did not achieve the aim of protecting those selling sex against exploitation in the Netherlands, Outshoorn argues that the reason for its failings lay in its implementation rather than the principle behind it: ‘the state, by its slack implementation of the 2000 act and lack of attention to social rights .. is responsible for creating the bad working conditions, intimidation and blackmail itself.’⁵²¹

By contrast, in their comparative study of legal frameworks for prostitution across nine countries, Kelly *et al* concluded by finding a lack of evidence that either the decriminalisation or legalisation model can ensure that women engaged in prostitution are safe or free from exploitation, or that such models can deliver rights or material benefits promised.⁵²² Indeed, they asserted that violence persisted even under such models, and that ‘[n]ormalisation of prostitution has not assuaged the stigma that attaches to women who sell sex.’⁵²³ Thus, they said that the ‘case for legalisation is weak and unsubstantiated’, although they observed that a strong evidence base for any model of regulation is notably lacking, with much public debate ‘based on belief rather than a strong evidence base’.⁵²⁴

⁵¹⁵ Foster, Nick, ‘Amsterdam: an End to the Red Light District?’, *The Telegraph*, 16 December 2011, at <https://www.telegraph.co.uk/travel/travelnews/8961513/Amsterdam-an-end-to-the-red-light-district.html>

⁵¹⁶ Dutch Government website, <https://www.government.nl/topics/prostitution>, accessed 10 January 2022.

⁵¹⁷ Schulze, Erika, Novo Canto, Sandra, Mason, Peter and Skalin, Maria, *Study on Sexual Exploitation and Prostitution and its Impact on Gender Equality*. Brussels: EU Parliament, 2014; see Chapter 3.

⁵¹⁸ *Ibid*, at 22.

⁵¹⁹ Banyard, *op cit* at 168.

⁵²⁰ O’Connor, Monica and Yonkova, Nusha, ‘Gender, Trafficking for Sexual Exploitation, and Prostitution’, in Black, Lynsey and Dunne, Peter (eds), *Law and Gender in Modern Ireland: Critique and Reform*. UK: Hart Publishing, 2019.

⁵²¹ Outshoorn, *op cit*, at 242.

⁵²² Kelly, Liz, Coy, Maddy & Davenport, Rebecca, *Shifting Sands: a Comparison of Prostitution Regimes across Nine Countries*, London: London Metropolitan University Child and Woman Abuse Studies Unit, 2009, at 52.

⁵²³ Kelly *et al*, *ibid*, at 53.

⁵²⁴ Kelly *et al*, *ibid*, at 61-2.

Writing from a very different perspective, Eilís Ward and Gillian Wylie produced an edited volume of country case studies on prostitution law in 2017, reviewing what they described as the rise of ‘neo-abolitionism’, pressure for which they argue had arisen from a convergence between radical feminism and state interests in justifying strict border controls and tough law enforcement responses to organised criminality and illegal migration.⁵²⁵

They presented analyses of prostitution policy in Sweden; the Netherlands; the US; England and Wales; Australia and New Zealand, as well as discussing the 2017 law reform in Ireland (then still being debated).⁵²⁶ In their introduction, Ward and Wylie set out a clear ideological position highly critical of ‘neo-abolitionism’, which they defined as

a new version of an established approach to prostitution, abolitionism, that seeks to shut down the spaces and places wherein commercial sex is transacted. This works by criminalising activities attendant to sex work such as pimping, profiteering, living off the earnings of prostitution, organising and so on.. a regime that attempts to squeeze ‘supply’ by criminalising its technologies, human or otherwise, but on paper at least, does not punish the seller. Neo-abolitionism continues to argue that states ought to attempt to abolish prostitution but shifts attention towards demand as the pivot to this end goal.⁵²⁷

They argued that ‘neo-abolitionism’ is often advocated for both by radical feminists and by ‘conservative and fundamentalist religious forces’, based upon an ‘unlikely collaboration of feminism and fundamentalism’, manifesting ‘carceral feminism’, associated with neo-liberal economic policies.⁵²⁸ But they acknowledged that while ‘neo-abolitionism appears to flourish in neo-liberal contexts’, in fact there is ‘no clear pattern between type of state and type of prostitution regime’.⁵²⁹ In support of this, they point out that Sweden is a ‘state feminist welfare state and the sex purchase ban is integral to its interventionist equality agenda. It understands that the state can intervene into sexual acts between adults in order to redress and rebalance gender inequalities and is deeply culturally embedded in Sweden’s long history of state welfarism’.⁵³⁰

A very different perspective was provided in the EU-commissioned comparative study of prostitution across different jurisdictions, referred to previously, in which Walby et al conducted a detailed study of prostitution law frameworks in Germany and the Netherlands, as well as in Sweden.⁵³¹ In their review of studies comparing the scale of prostitution in different European counties, they found that

⁵²⁵ Ward, Eilís and Wylie, Gillian, *Feminism, Prostitution and the State: The Politics of Neo-Abolitionism*. Routledge, 2017.

See also Wylie, Gillian, *The International Politics of Human Trafficking*. Palgrave, 2016.

⁵²⁶ For a detailed discussion of the legislative process, see Chapter 6.

⁵²⁷ Ward and Wylie, *op cit*, at 2.

⁵²⁸ At 3, citing Bernstein, Elizabeth, ‘Carceral Politics as Gender Justice? The “Traffic in Women” and Neo-Liberal Circuits of Crime, Sex and Rights’ (2012) 41(3) *Theory and Society* 233-259. They refer to Northern Ireland as a particular example of the influence of ‘conservative and fundamentalist religious forces’ upon the adoption there of prostitution law reform modelled on the Swedish approach.

⁵²⁹ At 3; they say the notion that ‘neo-abolitionism’ and neo-liberalism are inextricably linked is confounded by the case of both Sweden and New Zealand.

⁵³⁰ At 3, citing Carson, Lisa and Edwards, Kathy, ‘Prostitution and Sex Trafficking: What are the Problems Represented to be? A Discursive Analysis of Law and Policy in Sweden and Victoria, Australia’ (2011) 34(1) *Australian Feminist Law Journal* 63-87.

⁵³¹ Walby *et al*, *op cit*, 2016: see Chapter 6, ‘Demand Reduction: Germany and the Netherlands’.

Germany has the largest proportion of prostitution (for population size) of any of the countries in our study. This is followed by the Netherlands; Sweden has the lowest proportion of prostitution in the population.. [and]...the larger scale of prostitution in Germany is rarely disputed in the literature. These statistics are consistent with the claim that allowing profit-taking from prostitution, even well-regulated profit-taking, correlates with the scale of prostitution. It is consistent with the further claim that legalising profit-taking from prostitution, however well-regulated, is causally connected to the scale of prostitution...⁵³²

They noted that ‘Though originally motivated by a labour rights approach, the fact that most prostitutes are self-employed in Germany and the Netherlands means that they are not covered by the employment and social protections and rights of dependent employees.’⁵³³ Moreover, they found that ‘in neither country are users of trafficked prostitutes sufficiently criminalised. The alternative demand reduction strategy tends to exonerate buyers, who are mainly men, in the regulation of prostitution and prosecution of trafficking.’⁵³⁴

Ultimately, Walby *et al* recommended the decriminalisation of the selling of sex; but they commented that this ‘is not the same as treating [prostitution] as if it were the same as any form of work.’ Further, they found that

Despite some claims that Germany and the Netherlands have ‘normalised’ sex work, our case studies found that this has not occurred. Sex work is not advertised in government offices providing information about job opportunities and no sanctions limiting benefits or income support are imposed on those who are unemployed as a consequence of choosing to exit sex work. Most sex workers are self-employed rather than employees with an employer; thus severely limiting their entitlement to make claims as workers against an employer. Despite the introduction of registration and licensing practices, many sex workers remain outside these schemes with consequences for the payment of taxes and insurance and for entitlement to benefits and pensions. In short, prostitution is not ‘work like any other’ even in those countries that have attempted to move their policies in that direction.⁵³⁵

Thus, among the extensive recommendations in the report was the proposal that:

[EU] Member States should consider criminalising the purchase of sex. Although the quantitative evidence base is insufficiently developed to offer definitive conclusions (including on the issue of displacement), surveys, studies, and expert judgement of key actors suggests that criminalising the purchase of sex, in some or all circumstances, decreases the legitimacy and likelihood of men paying for sex, with probable implications for the reduction in trafficking for purposes of sexual exploitation.⁵³⁶

While the focus of the report was upon trafficking rather than prostitution itself, its findings have clear implications for the sex trade generally. In this context, the report notes that

⁵³² At 189.

⁵³³ *Ibid* at 104.

⁵³⁴ At 121.

⁵³⁵ At 186.

⁵³⁶ At 198.

Demand reduction... is a strategy to reduce trafficking by reducing the economic attraction of the institutions into which people may be coerced by traffickers. In the case of trafficking for purposes of sexual exploitation, the most important institution is prostitution. The issue for this study concerns the ways in which the regulation of prostitution might reduce the demand for the services of trafficked people or, in other words, the sexual services of those trafficked into prostitution. Prostitution is regulated in all Member States of the EU in order to reduce the harms that can be associated with it, which include, but are not confined to, trafficking. Demand reduction through the regulation of prostitution can logically be centred either on those that seek to take profits (rent or fees) from prostitution or on the men (usually) who seek to buy sex. It is sometimes focused on reducing the forms of prostitution that are known to be more associated with trafficking and other forms of criminality, and sometimes focused on prostitution in general. We investigated the implications of different forms of regulation of prostitution for the reduction of trafficking. In the light of these findings we offer new ways of thinking about this regulation and for the assessment of what works to reduce trafficking.⁵³⁷

In her review of models for legalisation of prostitution as adopted in Germany, the Netherlands and New Zealand, Monica O'Connor refers to the Walby report findings in developing these arguments further, contrasting the immense expansion of the market for prostitution in those jurisdictions with the reduction in numbers of those engaged in prostitution in Sweden following the introduction of the sex purchase ban there.⁵³⁸ While she acknowledges that support for the legalisation model is often based upon a concern to address the 'adverse and unacceptable conditions'⁵³⁹ in which sex work is carried out, she notes that legalisation in those jurisdictions has not brought about significant improvement in the conditions for women in prostitution, concluding that

even if some women for a period of time may be able to negotiate *relatively* better conditions, legalization has brought with it an expanded and more profitable market with increased competition, higher costs and diminishing earnings. Furthermore, those with least bargaining power including minors, undocumented migrants, pimped and trafficked women continue to be located in the worst circumstances. Legalized regimes have proven to be failed experiments..⁵⁴⁰

She argues that the effect of legalisation must be considered by any policy-makers in considering ways to regulate prostitution, and that the role of the state in regulating prostitution is comparable to its role in legislating to balance different rights in other contexts, as in the case of laws banning incitement to hatred on grounds of ethnicity, for example. Such laws balance the freedom to be free from discrimination against the right to freedom of speech; similarly, O'Connor suggests that 'removing the right to buy a person for sex by criminalization privileges the right to bodily autonomy, sexual integrity and gender equality as more important rights for the state to uphold and protect.'⁵⁴¹ She contends that laws on prostitution, like other laws, have an important normative role; and that specific

⁵³⁷ At 185.

⁵³⁸ O'Connor, Monica, *The Sex Economy*. Newcastle upon Tyne: Agenda Publishing, 2018, at 84; in respect of New Zealand, she writes that 'New Zealand with a population of 4.5 million and an estimated 6,000-8,000 sex workers is 12 to 16 times the size of the sex trade in Sweden.' (at 88).

⁵³⁹ *Ibid*, at 69.

⁵⁴⁰ *Ibid*, at 94.

⁵⁴¹ *Ibid*, at 95.

types of regime, such as legalisation, may ‘create and reinforce gender inequality and gender injustice at a wider societal level.’⁵⁴²

Apart from her consideration of specific models for legal regulation of prostitution, in the same text O’Connor also provides a detailed analysis of different feminist perspectives. She notes that radical feminists opposing prostitution were in the past ‘accused of adopting a *moralistic* stance towards sexuality which sought to repress sexual liberation, sexual deviancy, sexual freedom and sexual choice’ and that even today ‘feminists who critique prostitution sex are cast as morally righteous, opposed to emerging forms of sexual diversity and seeking to repress sexual activity which lies outside the acceptable monogamous relationship...’⁵⁴³ However, she asserts the ‘importance of challenging this “sex-negative” slur’ and the need to ‘ensure that we do not allow the language of sexual freedom, rights and diversity to be colonized by sex work academics in seeking to undermine those holding a position on the commodification of sex and sexuality.’⁵⁴⁴

Instead, she emphasises that ‘the right to sexual identity is premised upon the right to be the subject of one’s own sexuality, not the object of someone else’s, which is the basis of prostitution sex; being against prostitution is in fact a progressive struggle for a sexual ethic premised upon mutual, consensual and reciprocal sex between adults...’.⁵⁴⁵ Fundamentally, she thus concludes that ‘A core demand of feminism has always been women’s right to bodily autonomy and sexual integrity. It is difficult to sustain the sexual liberal argument that prostitution sex does not violate those rights when listening to the voices of women in prostitution and examining the evidence of immense harm they are subjected to...’⁵⁴⁶

Both the Walby report and O’Connor’s analysis emphasise a surprisingly overlooked aspect of prostitution; its economic aspect, its status as a market, and the role of liberal economic ideology in justifying pro-‘sex work’ arguments.

Jakobsson and Kotsadam have observed that ‘The economics literature on prostitution is still sparse, although it has grown somewhat in recent years... The economics literature on trafficking for sexual exploitation is even sparser.’⁵⁴⁷ But, increasingly, feminist analyses of prostitution seek to address, as Senent Julian suggests, ‘both capitalist and patriarchal power relations’.⁵⁴⁸ Writing in 2019, she notes that ‘prostitution revenue worldwide is estimated to be \$186 billion: estimates for the United States alone, where the industry is predominantly illegal, exceeds [sic] \$14 billion annually.’⁵⁴⁹ She notes that, as Jeffreys and Cho et al have found, ‘Economic growth is likely to follow legalisation. Trafficking and sex tourism are lucrative businesses that *increase* in countries where prostitution is legalised or decriminalised.’⁵⁵⁰ This massive international trade, she argues, regards *buying* as a privilege that must be protected: defending the ‘right’ of women to be prostitutes means to implicitly defend men’s right to demand prostitution.... the pro-prostitution lobby does its job by

⁵⁴² *Ibid*, at 96.

⁵⁴³ *Ibid*, at 106-7.

⁵⁴⁴ *Ibid*, at 107-8.

⁵⁴⁵ At 108.

⁵⁴⁶ At 108.

⁵⁴⁷ Jakobsson and Kotsadam, *op cit*, 88-9.

⁵⁴⁸ Senent Julian, Rosa, ‘Tensions between feminist principles and the demand for prostitution in the neoliberal age: a critical analysis of sex buyers’ discourse’ (2019) 24(2) *Recerca: Revista de Pensament i Anàlisi* 109-128 at 110.

⁵⁴⁹ Senent Julian, *ibid*, 112.

⁵⁵⁰ *Ibid*, 112, citing Jeffreys, Sheila, *The Idea of Prostitution*. Melbourne: Spinifex Press, 2008; and Cho, Seo-Young, Dreher, Axel and Neumayer, Eric, ‘Does Legalized Prostitution Increase Human Trafficking?’ (2013) 41 *World Development* 67-82.

spreading a discourse on prostitution based on a neoliberal co-optation of left-wing and feminist terms.⁵⁵¹ Senent Julian points out further that:

Paradoxically, legalisation is a legal model characteristic of right-wing governments. For example, under Franco's dictatorial regime, prostitution was legalised in Spain: it "provided jobs for poor women and solace for men who were struggling in post-war Spain". With the onset of the war, the Nazis regulated it too: they even established brothel barracks in concentration camps "to increase the efficiency of production by granting selected [male] prisoners the right to frequent a brothel".⁵⁵²

The co-option of feminist language by those arguing in favour of treating prostitution as 'work' is a notable feature of recent discourse. Sonia Sodha has recently written that women who argue against the 'sex work' approach are increasingly 'depicted as prudes constrained by their own squeamishness about sex'.⁵⁵³ Indeed, those who advocate for a Dutch or New Zealand-style model of prostitution law increasingly may be seen to suggest their belief system is more radical or revolutionary than that of those they label disparagingly as being 'conservative neo-abolitionists'. Walby's suggestion that the preponderance of feminist academic writings in favour of decriminalisation of prostitution was due to 'a 'neoliberal' turn in the academy' has been referenced earlier in this chapter, as has her assertion that while such academics may frame their arguments in terms of 'individual agency', this masks the way in which commercialised sexuality is in reality a highly exploitative neoliberal gender regime.⁵⁵⁴ Using similar language, West has characterised those who support legal prostitution as '[l]iberal, pro-sex and postmodern feminists [who side] with nonfeminist liberals ...'.⁵⁵⁵

Thus, the celebration of individual agency within contemporary third-wave feminist writing may be characterised as effectively masking a new form of control over women by powerful economic interests – control exerted by and in the interests of a particular form of free market or neoliberal capitalism. Although as previously indicated, there has until recently been little focus in economics literature on sex trafficking and prostitution, increasingly this is changing with a new focus on identifying MLM in economics scholarship (Moral Limits of Markets). So for example, former Bank of Canada/Bank of England Governor Mark Cagney makes the argument that the commodification of all human activity can corrode the value of certain activities usually carried out on a voluntary basis in many societies (eg blood donation; exercising voting rights); and that not the market should not extend into every area of human life.⁵⁵⁶

The impact of MLM literature on prostitution has recently been examined by Cantillon and O'Connor, who have similarly argued for the placing of ethical limits upon sex industry

⁵⁵¹ *Ibid*, at 114.

⁵⁵² *Ibid*, at 114, citing Morcillo, Aurora, *The Seduction of Modern Spain: The Female Body and the Francoist Body Politic*. Lewisburg: Bucknell, 2010, at 19; and Sommer, Robert, 'Camp Brothels: forced sex labour in Nazi concentration camps' in Herzog, Dagmar (ed), *Brutality and Desire: War and Sexuality in Europe's Twentieth Century*. UK: Palgrave Macmillan, 2008, at 169.

⁵⁵³ Sodha, Sonia, 'Selling sex is highly dangerous: Treating it like a regular job only makes it worse', *The Guardian*, 21 November 2021.

⁵⁵⁴ Walby, Sylvia, *The Future of Feminism*. Polity Press, 2011, at 19-20.

⁵⁵⁵ West, Robin, 'Women in the legal academy: a brief history of feminist legal theory' (2018) (87) *Fordham L. Rev.* 977-1003 at 997.

⁵⁵⁶ Cagney, Mark, *Value(s): Building a Better World for All*. London: HarperCollins, 2021.

markets, in referring to the concept of ‘noxious markets’ and drawing on arguments around regulation of organ donation and surrogacy to conclude that legalising prostitution amounts to ‘the commodification of sex’ by the application of ‘the corruptive force of the market on a valued aspect of human life’; thus, adopting a stance supportive of laws criminalising demand is an approach that is ‘not a morally repressive stance. Rather it is about gender equality and a progressive defence of sexual ethics based on mutuality, reciprocity and meaningful sexual consent.’⁵⁵⁷

Indeed, the reality that the case for legalisation of prostitution is most effectively asserted, not from a progressive feminist position but rather from an explicitly neo-liberal belief-system, a faith in market values above all else, is made clear by Marcus Sibley in his discussion of the 2013 Canadian Supreme Court judgment in which criminal code provisions regulating prostitution were declared unconstitutional.⁵⁵⁸ Sibley writes that, in that case and more generally, ‘sex workers’ successful articulation of the right to work materializes because of its ideological position that the state should have no, or very minimal, involvement in the regulation of sex workers.... The claimants in *Bedford* are .. actively articulating a laissez-faire sex trade – one in which sex workers are empowered through technologies of self-protection to mitigate their own risks.’⁵⁵⁹ Sibley notes thus that ‘sex work advocates are adamant about positioning the sex worker subject as entrepreneurial in nature’.⁵⁶⁰

Similarly, writing about the New Zealand model legalising prostitution, Harrington has argued that this regime ‘fits snugly into ideas of the marketisation of the economy and society inherent in the neo-liberalism of the state. Indeed, the argument is often made that neo-liberalism is good for sex workers because its privileging of individualism and market forces can rationalise the kind of social norms within which women who wish to engage in sex commerce can do so without, necessarily, attendant stigmatisation. In this approach, selling sex become [*sic*], hence, an act like selling any other ‘product’’.⁵⁶¹

3.5 Conclusions

It has been argued in this chapter that while the ‘sex work’ approach is often identified as a postmodern or cultural feminist perspective, it owes much more to nineteenth century neo-liberal views of the individual as a moral agent free from context, class or gender. Thus the argument for a New Zealand model of (de)regulation asserts that women who choose to sell sex must be free to enter a contractual relationship to do so; classic free market or neoliberal theory. Yet this argument is undermined by the experience of a similar approach in the Netherlands, where successive government studies found abuses of those engaged in prostitution to have continued despite the freeing up of ‘markets’ through a local licensing regime.

⁵⁵⁷ Cantillon, Sara and O’Connor, Monica, ‘Gender, Equality and Sex Work’ (2021) 89 *Women’s Studies International Forum*, at 16: <https://doi.org/10.1016/j.wsif.2021.102532>

⁵⁵⁸ Sibley, Marcus, ‘Owning Risk: Sex Worker Subjectivities and the Reimagining of Vulnerability and Victimhood’ (2018) 58 *Brit. J. Crim.* 1462, discussing *Canada (Attorney General) v Bedford* [2013] 3 SCR 1101. For analysis of a more recent Canadian decision on prostitution law in *R v Anwar and Harvey*, Ontario Court of Justice, 21 February 2020, and its application for Irish law, see Bacik, Ivana, ‘Legislating for the Nordic Model: Insights for Ireland, Parts 1 & II’ (2020) 38(17) *Irish Law Times* 254-258; and (2020) 38(18) *Irish Law Times* 270-274.

⁵⁵⁹ *Ibid*, at 1475.

⁵⁶⁰ At 1475.

⁵⁶¹ At 3, citing Harrington, Carol, ‘Prostitution Policy Models and Feminist Knowledge Politics in New Zealand and Sweden’ (2012) 9 *Sexuality Research and Social Policy* 337-394.

By contrast to the ‘sex work’ model, advocates of the Swedish (or Nordic) approach to prostitution law based on a view of prostitution as exploitation say that it is effective in tackling abuses and moving towards abolition by reducing demand. They premise the argument in support of this model on a feminism that sees prostitution as part of a network of laws and policies that are structurally gendered; a gender regime. And they assert that where prostitution is tolerated or legalised, this regime reproduces gender as a hierarchy. They also argue that prostitution is a site of intersectional inequalities; an ‘entwinement of sex, race, and economic inequalities.’⁵⁶²

They point to empirical studies reviewing the effectiveness of Swedish law; yet the empirical findings of these studies are hotly contested by those opposed in principle to the ‘exploitation’ model. ‘Sex work’ advocates also contest empirical findings that trafficking and prostitution are inherently linked, arguing that it is possible to draw legal and factual distinctions between ‘forced’ and ‘voluntary’ prostitution. In truth, the divisions within feminism on prostitution are so entrenched that no findings or figures go unchallenged. The opacity of empirical findings is also due to the necessarily clandestine or covert nature of the prostitution exchange itself, even where it is conducted in a legalised setting.

Ultimately, it is difficult to make a decision on appropriate legal frameworks based on data alone. Skilbrei and Holmstrom make this point, saying in the Nordic context that

The reason why there is such a strong focus on the composition and size of Nordic prostitution markets, is that these are taken to indicate whether or not the national legislation is successful or not. All in all it is difficult to say something conclusive about the relationship between prostitution law and the size and composition of the prostitution market.⁵⁶³

As Michelle Goldberg wrote in presenting her investigative research into the relative merits of the Swedish and Dutch prostitution regimes,

Supporters of the Swedish model say that in countries like the Netherlands, where pimping and brothel-keeping were legalised in 2000, trafficking has increased and the welfare of prostitutes has suffered. They are right. Opponents of the Swedish model, particularly sex worker advocacy groups, say that the law has increased the stigma on sex workers, with occasionally grave repercussions. They are also right. Deciding which model works better is as much an ideological as an empirical question, ultimately depending on whether one believes that prostitution can ever be simply a job like any other.⁵⁶⁴

Thus the decision to adopt a particular model of legislation on prostitution, while being cognisant of all the available evidence, must ultimately also be value-based and capable of being justified by reference to a coherent theoretical framework. While all available data should be reviewed and critiqued, ideological approaches to commercial sex thus remain relevant in the policy-making process. As Frug suggested several decades ago, postmodern feminists and ‘sex workers’ may favour legalisation as they believe it would lead to safer ‘work’ conditions; radicals oppose legalisation as they see prostitution as inherently

⁵⁶² Moran and Farley, 2019, *op cit*, 1.

⁵⁶³ Skilbrei and Holmstrom, *op cit*, 69.

⁵⁶⁴ Goldberg, Michelle, ‘Swedish Prostitution Law is Spreading Worldwide: Here’s How to Improve It’, *The Guardian*, 8 August 2014, at <https://www.theguardian.com/commentisfree/2014/aug/08/criminsalise-buying-not-selling-sex>

oppressive of women; others may accept that some women engaged in prostitution exercise sexual autonomy, but nonetheless oppose legalisation because they 'resist the commodification of women's sexuality'.⁵⁶⁵ Ultimately, Frug's conclusion of uncertainty as to the appropriate legal framework for prostitution is understandable when confronted with the extensive and highly polarised feminist literature in this area.

Through the remaining chapters of this thesis, the development of Irish law on prostitution, and recent prostitution law reform, will be analysed in order to ascertain whether the 'exploitation' perspective is an appropriate lens through which to discuss prostitution in Ireland; whether prostitution in Ireland may be framed as a 'gender regime' according to Coy's model; and how to show that a sex purchase ban law in Ireland can be justified, based on socialist feminist theorising which has developed a legal understanding that 'consent' may be compromised in certain structural power contexts.

⁵⁶⁵ Frug, Mary Joe, 'A Postmodern Feminist Legal Manifesto (an unfinished draft)' (1992) 105 *Harvard Law Review* 1045 at 1058.

CHAPTER 4 – GENDER AND CONSENT IN IRISH LAW

4.0 Introduction

Within this chapter, an overview is provided of the development of gendered legal frameworks, followed by a discussion of feminist criminology in Ireland, and an account of how understandings of ‘consent’ as a legal concept have been developed in different legal settings.

In the next chapter, the development of Irish laws on prostitution until the emergence of a feminist campaign to reform the law around 2010 will be examined, in the context of the gendered legal frameworks that support or contribute to particular constructions of the key legal concept of ‘consent’ in Ireland.⁵⁶⁶ The question as to whether prostitution law and policy in Ireland prior to the 2017 reform may be described as constituting a ‘gender regime’ in accordance with the model developed by Maddy Coy will be considered.⁵⁶⁷ The next chapter will also consider whether the ‘exploitation’ perspective is an appropriate lens through which to discuss prostitution in Ireland, and whether this perspective can be defended from a socialist feminist position through which a legal understanding may be developed, seeing ‘consent’ as capable of being compromised in certain structural power contexts.

In the following substantive chapters, a detailed analysis of the process of law reform itself will be provided, from the commencement of the feminist campaign for reform in 2010, to the introduction of the legal reform into the Oireachtas in September 2015,⁵⁶⁸ up until its commencement in March 2017 and the first three years of its application. An analysis of the parliamentary debates on the legislation will be conducted, supported by findings from a number of ‘elite interviews’ conducted with key proponents of the reform, in order to ascertain how the new law fits within the ‘exploitation’ perspective; and whether this perspective can be defended from a socialist feminist position.

4.1 Gendered Legal Frameworks in Ireland

Despite dramatic legal change in recent years through referendums establishing the right of same-sex couples to marry and the right of women to access abortions, it remains the case that women, and feminists, have always had an uneasy relationship with the law in Ireland.⁵⁶⁹ Even today, despite years of equality legislation, women collectively continue to occupy a position of social, economic and legal disadvantage in Irish society relative to men.⁵⁷⁰ To understand why this remains the case, it is useful to examine briefly the historical development of women’s position in Irish law and the evolution of what may be described

⁵⁶⁶ With reference to the work of Frug, Mary Joe, ‘A Postmodern Feminist Legal Manifesto (an unfinished draft)’ (1992) 105 *Harvard Law Review* 1045, discussed in the previous chapter.

⁵⁶⁷ As discussed in previous chapters; see Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality: Theory, Research and Policy*. Surrey: Ashgate, 2012.

⁵⁶⁸ As the Criminal Law (Sexual Offences) Bill 2015, presented before the Seanad on 23rd September 2015 and debated at Second Stage on 6th October 2015.

⁵⁶⁹ The Marriage Equality Referendum in May 2015; and the Referendum to Repeal the Eighth Amendment in May 2018.

⁵⁷⁰ See February 2017 submission of the Irish Human Rights and Equality Commission to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and CEDAW reports, at <https://www.ihrec.ie/documents/ireland-convention-elimination-forms-discrimination-women/>; the World Economic Forum Global Gender Gap Index rankings at <http://reports.weforum.org/global-gender-gap-report-2016/economies/#economy=IRL>.

as gendered legal frameworks within which prostitution laws and policies have been implemented.⁵⁷¹

The Irish legal system is based on common law, the framework of laws spread gradually throughout the country to replace the indigenous Brehon Law system following the Norman conquest in the twelfth century.⁵⁷² At common law, women were regarded as legally incompetent, along with criminals, minors and the 'insane'; they had a duty to submit to sex with their husbands; intercourse had to be 'unlawful' as well as non-consensual to constitute rape, and 'unlawful' was defined as meaning outside of the marital relationship. Thus, according to Hale's infamous statement, 'A husband cannot be guilty of rape upon his wife for by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract.'⁵⁷³

Although discriminatory laws were challenged by individual women,⁵⁷⁴ it was not until the Married Women's Property Act 1882 that women were permitted to keep their own property on marriage, in both Ireland and England, since after the Act of Union of 1800, the Westminster Parliament passed laws for Ireland.⁵⁷⁵ This situation persisted throughout the nineteenth century, until the emergence of an independence movement resulted in the creation of the 1922 Irish Free State.

In the late nineteenth and early twentieth century, an influential women's liberation and suffrage movement developed alongside the emerging campaign for Irish independence, although there existed a certain tension between those espousing the causes of feminism and of nationalism.⁵⁷⁶ The suffrage campaigns culminated in the passage of the Representation of the People Act 1918, which granted the right to vote to women over 30, subject to certain property restrictions.⁵⁷⁷ After the Easter Rising of 1916, and during the War of Independence that followed, women remained prominent in the nationalist movement.⁵⁷⁸ After 1922, however, many of the women who had been prominent in the independence movement and during the birth of the new State faded from public view; few women were involved at a

⁵⁷¹ Much of this section is drawn from previous publications by the author, in particular Bacik, Ivana, 'The Impact of the Constitution on Women's Rights' in Hayes, Alan and Meagher, Máire (eds), *A Century of Progress? Irish Women Reflect*. Dublin: Arlen House, 2016; and Bacik, Ivana, Chapter 4, 'Gender Equality' in *Kicking and Screaming: Dragging Ireland into the Twenty-First Century*. Dublin: O'Brien Press, 2004.

⁵⁷² See Kelly, Fergus, *A Guide to Early Law*. Dublin: Institute for Advanced Studies, 1988; Binchy, Donald, in Thurneyson, Rudolf (ed), *Studies in Early Irish Law*. Dublin: Royal Irish Academy, 1936.

⁵⁷³ 'History of the Pleas of the Crown', 629. This rule was abolished in 1990, after a long campaign by the Rape Crisis centres, with the enactment of section 5 of the Criminal Law (Rape)(Amendment) Act, 1990.

⁵⁷⁴ See Menkel-Meadow, Carrie, 'Feminization of the legal profession: The Comparative Sociology of Women Lawyers' in Abel, Richard and Lewis, Philip (eds), *Lawyers in Society – An Overview*. Berkeley: University of California Press, 1995, at 221, 226.

⁵⁷⁵ See further Bacik, Ivana, Costello, Cathryn and Drew, Eileen, *Gender Injustice: Feminising the Legal Professions*. Dublin: Trinity College Dublin Law School, 2003, Chapter 1.

⁵⁷⁶ See further Connolly, Linda, *The Irish Women's Movement*. Dublin, Lilliput Press, 2003, at 59-71. See also Ward, Margaret, *Hanna Sheehy Skeffington, Suffragette and Sinn Féiner*. Dublin: UCD Press, 2017.

⁵⁷⁷ The same legislation abolished most property qualification requirements for men, who could vote at the age of 21.

⁵⁷⁸ For a detailed account of the history of this period, see Ward, Margaret, *Unmanageable Revolutionaries: Women and Irish nationalism*. London: Pluto Press, 1995. For a brief period between 1920-1924, both before the creation of the Irish Free State and during the Civil War that followed independence, women played a particularly formal role in the Dáil Courts, a grassroots courts structure set up as a part of the independence movement; see Kotsonouris, Mary, *Retreat from Revolution: The Dail Courts, 1920-1924*. Dublin: Irish Academic Press, 1994, at 38; 45; 126.

policy-making level in the new State.⁵⁷⁹ As Kilcommins et al write, ‘Although granted the vote six years before British women..., Irish women were relegated to a subordinate position both in public and in private life after Independence. The State, by allowing the Church to provide social services, allowed women to be abused and exploited.’⁵⁸⁰

Indeed, many of the laws passed in the early decades of the newly independent state were highly restrictive of women, representing a deeply conservative view of their role in society, apparently deriving from the particular religious ethos of the Catholic Church. It is argued that women were indeed maternalised and sexualised by the laws of the Irish Free State passed following Independence in 1922. As Luddy writes, under these laws ‘[p]olitical and religious imperatives dictated an understanding that women’s place was in the home, removed from both public and political life. In this atmosphere the problems associated with prostitution and unmarried motherhood.. saw the sexuality of all women as suspect and in need of restraint. All women, it seemed, were potential carriers of disease and immorality.’⁵⁸¹

Margaret Ward summarises the dominant ethos which characterised post-1922 laws thus:

The strengthening influence of the Catholic Church on Irish society continued inexorably [post-independence] with the Censorship of Publications Act in 1929, the ban on married women in the civil service in 1932, the ban on contraceptives in 1934, and the restriction of women in industrial employment in 1935. The first act of the Free State government had been to restrict women’s right to jury service, through the 1924 Juries Act, followed up with the 1926 Act....The final insult was the 1937 Constitution...⁵⁸²

Ward refers to specific provisions contained in the Irish Constitution (Bunreacht na hÉireann), introduced in 1937.⁵⁸³ Article 41, which guarantees the rights of ‘the Family’ and makes specific reference to women and mothers, uses language directly maternalising of women. Article 41.3.1 refers specifically to ‘the institution of Marriage, on which the Family is founded...’;⁵⁸⁴ the definition is confined to the family unit based upon marriage, despite many recommendations for adoption of a more inclusive definition.⁵⁸⁵ Within the same Article, clause 41.2 refers specifically to women as having a ‘life within the home’; and

⁵⁷⁹See Coulter, Carol, *The Hidden Tradition: Feminism, women and nationalism in Ireland*. Cork: Cork University Press, 1993.

⁵⁸⁰ Kilcommins, Shane, Leahy, Susan, Moore Walsh, Kathleen and Spain, Eimear, *The Victim in the Irish Criminal Process*. Manchester University Press, 2018, at 34.

⁵⁸¹ Luddy, Maria, *Prostitution and Irish Society 1800-1940*. Cambridge University Press, 2007, at 239.

⁵⁸² Ward, Margaret, *Hanna Sheehy Skeffington, Suffragette and Sinn Féiner*. Dublin: UCD Press, 2017, at 309.

⁵⁸³Chubb, Basil, *The Constitution and Constitutional Change in Ireland*. Dublin: IPA, 1978, at 7. For a definitive account of the drafting of the 1937 Constitution and the role of John Hearne, see Hogan, Gerard, *The Origins of the Irish Constitution 1928-1941*. Dublin: Royal Irish Academy, 2012. For more on the role of John Hearne, see Broderick, Eugene, *John Hearne: Architect of the 1937 Constitution of Ireland*. Dublin: Irish Academic Press, 2017.

⁵⁸⁴ Irish understandings of ‘family’ and ‘marriage’ changed significantly, however, with the resounding Yes vote in the Marriage Equality referendum held in May 2015 to enable legal provision for same-sex marriage; this inserted a new Article 41.4 into the Constitution, stating that: ‘Marriage may be contracted in accordance with law by two persons without distinction as to their sex.’

⁵⁸⁵ See eg *Report of the Constitution Review Group*. Dublin: Government Publications, 1996. Even despite the adoption of more inclusive definitions of ‘family’ by the European Court of Human Rights, the constitutional ‘family’ in Ireland remains that based upon marriage (albeit now including marriage of a same-sex couple); in *Y and Z v. UK* [1997] 24 EHRR 143, the ECHR held that a number of factors could be examined to establish whether a relationship could amount to ‘family life’.

declares that the State shall endeavour to ensure ‘mothers’ are not forced into the workforce ‘to the neglect of their duties in the home.’

This clause has been widely criticised, and numerous calls have been made for its removal from the Constitution.⁵⁸⁶ But it remains in place, with symbolic and substantive consequences, as Alan Brady writes: ‘Despite the limited case law on Article 41.2 .. the approach of the superior courts to Article 41 has been to endorse existing substantive inequalities in the name of preserving freedom between unequally situated parties.’⁵⁸⁷

In 1973, Ireland became a member of the EEC, a watershed for the development of gender equality in Ireland.⁵⁸⁸ Since then, largely through feminist legal and political activism,⁵⁸⁹ a strong gender equality policy has emerged at EU level, albeit generally confined to the economic sphere.⁵⁹⁰ Thus, when Ireland joined the EEC, it was required to change many overtly discriminatory laws and practices.⁵⁹¹ In addition, over the same period, the civil service ‘marriage bar’ was abolished, maternity leave was introduced, followed in 1998 by parental leave.⁵⁹² Although EC law provided a significant impetus for much of this legislative change, the decades following 1970 also represented a period of strong feminist activism. The Irish Women’s Liberation Movement was formed in 1970; and in 1985, Ireland ratified the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (‘CEDAW’).

The period also saw a significant increase in litigation around equality issues, often led by women lawyers like Mary Robinson.⁵⁹³ Law was used as an instrument of social change by women litigants like Mary McGee who challenged the law banning contraceptives, leading to a lengthy legalisation process for contraception rights; Máirín de Burca, whose case changed the law on jury selection; and Josie Airey, whose case established the right to civil

⁵⁸⁶See for example the *Report of the Constitution Review Group*, *op cit*, 1996, at 333; this expert group recommended the replacement of this Article with a revised gender-neutral provision recognising the importance of persons who perform a caring function within the home. More recently, see the recommendation of the Constitutional Convention that these provisions be replaced; Constitutional Convention, *Second Report*. Dublin: Government Publications, May 2013, at <https://www.constitution.ie/AttachmentDownload.ashx?mid=268d9308-c9b7-e211-a5a0-005056a32ce4>. See also international commentary, notably the UN Human Rights Committee, *Concluding Observations on Ireland and the International Covenant on Civil and Political Rights*, 24 July 2014, paragraph 7, recommending the amendment of Article 41.2 of the Constitution to render it gender neutral.

⁵⁸⁷ Brady, Alan, ‘Gender and the Irish Constitution’ in Black, Lynsey and Dunne, Peter (eds), *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart, 2019, at 212.

⁵⁸⁸ See Barnard, Catherine, ‘The Economic Origins of Article 119 EEC’ in Hervey, Tamara and O’Keeffe, David (eds), *Sex Equality Law in the European Union*. Chichester: Wiley, 1996, at 321.

⁵⁸⁹ Hoskyns, Catherine, *Integrating Gender – Women, Law and Politics in the European Union*. London: Verso, 1996.

⁵⁹⁰ More, Gillian, ‘Equality of Treatment in European Community Law: the limits of Market Equality’ in Bottomley, Anne (ed), *Feminist Perspectives on the Foundational Subjects of Law*. London: Cavendish, 1996; and ‘The Principle of Equal Treatment: From Market Unifier to Fundamental Right’ in Craig, Paul and de Burca, Grainne (eds), *The Evolution of EC Law*. Oxford University Press, 1999.

⁵⁹¹ Fennell, Caroline and Lynch, Irene, *Labour Law in Ireland*. Dublin: Gill & Macmillan, 1993, at 58. Irish membership of the EEC necessitated the passing of the Anti-Discrimination (Pay) Act 1974, and the Employment Equality Act 1977, both prohibiting discrimination on gender grounds in employment.

⁵⁹² Lynch, Irene, ‘Labour Law’ in Connelly, Alpha, (ed), *Gender and the Law in Ireland*. Dublin: Oak Tree Press, 1993, at 53. In 1981 the Maternity (Protection of Employees) Act gave women the right to paid maternity leave, and the right to return to work following such leave; later amended by the Maternity Protection Act, 1994 and Maternity Protection (Amendment) Act 2004. Parental leave was first introduced following adoption of Directive 96/34/EC of 3 June 1996 on Parental Leave.

⁵⁹³For example, in *de Burca*, the voting rights case, where she acted as the plaintiff’s junior counsel; and in *Airey v Ireland*, the case before the European Court of Human Rights establishing the right to civil legal aid; where she again acted for the plaintiff. In 1990, she was elected as Ireland’s first woman President; a development heralded as marking significant advance for women’s rights.

legal aid.⁵⁹⁴ During the 1990s, legislation was introduced permitting contraception; and a referendum in 1995 succeeded in legalising divorce (after defeat of an earlier divorce referendum in 1986); significant advances were also made through the enactment of equality legislation.⁵⁹⁵

The most high-profile gender equality claims made in recent years have been taken under this legislation rather than under the Constitution; for example a 2014 decision finding university promotion practices to be discriminatory against women.⁵⁹⁶ Not all such claims have succeeded, however. A 2010 challenge taken by the Equality Authority to the men-only membership policy of a prominent golf club failed through very restrictive interpretation of the legislation.⁵⁹⁷ The Supreme Court by a 3:2 majority ruled that it was not a requirement under the Act, in order to justify discrimination, that the club had to show a logical connection between the principal purpose of the club (ie golf) and the category of person to which membership was limited (ie men). Thus the club was entitled to discriminate by not allowing women full membership. This case demonstrates the limitations of the equality legislation, and the restrictive approach taken by the courts to interpretation of equality law.

Despite such setbacks, great progress for women's legal rights was undoubtedly made over the decades following the assertion of a feminist movement in Ireland.⁵⁹⁸ However, during this time a powerful backlash against feminism and against progressive social change was also evident, notably in the area of sexuality and reproductive rights, where the law continued for many decades to maternalise and sexualise women, in Frug's sense.

Traditionally, women in Ireland who failed to conform to conservative and Catholic moral codes on sexuality were subject to particularly repressive social and legal sanctions, as Quinlan writes.⁵⁹⁹ She says that although relatively low numbers of women were imprisoned annually in Ireland post-independence,

relatively high numbers of women [were] coercively confined in institutions outside of the criminal justice system....historically, the linking of female sexuality with female deviance led to the development of very elaborate patriarchal social arrangements designed for the control of women, and particularly for the control of female sexuality....It was the drive to control female sexuality that led to the mass incarceration of women... in institutions such as mother and baby homes and Magdalen Homes and Asylums. In these places, the harshest treatment and punishments were reserved for the most intractable women, that is, those who failed to conform to hegemonic feminine ideals.⁶⁰⁰

⁵⁹⁴ Robinson, Mary, 'Women and the Law in Ireland' in Smyth, Ailbhe (ed), *Irish Women's Studies Reader*. Dublin: Attic Press, 1993, at 101. The cases she refers to are: *McGee v Attorney General* [1973] IR 284; *De Burca v Attorney General* [1976] IR 38; *Airey v Ireland*, European Court of Human Rights, 9 October 1979, Series A, No. 32. These and other cases are discussed further in Bacik, Ivana and Rogan, Mary, *Legal Cases that Changed Ireland*. Dublin: Clarus Press, 2016.

⁵⁹⁵ In particular, the Employment Equality Act 1998 and the Equal Status Act 2000 provided for the creation of an Equality Authority, later incorporated into the Irish Human Rights and Equality Commission.

⁵⁹⁶ *Sheehy-Skeffington v. NUI Galway*, DEC-E2014-078, 13 November 2014.

⁵⁹⁷ *Equality Authority v. Portmarnock Golf Club* [2010] 1 IR 671.

⁵⁹⁸ Evidenced by progressive change on legalising contraception through a series of Acts passed following the judgment in the *McGee* case; the introduction of divorce by way of referendum in 1995; and reform of the laws on rape (through the Criminal Law (Rape) (Amendment) Act 1990) and domestic violence (through the Domestic Violence Act 1996, itself subsequently repealed by the Domestic Violence Act 2018), for example.

⁵⁹⁹ Quinlan, Christina, 'Women, Prison and Social Control' in Healy, Deirdre, Hamilton, Claire, Daly, Yvonne and Butler, Michelle (eds), *The Routledge Handbook of Irish Criminology*. London: Routledge, 2016.

⁶⁰⁰ *Ibid*, at 516.

Indeed, it is in this area that the provisions of the Constitution have most clearly contributed to the sexualising and maternalising of women's bodies, as may be seen from any review of the extensive case law and academic writing on Irish abortion law.⁶⁰¹ Intensive lobbying of the then government by the anti-choice lobby, concerned at the growth of feminist activism in the late 1970s, resulted in the passing of the Eighth Amendment in September 1983; the bitter campaign on this referendum marked a particularly bleak moment in the history of the Irish women's movement, and the amendment generated immense political and legal controversy over subsequent decades, until it was finally repealed by referendum in May 2018.⁶⁰² The 1983 referendum had inserted a new Article 40.3.3 into the Constitution:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.⁶⁰³

The practical effect of the text became swiftly evident, generating a series of cases; notably the infamous 1992 'X' case, concerning a 14-year-old girl who had been raped, had become pregnant and wished to terminate her pregnancy; the Supreme Court ultimately allowed her to travel to England to do so, ruling that because she was suicidal, the continuation of the pregnancy posed 'a real and substantial risk' to her life, as distinct from her health, which could only be avoided by terminating pregnancy; thus such termination was permissible.⁶⁰⁴

Further referendums to deal with the fall-out of the X case were held in 1992 and again in 2002; and over the years, several cases were taken challenging the effects of the Eighth Amendment. Then in 2012, a young woman called Savita Halappanavar died while undergoing a miscarriage at Galway University Hospital; her death generated public outrage at reports that the lack of legal clarity as to when life-saving abortion could be carried out clearly contributed to the failures in her medical treatment resulting in her death.⁶⁰⁵ In the aftermath of this tragedy, the Protection of Life During Pregnancy Act 2013 (the '2013 Act') was passed to enable doctors to carry out life-saving abortions under the X case test.⁶⁰⁶ In December 2014, another tragic case came to light, when a young pregnant woman, despite

⁶⁰¹ For an overview, see for example, Bacik, Ivana, 'A Feminist Review of the Law on Abortion' in Fischer, Celia and McAuliffe, Mary (eds), *Irish Feminisms: Past, Present and Future*. Dublin: Arlen House, 2015, at 147 – 168; Bacik, Ivana, 'A History of Abortion Law in Ireland: Prospects for Change' (2014) 20(2) *Medico-Legal Journal of Ireland* 75 – 81.

⁶⁰² See, for example, Smyth, Ailbhe (ed), *The Abortion Papers Ireland*. Dublin: Attic Press, 1992; Quilty, Aileen, Kennedy, Sinead and Conlon, Catherine (eds), *The Abortion Papers Ireland Volume II*. Cork University Press, 2015; McEvoy, Sandra, 'From Anti-Amendment Campaigns to Demanding Reproductive Justice: the changing landscape of abortion rights activism in Ireland 1983–2008' in Schweppe, Jennifer (ed), *The Unborn Child, Article 40.3.3 and Abortion in Ireland: Twenty-Five Years of Protection?* Dublin: Liffey Press, 2008.

⁶⁰³ For further discussion see Kingston, James and Whelan, Anthony with Bacik, Ivana, *Abortion and the Law*. Dublin: Round Hall Sweet & Maxwell, 1997; Schweppe, Jennifer (ed), *The Unborn Child, Article 40.3.3 and Abortion in Ireland: Twenty Five Years of Protection?* Dublin: The Liffey Press, 2008; Quilty, Aileen, Kennedy, Sinead & Conlon, Catherine (eds), *The Abortion Papers Ireland Volume II*. Cork University Press, 2015.

⁶⁰⁴ *Attorney General v X* [1992] 1 I.R. 1.

⁶⁰⁵ See, for example: <http://www.irishtimes.com/news/politics/legal-confusion-in-savita-case-shatter-1.1360821> [last accessed September 23, 2014].

⁶⁰⁶ See <http://www.irishstatutebook.ie/2013/en/act/pub/0035/index.html>. For more discussion about the origins of this legislation and recent legal developments generally, see, for example, Bacik, Ivana, "Legislating for Article 40.3.3" (2013) 3(3) *Irish Journal of Legal Studies* 18; and Bacik, Ivana, 'A History of Abortion Law in Ireland and Prospects for Change' (2014) 20(2) *Medico-Legal Journal of Ireland* 75. The provisions of the 2013 Act came into political focus in respect of one individual case in August 2014, when it was revealed in the media that a young asylum-seeker with a crisis pregnancy had been denied an abortion despite having been found suicidal in accordance with the 2013 Act; <http://www.irishtimes.com/news/health/woman-in-abortion-case-tells-of-suicide-attempt-1.1901256> [last accessed September 23, 2014].

having been pronounced dead, was being kept alive by a hospital against her family's wishes because of concerns to preserve the life of the 15-week old foetus that she carried.⁶⁰⁷

After so many tragic cases, political momentum grew rapidly for a referendum to repeal the Eighth Amendment, which was held on 25 May 2018.⁶⁰⁸ An overwhelming majority voted for repeal, and to insert the 36th Amendment into the Constitution, deleting the 1983 text, and asserting instead that 'Provision may be made by law for the regulation of termination of pregnancy'. The Health (Regulation of Termination of Pregnancy) Act 2018 was then passed through the Oireachtas, coming into effect on 1 January 2019, and providing for abortion without restriction as to conditions in the first trimester; and without time limits on grounds of serious risk to the life or health of the pregnant woman, or risk of fatal foetal abnormality.

In her analysis of the Eighth Amendment campaign, Mairéad Enright writes that the Repeal movement was successful because it 'articulated a new nationalism around abortion', relying on women's personal narratives or 'abortion stories' in generating support for repeal on grounds of empathy.⁶⁰⁹ However, she argues that 'the language of 'compassion and care' centred in the Together for Yes campaign' may not have fully succeeded in undoing 'Irish abortion law's relation to punitive nationalism' sine the legislation 'stops short of meeting the demand for 'free, safe, legal' abortion.'⁶¹⁰

Despite these misgivings, the success of activists in achieving removal of the Eighth Amendment and the adoption of abortion legislation, along with the success of LGBT advocates in winning the marriage equality referendum, have brought about a notable shift in construction of gender stereotypes in Ireland. Further change is necessary; proposals currently before the state-funded Citizens' Assembly to expand the definition of the constitutional 'family', and to remove the gendered language relating to women's domestic role in Article 41 by way of future referendums, would enable more effective protection for women's rights through the structures of the Constitution – and might at last breathe new life into the text of the equality guarantee and enable more progressive legal constructions of 'woman' to be developed in law.⁶¹¹

That this sweeping change might eventually be possible was of course suggested in 1993 by Mary Robinson, writing that the 'instrument of law can be invoked by women as a powerful ally in seeking social change.'⁶¹² While gender stereotyping has been challenged powerfully through recent feminist activism, Robinson's own work shows that the use of law as a potential instrument of progressive change is not new.

Indeed, alternative forms of resistance against laws regulating women's sexuality have long been evident in Ireland. Historian Diarmaid Ferriter, for example, in his powerful study of the Irish history of 'sexual exploitation, vulnerability and abuse', suggests that repressive

⁶⁰⁷ *PP v. HSE* [2014] IEHC 622.

⁶⁰⁸ Recommendations in favour of a repeal referendum were made by a Citizens' Assembly held in April 2017 and an Oireachtas Joint Committee which reported in December 2017; see www.citizensassembly.ie and <http://beta.oireachtas.ie/en/committees/32/eighth-amendment-constitution/>

⁶⁰⁹ Enright, Mairéad, 'Abortion Law in Ireland: Reflecting on Reform' in Black, Lynsey and Dunne, Peter, *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart, 2019, at 65.

⁶¹⁰ Enright, *ibid*, at 69-70.

⁶¹¹ See ongoing work of the Assembly on gender-related issues during February and March 2021, at www.citizensassembly.ie.

⁶¹² Robinson, Mary, 1993, *op cit*, at 105.

moral attitudes by those in authority have never had the effect of utterly stifling expressions of sexuality:

During an Irish century when there was an avowedly Catholic ethos, oppression and watchfulness, there was also no shortage of clandestine and illicit sexual behaviour. The challenge that various authorities set themselves was to keep uncomfortable truths behind closed doors.⁶¹³

He quotes the assertion by sociologist Mark Finnane, that ‘an obsession with the visibility of sex (in dance halls, on country lanes, or imagined in the motor vehicles parked along the roads) avoided a more considered attention to the contexts and harm of serious sexual offending.’⁶¹⁴ Yet Ferriter notes that not all of those who engaged in so-called deviant sexual activity were stigmatised; and that stigmatisation was clearly gendered, since the most obvious examples of those who escaped social sanction were those ‘men who frequent prostitutes, or make young unmarried women pregnant.’⁶¹⁵

Historian Maria Luddy, in her comprehensive study of prostitution in Irish society from 1800-1940, also challenges the dominant narrative to some extent.⁶¹⁶ She does acknowledge that the ‘idea of Irish purity, particularly sexual purity’ had a strong hold on the population, but says that priests ‘were challenged in their attempts to control the activities of the Catholic population’.⁶¹⁷ She cites the incidence of ‘unmarried motherhood, where women choose to leave Ireland and have their babies in England’ which ‘remained a concern and problem for Church and state until, arguably, the 1960s.’⁶¹⁸

An overview of the history of treatment of women in Irish laws post-independence thus reveals the extent to which national legal frameworks had indeed, certainly prior to 2018, reinforced particularly punitive and repressive cultural attitudes towards sexuality, especially women’s sexuality and fed into a particular problematising of the legal construction of ‘woman’ and of gender stereotypes.⁶¹⁹

Indeed, given the history of Irish laws controlling and regulating expressions of sexuality, Tom Inglis contends that the Catholic Church’s control of sexuality post-independence, enshrined in laws passed by the new state, ‘became centred on gaining control of women’s sex.’⁶²⁰ Similarly, Ailbhe Smyth has previously suggested that women ‘powerless under patriarchy, are maintained as Other of the ex-Other, colonized of the post-colonized’⁶²¹; just as Máiréad Enright pointed out a ‘judicial assumption that motherhood is women’s natural state and primary aspiration’ and the law has a ‘tendency to foreground maternity as the

⁶¹³ Ferriter, Diarmaid, *Occasions of Sin: Sex and Society in Modern Ireland*. London: Profile Books, 2009, at 546.

⁶¹⁴ Finnane, Mark, ‘The Carrigan Committee of 1930-31 and the “Moral Condition” of the Saorstát’ (2001) 32 (128) *Irish Historical Studies* at 519, quoted in Ferriter, *ibid*, at 546.

⁶¹⁵ Ferriter, *ibid*, at 546.

⁶¹⁶ Luddy, Maria, *Prostitution and Irish Society 1800-1940*. Cambridge University Press, 2007, at 2.

⁶¹⁷ At 2.

⁶¹⁸ At 2.

⁶¹⁹ See for example Inglis, Tom, *The Rise and Fall of the Catholic Church in Modern Ireland*. University College Dublin Press, 1998; Finnegan, Frances. *Do Penance or Perish: Magdalen Asylums in Ireland*. Oxford University Press, 2004; Crowley, Una and Kitchin, Rob, ‘Producing ‘decent girls’: Governmentality and the Moral Geographies of Sexual Conduct in Ireland 1922-1937’ (2008) 15(4) *Gender, Place and Culture* 355-72; and O’Sullivan, Eoin and O’Donnell, Ian (eds), *Coercive Confinement in Ireland: Patients, Prisoners and Penitents*. Manchester University Press, 2012.

⁶²⁰ Inglis, Tom, *op cit*, at 140.

⁶²¹ Smyth, Ailbhe, ‘The Floozie in the Jacuzzi’ (1989) 6 *The Irish Review* 7-24.

primary role women play for the nation.⁶²² Likewise, Bradley and Valiulis wrote that discussions about sexuality in Ireland were typically ‘accompanied by a growing intellectual awareness of the extent to which social experience, past and present, is gendered.’⁶²³

This gendered experience was most keenly evident where women were seen as failing to conform to conventional religious and political models of sexuality; as Christina Quinlan writes, such women

were often subjected to intense and prolonged forms of social control. The focus, in particular, was on regulating, rescuing and reforming prostitutes, ‘fallen women’ and unmarried mothers.. women who were regarded as having engaged in, or been susceptible to, inappropriate sexual behaviour were routinely confined in convents, homes and penitentiaries.. Magdalen Homes and Asylums, the carceral appendage of the convent, were used for over a century to encourage conformity in non-conforming women... Their widespread use was justified by the State, which, with the Catholic Church, created legislation to develop, propagate and enforce a Catholic construction of sexuality in a gendered project which dedicated almost all actions and energies to the disciplining of women... Female sexuality, it seems, was linked in the public mind with deviance.⁶²⁴

In her historical research examining the practice of capital punishment in Ireland from a critical gender perspective, Lynsey Black wrote that women in Ireland have for decades been subjected to an ‘idiosyncratic .. landscape of private patriarchy’; ‘a particular form of Irish paternalism, related to notions of sexuality, informed by a moralistic culture and economic imperatives’, enshrined in legal frameworks.⁶²⁵ Reviewing the cases of the Magdalene Laundries, Mother and Baby Homes, and the medical procedure of symphysiotomy, Gallen writes that these ‘institutions and practices particularly demonstrate the gendered dimension and nature of historical abuse’ and that they ‘contribute to a dominant interest of Church and State authorities with the management of perceived immorality and vice, especially, for women, and the construction of a normative Irishwoman as a wife capable of bearing and rearing a large family of children in the context of marriage.’⁶²⁶

Things are changing for women and for equality activists more generally, however, as illustrated by the 2015 and 2018 referendum outcomes detailed above; and the slow process of change has been visible for some decades. Gallen points out that although the last Magdalene Laundry did not close until 1996, for some years before that ‘the tireless and lengthy work of activists changed Ireland, through the use of litigation and political activism, opening new if limited opportunities for women to control their bodies and choices beyond narrow nationalistic constructions of womanhood and vice, such as the eventual

⁶²² Enright, Máiréad, ‘Involuntary Patriotism’ in Enright, Máiréad, McCandless, Julie and O’Donoghue, Aoife (eds), *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity*. London: Bloomsbury, 2017, at 40-1.

⁶²³ Bradley, Anthony and Valiulis, Maryann (eds), *Gender and Sexuality in Modern Ireland*. MA: Amherst, 1997, at 7.

⁶²⁴ Quinlan, Christina, ‘Women, Prison and Social Control’ in Healy, Deirdre, Hamilton, Claire, Daly, Yvonne and Butler, Michelle (eds), *The Routledge Handbook of Irish Criminology*. London: Routledge, 2016, at 503.

⁶²⁵ Black, Lynsey, *Gendering the Condemned? Women and Capital Punishment in Ireland post-1922*, PhD Thesis submitted to University of Dublin, Trinity College, 2016, at 368.

⁶²⁶ Gallen, James, ‘Redressing Gendered Mistreatment: Magdalene Laundries, Symphysiotomy and Mother and Baby Homes’ in Black and Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart, 2019, at 263, 266.

decriminalisation of contraception'.⁶²⁷ Other progressive legal change has also been achieved within recent years. Notably, the introduction of the Gender Recognition Act 2015 after years of campaigning by Transsexual and Transgender rights activists 'represented a seismic shift in the Irish legal landscape as regards the legal recognition of people whose preferred gender does not correspond with the sex noted upon the register of births.'⁶²⁸

The construction of woman as 'other', to be controlled and repressed by legal structures, has thus been strongly challenged through feminist activism in recent years. Black and Dunne argue that, particularly in the last decade, 'there has been sustained, organised and impassioned activism, leading to tangible legal reforms in Ireland'.⁶²⁹ They point to 'the work of advocates in the 2015 Yes Equality campaign for same-gender marriage... and the 2018 Together for Yes campaign to remove the '8th Amendment'', suggesting that both of these movements

-fuelled and sustained by (years of) grassroots activism – speak to the power of people and community-led advocacy in creating substantive reform in Irish law... Their successes signal and changed (and changing) Ireland, different in many respects from the country that existed 25 years ago.

The success of feminist activists in using the law and other advocacy strategies to bring about real change in recent years suggests that progressive legal reforms are possible and achievable, despite the traditionally gendered legal frameworks so embedded in Irish society.

From this brief overview, it may be seen that legal frameworks in Ireland for many decades post-independence were particularly repressive of women's sexuality and rights, with harsh social and legal sanctions applied to those women who failed to conform to prevailing legal codes heavily influenced by Catholic moral doctrine. However, during the past decade a significant social and political shift has taken place, with a new generation of feminist activists achieving real and tangible legal gains. While women continue to face ongoing structural disadvantage, nonetheless a more progressive construction of gender has been developed, and more positive legal recognition for women's rights won in Ireland over recent years.

4.2 Feminist Criminology in Ireland

Despite the strong engagement by feminist activists with the law in Ireland, there is a noted lack of Irish academic literature on feminist criminology; and very little by way of developed feminist criminological theory. While an extensive literature now exists on gender and criminality internationally, as discussed in previous chapters, only limited empirical research into women's criminality has been carried out to date within Ireland. No chapter on feminist criminology was included even with the publication in 2019 of a new Irish text on law and gender.⁶³⁰ In an earlier such text, published in 1993, a brief overview of women accused of crime was included, along with a discussion of women as victims: Caroline Fennell wrote

⁶²⁷ Gallen, *ibid*, at 266.

⁶²⁸ Ní Mhuirthile, Tanya, 'Gender Identity, Intersex and Law in Ireland' in Black and Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart, 2019, at 191. For an account of the litigation and the enormous role played by Dr Lydia Foy, see Bacik, Ivana and Rogan, Mary, *Legal Cases that Changed Ireland*. Dublin: Clarus Press, 2016, at 104-7.

⁶²⁹ Black, Lynsey and Dunne, Peter, 'Conclusions and Analysis' in Black and Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart, 2019, at 319-20.

⁶³⁰ Black and Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart, 2019.

then of the limited empirical work on women's criminality in Ireland, while noting that the Irish criminal justice system

is not neutral. The partisan nature of the system is informed by a series of stereotypical assumptions and myths with regard to male and female roles, and the nature of sexuality which operate to disproportionately disadvantage women. These have been found in the 'underbelly' of the criminal justice system... Currently woman's treatment by the criminal justice system is dependent on the extent to which she conforms, or fails to conform to, her perceived appropriate role.⁶³¹

In his 1996 text dealing generally with crime in Ireland, the first text in this jurisdiction seeking to provide a comprehensive criminological overview, sociologist Ciaran McCullagh devoted a chapter to women and crime, in which he wrote that 'surprisingly little' was then known about women and the criminal justice system in Ireland.⁶³²

In a further text on the Irish criminal justice system, published in 2002, a chapter (by this author) was also included on women and crime.⁶³³ In that chapter, Bacik noted the paucity of empirical studies on women and crime in Ireland, and the disparity between the much higher numbers of men prosecuted, convicted and sentenced through the criminal process, compared to the much lower numbers of women.⁶³⁴ Bacik also noted that the convictions of women were 'overwhelmingly for crimes against property (98%)'.⁶³⁵ The limited literature available at the time that chapter was published in 2002 tended to bear out findings on the treatment of women offenders in other jurisdictions. In the context of gender and sentencing, for example, Lyons and Hunt's study of District Court and Garda larceny records for the Dublin Metropolitan area had found that, when other variables were excluded, women were still treated more leniently in 70% of cases; concluding judges were placing more weight on factors such as marital status, family background and parenthood in the sentencing of women.⁶³⁶

A later study conducted by Bacik *et al* into Dublin District Court sentencing practice also showed evidence of differential sentencing practices for men and women.⁶³⁷ While there was less discrepancy between men and women whose sentences were suspended, or who were sentenced to do community service or to pay fines, a marked variation was noted at each end of the sentencing spectrum. A significantly higher proportion of women received no

⁶³¹ Fennell, Caroline, 'Woman as Accused' in Connelly, Alpha (ed), *Gender and the Law in Ireland*. Dublin: Oak Tree Press, 1993, at 182.

⁶³² McCullagh, Ciaran, *Crime in Ireland: A Sociological Introduction*. Cork University Press, 1996, at 115.

⁶³³ Bacik, Ivana, 'Women and Crime' in O'Mahony, Paul (ed), *Criminal Justice in Ireland*. Dublin: Institute of Public Administration, 2002, at pp 134. Some of the material in this section is drawn from this chapter.

⁶³⁴ Bacik, *ibid*, at 134-5: '...in 1996, a total of 5,202 persons were convicted of indictable offences in Ireland; of these only 476, or less than 10%, were women.' Men continue to be greatly over-represented in crime and prison figures in Ireland compared to women. In 2016, for example, CSO figures show that while 10,209 men were committed to prison, there were only 2,644 women committed: <http://www.cso.ie/en/releasesandpublications/ep/p-wamii/womenandmeninireland2016/>.

⁶³⁵ At 135: 'From an overall total of 2,341 convictions for indictable offences in 1999, women offenders accounted for 309 (13%) and their convictions were overwhelmingly for crimes against property (98%).'

⁶³⁶ Lyons, A. and Hunt, P., 'The Effects of Gender on Sentencing: a Case Study of the Dublin Metropolitan Area District Court' in Tomlinson, Michael *et al* (eds), *Whose Law and Order*. Belfast: Sociological Association of Ireland, 1988.

⁶³⁷ Bacik, Ivana, Kelly, Alan, O'Connell, Michael and Sinclair, Hamish, 'Crime and Poverty in Dublin: An Analysis of the Association Between Community Deprivation, District Court Appearance and Sentence Severity' in Bacik, Ivana and O'Connell, Michael (eds), *Crime and Poverty in Ireland*. Dublin: Round Hall Sweet & Maxwell, 1998.

conviction; while only 14.6 per cent of women defendants were sentenced to prison, as against 29 per cent of male offenders.

Where women are sentenced to prison, Bacik noted in 2002 that again, as in studies elsewhere, Irish studies showed that they were likely to receive significantly differential treatment to male prisoners. This differential treatment of women by sentencers was subsequently confirmed in Lynsey Black's thesis examining the practice of capital punishment in Ireland historically; she found paternalism by judges to be a particular feature in the decision-making process.⁶³⁸

However, there is little contemporary research on women within the criminal justice system or in Irish prisons.⁶³⁹ While two major studies of male prisoners in Mountjoy prison have been published,⁶⁴⁰ there exists no comparable publication on women's imprisonment here. Some support for the findings produced by studies in other jurisdictions may however be found in a study on the health of women prisoners in Mountjoy conducted by Carmody and McEvoy in 1996. They interviewed 100 women prisoners, finding that the majority of crimes they had committed were theft and drug related offences; they were likely to be from poor social backgrounds in Dublin's inner city, to have a history of self-harm, and to have an average of two to three children each.⁶⁴¹ The study found that women prisoners were a particularly vulnerable group, possessing many special needs not catered for in the prison at the time.

In her sociological analysis of women in Mountjoy Prison, McCann James examined the forms of management in the prison, finding that the prison regime paralleled and intensified the social structures in Irish society which oppress women.⁶⁴² Her research showed that the practices in the prison institutionalised the transfer of social disadvantage from the larger society to the prison society, and served to sustain the oppression of women.

A new women's prison in Dublin (the Dóchas Centre) opened in 1999, replacing Mountjoy women's prison and providing 70 places for women prisoners.⁶⁴³ The prison is designed so that small numbers of prisoners can live together in 'houses', to encourage greater autonomy. Greatly improved physical facilities are provided, including a theatre, gymnasium, creche and sports grounds. Before it opened, the Irish Penal Reform Trust was critical of the decision to build one large prison in Dublin, rather than a series of small units around the country to facilitate greater family contact.⁶⁴⁴ The Trust also noted an excessive emphasis on security in the new prison, and called for semi-open conditions to be provided instead.

Since the prison opened, an internal study conducted by PACE, the prisoners' support group, in May 2000 found that despite the improved conditions within the prison, no basic

⁶³⁸ Black, Lynsey, 2016, *op cit*, at 368; this thesis examines the practice of capital punishment in Ireland from a critical gender perspective.

⁶³⁹ There are some historical accounts of women in Irish prisons, eg McCoolle, Sinéad, *Guns and Chiffon: Women Revolutionaries and Kilmainham Gaol 1916-23*. Dublin: Heritage Service, 1997.

⁶⁴⁰ O'Mahony, Paul, *Crime and Punishment in Ireland*. Dublin: Round Hall Press, 1993; and O'Mahony, Paul, *Mountjoy Prisoners: A Sociological and Criminological Profile*. Dublin: Government Publications, 1997.

⁶⁴¹ Carmody, Patricia and McEvoy, Mel, *A Study of Irish Female Prisoners*. Dublin: Government Publications, 1996.

⁶⁴² McCann James, Celesta, *Recycled Women: Oppression and the Social World of Women Prisoners in the Irish Republic*. Ph.D. Thesis for NUI Galway, 2001.

⁶⁴³ Numbers of women held in the prison regularly exceed the specified limit of places.

⁶⁴⁴ *Policy Statement: Women and the Penal System*. Dublin: Irish Penal Reform Trust, 1998.

support services existed for the women upon release.⁶⁴⁵ Christina Quinlan's more recent research into the experiences of women incarcerated in the Dóchas Centre showed that even in the more benign physical environment of that more modern prison, power differentials and hierarchies remain, rendering women prisoners a particularly vulnerable population.⁶⁴⁶

More recently, although regrettably no chapter on 'women and crime' appears within the *Routledge Handbook of Irish Criminology*, Quinlan did contribute a chapter on women and prison to that text, in which she argued for the need to see women's imprisonment in Ireland in a broader carceral context.⁶⁴⁷ Quinlan writes that although relatively low numbers of women have traditionally been imprisoned in Ireland post-independence,

relatively high numbers of women [were] coercively confined in institutions outside of the criminal justice system.. historically, the linking of female sexuality with female deviance led to the development of very elaborate patriarchal social arrangements designed for the control of women, and particularly for the control of female sexuality....It was the drive to control female sexuality that led to the mass incarceration of women... in institutions such as mother and baby homes and Magdalen Homes and Asylums. In these places, the harshest treatment and punishments were reserved for the most intractable women, that is, those who failed to conform to hegemonic feminine ideals.⁶⁴⁸

While the work of Kilcommins, O'Sullivan and O'Donnell, in particular, has established that for much of the twentieth century, Ireland had a notably high level of incarceration of adults and children generally through different, mostly non-penal institutions like industrial schools, county homes and psychiatric institutions, women have traditionally been subject to particularly gendered forms of non-penal confinement; particularly through the networks of mother and baby homes and Magdalene laundries discussed earlier.⁶⁴⁹ Indeed, Lynsey Black has described the history of women's penal and non-penal incarceration in this jurisdiction as 'a particular form of Irish paternalism, related to notions of sexuality, informed by a moralistic culture and economic.'⁶⁵⁰

By contrast with the lack of literature on women as offenders within Irish criminology, there has been notably greater focus within feminist legal research into the experience of women as victims in the criminal justice system, and necessary law reforms on sex offences, domestic violence and sexual harassment in Ireland. As shown above, it was not until well after the 1960s that feminist challenges to the repressive laws around women's sexuality began to have an impact. Indeed, legal constructions of gender in Ireland continued to have the effect of maternalisation, terrorisation and sexualisation of women until much later in the twentieth century. Only during the 1970s and 1980s did laws and principles around sexual violence and 'consent' become a focus for women's rights campaigners. As Kilcommins *et al* write,

⁶⁴⁵ PACE Study, 2000, unpublished and conducted for internal information purposes. Reported in O'Kelly, Barry, 'Women Prisoners Want to Remain on the Inside', *Sunday Business Post*, October 8, 2000.

⁶⁴⁶ Quinlan, Christina, *Inside: Ireland's Women Prisons, Past and Present*. Dublin: Irish Academic Press, 2011.

⁶⁴⁷ Quinlan, Christina, 'Women, Prison and Social Control' in Healy, Deirdre, Hamilton, Claire, Daly, Yvonne and Butler, Michelle (eds), *The Routledge Handbook of Irish Criminology*. London: Routledge, 2016.

⁶⁴⁸ *Ibid*, at 516.

⁶⁴⁹ See O'Sullivan, Eoin and O'Donnell, Ian (eds), *Coercive Confinement in Ireland: Patients, Prisoners and Penitents*. Manchester University Press, 2012; Kilcommins, Shane, O'Donnell, Ian, O'Sullivan, Eoin and Vaughan, Barry, *Crime, Punishment and the Search for Order in Ireland*. Dublin: IPA, 2004.

⁶⁵⁰ Black, Lynsey, *Gendering the Condemned? Women and Capital Punishment in Ireland post-1922*, PhD Thesis submitted to University of Dublin, Trinity College, 2016, at 368.

During the 1970s the women's movement.. began to 'consciousness raise' about female victimisation, highlighting previously invisible and unvoiced social problems. Campaigning activists started to establish support networks such as rape crisis centres and women's refuge centres, while simultaneously drawing attention to the limitations and challenges posed by an exclusively State/accused model of criminal justice.⁶⁵¹

Indeed, the first domestic abuse shelter in Ireland was established in 1974; the first Rape Crisis Centre was set up in Dublin in 1977, and the Victim Support organisation was established in 1985.⁶⁵² At that time, in the mid-1980s, 'the only national victims' movement in Ireland was the women's movement, which was primarily concerned with victims of sexual violence and domestic abuse.'⁶⁵³ Activism by this movement over the following decades was to have a significant impact upon the evolution of legislation on gender-based violence, on conceptions of consent, and ultimately, it is argued, upon the construction of femininity through Irish laws.

4.3 Consent as a Legal Concept in Ireland

As was outlined in previous chapters, extensive campaigning over many years by feminist activists, victims' and survivors' groups and rape crisis centres has brought about substantial legal reforms in different jurisdictions. Increasingly, individual countries have adopted statutory definitions of 'consent', generally motivated by the frustration experienced over difficulties with securing convictions for rape due to lack of clarity, typically among jurors, on the legal meaning of 'consent.' Similar frustrations around conceptions of consent have been expressed in Ireland by feminist activists; defining consent has not been straightforward in Irish law, as in any other jurisdiction.

A recent comparative study on consent in criminal law, cited in Chapter 1, found that there remains a surprising lack of clarity as to the precise circumstances in which genuine consent is legally present.⁶⁵⁴ Yet the centrality of constructions of consent to feminist understandings of the law on sexual offences, on domestic violence and on sexual harassment has been clear to feminist activists from the early attempts at reform of Irish law.

Indeed, from the early years of the emergence of the women's movement in Ireland, there has been a clear focus within feminist legal research on the experience of women as victims of crime, in particular as victims of sexual offences and rape, with ground-breaking research in 2001 establishing high levels of undisclosed and unreported sexual abuse in Irish society.⁶⁵⁵ A number of studies have also highlighted the high attrition rate that applies to sexual assault

⁶⁵¹ Kilcommins, Shane, Leahy, Susan, Moore Walsh, Kathleen and Spain, Eimear, *The Victim in the Irish Criminal Process*. Manchester University Press, 2018, at 142.

⁶⁵² Kilcommins *et al, ibid*, at 2.

⁶⁵³ Kilcommins *et al, ibid*, at 35.

⁶⁵⁴ See O'Malley, Tom and Hoven, Elisa, 'Consent in the law relating to sexual offences', at 135-171 in Ambos, Kai, Duff, Antony, Roberts, Julian and Weigend, Thomas (eds), *Core Concepts in Criminal Law and Criminal Justice*. Cambridge University Press, 2020.

⁶⁵⁵ McGee, Hannah, Garavan, Rebecca, de Barra, Mairéad, Byrne, Joanne and Conroy, Ronán, *The SAVI Report: Sexual Abuse and Violence in Ireland*. Dublin: Liffey Press, Rape Crisis Centre and Royal College of Surgeons, 2002.

offence cases in Ireland, and have concluded that attrition or slippage can occur at multiple points in the legal process, including the pre-reporting stage.⁶⁵⁶

Significant substantive and procedural reforms in sex offence laws have been instituted as a result of feminist campaigns, notably through the enactment of the Criminal Law (Rape) (Amendment) Act 1990, which abolished the 'marital rape exemption', introduced a new gender-neutral statutory offence of 'rape under section 4' to cover penetrative sexual assault aside from the common law rape offence constituted by penile-vaginal penetration without consent. However, despite some welcome changes, the law on rape remains problematic in many respects, and gendered rules continue to apply to rape law and the conduct of rape trials, even despite extensive procedural reforms more recently introduced in the Criminal Law (Sexual Offences) Act 2017.⁶⁵⁷

Apart from the literature on rape, research has also been carried out by feminist criminologists in Ireland on women's experiences of 'domestic' violence; aside from difficulties with the language used, and with establishing the extent of such violence, feminist writing has also focused on the low levels of criminal law enforcement in this area.

The law was strengthened with the passing of the Domestic Violence Act 1996, which extended protection beyond spouses to non-marital relationships, and gave enhanced powers of arrest to gardai; this Act itself was later repealed and replaced by the Domestic Violence Act 2018, which introduced a range of procedural protections for victims, as well as a new offence of 'coercive control'.⁶⁵⁸ On sexual harassment law, both civil remedies and criminal sanctions are provided for, with growing awareness in Ireland as to the extensive incidence of such harassment as a result of the global #MeToo movement. The different legal formulations of consent in these and related contexts will be considered further below.

4.3.1 Consent and Rape Law

In Ireland as in many other jurisdictions, the concept of consent is central to the law on sexual offences. Irish criminal laws prohibiting sexual assault and rape require the prosecution to show beyond reasonable doubt that the complainant/victim's consent to the sexual act was absent *and that the accused was aware of this* before an accused can be convicted.⁶⁵⁹

⁶⁵⁶ See for example Hanly, Conor, Healy, Deirdre and Scriver, Stacey, *Rape and Justice in Ireland*. Dublin: Liffey Press, 2009; Leane, Maire, Ryan, Samantha, Fennell, Caroline and Egan, Emily, *Attrition in Sexual Assault Offence Cases in Ireland: A Qualitative Analysis*. Dublin: Government Publications, 2001; Leon, Claire, 'Recorded Sexual Offences 1994-1997: An Overview' (2000) 10 *Irish Criminal Law Journal* 2-7.

⁶⁵⁷ For an account of the reforms and changes in rape and sexual offences law over the decades, see generally O'Malley Tom, *Report of the Review Group on Protections for Vulnerable Witnesses in the Investigation and Trial of Sexual Offences*. Dublin: Government Publications, 2020; Leahy, Susan and Fitzgerald O'Reilly, Margaret, *Sexual Offending in Ireland: Laws, Procedures and Punishment*. Dublin: Clarus Press, 2018; Charleton, Peter, McDermott, Paul, Herlihy, Ciara and Byrne, Stephen, *Charleton & McDermott's Criminal Law and Evidence*. Dublin: Bloomsbury Professional, 2nd edition, 2020; O'Malley, Tom, *Sexual Offences*. Dublin: Round Hall Press, 2nd edition, 2013; Hanly, Conor, Healy Deirdre and Scriver, Stacey, *Rape and Justice in Ireland*. Dublin: Liffey Press, 2009; Bacik, Ivana, Maunsell, Catherine and Gogan, Susan, *The Legal Process and Victims of Rape*. Dublin: Rape Crisis Centre, 1998. See also Bacik, Ivana, 'Rape and the Law: The Quest for a Best-Practice Rape Law Model' (2000) 4 *Irish Journal of Feminist Studies* 17-30. See also Fennell, Caroline, 'Criminal Law and the Criminal Justice System: Woman as Victim' in Connelly, Alpha (ed), *Gender and the law in Ireland*. Dublin: Oak Tree Press, 1993; the *Report of the Working Party on the Legal and Judicial Process for Victims of Sexual and Other Crimes of Violence Against Women and Children*. Dublin: National Women's Council of Ireland, 1996; Leonard, Madeline, 'Rape: Myths and Reality' in Smyth, Ailbhe (ed), *Irish Women's Studies Reader*. Dublin: Attic Press, 1993.

⁶⁵⁸ In section 39 of the 2018 Act.

⁶⁵⁹ The laws on rape and sexual offences are set out in range of different statutes, in particular the Criminal Law (Rape) Act 1981, the Criminal Law (Rape) (Amendment) Act 1990 and the Criminal Law (Sexual Offences)

Traditionally, however, consent to sexual intercourse was presumed to exist within a marital relationship, so that a husband could not be convicted for rape of his wife. This ‘marital rape exemption’ was strongly criticised by rape crisis centres, feminist activists and lawyers over many years and finally abolished by statute in 1990.⁶⁶⁰

By contrast, consent cannot legally be given to sexual intercourse in Irish law where the complainant is under 17, under sections 2 and 3 of the Criminal Law (Sexual Offences) Act 2006.⁶⁶¹ These provisions re-instated the common law rule that children were deemed legally incapable of giving consent, and they provided for a more severe penalty in respect of offences committed against a child under 15.⁶⁶²

Thus, it remains the case that the age of consent in Ireland is 17 for sexual intercourse and some other sexual acts.⁶⁶³ The age of consent to lesser sexual acts (capable of being

Act 2017. The gender-specific offence of rape (requiring the perpetrator be male and the victim female) is criminalised under section 2 of the Criminal Law (Rape) Act 1981. A gender-neutral offence of rape (penetrative sexual assault) is criminalised under section 4 of the Criminal Law (Rape) (Amendment) Act 1990. Sexual assault is defined as meaning an assault in circumstances of indecency, including acts of sexual groping or threatened groping, as well as more serious sexually abusive behaviours. For critical perspectives on sex offences law in Ireland, see further Leahy, Susan, ‘Sexual Offences Law in Ireland: countering gendered stereotypes in adjudications of consent in rape trials’ in Black and Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart, 2019; Leahy, Susan and Fitzgerald O’Reilly, Margaret, *Sexual Offending in Ireland*. Dublin: Clarus Press, 2018, Chapter 1; Leahy, Susan, ‘When Honest is not Good Enough: the need for reform of the honest belief defence in Irish rape law’ (2013) 23 *ICLJ* 102; Hanly, Conor and Healy, Deirdre, *Rape and Justice in Ireland*. Dublin: Liffey Press, 2009; Leahy, Susan, ‘In a woman’s voice: a feminist analysis of Irish rape law’ [2008] *ILT* 203; and Bacik, Ivana, Maunsell, Catherine and Gogan, Susan, *The Legal Process and Victims of Rape*. Rape Crisis Centre, 1998, Chapter 10.

⁶⁶⁰ The so-called ‘marital rape exemption’ was abolished in Ireland through section 5 of the Criminal Law (Rape) (Amendment) Act 1990. The common law presumption was articulated infamously by Matthew Hale CJ in 1736, writing that: ‘By their mutual matrimonial contract a wife hath given herself in kind unto the husband, which she cannot retract.’ For more on the traditional common law rule and the process leading to reform, see Leahy and Fitzgerald O’Reilly, *op cit*, at 43-6 and O’Malley, Tom, *Sexual Offences*. Dublin: Round Hall Press, 2nd edition, 2013, at 3-34-3-36.

⁶⁶¹ As substituted by sections 16 and 17 of the Criminal Law (Sexual Offences) Act 2017.

⁶⁶² In respect of an offence committed against a child under 15, section 2(6) of the 2006 Act, as substituted by section 16 of the 2017 Act, provides that ‘It shall not be a defence to proceedings for an offence under this section for the defendant to prove that the child against whom the offence is alleged to have been committed consented to the sexual act of which the offence consisted.’ Similarly, in respect of children aged between 15 and 17, section 3(6) of the 2006 Act, as substituted by section 17 of the 2017 Act, provides that ‘..it shall not be a defence to proceedings for an offence under this section for the defendant to prove that the child against whom the offence is alleged to have been committed consented to the sexual act of which the offence consisted.’ A defence of ‘reasonable mistake’ as to the age of the child is however permitted. Section 3(8), as substituted, also recognises the reality of under-age, consensual, peer relationships through the introduction of a ‘proximity of age’ defence. Under this provision, a person charged with an offence of engaging in a sexual act with a person between the ages of 15 and 17 years can use consent as a defence if the person charged is younger; or is less than two years older than the child complainant. They must not be in authority over the child or have been in a relationship with the child that was ‘intimidatory or exploitative’. The consent of the Director of Public Prosecutions is required for any prosecution of a child under the age of 17 years for this offence.

⁶⁶³ It is a criminal offence carrying a maximum penalty of life imprisonment to engage or attempt to engage in a sexual act with a child under 15 years of age; and an offence carrying a maximum penalty of seven years imprisonment (rising to 15 years where the perpetrator is a ‘person in authority’) where the child is over 15 but under 17: under sections 2 and 3 of the Criminal Law (Sexual Offences) Act 2006, as amended by sections 16 and 17 of the Criminal Law (Sexual Offences) Act 2017. Section 1 of the 2006 Act provides a definition of ‘sexual act’, meaning an act consisting of (i) sexual intercourse, or (ii) buggery ‘between persons

prosecuted as ‘indecent assault’) remains effectively at 15 under a 1935 Act provision still in force.⁶⁶⁴

This brief overview illustrates the extraordinary complexity of Irish law on sexual offences, and in particular the law relating to consent and to child sexual offences.⁶⁶⁵

The difficulty with navigating the law in this area was complicated further by the absence until recently of any statutory definition of consent in the context of sex offence laws more generally. This had meant that over many years, understandings of consent in law had been developed by judges through common law in a highly gendered way. As O’Malley writes, ‘Historically, a woman was not regarded as a victim of rape unless intercourse took place “forcibly and against her will” and this probably explains why, even in more recent times, textbooks tended to state that consent could be vitiated only by force, fear or fraud.’⁶⁶⁶

While the English case of *R v Olugboja* established that it was not necessary to prove presence of force to show lack of consent,⁶⁶⁷ extraordinarily it was not until the reforming 1990 Act that Irish legislative provisions made clear that, where the absence of consent is an ingredient of the offence, ‘any failure or omission by [the complainant] to offer resistance to the act does not of itself constitute consent to the act.’⁶⁶⁸

Prior to the passage of the 1990 Act, the Law Reform Commission had gone further and recommended the introduction of a full statutory definition of consent, on the basis that the lack of a definition was capable of causing difficulty with prosecuting sexual offences.⁶⁶⁹ However, no such definition was included in the Act. Leahy and Fitzgerald O’Reilly note that during Dáil and Seanad debates on the 1990 provisions, the then Minister for Justice had defended this omission to include a statutory definition of consent on the basis that it had not given rise to any problems in rape trials nor in prosecutions for sexual assault, since an assault must be considered, by definition, ‘non-consensual.’⁶⁷⁰

who are not married to each other’ or ‘an act described in section 3(1) or 4(1) of the Act of 1990’; this relates to the offences of aggravated sexual assault and rape under section 4 (non-penile vaginal penetration) as provided for in the Criminal Law (Rape) (Amendment) Act 1990. A girl under the age of 17 who has sexual intercourse may not be convicted of an offence on that ground alone. Section 5 of the Criminal Law (Sexual Offences) Act 2006 provides that ‘A female child under the age of 17 years shall not be guilty of an offence under this Act by reason only of her engaging in an act of sexual intercourse.’

⁶⁶⁴ Section 14 of the Criminal Law Amendment Act 1935 provides that ‘It shall not be a defence to a charge of indecent assault upon a person under the age of fifteen years to prove that such person consented to the act alleged to constitute such indecent assault.’ Indecent assault itself has been re-named as ‘sexual assault’ under section 2 of the Criminal Law (Rape) (Amendment) Act 1990.

⁶⁶⁵ For a recent overview of the law on sexual offences against children which incorporates the changes made by the Criminal Law (Sexual Offences) Act 2017, see Leahy and Fitzgerald O’Reilly, 2018, *op cit*, Chapter 3.

⁶⁶⁶ O’Malley, Tom, *Sexual Offences*. Dublin: Round Hall Press, 2nd edition, 2013, at 3-03.

⁶⁶⁷ *R v Olugboja* [1981] 3 All ER 443.

⁶⁶⁸ Criminal Law (Rape) (Amendment) Act 1990, section 9. As indicated above, section 5 of the same Act also abolished the traditional ‘marital rape exemption’, whereby the consent of a woman was presumed within marriage.

⁶⁶⁹ Law Reform Commission, LRC 24-1988, *Report on Rape*. Dublin: Official Publications, 1988, at 9.

⁶⁷⁰ Leahy and Fitzgerald O’Reilly, 2018, *op cit*, at 16; 55. See further Fennell, Caroline, ‘Annotation of the Criminal Law (Rape) (Amendment) Act 1990’, (1990) *Irish Current Law Statutes Annotated*, 32-01 at 32-06.

Following the 1990 reform, despite this stated view, the question then did arise in a series of cases as to how ‘consent’ should best be defined; it was established that it must involve ‘free and voluntary agreement’ through, in particular, the 2001 decision of the Court of Criminal Appeal in *People (DPP) v C*,⁶⁷¹ as confirmed in 2016 by the Supreme Court in *People (DPP) v C O’R*.⁶⁷² The Court ruled in the latter case that ‘Consent is the active communication through words or physical gestures that the woman agrees with or actively seeks sexual intercourse.’⁶⁷³

However, by the time this decision was given in 2016, the momentum had grown for introduction of a statutory definition of consent; as Susan Leahy writes, there had been

a number of problems with the reliance on common law to define consent which prevailed .. The guidance provided on consent was both vague and stagnant. For example, although fear of adverse consequences was capable of vitiating an apparent consent to sexual activity, it was very unclear what forms of sexual coercion might be included within this... The law was certainly not robust enough to overcome the effects of societal attitudes about rape.⁶⁷⁴

Indeed, Leahy states that ‘Irish legal commentators and victim support groups repeatedly called for the introduction of a legislative definition’, and so this was ultimately brought about through the passage of the Criminal Law (Sexual Offences) Act 2017.⁶⁷⁵ In Part 8 of the Act, a statutory definition of consent was included for the first time in section 48, which inserts a new section 9 into the Criminal Law (Rape) (Amendment) Act 1990.

The new section 9(1) provides for the key definition, namely that a ‘person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.’ Section 9(2) lists a number of situations where a person ‘does not consent to a sexual act’ in law, including where a person is asleep, unconscious, mistaken as to the nature of the act or the identity of any other person involved; or incapable of consenting due to the effect of alcohol or drugs. Section 9(3) states however that the section ‘does not limit the circumstances in which it may be established that a person did not consent to a sexual act.’ The buying of consent is not itself covered in section 9, although section 9(2)(h) provides that a person does not consent where ‘the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself.’ In other words, a person’s consent is not legally present where somebody else has purported to give it on their behalf.

In their subsequent commentary on this provision, the Law Reform Commission pointed out that the effect of the new section 9 as inserted by section 48 was

to codify the pre-2017 general definition of consent as well as the circumstances in which consent is deemed not to be present.. [the new section 9] did not involve any

⁶⁷¹ [2001] 3 IR 345; at 360 the Court held that ‘Consent means voluntary agreement or acquiescence to sexual intercourse by a person of the age of consent with the requisite mental capacity. Knowledge or understanding of facts material to the act being consented to is necessary for the consent to be voluntary or constitute acquiescence.’

⁶⁷² [2016] 3 IR 322.

⁶⁷³ At para 36.

⁶⁷⁴ Leahy, Susan, ‘Sexual Offences Law in Ireland: countering gendered stereotypes in adjudications of consent in rape trials’ in Black and Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart, 2019, at 10.

⁶⁷⁵ Leahy, Susan, 2019, *ibid*, at 10; see also Leahy, Susan, ‘Reform of Irish Rape Law: The Need for a Legislative Definition of Consent’ (2014) 43 *Common Law World Review* 231.

reform as such of the law on consent, because it broadly reflected the pre-2017 position in Irish law in this area, as reflected in case law.. Nonetheless, by placing the existing law on a statutory footing, the law on consent has been clarified with the benefits that flow from that.⁶⁷⁶

Leahy and Fitzgerald O'Reilly similarly asserted in a text published following enactment of the 2017 Act, that the 'legislative definition of consent in the 2017 Act is heavily based upon the pre-existing common law, and thus common law guidance will necessarily inform the interpretation of the new definition.'⁶⁷⁷ However, they noted that the new 2017 version of section 9 represented 'significant' clarification of the common law, providing 'welcome transparency' in confirming that the definition of consent applies to rape and serious sexual assault, as well as to any act 'which if done without consent would constitute a sexual assault.'⁶⁷⁸

Indeed, Leahy has suggested more recently that while 'the list of situations where consent is deemed to be absent largely replicates the common law.. there is some expansion [in the 2017 Act definition] of the understanding of the factors which are contra-indicative of genuine sexual choice.'⁶⁷⁹ She notes that for the first time, it is stated clearly in statute that consent expressed by a third party, other than the complainant, is not considered a valid consent, thus aligning with the principle of 'communicative sexuality' which she argues 'offers greater protection from sexual abuse for vulnerable individuals, such as trafficked persons or sex workers, who may be offered for sexual services without their consent.'⁶⁸⁰

She is critical however of the limitations of the definition, arguing that 'the legislature could have gone further and sought to more directly tackle the rape myths... the legislature did not stray far from the traditional, indeed stereotypical, understandings of force which are found within the common law' and that threats other than those of force which might also have the effect of obviating sexual choice should have been expressly included in the list.⁶⁸¹ She writes pointedly that,

given the conservative judicial development of understandings of consent to date in this jurisdiction and the persistence of the 'real rape' stereotype which continues to create an expectation that rape involve forcible compulsion, positive legislative action emphasising that unjustifiable sexual coercion involves more than physical force and threats thereof would have been beneficial.⁶⁸²

A further criticism about the 2017 Act, made by Leahy and echoed by others, is that it did not address the subjective 'honest belief in consent' defence to a rape charge.⁶⁸³ This common law defence, associated with the notorious House of Lords decision in *R v Morgan*,⁶⁸⁴ requiring proof that an accused person was *subjectively aware* of the complainant's lack of consent in order to convict, has been subject to extensive critique by feminist writers,

⁶⁷⁶ Law Reform Commission, LRC 122-2019, *Report on Knowledge or Belief Concerning Consent in Rape Law*. Dublin: Official Publications, 2019, at 26.

⁶⁷⁷ Leahy and Fitzgerald O'Reilly, 2018, *op cit*, at 16.

⁶⁷⁸ Leahy and Fitzgerald O'Reilly, *ibid*, at 56.

⁶⁷⁹ Leahy, 2019, *op cit*, at 11.

⁶⁸⁰ *Ibid*, at 11.

⁶⁸¹ *Ibid*, at 12.

⁶⁸² *Ibid*, at 12.

⁶⁸³ For a discussion of this defence, see O'Malley, Tom, *op cit*, at 58-60.

⁶⁸⁴ [1976] AC 182.

victims' groups and rape crisis centres.⁶⁸⁵ It has long been argued by feminist scholars and others that the retention of this subjective 'honest belief' defence has capacity to undermine statutory definitions of consent.⁶⁸⁶

In 2019, welcoming the introduction of the new section 9, the Law Reform Commission pointed out thus that:

the availability of a primarily subjective honest belief defence is not consistent with the fact that consent must involve "free and voluntary agreement"... The Commission has concluded that continuing a primarily subjective, and unilateral, understanding of belief in consent undermines the long-standing concept of consent, now placed on a statutory footing in the 2017 Act.⁶⁸⁷

Thus, the Commission recommended 'that the current honest belief defence in section 2(2) of the 1981 Act should be repealed and replaced.'⁶⁸⁸

This recommendation was subsequently reinforced by the report of the government-commissioned review into Irish laws and procedures on sexual offences chaired by Tom O'Malley ('the O'Malley report'), which recommended in July 2020 that 'legislation should be introduced at an early date to give effect to the Commission's recommendation'.⁶⁸⁹ The report also recommended the strengthening of education programmes around consent, commenting that

It is critically important that everyone should be aware of the legal definition of consent as free and voluntary agreement to a sexual act... Education on consent should focus on the right to personal autonomy. ... It further means that everyone has an absolute right to refuse to engage in sexual activity, either generally or with a particular individual or in particular circumstances. Sexual autonomy therefore entails two complementary freedoms: the freedom to engage and the freedom to refuse.⁶⁹⁰

The new section 9, as inserted by section 48 of the 2017 Act, thus represents a very welcome first-time statutory definition of what positively constitutes consent for the purpose of sexual offences, including rape. Its language emphasises the need for 'a clear communicative basis for consent', in keeping with understandings drawn from other jurisdictions that statutory definitions of consent require 'active communication'.; but this 'communicative consent' principle is undermined by the retention of the 'honest belief in consent' defence.⁶⁹¹

⁶⁸⁵ See for example: Leahy, Susan, 'When Honest is not Good Enough: the need for reform of the honest belief defence in Irish rape law' (2013) 23 *ICLJ* 102.

⁶⁸⁶ As Susan Leahy has written, 'law reform in the form of reformulation of the honest belief in consent defence is urgently required if the message of the new communicative model of consent is not to be undermined.' Leahy, 2019, *op cit*, at 18.

⁶⁸⁷ Law Reform Commission, LRC 122-2019, *Report on Knowledge or Belief Concerning Consent in Rape Law*. Dublin: Official Publications, 2019, at 51.

⁶⁸⁸ *Ibid*, at 52.

⁶⁸⁹ *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (the O'Malley Report)*. Dublin: Government Publications, 2020, at 29.

⁶⁹⁰ *Ibid*, at 29. The O'Malley report (at 30) also commended the Department of Education for its launch in 2019 of a framework for the higher education sector for promoting education about consent, and the Department of Justice for its 'No Excuses Campaign', rolled out to address domestic and sexual violence, previously launched in 2016 and re-launched in November 2020; see <https://www.justice.ie/en/JELR/Pages/PR20000263>

⁶⁹¹ Law Reform Commission, 2019, *op cit*, at 83-4.

Building on the O'Malley report recommendations, this issue is at last to be addressed through forthcoming legislation; a commitment is made in the current Department of Justice Action Plan to publish 'a new Sexual Offences Bill to deliver reforms to sexual offences legislation arising from the O'Malley report and the recommendations of the Law Reform Commission on reasonable belief in consent' during the last Quarter of 2021.⁶⁹²

It may be concluded therefore that understandings of consent in sex offence laws across different jurisdictions, now including Ireland, are increasingly reliant on insisting that 'active steps' be taken to ascertain if consent is present, in accordance with the principle of underlying what Leahy describes as the 'new communicative model of consent'.⁶⁹³

This approach, it is argued, represents a direct contradiction of the tendency among 'sex work' proponents to argue that consent in the context of the sex trade is simply presumed to exist. To make a presumption of consent in the context of prostituted sex may be seen as the contemporary equivalent of presuming that consent must always be deemed to exist in marriage – a presumption now considered as utterly outdated and archaic, a throwback to a culture of unchallenged patriarchy. Louise Crowley describes the traditional 'marital rape exemption' as an 'especially heinous example of the presumed domination of a husband over his wife'.⁶⁹⁴ Crowley also recalls that, when attempts were made to abolish the exemption in 1981, a briefing note prepared for the then Minister for Justice had noted that its abolition 'could be very detrimental to the family'; thus, 'relentless efforts to maintain and protect the married family unit were used to justify' retention of the exemption.⁶⁹⁵

It may now seem laughable that just by virtue of being married, a woman could be said to presume to consent to sex with her husband in every situation; and in years to come, it is argued that, as the true extent of exploitation and the vast preponderance of minority women in prostitution becomes apparent, the concept that consent can be similarly presumed to exist in any relationship or institutional structure will be seen as equally outdated.

4.3.2 Consent and Domestic Violence

As outlined in Chapter 1, recognition that consent may be compromised by reference to context is well-established within the context of domestic violence internationally. In Ireland, however, it has taken many decades for progressive legal changes to be brought about for survivors of abuse in the home, since the establishment of the first shelter for victims of such violence, and the founding of the *Women's Aid* organisation, in 1974.⁶⁹⁶ As Louise Crowley writes, the definition of 'family' in Article 41 of the Constitution, in serving 'to

⁶⁹² Department of Justice, *Justice Action Plan 2021*. Dublin: Government Publications, 2021, Action 129, at 31: see <https://www.justice.ie/en/JELR/Pages/PR20000263>. This deadline had not been met as of 13 January 2022; although as of that date, and following the murder of Ashling Murphy in Tullamore, Co Offaly on 12 January 2022, the Minister for Justice promised imminent publication of a new Government Strategy on Domestic and Sexual Violence; see for example <https://www.irishexaminer.com/news/politics/arid-40784409.html>

⁶⁹³ Leahy, 2019, *op cit*, at 18.

⁶⁹⁴ Crowley, Louise, 'Domestic Violence Law' in Black and Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart, 2019, at 148-9. Crowley notes that, despite the abolition of that exemption in 1990, to date 'there have only been three successful convictions for marital rape', indicating the persistence of traditional rape myths.

⁶⁹⁵ *Ibid* at 149.

⁶⁹⁶ Kilcommins *et al*, *op cit*, at 2. See further Fennell, Caroline, 'Criminal Law and the Criminal Justice System: Woman as Victim' in Connelly, Alpha, *Gender and the law in Ireland*. Dublin: Oak Tree Press, 1993.

establish the inviolability of the family.. traditionally served to prevent the State from intervening in the privacy of the family unit despite alleged adverse effects on individual members.⁶⁹⁷

Thus, legal reforms to protect family members abused or victimised within the home have been introduced incrementally and piecemeal. The first such reform, introduced in 1976, was ‘relatively minimal’; provision for a ‘barring order’ empowering the courts to remove a violent spouse from the home where reasonable grounds existed for believing that the safety or welfare of the applicant spouse or any dependent child required it.⁶⁹⁸ The provisions of the 1976 Act were superseded by stronger protections in the Domestic Violence Act 1996, which extended protections further beyond the marital family, and introduced the concept of ‘safety orders’; but ‘did not provide any clarity or direction in respect of the evidentiary thresholds for securing protective relief.’⁶⁹⁹

The changes in that Act were hard-fought, brought about after years of campaigning and awareness-raising by feminist advocacy groups, notably Women’s Aid. In 1995, they published the first Irish study examining women’s experiences of intimate-partner violence.⁷⁰⁰ This was followed by a succession of publications over many years, exposing the extent of such violence and abuse.⁷⁰¹

Building on the increased awareness of domestic violence, a programme of intensive advocacy, and pressure at international level following Ireland becoming a signatory to the Istanbul Convention in 2015, further positive legal changes were introduced through the Domestic Violence Act 2018, which generated significant improvements in court processes and treatment of victims. Among its most notable provisions was the broadening of availability of emergency barring orders;⁷⁰² and the provision for the first time of a list of factors to be taken into account by the courts in considering applications for safety orders, barring orders or protection orders.⁷⁰³ Importantly, the Act also provides for an innovative new offence of ‘coercive control’, defined in section 39 as occurring where a person ‘knowingly and persistently engages in behaviour’ against their partner which is ‘controlling or coercive’ and which has a serious effect by causing serious alarm or distress which has a ‘substantial adverse impact on their usual day-to-day activities’; or by causing them to fear that violence will be used against them.

The creation of this offence represents a new recognition that many abusers in a domestic setting use controlling behaviour to coerce their partner into apparent acquiescence or acceptance of the abuse, thus marking an important development in society’s understanding of domestic violence and of consent in the context of abuse within intimate family

⁶⁹⁷ Crowley, Louise, 2019, *op cit*, at 140.

⁶⁹⁸ *Ibid* at 140; section 22 of the Family Law (Maintenance of Spouses and Children) Act 1976, later amended and extended by section 2(4) of the Family Law (Protection of Spouses and Children) Act 1981.

⁶⁹⁹ *Ibid* at 143.

⁷⁰⁰ O’Connor, Monica and Kelleher Associates, *Making the Links: Towards an Integrated Strategy Towards the Elimination of Violence against Women in Intimate Relationships with Men*. Dublin: Women’s Aid, 1995.

⁷⁰¹ See for example *One in Five Women Report*. Dublin: Women’s Aid, 2020; *Behind Closed Doors Report*. Dublin: Women’s Aid, 2016. See also publications by Safe Ireland, at www.safeireland.ie; and see also the groundbreaking SAVI Report; McGee, Hannah, Garavan, Rebecca, de Barra, Mairéad, Byrne, Joanne and Conroy, Ronán, *The SAVI Report: Sexual Abuse and Violence in Ireland*. Dublin: Liffey Press, Rape Crisis Centre and Royal College of Surgeons, 2002.

⁷⁰² Section 9 of the Domestic Violence Act 2018.

⁷⁰³ Section 5 of the Domestic Violence Act 2018.

relationships. As Crowley writes, through this new offence and other provisions, the 2018 Act ‘endeavours in numerous ways to redress the imbalance of power typically arising in cases of domestic abuse.’⁷⁰⁴

Coercive control is now a criminal offence; but legal interventions to address domestic violence are frequently carried out through non-criminal means, within the network of family law mechanisms including barring and safety orders. However, the onus to initiate such mechanisms rests with the victim, who must take civil proceedings through the family courts to obtain legal remedies; breach of such orders does carry a criminal sanction. Crowley points out that this places ‘an inordinate pressure on victims to initiate the process of State intervention. Rather than ordinarily recognising domestic abuse as an act of criminal assault in the first instance .. too often it remains incumbent upon the victim to seek out civil remedies in the form of a barring order of safety order and to rely upon these reliefs to provide protection into the future.’⁷⁰⁵ She argues further that this ‘normalisation of a civil-based response to an act of domestic violence suggests, deliberately or otherwise, that an act of violence in the domestic setting is regarded as a lessor form of assault than that committed outside that context.’⁷⁰⁶

Undoubtedly the passage of the Criminal Justice (Victims of Crime) Act 2017 will enable the provision of additional supports and protections to victims of crime in Ireland, and may have ‘immense significance’ for victims of domestic abuse in particular. But it is nonetheless likely that because civil-based responses remain the primary means of addressing intimate partner violence, many women will continue to lack adequate State protection.⁷⁰⁷

It may be surmised that there is continued reliance on civil law remedies where criminal law sanctions should apply, largely because of the traditional reluctance by the State to intervene in private family matters. Yet with the passage of the 2018 Act, this reluctance is being steadily eroded, and the need to recognise violence within the home *as violence* is gaining greater recognition.

Such a development fundamentally relies on an understanding of apparent consent by victims of domestic violence to be compromised within a violent relationship. In her empirical research into prostitution conducted in Ireland, Monica O’Connor draws parallels with domestic violence, using a continuum concept to describe how choice, agency and coercion can co-exist for women experiencing violence within the home or in intimate relationships.⁷⁰⁸ She applies the insights she has derived from domestic violence settings to her analysis of women’s descriptions of their lived experience of prostitution; noting the ‘coercive context in which consent is given and obtained in prostitution’.⁷⁰⁹ She also notes ‘the importance of differentiating between adult consensual sex, implying mutual, desired sex and prostitution sex described by women in [her] study which is better defined as buyers gaining acquiescence to commit unwanted sexual acts’.⁷¹⁰ O’Connor’s analysis based on insights derived from domestic violence laws and policies, along with her immense

⁷⁰⁴ Crowley, *op cit*, at 156.

⁷⁰⁵ Crowley, *op cit*, at 149.

⁷⁰⁶ *Ibid*, at 150.

⁷⁰⁷ The 2017 Act transposes into Irish law EU Directive 2012/29; see further Crowley, *op cit*, at 153-4.

⁷⁰⁸ O’Connor, Monica, ‘Choice, Agency, Consent and Coercion: Complex Issues in the Lives of Prostituted and Trafficked Women’ (2017) 62 *Women’s Studies International Forum* 8-16.

⁷⁰⁹ *Ibid* at 15.

⁷¹⁰ *Ibid* at 15.

contribution to the law reform process in Ireland, will be discussed further in this and later chapters.

Just as we now recognise the ‘coercive context’ setting in our domestic violence laws, so too it is argued should we recognise prostituted sex as taking place within such a setting. This understanding is already established in another context where civil law remedies have traditionally taken centre stage; that of workplace-based sexual harassment.

4.3.3 Consent and Sexual Harassment

Before the international media focus on the #MeToo movement emerged late in 2017, there had already been significant public focus on gender discrimination and sexual harassment in Irish society, which had influenced the passage of the Criminal Law (Sexual Offences) Act 2017.⁷¹¹ In November 2015, the grassroots campaign #WakingTheFeminists had been formed by a group of women working in theatre to protest against the male-dominated lineup in the Abbey (Irish National Theatre) centenary programme marking 100 years since the 1916 Easter Rising, a formative moment in the birth of the Irish State. The campaign mobilised women in the arts, the media and elsewhere to highlight discrimination, marginalisation and harassment issues.

Following the passage of the 2017 Act, writer/director Grace Dyas published online allegations of sexual harassment against the former director of another leading Dublin theatre, the Gate; more women then came forward publicly with similar allegations.⁷¹² These developments, along with the extensive reporting about #MeToo in the Irish media, may well have influenced many victims and survivors to speak out for the first time about their abuse. In September 2018, the Crime Victims Helpline published its Annual Report showing that the number of people contacting the service about rape or sexual assault in 2017 had more than doubled over the previous year.⁷¹³ In 2019, the government launched a ‘No Excuses’ publicity campaign aimed at increasing awareness around sexual harassment and sexual violence.⁷¹⁴

The #MeToo movement was unlikely, however, to have been the only catalyst for this increase in reporting of, and awareness about, sexual harassment and abuse. The proceedings of a Belfast rape trial, in which the accused men were all well-known rugby players, dominated the Irish media over nine weeks until the end of March 2018.⁷¹⁵ When the men were all acquitted, thousands came out on Dublin streets to protest at the verdict, using the hashtag #IBelieveHer. The case, albeit that it was tried in a different legal jurisdiction (Northern Ireland), was described as generating Ireland’s own #MeToo movement across the whole island.

The public outcry surrounding the verdict led to initiation by the government of a review of the investigation and prosecution of sexual offences, as previously discussed; this was chaired

⁷¹¹ See further Bacik, Ivana, ‘A Changing Landscape: Ireland and the #MeToo Movement’ in Noel, Ann and Oppenheimer, David (eds), *The Global #MeToo Movement: how social media propelled a historic movement and the law responded*. US: Full Court Press, 2020, at 139-146.

⁷¹² Falvey, Deirdre, ‘Release of Gate Report into Colgan Behaviour’, *The Irish Times*, 28 February 2018.

⁷¹³ Gleeson, Conor, ‘Crime Helpline Credits MeToo with Huge Rise in Sexual Assault Calls’, *The Irish Times*, 13 September 2018.

⁷¹⁴ <https://www.gov.ie/en/campaigns/no-excuses/>

⁷¹⁵ See Gallagher, Conor, ‘Inside Court 12: the Complete Story of the Belfast Rape Trial’, *The Irish Times*, 28 March 2018.

by legal expert Tom O'Malley and reported in August 2020 on further necessary procedural changes within the criminal justice system beyond those introduced through the 2017 Act.⁷¹⁶

However, even prior to 2017, laws had already been in place prohibiting sexual harassment. Harassment (including sexual harassment) is specifically criminalised under section 10 of the Non-Fatal Offences Against the Person Act 1997, defined as 'persistently following, watching, pestering, besetting or communicating with' a person, so as to 'seriously interfere' with their 'peace and privacy' or to cause 'alarm, distress or harm' to them.

Sexual harassment which does not fit the criminal definitions either of sexual assault or of harassment under section 10 of the 1997 Act and which occurs in a workplace environment can however be actionable under civil law. Apart from the criminal law, under civil law employers in Ireland have a legal duty of care to have adequate policies in place to ensure dignity at work is safeguarded, under both the anti-discrimination legislative framework, the Employment Equality Acts 1998-2015; and also under the Safety, Health and Welfare at Work Act 2005.⁷¹⁷

The employment equality legislation covers nine different grounds of discrimination: namely gender, civil status (such as being single, married etc), family status (parenting responsibility), sexual orientation, age, disability, race (including nationality), religious belief or membership of the Traveller community. Trade union membership, economic status and political opinion are among the grounds not covered. Harassment based on any of the nine specified grounds is regarded legally as a form of discrimination in relation to conditions of employment. Harassment that is not based on one of the discriminatory grounds may still constitute a breach of employer's responsibilities under the legislation health and safety in the workplace.

Under section 14A of the 1998 Act, harassment is defined as 'any form of unwanted conduct related to any of the discriminatory grounds'. In the same section, sexual harassment is defined as covering 'unwanted verbal, non-verbal or physical conduct of a sexual nature'. To constitute either harassment or sexual harassment, the conduct must have 'the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person'.

The statutes protect employees and independent contractors; but a separate anti-discrimination statutory framework, the Equal Status Acts 2000-2018, offer similar protections to consumers, including protection against sexual and other harassment, on the same nine grounds in respect of the provision of goods and services. Irish equality legislation does not require those alleging harassment before the civil courts or tribunals to show that they did not consent to any sexual advances made. The civil law test is based upon the less onerous requirement to show that the conduct was 'unwanted', and had 'the purpose or effect of violating a person's dignity...'.⁷¹⁸

Under the employment equality legislation, employees can file complaints of discrimination or harassment with the Workplace Relations Commission (WRC), which is a free service. Complaints must be brought within six months of the last act of harassment.⁷¹⁹ Complaints can be dealt with by mediation if both sides agree, or else will be dealt with by the WRC

⁷¹⁶ *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (the O'Malley Report)*. Dublin: Government Publications, 2020; see discussion earlier in this Chapter.

⁷¹⁷ For a general overview of sex discrimination law in Ireland, see Bolger, Marguerite and Kimber, Cliona, *Sex Discrimination Law*. Dublin: Round Hall Sweet & Maxwell, 2000.

⁷¹⁸ The Equal Status Acts 2000-2018.

⁷¹⁹ This time limit can be increased to 12 months if 'reasonable cause' for the delay can be shown.

adjudication service. Remedies available from the WRC are back pay and compensatory damages. In addition, there are strong protections against victimisation provided for in the Employment Equality Acts, so an employer cannot treat an employee badly for taking a claim, or for being a witness in a claim. The WRC also deals with complaints relating to harassment or discrimination under the Equal Status Acts.

A Code of Practice on Sexual Harassment and Harassment at Work was introduced by way of statutory instrument in 2012, giving practical guidance to employees and employers on appropriate procedures for preventing and dealing with sexual harassment at work, and seeking to ‘promote the development and implementation of policies and procedures which establish working environments free of sexual harassment and harassment and in which the dignity of everyone is respected.’⁷²⁰ The Irish Human Rights and Equality Commission has a general remit to promote equality and can provide advice, and in some cases legal assistance, where a complainant brings a harassment claim before the WRC.

Before the beginnings of the #MeToo movement, very few complaints of gender discrimination or sexual harassment were made each year. The WRC annual report for 2017 discloses that 11% of complaints made before it that year related to discrimination/equality grounds.⁷²¹ Notably, the number of gender-related claims rose by 61% from 2016 to 2017.⁷²² Between 2018 and 2019, the number of gender-related workplace claims rose further, by 36%; but gender-related claims under the Equal Status Acts fell by 23%.⁷²³ It is too soon to say whether any increase in the numbers of gender-related workplace discrimination claims will be sustained, or whether the #MeToo movement is responsible for the rise in numbers, given that at least some of these cases are known to include claims of harassment, but some commentators have speculated on its influence.⁷²⁴ In addition, other recent developments have highlighted issues around gender-based harassment and violence, particularly with greater awareness around the prevalence of online harassment; new legislation has been passed to tackle online abuse, including sexual abuse.⁷²⁵ Furthermore, while in Ireland as in Britain, the tragic death of Sarah Everard prompted an upsurge in feminist activism through the #ReclaimtheStreets movement during 2021, the horrific killing of Ashling Murphy in Tullamore, Co Offaly on 12 January 2022 generated a further immense public movement.⁷²⁶

Thus, it is clear from recent legal and political developments that the #MeToo, #WakingTheFeminists and #IBelieveHer movements, among others, have helped to

⁷²⁰ SI 208/2012; Employment Equality Act 1998 (Code of Practice) (Harassment) Order.

⁷²¹ https://www.workplacerelations.ie/en/Publications_Forms/Workplace_Relations_Commission_-_Annual_Report_2017.pdf

⁷²² The gender ground was only indicated in an Equal Status Acts claim 20 times in 2016, but 101 times in 2017.

⁷²³ www.workplacerelations.ie/en/Publications_Forms/Annual_Report_2019

⁷²⁴ Sheridan, Kathy, ‘The MeToo Movement is Far From Over’, *The Irish Times*, 28 March 2018, <https://www.irishtimes.com/opinion/kathy-sheridan-metoo-movement-is-far-from-over-1.3442194>, reporting on a case in which an Irish car parts company was ordered to pay €46,000 compensation to a receptionist who was sacked after refusing to have sex with her boss.

⁷²⁵ The Harassment, Harmful Communications and Related Offences Act 2020, known as ‘Coco’s Law’; see for example Burns, Sarah, ‘Gardai Begin Investigations into Online Harassment Complaints’, *The Irish Times*, 17 February 2021.

⁷²⁶ See for example Blaney, Amy, ‘Protesters Gather at Dublin Rally following Death of Sarah Everard in UK’, *Irish Independent*, 16 March 2021; Hilliard, Mark, ‘Ashling Murphy Killing: Vigils to take place around country’, *The Irish Times*, 14 January 2022, at <https://www.irishtimes.com/news/ireland/irish-news/ashling-murphy-killing-vigils-to-take-place-around-country-1.4775928>

generate a renewed focus on laws and procedures to address the incidence of sexual harassment and abuse in Ireland, with calls from many to ensure more robust and effective remedies be introduced to protect women and girls from harassment on gender grounds. Currently, civil/employment law remedies offer the main means of recourse to a woman (or man) who has been harassed; the test is based upon the harassing conduct being ‘unwanted’; a very different test to that applicable in rape and sexual offences, where the prosecution must prove absence of consent.

However, as pointed out in the previous chapter, in Ireland as elsewhere, insufficient attention has been paid to the broader implications of the #MeToo movement for legal considerations of consent within other contexts, specifically that of the sex trade. An understanding that consent and agency may be compromised by the context of power relationships has been developed from the #MeToo movement and discourse around sex offences and domestic violence. This understanding can have profound implications for prostitution law and policy, as will be argued further below.

4.3.4 Consent and Prostitution

Indeed, this understanding has been developed in an Irish context by Monica O’Connor, who used the theoretical framework of a continuum of sexual exploitation to explore the experiences of seven women who had been in prostitution in Ireland, and to examine ‘how the concepts of consent, choice, agency, harm and coercion may co-exist in the lived reality of prostitution.’⁷²⁷ O’Connor illustrates the way in which ‘radical feminist theory on patriarchy, gender, sexuality and violence against women.. informs the theoretical positioning of prostitution as a form of sexual violence and exploitation’, and further examines what she describes as ‘the emergence of a competing discourse’ to this position, namely a ‘sexual liberal and liberal feminist perspective [which] rejected the positioning of prostitution as a form of sexual exploitation, instead theoretically framing it as a legitimate choice and profession.’⁷²⁸ She concludes that, at present

the current, dominant feminist academic discourse is one of sexual liberalism, within an ever expanding global sex industry. The neo-liberal language of the market is increasingly evident in the discourse, with the use of terms such as sexual commerce, commercial sex, transactional sex, commercial exchange and consumer demand, and the conceptualisation of sex and intimacy as saleable commodities.⁷²⁹

O’Connor’s work strongly challenges this liberal approach to prostitution; from her empirical research into the experiences of women engaged in prostitution in Ireland, she found that ‘sexual exploitation and criminal acts of abuse .. are endemic within prostitution’.⁷³⁰ She acknowledges that the ‘emergence of the sexual liberal response to radical feminism did place a critical spotlight on the need to promote a positive, liberatory and diverse sexuality for women, and to emphasise the need to be *for* sexual pleasure, freedom and diversity and not only *against* sexual violence against women,’ but argues that

⁷²⁷ O’Connor, *op cit*, at 2. See further O’Connor, Monica, ‘Choice, Agency, Consent and Coercion: Complex Issues in the Lives of Prostituted and Trafficked Women’ (2017) 62 *Women’s Studies International Forum* 8; and O’Connor, Monica and Yonkova, Nusha, ‘Gender, Prostitution and Trafficking for Sexual Exploitation’ in Black, Lynsey and Dunne, Peter (eds), *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart Publishing, 2019, 39.

⁷²⁸ O’Connor, *ibid*, at 7.

⁷²⁹ O’Connor, *ibid*, at 48.

⁷³⁰ O’Connor, *ibid*, at 200.

the inclusion of prostitution and pornography within this sexual liberal frame is deeply problematic. There is no evidence that the sex of prostitution revealed in the narrative accounts in this study is transformative or liberating for women; rather it is reported as profoundly misogynist and violating.... there is ample evidence in this study that prostitution sex and prostitution as an institution perpetuates gender inequality.⁷³¹

O'Connor's perspective is supported by more recent research analysing the discourse and language of sex buyers on Irish and British websites; Senent Julian has found through her empirical study that 'Sex buyers' lexical choices prove they do not intend to establish a commercial type of relationship based on equality and mutual respect. Women are systematically objectified and often treated with contempt.'⁷³² Thus, she says that 'there is evidence from the buyers themselves supporting the claims made by anti-prostitution researchers and survivors according to which it is a degrading and violent practice.'⁷³³

Explicitly locating prostitution within the current neo-liberal economic context, Senent Julian offers a robust critique of 'pro-prostitution feminists', stating that they 'must be aware that their approach to prostitution is rightly applied only to the experience of a small privileged minority of "First World" women' as they neglect the 'capitalist and patriarchal power relations' within which prostitution must be understood to exist as a 'gendered phenomenon', justified by 'the myth of free choice.'⁷³⁴ So, she argues that 'the pro-prostitution lobby does its job by spreading a discourse on prostitution based on a neoliberal co-optation of left-wing and feminist terms.'⁷³⁵

Ultimately, she concludes that

Despite a deliberate, strategical co-optation of feminist terms, the aims and interests of the pro-prostitution lobby are intrinsically anti-feminist... its roots are firmly entrenched in socially and economically non-egalitarian, gendered conditions and, as our analysis revealed, it tells men they can buy a self-coerced, subservient role of women and potentially enact traditional gender roles without being effectively challenged.⁷³⁶

Just as Senent Julian's findings confirm the real power imbalance between buyers and sellers within the sex industry, so O'Connor's interviews with women engaged in prostitution reveal the lived realities of those selling sex; realities that are often obscured by the emergence and academic prominence of the liberal perspective on prostitution, based upon concepts of 'choice', 'agency' and 'consent', but lacking any understanding of the structural contexts within which choice, agency and consent are exercised and may be compromised by certain settings.

4.4 Conclusions

⁷³¹ O'Connor, *ibid*, at 202.

⁷³² Senent Julian, 'Tensions between feminist principles and the demand for prostitution in the neoliberal age: a critical analysis of sex buyers' discourse' (2019) 24(2) *RECERCA Magazine De Pensament I Anlisi* 109-128, at 121.

⁷³³ *Ibid* at 123.

⁷³⁴ *Ibid* at 110-12.

⁷³⁵ *Ibid* at 114.

⁷³⁶ *Ibid* at 124.

Just as Irish laws have generally fed into a particular problematising of the legal construction of ‘woman’, as discussed earlier in this chapter, so too an overview of the history of treatment of women in Irish criminal law and criminal justice post-independence reveals the extent to which repressive cultural and social attitudes towards women’s sexuality prevailed; and emphasises the State’s apparent imperative in confining and incarcerating ‘problem’ women.⁷³⁷

While there is scant literature on women’s criminality in Ireland, with women representing only a small proportion of those processed through the criminal justice system, there has been greater focus in academic research on women as victims of crime, often brought about through the work of those actively campaigning for legal change to ensure greater protection of women against gender-based violence. This advocacy and campaigning work has recently generated significant legislative changes, and has informed new legal understandings of ‘consent’ in different settings.

It is argued therefore that Irish legal frameworks in general, and criminal laws in particular, have historically contributed to the gendering of women’s bodies in the way that Frug suggested; they explicitly terrorised, sexualised and maternalised women through enshrining protection only for families based upon marriage and for ‘mothers’ in the Constitution; and by referring to women as having lives ‘within the home’, as well as through the criminalisation of abortion until recently.

They also terrorise women through a ‘combination of provisions that inadequately protect women against physical abuse and that encourage women to seek refuge against insecurity’; and, as will be seen further in the next chapter, they generally support a meaning of the female body that it is ‘for’ sex with men, thereby sexualising women.⁷³⁸ Women in Ireland were thus for many decades rendered ‘weak, sexy and nurturing’ through a combination of laws, just as Frug found them to be within the legal frameworks that she described.

However, Irish feminist activists have also long recognised the power of the law as a means of achieving social change. Mary Robinson, feminist lawyer and the first woman elected President in Ireland, wrote in 1993 that ‘Law can be an important instrument of social change.’⁷³⁹ While the broad approach of the women’s movement initially was to seek removal of existing discrimination against women or victimisation of women, she wrote that ‘From now on the strategy must become more positive. Women must learn to harness the existing resources in an effective and strategic manner in order to compensate for their lack of numbers in the power structures themselves. For centuries women were the victims under discriminatory laws. Now that same instrument of law can be invoked by women as a powerful ally in seeking social change.’⁷⁴⁰

Later feminist writings on the Irish legal system similarly confirmed the multiple ways in which women experienced discrimination against them through laws; and the ways in which the law could be used as a site of struggle and a way to achieve progressive social change.⁷⁴¹ And feminist writers continue to emphasise the potential for activists in using the law to achieve real change; this author (with Mary Rogan) has previously published research

⁷³⁷ See for example O’Sullivan and O’Donnell (eds), 2012, *op cit.*; Finnegan, Frances, 2004, *op cit.*

⁷³⁸ Frug, *op cit.*, at 1050-1.

⁷³⁹ At 101.

⁷⁴⁰ At 105.

⁷⁴¹ Connelly, Alpha and Hilliard, Betty, ‘The Legal Profession’ in Connelly, Alpha (ed), *Gender and the Law in Ireland*. Dublin: Oak Tree Press, 1993.

demonstrating the effectiveness of public interest litigation as a means to achieve positive reforms.⁷⁴²

Similarly, in her overview of women's progression as lawyers over the years, Mary O'Toole writes that 'Enormous change has been wrought in the last number of decades, and still more change can be achieved. We must keep on keeping on'.⁷⁴³ Indeed, Máiréad Enright also notes that law 'has always been important to feminist organising in Ireland..',⁷⁴⁴ while Mary Shine Thompson suggests that initiatives like the feminist judgments projects exemplify how those adhering to different feminist paradigms can work together effectively 'so as to interrogate the law's substance and structure'.⁷⁴⁵

Thus, despite its maternalising, terrorising and sexualising effects traditionally in Ireland, the law can be and has been used by feminist activists to achieve progressive change. This theme will be explored further in the next two chapters. In the next chapter, the development of law and policy on prostitution in Ireland until the initiation of campaigns seeking law reform around 2010 will be outlined and analysed within the context of the legal frameworks and concepts considered in this chapter. It will be considered whether prostitution in Irish society could be said to constitute a 'gender regime' as it 'reflects and reproduces unequal gender orders', to use the analysis developed by Maddy Coy,⁷⁴⁶ whether the 'exploitation' perspective is an appropriate lens through which to view prostitution in Ireland; and to explore how the campaign to introduce a sex purchase ban law in Ireland may best be understood as a progressive feminist law reform campaign like other campaigns outlined in this chapter, based upon an understanding that 'consent' may be compromised within certain structural settings.

⁷⁴² Bacik, Ivana and Rogan, Mary, *Legal Cases that Changed Ireland*. Dublin: Clarus Press, 2016.

⁷⁴³ O'Toole, Mary, 'Women in Law', in Black, Lynsey and Dunne, Peter (eds), *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart, 2019, at 318.

⁷⁴⁴ Enright, Máiréad, 'Involuntary Patriotism' in Enright, Máiréad, McCandless, Julie and O'Donoghue, Aoife (eds), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity*. London: Bloomsbury, 2017, at 39.

⁷⁴⁵ Shine Thompson, Mary, 'Doing Feminist Judgments' in Enright, McCandless and O'Donoghue, *ibid*, at 55.

⁷⁴⁶ Coy, *op cit*, at 4.

CHAPTER 5 – PROSTITUTION LAW IN IRELAND 1922 – 2010

5.0 Introduction

In the previous chapter, the contribution of Irish laws and the constitutional and statutory frameworks to the construction of gender in society was considered; and it was concluded that Irish legal frameworks in general, and criminal laws in particular, did contribute to the gendering of women's bodies in the way described by Frug. In this chapter, Irish laws and literature on prostitution will be considered, with an overview provided of the development of law and policy in this area until the beginnings of the movement for reform around 2010.⁷⁴⁷

Until 2017, Irish law on prostitution was based on a prohibitionist model of legal regulation, focused upon the public display of the act of selling sex, rather than the sale of sex itself. Prohibition was directed equally, at least in theory, against those selling sexual services and those buying, with offences of loitering and soliciting framed in gender-neutral language, under the principal statute: the Criminal Law (Sexual Offences) Act 1993. However, the act of buying or selling sex itself was not criminalised directly. Thus, in 2014, Monica O'Connor described Ireland as having a 'prostitution tolerance regime'.⁷⁴⁸

In practice, under the 1993 legal framework, the law still targeted only the most visible manifestations of prostitution, not the private exploitation of those engaged in selling sex, predominantly women.⁷⁴⁹ Thus, the criminal law on prostitution, as this author has previously written, has 'developed historically in a clearly gendered way. Typically, only those working as prostitutes (mostly women) are penalised, while the (mostly male) customers remain outside the controls of the criminal law'.⁷⁵⁰

The 1993 law thus promoted a double standard, in prohibiting the public display of prostitution, but not the act of selling sex itself. The focus was on controlling, containing and above all concealing the sale of sex. Only the offer of sex for sale in public was criminalised, through the offences of 'loitering' and 'soliciting.' The offer of sex for sale in private was not criminalised, other than through laws forbidding the existence of brothels. Until the 2017 law reform, it was not an offence for a man to buy sex, either in public or in private.. This reform was introduced in Part 4 of the Criminal Law (Sexual Offences) Act 2017.⁷⁵¹

If, as was argued in the previous chapter, many Irish laws, from the provisions of the 1937 Constitution, to the laws on rape, domestic violence and sexual harassment, can be seen as operating in a gendered way and as contributing to a particular construction of 'womanhood',

⁷⁴⁷ Some of the content in this section is derived from materials previously written by the author, including Chapter 2 'The Law on Prostitution' in Trinity College Dublin Centre for Gender and Women's Studies, *Interdisciplinary Report on Prostitution in Ireland*. Dublin: TCD, 2009, at 102; Bacik, Ivana, Chapter 6 'Sexuality and Sexual Offences' in *Kicking and Screaming: Dragging Ireland into the Twenty-First Century*. Dublin: O'Brien Press, 2004; and Bacik, Ivana, 'Women and Crime' in O'Mahony, Paul (ed), *The Irish Criminal Justice System*. Dublin: IPA, 2002.

⁷⁴⁸ O'Connor, Monica, *Consent, Agency and Harm: A Phenomenological Inquiry into the Experience of Women in Prostitution and Women Trafficked for Sexual Exploitation in Ireland*. Dublin City University, Unpublished PhD Thesis, 2014, at 78 et seq.

⁷⁴⁹ As borne out in the international literature on prostitution; see further Chapter 1.

⁷⁵⁰ Bacik, Ivana, Chapter 6 'Sexuality and Sexual Offences' in *Kicking and Screaming: Dragging Ireland into the Twenty-First Century*. Dublin: O'Brien Press, 2004, at 149.

⁷⁵¹ Part 4 and many of the Act's other provisions were commenced on 27 March 2017 by Statutory Instrument 112/2017, Criminal Law (Sexual Offences) Act 2017 (Commencement) Order 2017.

then Irish laws on prostitution in particular are highly gendered. It is argued below that, when viewed in an historical context, the way in which Irish prostitution was carried on and regulated from independence in 1922 and for the rest of the twentieth century can indeed truly to be said to have represented a 'gender regime' in Coy's sense. Further, it is argued that, as will be outlined in this chapter, the momentum for reform and for the introduction of a new model of regulating prostitution came about as a result of growing recognition in the early decades of this century about the levels of gendered exploitation involved in the Irish sex trade; and the consequent development of an understanding that 'consent', choice and agency could be legally conceived of as being compromised by certain structural contexts.

5.1 Prostitution in Ireland: Law and Policy

On a theoretical level, as has been discussed in previous chapters, prostitution is no longer regarded within criminology as the 'typical female crime'. But the criminal law on prostitution in Ireland until recently continued to operate and be applied in a highly gendered way. Typically, only those working as prostitutes (mostly women) were penalised, while the (mostly male) customers remained outside the controls of the criminal law. The law also promoted a double standard, in prohibiting the public display of prostitution, but not the act of selling sex itself. The focus was on controlling, containing and above all concealing the sale of sex, while not actually outlawing it; a 'distinctly ambivalent' legal structure which only 'partly criminalised' prostitution, as Tom O'Malley writes;⁷⁵² or a 'prostitution tolerance regime' as Monica O'Connor describes it.⁷⁵³

Irish prostitution law has a long and complex history – from the Contagious Diseases Acts and the Vagrancy legislation of the nineteenth century, to the focus on 'indecent behaviour' and the existence of the 'common prostitute' in early twentieth century legislation. Ensuing difficulties around providing proof of 'indecent exposure' in order to secure convictions in the 1980s led to pressure to change the law. Legislation was finally enacted in 1993 which, until 2017, formed the basis for most of the criminal laws regulating prostitution.⁷⁵⁴

Despite the changing legal regimes for dealing with prostitution, some themes have remained constant throughout. Above all, the criminal law has always focused upon the perceived need to control, contain and above all conceal the sale of sex in public; the laws have until recently not been designed to suppress prostitution itself, nor to prohibit the act of selling sex. Thus, the focus of criminal law prohibitions was traditionally upon the offer of sex for sale in public, generally through offences based upon terms such as 'loitering', 'soliciting' or 'importuning'. Neither the sale of sex itself nor the offer of sex for sale in private was criminalised, other than through laws forbidding the existence of brothels.

5.2 Historical Development of Prostitution Law: Nineteenth Century

Long before Ireland achieved independence in 1922, it is clear from the early statutes emanating from the Westminster parliament which applied to prostitution in Ireland, such as the Vagrancy Act 1824, that legislative concern from the nineteenth century and before centred not on the existence of prostitutes themselves, but on the public manifestation of their activities. Section 3 of the 1824 Act, for example, provided that 'every common prostitute wandering in the public streets or public highways, and behaving in a riotous or indecent manner, shall be deemed an idle and disorderly person within the true intent and

⁷⁵² O'Malley, Tom, *Sexual Offences*. Dublin: Round Hall Press, 2013 (2nd edition), at 202.

⁷⁵³ O'Connor, *op cit*, at 78.

⁷⁵⁴ The Criminal Law (Sexual Offences) Act 1993.

meaning of this Act.’ Another such statute, the Metropolitan Police Act 1839, further provided for the prosecution of a ‘common prostitute’ or ‘nightwalker’ for loitering or being in a public place for the purposes of prostitution or soliciting. It is significant that none of the key terms used in the laws of this period were defined in the Acts.

Various other public order statutes of the time also contained measures aimed at regulating the public activities of prostitutes. For example, section 28 of the Town Police Clauses Act 1847 referred to ‘Every common Prostitute or Nightwalker loitering and importuning Passengers for the Purpose of Prostitution.’ Section 72 of the Towns Improvement (Ireland) Act 1854 stated that ‘Every common Prostitute or Nightwalker loitering and importuning Passengers for the Purpose of Prostitution, or otherwise offensive, shall be liable to a fine not exceeding Forty Shillings.’ In similar language, section 14(11) of the Dublin Police Act 1842 provided that ‘every common prostitute or night-walker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation, to the annoyance of the inhabitants or passengers’ was liable for a penalty of up to £2; and the opinion of a police officer as to whether any individual woman was a prostitute constituted sufficient evidence for the court to convict.

An analysis of the early case law on prostitution shows that judges, too, were more concerned with the regulation of the public manifestation of prostitution rather than with its abolition. Definitions and statutory interpretations adopted by the courts became part of the common law on prostitution; many of these have survived into contemporary jurisprudence in this area. As Maria Luddy writes, the ‘prostitute’ in Ireland throughout the nineteenth century was ‘constructed as a ‘seduced and abandoned’ woman, who was in need of, and deserved, rescue. She was also, at the same time, an infectious creature, a carrier of disease and immorality which was transferable to the respectable men and women of society.’⁷⁵⁵

In the 1860s, the full force of Westminster statutory regulation was brought to bear on prostitution itself, with the enactment of the notorious Contagious Diseases Acts, 1864–69. These Acts introduced registration and compulsory medical examination for prostitutes, aimed at protecting soldiers, who were not examined, from venereal disease. Under the Act, a woman could be summoned before a judge if suspected of being a prostitute with venereal disease who had been soliciting in a public place. She could be forcibly examined medically and detained for up to three months if found to be suffering from venereal disease. Judith Walkowitz writes that these Acts were introduced ostensibly as a sanitary measure, based upon concerns about soldiers contracting venereal disease, but were also ‘part of the institutional and legal efforts to contain.. occupational and geographical mobility [and] an attempt to clarify the relationship between the unrespectable and respectable poor.’⁷⁵⁶

After a long ‘moral reform’ campaign conducted by groups appalled at the unfair treatment of women and the practice of conducting forced medical examinations, the Acts in their entirety were finally repealed in the 1880s.⁷⁵⁷ The Criminal Law (Amendment) Act 1885 was then passed, giving the police extensive powers against procurers and brothel keepers. The implementation of the new legislation was successful in reducing the number of brothels, but this had the effect of forcing prostitutes back onto the streets.

⁷⁵⁵ Luddy, *op cit*, at 7.

⁷⁵⁶ Walkowitz, Judith, ‘The Making of an Outcast Group: Prostitutes and Working Women in Nineteenth-Century Plymouth and Southampton’ in Vicinus, Martha (ed), *A Widening Sphere: Changing Roles of Victorian Women*. London: Methuen, 1977, at 72.

⁷⁵⁷ For an account of the reform campaign, see eg Sanders *et al*, 2009, *op cit*, at 114, referring to the ‘pivotal’ role of reformer Josephine Butler.

Commentators have noted that the repressive operation of the Contagious Diseases Acts and the fervour of the Victorian moral reformers both had the result of isolating prostitutes from their communities.⁷⁵⁸ In turn, they were rendered more dependent in every way upon men. Another drawback to the moral reform crusade was that it disregarded the social circumstances that forced women into prostitution in the first place, in effect treating the symptoms rather than the disease. Further, much of the moral reform focused on the need to protect 'honest' women from being mistaken for prostitutes by potential clients and/or police. Walkowitz, in particular, has discussed the Victorian feminist campaign against prostitution and the appropriation of its discourse by social purity or 'moral' reformers.⁷⁵⁹

5.3 Legal Definitions and Prostitution

While the courts confirmed in the 1890s that it is not an offence for one woman to offer sex for sale in private,⁷⁶⁰ much of the case law since then has focused upon the meaning of the terms 'soliciting' and 'importuning', which remained central within Irish law even following enactment of specific changes to prostitution law through the 1993 Criminal Law (Sexual Offences) Act.

In his leading text on Irish sex offences law, Tom O'Malley suggests that both the terms 'soliciting' and 'importuning' must 'imply some gesture, act or words directed to another person whose attention it is sought to attract.'⁷⁶¹ In *Horton v Mead*, 'solicitation' was held to entail 'some gesture, act or words addressed to a prospective customer or contact'; solicitation by a prospective customer, however offensive, did not constitute an offence.⁷⁶² It was not considered necessary for solicitation to involve any verbal communication. Another court subsequently held that soliciting and importuning had the same meaning.⁷⁶³

According to more recent case law, the prostitute/client does not have to make any clear request or offer in order to be deemed to have solicited or importuned. As Hanly notes, following the 1967 English decision in *Dale v. Smith*,⁷⁶⁴ where the defendant's speaking the word 'Hello' to another person in a public toilet was held sufficient to constitute importuning, 'neither the prostitute nor the client have to make any clear request or offer in order to be soliciting or importuning'; but he also asserts that 'it is likely that an Irish court would require evidence of something in excess of merely greeting another person before considering a conviction for importuning'.⁷⁶⁵

In the 1976 case of *Behrendt v. Burridge*, again it was held that no express invitation was necessary where the defendant was sitting on a high stool in the bay window of a house, wearing a low-cut top and a mini-skirt, and lit by a red light.⁷⁶⁶ Although she made no attempts to communicate directly with potential clients, Boreham J held on a consideration of earlier case law that this amounted to solicitation. He concluded that she was 'soliciting

⁷⁵⁸ See for example Walkowitz, Judith, *Prostitution and Victorian Society: Women, Class and the State*. Cambridge University Press: Cambridge, 1980.

⁷⁵⁹ Walkowitz, Judith, 'The Politics of Prostitution' (1980) 6(1) *Signs: Journal of Women in Culture and Society* 123-35.

⁷⁶⁰ *Singleton v. Ellison* (1895) 18 Cox CC 79.

⁷⁶¹ O'Malley, 2013, *op cit*, at 209.

⁷⁶² [1913] 1 KB 154.

⁷⁶³ *Field v. Chapma*, *The Times*, 9 October, 1953.

⁷⁶⁴ [1967] 2 All ER 1133.

⁷⁶⁵ Hanly, *op cit*, at 433.

⁷⁶⁶ [1976] 3 All ER 285.

in the sense of tempting or alluring prospective customers to come in for the purpose of prostitution and projecting her solicitation to passers by'.⁷⁶⁷

In *Darroch v. DPP*, the appellant was charged with persistently soliciting a woman for the purposes of prostitution, contrary to section 2(1) of the Sexual Offences Act, 1985.⁷⁶⁸ He was observed on several occasions driving his car slowly around a red light district, and on one occasion stopped and beckoned a woman towards him. He was arrested as he was driving with the woman in his car. The High Court found that the mere act of cruising alone in his car in a red light district did not amount to soliciting, but that the beckoning of the woman to the car could be regarded as an act of 'soliciting', since it meant that the appellant had 'given some positive indication, by physical action or words, to the prostitute that he requires her services.' However, in order to be 'persistent', as the Act required, evidence of at least two acts of soliciting would be required.

An authoritative definition of the term 'prostitute' itself was given in *de Munck*'s case in 1918, where prostitution was described as taking place when 'a woman offers her body commonly for lewdness for payment in return.'⁷⁶⁹ Thus it was not necessary that the woman offered herself for actual sexual intercourse, nor did sexual intercourse itself need to take place. In the later case of *R v. Webb*, for example, this definition was held to cover a woman who merely masturbated clients during massage sessions.⁷⁷⁰ A 'common prostitute', the term used throughout much of the nineteenth century legislation, only abolished in 1993, was therefore a woman who offered herself 'commonly for lewdness'.

A further definition was offered more recently by the 1994 English Court of Appeal decision in *R v. McFarlane*, where the defendant had been charged with living on the earnings of prostitution.⁷⁷¹ The alleged prostitute was his partner, with whom he lived; but she gave evidence that she did not in fact provide sex for money, but rather took money in return for sex without any intention of engaging in the sex. The Court of Appeal held that the essence of prostitution is the making of an offer of sexual services for reward; an intention to perform the services was irrelevant, and similarly the fact of failing to provide them. Conor Hanly suggests that, given 'the archaic use of language in *De Munck*, it is likely that an Irish court would prefer the decision in *McFarlane*.'⁷⁷² At common law it appears to have been assumed that a 'prostitute' would always be female⁷⁷³ – however, following the enactment of section 1(4) of the 1993 Act, discussed further below, it is clear that in Ireland, a reference to a prostitute includes reference to a male prostitute.

The courts have also provided a common law definition of a brothel as a premises 'resorted to or used by more than one woman for the purposes of fornication'.⁷⁷⁴

5.4 Post-Independence Law on Prostitution

By the late nineteenth century, Maria Luddy writes that

the prostitute in Ireland was, for some at least, an innocent corrupted by the presence of the British garrison.. in time she became associated with unmarried motherhood,

⁷⁶⁷ At 288.

⁷⁶⁸ [1990] 91 Cr App R 378.

⁷⁶⁹ [1918] 1 KB 635.

⁷⁷⁰ [1964] 1 QB 357.

⁷⁷¹ [1994] 2 All ER 283.

⁷⁷² Hanly, Conor, *An Introduction to Irish Criminal Law*. Dublin: Gill & Macmillan, 2015 (3rd edition), at 433.

⁷⁷³ See *R v. Bull* [1995] QB 88 and commentary at O'Malley, 2012, *op cit*, at 208-9.

⁷⁷⁴ *Gorman v. Standen* [1963] 3 All ER 627.

‘separation’ women and the expression of sexuality by young Irish women. These constructions of the prostitute served the interests of rescue workers, advanced nationalists, suffragists and welfare workers. The real individual behind these constructions was often lost.⁷⁷⁵

During these early decades of the twentieth century, both the suffrage movement and the nationalist movement, Luddy avers, thus began to use prostitution as a means to advance their own political agenda; for nationalists, the

immorality evident in Dublin in particular was a consequence of the presence of the British garrison in the city. Once independence was achieved Ireland would be returned to purity.... [laws passed to suppress prostitution post-independence] attempted to enforce morality [but were] .. dealing with the symptoms rather than recognising the conditions that gave rise to exploitation in the first place. If prostitution was a result of immorality, or personal weakness, then there was no reason either to investigate or alter the social and economic conditions that gave rise to it.. the structural ways in which, for instance, poverty fed prostitution were not dealt with.⁷⁷⁶

The withdrawal of the British garrison in Dublin following independence in 1922 led to the decline of prostitution in the previously notorious area of ‘Monto’ in Dublin, where Luddy writes that prostitution had ‘thrived’ until then.⁷⁷⁷ This, together with a campaign by Legion of Mary in the early 1920s to drive prostitution out of the area, indirectly brought about a change in the legal regulation of prostitution. No longer could the policing of prostitution be confined to one area; instead, law enforcement became directed against individuals engaged in prostitution in different geographic areas. Because of this change, the identification of prostitutes became more problematic, and thus the definitions of terms like ‘soliciting’ and ‘loitering’, developed through legal cases and discussed above took on a new significance in any cases involving prosecutions for prostitution.

But Luddy says that, in reality, the law was not heavily brought to bear against those engaged in prostitution at this time:

Eradicating prostitution was never on the agenda for either state or Church authorities in nineteenth- or twentieth-century Ireland. Even the closure of the brothel system in Dublin did not lead to the end of prostitution. For most members of Irish society a tolerance for prostitution was evident. But it was a tolerance based on hypocrisy; as long as the women did not reside, work or show their presence in middle-class areas then it was acceptable. It was the institutions of the period, workhouses, rescue homes and Magdalen asylums, that offered practical aid to these women, but showed little concern for the social or economic conditions that brought them there.⁷⁷⁸

New legislation was introduced in 1935, through the Criminal Law (Amendment) Act of that year. This Act, while it contained provisions on a range of other issues, was the first post-Independence Irish law to deal with prostitution. Margaret Ward writes that it may best be seen within the context of a more general series of laws repressive of women’s sexuality,

⁷⁷⁵ At 7.

⁷⁷⁶ At 240.

⁷⁷⁷ North inner city Dublin, north-east of the Custom House; for more detail see for example Luddy, Maria, *op cit*, at 33-6.

⁷⁷⁸ At 240-1.

illustrating the strengthening influence of the Catholic church on legislators.⁷⁷⁹ The provisions on prostitution in the 1935 Act were drafted in similar terms to those of the nineteenth century statutes, using the same language employed in those. The provisions contained a comprehensive prohibition on ‘public indecency,’ criminalised brothel keeping, and made it an offence for a ‘common prostitute’ to loiter in a public place and to importune or solicit passers-by for the purposes of prostitution.

Section 16(1) of the Act provided that:

Every common prostitute who is found loitering in any street, thoroughfare, or other place and importuning or soliciting passers-by for purposes of prostitution or being otherwise offensive to passers-by shall be guilty of an offence under this section and shall on summary conviction thereof be liable, in the case of a first such offence, to a fine not exceeding two pounds or, in the case of a second or any subsequent such offence, to imprisonment for any term not exceeding six months.⁷⁸⁰

After the dispersal of the prostitutes of ‘Monto’, this 1935 Act, supplemented by earlier legislation, continued to be enforced by police with the purpose of containing and controlling the most visible manifestations of prostitution; Luddy’s research establishes however the extent to which prostitution was carried on in a less visible manner up until 1940. She cites the survival of prostitution ‘with little interference from the Church’ over this period by way of supporting her claim that ‘resistance to the Catholic Church’s teaching on celibacy and sexual continence, as reflected in the levels and extent of prostitution in the nineteenth and twentieth centuries, was far more common than generally believed.’⁷⁸¹ Beyond the minimal policing of Monto, it would appear that no developments in legislation or policy on the subject took place in Ireland for over twenty years after the passage of the 1935 Act.

By contrast, in England the Report of the Committee on Homosexual Offences and Prostitution (the Wolfenden Report) was published in 1957, authored by John Wolfenden and commissioned by then Home Office Secretary Sir David Maxwell Fyfe. Its recommendations subsequently formed the basis for the passage in England of the Sexual Offences Act 1959. The specifically stated focus of the Report was not on the criminalisation of the act of selling sex itself, but rather on the preservation of public order and decency, and protection of the ‘ordinary citizen’:

....no case can be sustained for attempting to make prostitution in itself illegal. ... [prostitution] has persisted throughout many centuries and the failure of attempts to stamp it out by repressive legislation shows it cannot be eradicated through the agency of criminal law... We are concerned not with prostitution itself, but with the manner in which the activities of prostitutes and those associated with them offend against public order and decency, expose the ordinary citizen to what is offensive and injurious..⁷⁸²

Thus, giving effect to these stated priorities, the 1959 Act focused upon offences of loitering and soliciting as giving rise to criminal liability; and section 1 of the 1959 Act provided that

It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution... A constable may arrest without warrant

⁷⁷⁹ Ward, Margaret, *Hanna Sheehy Skeffington, Suffragette and Sinn Féiner*. Dublin: UCD Press, 2017, at 309.

⁷⁸⁰ Now repealed by section 14 of the Criminal Law (Sexual Offences) Act 1993.

⁷⁸¹ At 2.

⁷⁸² Wolfenden Report, 1957, at 79-80.

anyone he finds in a street or public place and suspects, with reasonable cause, to be committing an offence under this section.⁷⁸³

Prostitution law in England has over the decades since 1959 undergone significant change through a series of statutes including the Sexual Offences Act 2003 and the Policing and Crime Act 2009, which amended section 1 of the 1959 Act to create an offence for a person (whether male or female) persistently to loiter or solicit in a street or public place for the purposes of offering services as a prostitute, with effect from 1 April 2010. The term ‘common prostitute’ has now been removed. Notably, section 53A of the major codifying legislation in this area, the Sexual Offences Act 2003, as inserted by section 14 of the Policing and Crime Act 2009, creates a new offence of paying for the sexual services of a prostitute subjected to force, coercion or deception. Section 47 of the 2003 Act also creates an offence of paying for the sexual services of a child, and separate trafficking offences are provided for in other legislation including the Protection of Freedoms Act 2012.⁷⁸⁴ However, despite extensive debate and several governmental reviews of prostitution law,⁷⁸⁵ the basic premise of the law as set out in the 1959 Act remains in place in England, with the sale or purchase of sex itself not criminalised.

5.5 Mid-Twentieth Century Legal Framework for Prostitution

In Ireland, no similar legislative initiative to the 1959 English Act was taken during the mid-twentieth century. But Margaret Ward writes that by the 1960s, brothels were well established in parts of Dublin city, as prostitution began to shift from an on-street to an off-street activity.⁷⁸⁶ In response to a perceived increase in prostitution, a major initiative in policing was commenced in 1964. That year, a Garda Síochána campaign was set up in Dublin to apply criminal law to clients as well as prostitutes. In one account, it has been suggested that the Gardaí had received complaints from ‘respectable’ women who had been accosted by men looking for prostitutes.⁷⁸⁷ The newly established Ban Gardaí (women police) were thus sent out on the streets around St. Stephen’s Green in order to entrap these men. When approached by would-be clients, the Ban Gardaí were instructed to engage them in haggling, so that the Vice-Squad could arrest them. They would then appear in court next morning charged with the common law offence of ‘breach of the peace’.

The publication of names and addresses of the male clients in the press apparently caused panic among those in power, so the policy was discontinued ‘with indecent haste’, due to publicly expressed concerns about the safety of the Ban Gardaí, as well as the supposed desire to protect the clients’ families.⁷⁸⁸

However, the practice of charging women with being ‘common prostitutes’ under the Criminal Law Amendment Act, 1935 continued. The treatment of prostitutes was only to change following the landmark 1980 Supreme Court decision in *King v. AG*.⁷⁸⁹ King had been

⁷⁸³ There is no evidence that this reform was analysed in an Irish academic context at the time.

⁷⁸⁴ For more on English prostitution law see for example Ormerod, David and Laird, Karl, *Smith and Hogan’s Criminal Law*. Oxford: OUP (14th edition), 2015, at 879-80.

⁷⁸⁵ See for example: *Paying the Price: A Consultation on Prostitution*. London: Home Office, 2004; *Co-Ordinated Prostitution Strategy*. London: Home Office, 2006; *Review of Tackling Demand*. London: Home Office, 2008.

⁷⁸⁶ Ward, Eilís, ‘From Prohibitionism to a Globalised Sex Trade’ (2010) 25(1) *Irish Political Studies* 47-65.

⁷⁸⁷ Gannon, Ita and Jack, *Prostitution: the Oldest Male Crime?* Dublin: Jig Publications, 1980, at 10.

⁷⁸⁸ *Ibid*, at 12.

⁷⁸⁹ [1981] IR 233. In the subsequent case of *Dillon v. DPP* [2008] 1 IR 383, a similar provision, section 3 of the Vagrancy (Ireland) Act 1847, which prohibited ‘wandering abroad and begging’, was also found unconstitutional, although an offence of begging was then legislated for through the Criminal Justice (Public Order) Act 2011. In *Douglas v. DPP* [2013] 2 ILRM 324, the offences of causing scandal or injuring community morals were found unconstitutional; and in *McInerney v. DPP* [2014] IEHC 181, Hogan J found the offence of

convicted under section 4 of the Vagrancy Act, 1824, for being a 'suspected person or reputed thief' found loitering in public. Evidence of his previous character was therefore necessary in order to convict him. On appeal, the Supreme Court overturned his conviction, ruling that section 4 was 'so arbitrary, vague and difficult to rebut' that it was clearly in breach of Article 38.1 of the Constitution.

The term 'common prostitute' used in earlier legislation and in section 16 of the 1935 Act was as vague and ill-defined as that found unconstitutional in *King*, yet apparently it continued to be used against women for some time after this landmark case. A conviction could be secured either where a Garda gave evidence that the woman had been found loitering on more than one occasion previously, or where the woman's previous convictions for loitering or soliciting were put in evidence. This method of proving the offence was thus similar to that used before the *King* decision. After the *King* case, for a time women engaged in prostitution were also prosecuted either for the common law offence of breach of the peace or for aiding and abetting indecent exposure under section 5 of the Summary Jurisdiction (Ireland) Act, 1871, which provides that any person who 'wilfully and indecently exposes his person or commits any act contrary to public decency' shall be liable to a £5 fine or two months' imprisonment. Clients could be charged directly under this section, while prostitutes were charged with aiding and abetting them in indecent exposure, and were subject to the same penalty.

But both these approaches proved ineffective from the point of view of securing convictions, and the number of prosecutions for prostitution-related activities generally declined. Between 1984 and 1992, only ten prosecutions for prostitution were recorded in the Annual Garda Reports, and in three separate years; 1988, 1989 and 1991, there were no prosecutions recorded for prostitution. Journalist Rosita Sweetman, writing in 1979, quoted an interview she had conducted with a Garda spokesperson in which he had contended that 'Brothels as such are not known to us. There have been no prosecutions in recent years so far as we are concerned none are operating..⁷⁹⁰

Then, in 1985, the Law Reform Commission (LRC) issued a Report on Vagrancy and Related Offences.⁷⁹¹ In chapter 16 of the report, the Commission considered the issue of 'Solicitation for Sexual Purposes', but under this heading they reviewed only offences related to prostitution provided for in the Vagrancy Acts and the Dublin Police Acts, noting that a comprehensive review of all offences related to prostitution was beyond the scope of the report. Thus the recommendations were focused upon three aspects of the criminal law as it affects prostitution; '(a) street offences by prostitutes, (b) solicitation by males, and (c) living on the earnings of prostitution.'⁷⁹² The Commission noted that, following the *King* case, 'charges of loitering and soliciting by a common prostitute are no longer being brought' and that prostitution itself was not an offence.⁷⁹³ They further noted that solicitation by a

'offending modesty' similarly to be unconstitutional. In the more recent case of *Douglas v. DPP* [2017] IEHC 248, McDermott J in the High Court again found a similar offence unconstitutional, namely that of 'outraging public decency contrary to common law' due to the difficulty with precise definition of its constituent elements, but confirmed the existence of the common law offence of 'committing an indecent act in public', an offence now effectively substituted by section 45 of the Criminal Law (Sexual Offences) Act 2017, which provides for an offence of 'exposure, offensive conduct of sexual nature.'

⁷⁹⁰ Sweetman, Rosita, *On Our Backs: Sexual Attitudes in a Changing Ireland*. London: Pan Books, 1979, 183-4.

⁷⁹¹ *Law Reform Commission Report on Vagrancy*. Dublin: Government Publications, 1985 (LRC 11-1985).

⁷⁹² *Report on Vagrancy*, *ibid*, at 97.

⁷⁹³ *Ibid*, at 253-4.

man for immoral purposes could constitute an offence under section 1(1) of the Vagrancy Act 1898.⁷⁹⁴

The Wolfenden Committee had commented that this wording could cover solicitation of a woman by a man; but this interpretation had been contested in *Crook v. Edmondson*, in which it was held that a man is not covered by this wording where he solicits a woman to have intercourse with himself.⁷⁹⁵ In any case, the Commission observed that ‘as a matter of practice it seems that in general prosecutions have not been brought under section 1 of the 1898 Act for solicitation of females by males.’⁷⁹⁶

In conclusion, the Commission considered that the present situation was ‘unsatisfactory’ and that a ‘specific offence of loitering or soliciting by prostitutes in streets and public places is required.’⁷⁹⁷ Rejecting the option of decriminalisation of ‘the street activities of prostitutes’, they commented 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. The public nuisance that would ensue would be unacceptable and would outweigh other considerations.⁷⁹⁸

Ultimately, the Commission advocated the creation of two new offences, based on the concepts of loitering and soliciting, to cover both the prostitute and the client without distinction on the basis of sex; they reasoned that ‘a modern offence should avoid such distinctions.’⁷⁹⁹ These offences should be: first, loitering for the purpose of soliciting or being solicited; and second, soliciting another person for the purpose of prostitution. The Report also recommended that ‘kerb-crawling’ be criminalised.

The Vagrancy Report represented the first attempt by a State body to tackle the issue of prostitution in a considered fashion, but unfortunately the Commission ultimately accepted the rationale of the nineteenth century legislation, with its emphasis on ‘loitering’ and ‘soliciting’. The new offences they recommended used similar language, yet the financial penalties they proposed were to undergo an alarming increase, from a maximum £5 fine to a £500 fine. They made their recommendations on penalty as a reaction to what they described as a ‘derisory’ maximum fine of £2 applying under the older legislation; and also suggested that imprisonment of up to six months would be a potential sanction, on the basis that ‘if imprisonment were not available as an ultimate sanction, for persistent offenders the nuisance of street solicitation by prostitutes would be likely to increase considerably’.⁸⁰⁰ Including imprisonment as a sanction would also, in the Commission’s words, ‘enable a progressive deterrent to be applied in the case of second or subsequent convictions.’⁸⁰¹

It is regrettable that the Commission did not consider what effect the drastic increase in financial penalty might have for those engaged in prostitution, and that they did not consider more fully the arguments against retaining imprisonment as a penalty. As O’Malley writes,

⁷⁹⁴ As amended and extended to Ireland by section 7 of the Criminal Law Amendment Act 1912, providing that an offence is committed by: ‘every male person who in any public place persistently solicits or importunes for immoral purposes.’

⁷⁹⁵ [1966] 1 All ER 833.

⁷⁹⁶ *Vagrancy Report, op cit*, at 101.

⁷⁹⁷ *Vagrancy Report, ibid*, at 102.

⁷⁹⁸ At 102.

⁷⁹⁹ At 111.

⁸⁰⁰ At 113.

⁸⁰¹ At 113.

in the Commission's report, 'prostitution was considered in the context of vagrancy offences which meant that it was not analysed as a social issue, and the problems and rights of prostitutes themselves [were] ignored.'⁸⁰² Indeed, O'Malley points out that the Commission 'did not, and in the circumstances could not have been expected to, consider the broader social dimensions of prostitution or the need for measures to protect prostitutes from violence, abuse and intimidation.'⁸⁰³ No action was however taken on the basis of the Law Reform Commission's Report for a number of years.

Then, in January 1993, a further relevant report was published; that of the Second Commission on the Status of Women.⁸⁰⁴ This report covered a wide range of policy issues, but included a few short paragraphs on 'Prostitution' within the 'Constitutional and Legal Issues' chapter, as well as a somewhat longer section later in the report on 'Women Involved in Prostitution'.⁸⁰⁵

The first section, like the Law Reform Commission report, again could be described as disappointingly superficial. Prostitution was described as a 'potential public nuisance', and the Commission reported their concern that in certain areas 'any woman may be approached on the erroneous assumption that she may be a prostitute .. [giving] rise to considerable distress and fear on the part of women so approached.'⁸⁰⁶ The Commission went on to recommend in this section that the 'even-handed' policy set out in the Law Reform Commission report should be adopted, 'so that the person soliciting and the client are open to the same sanctions.'⁸⁰⁷ There was no discussion of the possible consequences of these sanctions for those engaged in prostitution themselves.

In their consideration of the position of women involved in prostitution later in the report, the Commission did however comment bleakly that 'the lives of prostitutes are characterised by a sense of powerlessness, few opportunities, no voice in society, no choices in life and very little hope.'⁸⁰⁸ They noted that 'it is very difficult to form a reliable estimate of the numbers of women involved' but that existing case studies did show high levels of sexual and physical abuse among women in prostitution, and they quoted from the experiences of one such woman as described in *Lyn: A Story of Prostitution*.⁸⁰⁹ Their recommendations in this section did not address in any detail how to seriously improve the lives of women, focusing on the adoption of an integrated approach among the Departments of Health, Education, Social Welfare and Justice as well as voluntary organisations, to provide health and welfare services and information to women involved in prostitution; the setting up of drop-in centres and the establishment of a rehabilitation centre 'for women who want to get out of prostitution.'⁸¹⁰ This section lacked any concrete recommendations for legislative change. Again, like the earlier report of the Law Reform Commission, the clear focus was on the 'public nuisance' aspect of prostitution.

5.6 The Criminal Law (Sexual Offences) Act 1993

⁸⁰² O'Malley, Tom, *Criminal Law (Sexual Offences) Act 1993, Current Law Statutes Annotated*. Dublin: Round Hall, 1993, at 20:02.

⁸⁰³ O'Malley, Tom, *Sexual Offences*. Dublin: Round Hall Press, 2013 (2nd ed), at 202.

⁸⁰⁴ *Report of the Second Commission on the Status of Women*. Dublin: Government Publications, 1993.

⁸⁰⁵ (in a chapter entitled 'Women in Situations of Disadvantage').

⁸⁰⁶ *Report*, 1993, *ibid*, at 51.

⁸⁰⁷ At 51.

⁸⁰⁸ At 181.

⁸⁰⁹ At 181-2, referring to Madden, Lyn and Levine, June, *Lyn: A Story of Prostitution*. Dublin: Attic Press, 1987.

⁸¹⁰ At 183.

Just a few months after the publication of this report, reform of the law finally came with the passing of the Criminal Law (Sexual Offences) Act, 1993. This Act dealt with three distinct issues: firstly, it brought about the decriminalisation of male homosexual activity;⁸¹¹ secondly, it created an offence of sexual intercourse with a 'mentally impaired person'; and thirdly, it introduced new offences related to prostitution, strongly influenced by the reports of both the Law Reform Commission and the Second Commission on the Status of Women. Although there have been significant recent changes to other provisions of the Act, discussed further below, until 2017 it represented the core law on prostitution, containing within it the majority of prostitution-related offences at Irish law.

Presumably because of the potential for political controversy over the provisions on homosexuality, the Bill was given a relatively restricted two-day debate in the Dáil over 23-24 June 1993; and in the Seanad over 29-30 June 1993.

Unsurprisingly, most of the debating time in both Houses was devoted to discussion of the provisions decriminalising homosexuality. But several Opposition deputies, while commending Minister for Justice Máire Geoghegan-Quinn⁸¹² for her introduction of the decriminalisation of homosexuality, deplored the lack of time for discussion of the provisions relating to prostitution. During Second stage of the Bill on 23rd June 1993, for example, Liz O'Donnell TD (Progressive Democrats) said that:

I should like to have more time to discuss prostitution, which warrants a healthy debate in this House. The feminist movement is divided on whether prostitution should be decriminalised. I do not think this issue is getting the good intellectual debate it warrants in this House. It is being dealt with by way of knee-jerk reaction. Many of the old clichés, for example, 'the oldest profession in the world', have been used in the debate to describe prostitution. We should bear in mind that prostitution is also the oldest crime against women.⁸¹³

Similar language was used by another Deputy, Austin Deasy TD of Fine Gael, who went further, however, in suggesting in surprisingly trenchant terms that prostitution should be legalised:

It is ridiculous that this section dealing with prostitution has been included in a Bill which seeks to decriminalise homosexuality; they are two separate subjects. However, as it is contained in the Bill I should make the point that prostitution should be legalised, that brothels should be licensed and that there should be none of this soul-searching.⁸¹⁴

In the course of the debate, the provisions on prostitution were described by Joe Costello TD (Labour) as 'harsh, punitive and unenlightened' in their approach to prostitution and prostitutes.⁸¹⁵

While a good deal of time during the debate was spent discussing the prevalence of advertisements for prostitution in a number of publications, some Deputies expressed

⁸¹¹ Following the ECHR decision that Ireland's criminalisation of homosexuality was in breach of the European Convention on Human Rights in *Norris v. Ireland* (1991) 13 EHRR 186.

⁸¹² Of the government Fianna Fáil party.

⁸¹³ *Dáil Debates*, 24th June 1993, Vol 432 (8) at 2271.

⁸¹⁴ *Dáil Debates*, 24th June 1993, Vol 432 (8) at 2269.

⁸¹⁵ *Dáil Debates*, 23rd June 1993, Vol 432 (7) at 2022.

concern that prostitutes themselves would be the most likely targets of the new law, despite the extension of definitions to cover clients and touts. In response, the Minister provided assurances to her colleagues that clients would be specifically targeted under the new provisions, saying:

it must be realised that the real change brought about by the soliciting provisions of this Bill will be to extend the law to cover clients of prostitutes. I would expect the powers of the Garda concerning loitering to be used against kerb-crawlers where necessary⁸¹⁶

In the Seanad, again concern was expressed as to the likely adverse effect that the prostitution-related provisions would have on women engaged in prostitution. Senator Mary Henry for example, uniquely expressing the views of those engaged in prostitution, said

People working with these girls, and the girls themselves, are very worried by specific sections of this Bill. They are anxious that the Bill will not be applied justly....Men charged with soliciting or kerb-crawling will be in a much more powerful position than the women working the streets. ...⁸¹⁷

In response to these concerns, the Minister said in the Seanad that:

The sections dealing with prostitution are about the rights of women to be free from the harassment and fear of kerb crawling, to feel safe from being solicited and to know that not alone are they safe but that the law will respect their rights. ... In dealing with prostitution in this Bill I am concerned only with updating and strengthening certain aspects of the present laws. It was not my intention, as I said last week, to review in any comprehensive way all the offences relating to prostitution.⁸¹⁸

Indeed, the Minister went on to say that she anticipated such a review to take place on the basis of the recommendations in the Report of the Second Commission on the Status of Women. But such a comprehensive review never took place, and instead the basic framework for the regulation of prostitution contained in the 1993 Act remained in place, subject to amendments. until law reform was introduced in 2017.

5.6.1 The 1993 Act: Specific Provisions

In its favour, the 1993 Act did represent a limited attempt to modernise the law on prostitution – but it also retained much of what was most objectionable about the old law, despite restating it in a gender-neutral manner. In particular, it did not define 'prostitution' itself, thus retaining the definition provided by the early cases cited previously.

It did however end the use of the term 'common prostitute,' and created gender-neutral offences of loitering and soliciting for the first time, thus extending the criminal law to cover men as well as women engaged in prostitution; and to cover clients and touts, not just prostitutes themselves. Greatly increased penalties were also introduced for all prostitution-related offences.

Unfortunately, however, the terms 'loitering', 'soliciting' and 'importuning' were preserved in the Act. It appears that no attempt was made to examine other ways in which prostitution

⁸¹⁶ *Dáil Debates*, 23rd June 1993, Vol 432 (7) at 2048.

⁸¹⁷ *Seanad Debates*, 29th June 1993, Vol 137 (3) at 293-4.

⁸¹⁸ *Seanad Debates*, 29th June 1993, Vol 137 (3) at 326.

could be regulated, nor to examine the potential effect of the new law on the lives of those engaged in prostitution. As a result, O'Malley commented that the provisions of the Act dealing with prostitution 'do not display any fundamental reassessment of what the law's role should be in the area of prostitution', but retain the basic policy that prostitution is not illegal per se, but 'must be subject to various kinds of restraints in order to prevent it becoming a nuisance or an affront to public decency'.⁸¹⁹ The unfortunate retention of the traditional terms of 'loitering', 'soliciting' and 'importuning' as the basis for prosecution meant that, in practice, predictive identifying evidence continued to be used to convict for prostitution in any prosecutions taken under the 1993 Act.

Section 1 of the Act deals with interpretation of terms used throughout. The term 'soliciting' was retained, but in a new development its meaning expanded to cover prostitutes and clients of either sex, or anyone who touts on behalf of a prostitute. Further, section 1(4) changed the meaning of the word 'prostitute' to cover both women and men, a very significant change from the previous common law understanding.⁸²⁰

Sections 6 and 7 of the Act created new soliciting and importuning offences.⁸²¹ The soliciting or importuning could, for the first time following the 1993 Act, be done either by the prostitute; the client; or anyone acting on behalf of either client or prostitute.

Section 6, which related to child prostitution, was rendered effectively obsolete, at least initially, following the May 2006 Supreme Court decision in *CC v. Ireland & Others*, and the subsequent passing of the Criminal Law (Sexual Offences) Act, 2006 (now amended).⁸²²

⁸¹⁹ O'Malley, 1993, *op cit*, at 20:02.

⁸²⁰ Interestingly, a slightly different definition was offered depending on whether the defendant was a prostitute, or a client or tout Section 1(2)(a), which applied to those engaged directly in prostitution, covered any person who 'offers his or her services as a prostitute to another person.' This is a broader definition than the slightly narrower phrase used in sections 1(2)(b) and 1(2)(c) to cover clients and touts, both of which required that such persons actually 'solicit or importune', rather than that they merely 'offer ... services'.

⁸²¹ Section 6 referred effectively to child prostitution, and provided that: 'A person who solicits or importunes another person for the purposes of the commission of an act which would constitute an offence under section 3, 4 or 5 of this Act or section 1 of the Criminal Law Amendment Act 1935, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 12 months or to both.' A new wording for section 6 was subsequently substituted by section 250 of the Children Act 2001, so that it then read as follows:

A person who solicits or importunes another person (whether or not for the purposes of prostitution) for the purposes of the commission of an act which would constitute an offence under section 3, 4 or 5 of this Act or section 1 or 2 of the Criminal Law Amendment Act, 1935, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both."

⁸²² *CC and PG v. Ireland & Others*; *CC v. Ireland & Others* [2006] 4 IR 1. In the *CC* case, the Supreme Court upheld a challenge under the Constitution to section 1(1) of the Criminal Law Amendment Act, 1935, which criminalised 'unlawful carnal knowledge' of a girl aged under 15 years. The Court decided unanimously that the offence was unconstitutional because it did not allow a defence of mistake as to age. Only days after the judgment, the Oireachtas passed legislation aimed at replacing the impugned offences. The Criminal Law (Sexual Offences) Act, 2006 created in sections 2 and 3 two new offences of 'defilement of child', both incorporating a defence of honest mistake as to the age of the child. Section 2 concerned a newly-defined offence of defilement of a child under 15 years of age, and section 3 referred to the offence of defilement of a child under 17. The 2006 Act was itself later amended by the Criminal Law (Sexual Offences) (Amendment) Act 2007, the Criminal Procedure Act 2010, the Children First Act 2015 and the Criminal Law (Sexual Offences) Act 2017. Most recently, the 2017 Act created new offences of 'sexual act with child under 15' (section 16) and 'sexual act with child under 17' (section 17), substituting new text for sections 2 and 3 of the 2006 Act. The constitutionality of section 5 of the Criminal Law (Sexual Offences) Act 2006, which provided

The main offence of soliciting, however, is contained in section 7 of the 1993 Act.⁸²³ It was not subject to the changes affecting section 6 as a result of the *CC* case, or the 2006 and 2007 legislation. Unlike the section 6 offence, it does not relate to offences against a child; also unlike the section 6 offence, it may only be committed in a public place or street.⁸²⁴

This offence as enacted reflected again the general underlying theme of the criminal law, that prostitution itself was not a crime. One notable feature of section 7 when it was initially enacted was that it prescribed markedly heavier penalties than had applied previously for the older offences of soliciting or importuning; and that the maximum penalty increased with repeated convictions.

More recently, Section 25 of the 2017 Act has now provided for a new offence of ‘payment etc. for sexual activity with prostitute’, contained in a new section 7A of the 1993 Act. This provision will be considered further in the next chapter.

The law on soliciting and importuning may have remained substantially the same after the passage of the 1993 Act as before, but the 1993 Act introduced much more significant change to the law on loitering. The word ‘loitering’ is not defined in section 1 of the Act, and indeed loitering is not an offence in itself, because of concerns that an offence of loitering would no longer be constitutionally permissible in the light of the decision in the *King* case discussed above.⁸²⁵ Instead, section 8 creates a new offence, committed where a Garda who ‘has reasonable cause to suspect’ that a person is ‘loitering in a street or public place in order to solicit for prostitution’, has directed that person to leave that place ‘immediately’. If they fail to do so without reasonable cause, that person may then be charged with ‘loitering for the purposes of prostitution’. Once again, markedly heavier penalties were prescribed for this offence in 1993 than were previously applicable for the offence of loitering, and the maximum penalty was to be increased with repeated convictions.

However, the scope of the offence, and the penalties provided, were amended significantly through section 25 of the 2017 Act.⁸²⁶ Before this amendment was passed, difficulties with

immunity to one party (the girl) from prosecution for an under-age sexual intercourse offence, was upheld by the Supreme Court in *MD (a Minor) v. Ireland* [2012] IESC 10, discussed in the next chapter.

⁸²³ This provision effectively replaced section 16 of the Criminal Law Amendment Act 1935, discussed earlier, itself repealed by section 14 of the 1993 Act.

⁸²⁴ Section 7 as enacted provided in full that:

‘A person who in a street or public place solicits or importunes another person or other persons for the purposes of prostitution shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding—

(a) £250, in the case of a first conviction (now a Class E fine of up to €500)⁸²⁴,

(b) £500, in the case of a second conviction (now a Class D fine of up to €1,000), or

(c) £500 (a Class D fine of up to €1,000) or imprisonment for a term not exceeding 4 weeks or to both, in the case of a third or any subsequent conviction.’ A public place is defined in section 1(1) as meaning any place to which the public has access either as of right or with permission, irrespective of charges. Now that section 25 of the 2017 Act has altered the definition of ‘solicits or importunes for the purposes of prostitution’ so that it no longer covers those who offer services as a prostitute, the offence cannot be applied to those seeking to sell sex, although it continues to apply to those who seek to purchase sex.

⁸²⁵ Section 14 of the 1993 Act provides for the repeal of the earlier offences of ‘loitering and importuning’ under the 1847 and 1854 Acts.

⁸²⁶ As stated above, section 25(a) of the 2017 Act has significantly changed the definition of ‘solicits or importunes for the purposes of prostitution’ by deleting section 1(2)(a) of the 1993 Act, which had included

the prosecution of the section 8 offence had arisen on a number of occasions, largely because of its similarity to the public order offence of ‘failure to comply with a direction of a member of the Garda Síochána’ contained in section 8(2) of the Criminal Justice (Public Order) Act, 1994; the provision generated some relevant case law concerning the evidential requirements necessary for a successful prosecution.⁸²⁷ In the 1998 *Keogh* case, for example, it was confirmed that the offence created by section 8 is not that of soliciting or importuning for the purposes of prostitution itself, but of failing without reasonable cause to comply with the direction given by a Garda.⁸²⁸

The soliciting and loitering offences under sections 6, 7 and 8 of the 1993 Act are only capable of being tried as summary offences with no right to jury trial. Instead, all of these offences must be tried before a judge in the District Court, the court which under the Constitution has jurisdiction to deal only with ‘minor offences’.

By contrast, other offences created by sections 9, 10 and 11 of the 1993 Act (broadly speaking the ‘organisation of prostitution’ offences) are regarded as being more serious, and they may be tried either summarily (in the District Court) or on indictment (i.e. before a judge and jury in the Circuit Court). The offence of brothel keeping created by section 13 of the 1935 Act is repealed by section 14, and replaced by this new set of offences. Section 9 criminalises the ‘organisation of prostitution’. The less serious offence of ‘living on the earnings of prostitution’ is provided for in section 10. Both offences may be committed by persons of either sex; however the section 10 offence is not committed unless the person is both aiding and abetting prostitution, as well as living on its earnings.

Thus, as O’Malley writes, this wording ‘protects children, spouses and other dependants of the prostitute from prosecution unless they were aiding and abetting.’⁸²⁹ Section 11 penalises the use of premises as a brothel, and section 11 effectively re-enacts section 13 of the 1935 Act, which criminalised brothel-keeping, but greatly increases the maximum penalty available.⁸³⁰ Interestingly, while sections 9 (organisation of prostitution) and 11 (brothel-keeping) originally in 1993 carried the same maximum penalty of five years’ imprisonment on indictment, the 2017 changes have increased the maximum penalty on indictment only for the section 9 offence, leaving the five year maximum for the section 11 offence as it was.

A definition of brothel is not provided in the 1993 Act, although at common law brothels have been defined as houses ‘resorted to or used by more than one woman for the purposes of fornication’.⁸³¹ O’Malley suggested in his 1993 commentary on the Act that this definition, with its use of the term ‘fornication’ instead of ‘prostitution’, implies that section 11 might not apply to a case in which an alleged brothel was occupied by male prostitutes, or where the acts taking place in the house did not include sexual intercourse.⁸³²

However, in his 2013 text, O’Malley considered instead that given the 1993 change, since Irish law ‘now recognises the reality that both males and females work as prostitutes, we may

the phrase ‘offers his or her services as a prostitute to another person’ within the definition. Thus offences that are based on soliciting no longer apply to a person who offers their services as a prostitute to another person, but only now to clients or pimps. Section 25(b) creates the new offence under section 7A of the 1993 Act of ‘Payment etc for sexual activity with prostitute’; the 2017 Act changes are considered further in the next chapter.

⁸²⁷ *DPP (Sheehan) v. Galligan*, High Court, 2 November 1995; *Bates v. Brady* [2003] 4 IR 111; *DPP v. Nugent and O’Connor*, High Court, 16 January 1997; and *People (DPP) v. Keogh* [1998] 4 IR 416.

⁸²⁸ Kelly J in *People (DPP) v. Keogh* [1998] 4 IR 416.

⁸²⁹ O’Malley, 2013, *op cit*, at 211.

⁸³⁰ to five years imprisonment for conviction on indictment.

⁸³¹ *Singleton v. Ellison* [1895] 1 QB 607 at 608; *Gorman v. Standen* [1963] 3 All ER 627.

⁸³² O’Malley, 1993, *op cit*, at 20:11.

assume that the basic definition of a brothel.. should be adapted...⁸³³ In the same text, he again noted the problematic nature of the term ‘brothel’, pointing out that ‘A premises occupied by one prostitute only is not a brothel’ but that ‘difficulties have occasionally arisen in terms of how a premises should be defined for this purpose.’⁸³⁴

Although most prostitution-related offences are now contained in the 1993 Act, other relevant offences may be found in separate legislation, such as section 2 of the Criminal Law Amendment Act, 1885,⁸³⁵ which penalises the procuring or attempted procuring of a woman or girl to become a common prostitute in Ireland or elsewhere; and section 23 of the Criminal Justice (Public Order) Act, 1994, which prohibits any person from publishing, distributing or causing to be published or distributed any advertisements for brothels or prostitutes in Ireland.⁸³⁶ The provision is wide enough to cover advertisements that do not include the words ‘brothel’ or ‘prostitute’, but instead use words such as ‘massage parlours’. The prohibition also covers advertisements posted on the internet but does not cover advertisements for brothels located outside the State.

Other legislation also deals specifically with the protection of children against sexual exploitation through prostitution-related activity. Section 3 of the Sexual Offences Jurisdiction Act 1996, for example, criminalises so-called ‘sex tourism’.⁸³⁷ The Child Care Act 1991, as amended, allows intervention by the State to protect a child from abuse including trafficking or sexual exploitation. Similarly, the Children Act 2001 provides a statutory framework for the protection of children.⁸³⁸ A specific offence of soliciting for the purpose of prostitution of a trafficked person has also been created in the Criminal Law (Human Trafficking) Act 2008.⁸³⁹

5.6.2 Incidence of Prostitution in Ireland Post-1993

Even from a brief overview of its provisions, it is clear that despite the expanded definitions contained in the 1993 Act, the new offences it introduced were based upon the traditional legal premise, in criminalising those soliciting in a public place; or those loitering in a public

⁸³³ O’Malley, 2013, *op cit*, at 216.

⁸³⁴ O’Malley, 2013, *op cit*, at 215. In one early twentieth century English case, it seemed that an entire block of flats in which 12 out of 18 were used for prostitution, could be considered as a ‘premises’: *Durose v. Wilson* (1907) 21 Cox CC 421. In terms of sentencing for these ‘organisation of prostitution’ offences, O’Malley writes further that ‘Heavy fines and reasonably substantial prison sentences have occasionally been imposed’, citing cases in which a man described as being ‘at the top of the ladder’ in a Dublin prostitution ring received a sentence of two and a half years’ imprisonment, albeit with 14 months suspended; and a further case in which a man received a fine of €40,000 and a two year prison sentence: see cases in newspaper reports referred to by O’Malley, 2013, *op cit*, at 2016-7..

⁸³⁵ As amended by section 7 of the Criminal Law Amendment Act 1935.

⁸³⁶ An equivalent ‘advertising’ offence was impugned in the recent decision of the Ontario Court of Justice in *R v Anwar and Harvey*, Ontario Court of Justice, 21 February 2020.

⁸³⁷ by making it an offence to knowingly arrange to transport, or to transport, a person from within the State to a place in or outside the State for the purpose of enabling that person or any other person to commit a sexual offence of the type referred to in section 2.

⁸³⁸ Section 248, for example, makes it an offence to allow a child to reside in or frequent a brothel. Section 249 of the Children Act 2001 makes it an offence for a person who has the custody, charge or care of a child to cause or encourage ‘the seduction or prostitution of, or a sexual assault on, the child’.

⁸³⁹ Section 5 provides that a person who solicits or importunes for the purposes of prostitution of a trafficked person is guilty of an offence, and which also imposes criminal liability on any person who accepts or agrees to accept a payment or other benefit for the same person. The trafficked person is explicitly exempted from liability under section 5. The 2008 Act, and trafficking offences generally, are considered further below.

place in order to solicit who fail to move on after being directed to do so by police.⁸⁴⁰ The new Act, like the earlier legislation, was thus clearly based upon the traditional view of prostitution as public nuisance.⁸⁴¹ Consequently, it is unsurprising that it appeared to make little difference to the perceived incidence of prostitution. Like the earlier legislation on prostitution, it was clearly based upon a political concern to protect neighbourhoods and 'respectable' women from harassment, by the suppression of public loitering and soliciting. It therefore proceeded from the traditional legal assumption that prostitution must be hidden from public view without being prohibited outright. Because the act of selling sex itself was not illegal under the 1993 Act, the double standard was apparent, as it had been under previous legislation. The law continued to target only the most visible manifestations of prostitution, not the private exploitation of women.

Indeed, in a comment on the Act, then Senior Counsel Mary Ellen Ring noted in 1996 that the provisions in relation to prostitution were simply 'designed to deal with difficulties that had arisen in the prosecution of prostitutes in the early 1980s and which had meant that, for more than a decade, such prosecutions had almost disappeared from the courts in the Republic.'⁸⁴² Ring noted that the term 'common prostitute' used in the earlier statutes had been replaced by the neutral word 'person' in the new Act, but she argued that, despite seeking to make prosecution of prostitution offences easier, the new offences created in sections 7 and 8 were likely to raise 'awkward problems for Gardaí' in practice. She pointed out that they must 'first have reasonable cause for believing that a person is involved in prostitution before they can issue a warning. Then they must prove that the person failed to comply with that direction. And finally the court will have to decide – if the person moves from the area in question, but returns later – whether they have failed to comply with the Garda's request.'⁸⁴³

Indeed, the low numbers of arrests, prosecutions and convictions recorded under the 1993 Act also indicate that it was in practice very difficult to police or enforce. A Trinity College Dublin (TCD) report on prostitution for the Irish Human Rights and Equality Commission (IHREC), published in 2009, highlighted the low numbers of prosecutions taken annually under the Act in the intervening years.⁸⁴⁴

As will be seen in this and the next chapter, other studies carried out during the years after the introduction of the 1993 Act also sought to provide an estimate of the incidence of prostitution in Ireland; they illustrate a significant reduction in the numbers of Irish women engaged in prostitution, and a reduction also in the numbers on the streets; but a parallel rise in numbers of women from outside Ireland, many specifically brought into this jurisdiction for prostitution; and in levels of indoor and online-organised prostitution.

⁸⁴⁰ Offences created under sections 7 and 8 of the 1993 Act.

⁸⁴¹ For an analysis of the effect this legal approach has upon gendered constructions in the media, see Ryan, Lorna, *Reading the Prostitute: Appearance, Place and Time in British and Irish Press Stories of Prostitution*. London: Ashgate, 1997.

⁸⁴² Ring, Mary Ellen, 'Casting a Wider but More Complex Net against Prostitution', *The Irish Times*, 19th December 1996. These difficulties were of course based on the problem of proving that a person was a 'common prostitute,' once the decision in *King*, discussed above, had established that evidence tending to show prior convictions was inadmissible.

⁸⁴³ Subsequent court decisions (including those in *Nugent, Keogh*) interpreting provisions of the 1993 Act were to confirm the accuracy of Ring's predictions as to the awkward nature of the new offences from the point of view of the prosecution.

⁸⁴⁴ Trinity College Dublin Centre for Gender and Women's Studies, *Interdisciplinary Report on Prostitution in Ireland*. Report for the Irish Human Rights Commission, Dublin: TCD, 2009, at 57 *et seq.* The report noted that in 2003, proceedings were commenced in respect of only 214 'loitering and soliciting' offences; and just 95 such offences in 2005.

In 2009, the first extensive study on sexual exploitation of trafficked and migrant women in Ireland was published by the Immigrant Council of Ireland, in collaboration with the Women's Health Service and Ruhama (the Kelleher report).⁸⁴⁵ The authors of the report noted the difficulty with estimating numbers of women engaged in prostitution and trafficking, but based on their research they estimated that about 1000 women were engaged in indoor prostitution in Ireland on any one day.⁸⁴⁶ In terms of the numbers of women trafficked into Ireland for sexual exploitation, they found that, over a 21-month period between January 2007 and September 2008,

102 women were identified by ten services as being trafficked into or through Ireland... Of the 102 women, 26 were aware of a further 64 women who were trafficked into Ireland, bringing the number of women trafficked during that period to a possible 166. This number of 166 trafficked women is an underestimation; trafficking is covert and illegal, and many women who are trafficked remain invisible.⁸⁴⁷

The authors further found that 11 per cent of the 102 women trafficked had been children at the time they were brought into Ireland: 'deception was a key factor in their recruitment and many women experienced prostitution, rape, brutality and imprisonment prior to arriving in Ireland. The vast majority of women trafficked were from African countries.'⁸⁴⁸ Referring to earlier work by Layte *et al*, the authors of the report noted that only a small minority of men in Ireland report buying sex (one in 15, compared to one in eight in Sweden).⁸⁴⁹ They further found that the 'effect of prostitution on the emotional and mental health of women is immense. Drugs and alcohol are used as a coping mechanism. Being in prostitution is dangerous and women need to be continually concerned about their safety.'⁸⁵⁰

The authors analysed the circumstances of 425 women advertised on Escortireland.com, revealing them to be of 51 different nationalities; only three per cent (11) identified themselves as Irish; thus 97 per cent were migrant women.⁸⁵¹ They conducted interviews with of these 12 migrant women, finding that they were mainly recruited by so-called 'escort' agencies from particularly impoverished areas in Latin America and Central Europe.

Arising from their findings, the authors of the Kelleher report recommended that services for women in prostitution be improved; that exit routes should be created for them, and provision be made for regularising their immigration status. They stated that an inter-agency strategy was necessary to provide a coherent response to the needs of women in prostitution; and they specifically recommended the introduction of legislation to criminalise the buying and decriminalise those engaged in the sale of sex, alongside a public campaign to demonstrate the intrinsic harm caused to women by prostitution, in order to challenge the growth of the sex industry.

Summarising the report's findings subsequently, the lead author, Monica O'Connor, wrote that it had 'unveiled a highly organised, easily accessible and lucrative prostitution market

⁸⁴⁵ Kelleher Associates, O'Connor, Monica, Pillinger, Jane, *Globalisation, Sex Trafficking and Prostitution: The Experiences of Migrant Women in Ireland*. Dublin: Immigrant Council of Ireland, 2009.

⁸⁴⁶ At 21.

⁸⁴⁷ At 21.

⁸⁴⁸ At 21.

⁸⁴⁹ Layte, Richard, *et al*, *The Irish Study of Sexual Health and Relationships*. Dublin: Crisis Pregnancy Agency, 2006.

⁸⁵⁰ Kelleher Associates, *op cit*, at 24.

⁸⁵¹ At 87.

estimated to be worth over €180 million, with an estimated 1000 located in indoor venues aged between 18-58, 87% to 97% of whom were migrant women....’⁸⁵²

These stark findings and recommendations of the Kelleher Report made a significant impact on policy developments, as will be seen further in the next chapter, in reviewing developments in prostitution law and policy after 2010. For the first time in Ireland, the report in 2009 had exposed the extent to which women from other countries were being trafficked into Ireland for purposes of sexual exploitation; and the high numbers of migrant women engaged in prostitution here.

5.6.3 Reporting and Conviction Rates for Prostitution Offences Post-1993

Despite the clear findings of the Kelleher report, it remained difficult to ascertain the true extent of the practice of prostitution in Ireland after introduction of the 1993 Act, or the effect that the Act might have had upon incidence rates. Undoubtedly, it can be assumed that official crime statistics on reporting, prosecution and conviction rates for prostitution-related offences over the years following 1993 only represent a small fraction of the true incidence of prostitution in Ireland.⁸⁵³

In the TCD report for IHREC referred to earlier, a detailed analysis was provided of prostitution-related criminal proceedings over three years (2003-5), based on the Garda Annual Reports for those years.⁸⁵⁴ The report noted the widely varying application of the three loitering/soliciting offences created by sections 6, 7 and 8 of the 1993 Act. Overall, over those three years, it appeared that the section 6 offence of soliciting/importuning for commission of a sexual offence was rarely used, and offences were much more likely to be prosecuted under sections 7 and 8, with more than twice as many section 7 offences (soliciting for purpose of prostitution) being prosecuted in 2003 and 2004 than section 8 offences (loitering for purpose of prostitution).

In 2003, proceedings were commenced in respect of 160 offences under section 7 but only 54 under section 8. In 2004, the respective figures were 218 (section 7) and 101 (section 8). Prosecutions under both sections dropped dramatically in 2005, to 57 (section 7) and 38 (section 8) respectively.

Another interesting feature of the data relates to the low number of convictions resulting. For example, although a relatively high number of headline ‘prostitution’ offences was reported or known to the Garda Síochána in 2003 (122), of which 115 were detected, proceedings were commenced that year in respect of only 57 offences of prostitution, and the number of persons actually convicted for prostitution within the year was only twenty (nine men and eleven women).

In respect of non-headline offences, the conviction rate was similarly low, although no figures were provided for those offences reported or known to the Garda Síochána. In 2003, proceedings were commenced in respect of 223 offences under sections 7 and 8, but only 31 convictions were recorded (a 14% conviction rate). In 2004, 319 prosecutions were commenced under the same sections, and only 45 convictions resulted (again, this meant a

⁸⁵² O’Connor, 2014, *op cit*, at 87.

⁸⁵³ The extent to which the incidence of prostitution has traditionally been under-reported in different jurisdictions is well-documented (see literature review in Chapter 1).

⁸⁵⁴ Trinity College Dublin Centre for Gender and Women’s Studies, *Interdisciplinary Report on Prostitution in Ireland*. Dublin: TCD, 2009, at 57 *et seq.*

14% conviction rate). The equivalent figures in 2005 were for 95 offences, and 21 convictions (a slightly higher 22% conviction rate).

Finally, in terms of the gender breakdown of those convicted of prostitution-related offences, interestingly it appeared that as many, if not more, men as women were being convicted of these offences each year. In 2005, for example, a total of ten men, but only eight women, were convicted of offences under sections 7 and 8 of the 1993 Act. That same year, one man and two women were convicted of a headline prostitution offence. In each year, however, the numbers actually convicted were so small that the report concluded that it was difficult to draw any conclusions from the gender breakdown given.

In 2005, the Central Statistics Office (CSO) took over responsibility for the publication of crime statistics from An Garda Síochána, following the passage of the Garda Síochána Act of that year. Now, all crime statistics in Ireland are published by the CSO on a quarterly and annual basis, based on the number of crime incidents recorded by An Garda Síochána, 'derived from administrative data on recorded crime incidents as recorded on PULSE (Police Using Leading Systems Effectively), the incident recording system used by An Garda Síochána. Crime incidents are classified according to the Irish Crime Classification System (ICCS) and are based on the date the crime is reported to or becomes known to An Garda Síochána.'⁸⁵⁵

Data on prostitution-related offences after 2010 will be considered in the next chapter; but even in the years immediately following the enactment of the 1993 Act and before any debate on further law reform began, as the figures overall indicate, enforcement of the 1993 Act itself was minimal, given the low numbers of offences recorded annually and the even lower numbers of prosecutions and convictions.

5.6.4 Impact of the 1993 Act upon Women in Prostitution

Although only small numbers were prosecuted under the 1993 Act, it is argued that it did however continue to have a very particular terrorising and sexualising effect upon women, through the concepts it employed, the cultural or symbolic effects of those generally, and the perceptions of its operation held by the women most affected. In particular, in continuing to rely upon the concepts of 'loitering' and 'soliciting' previously used in the earlier legislation on prostitution, the 1993 Act provided a familiar and highly gendered legal framework for Gardaí to use in bringing forward the small numbers of prosecutions that were taken.

This framework, built upon a stereotype of the way in which women engaged in prostitution may be recognised as such, and the type of evidence brought forward by police and prosecutors in prostitution cases in practice, is discussed by Lorna Ryan in her scholarly analysis of Irish and British broadsheet newspaper stories about prostitution over a five year period 1987-1991. In this study, she found that recognisable descriptions of prostitution in the media are constructed on the basis of appearance, time and place of presence.⁸⁵⁶ She wrote that common themes

⁸⁵⁵ <http://www.cso.ie/en/methods/surveybackgroundnotes/recordedcrime/>: Crime incident types recorded on the PULSE system are mapped to the condensed Irish Crime Classification System (ICCS), and under this system there are 15 offence groups. Prostitution offences are listed under Group 13, 'Public Order and Other Social Code Offences' (itself a telling title); specifically under 13d, as: 'brothel keeping, organisation of prostitution, prostitution including soliciting, etc.' Data are provided by the CSO on numbers of crimes recorded and numbers detected, in each year. Additional data are provided for some years on the numbers of prosecutions commenced, and convictions obtained.

⁸⁵⁶ Ryan, Lorna, *Reading the Prostitute: Appearance, Place and Time in British and Irish press stories of prostitution*. London: Ashgate, 1997.

throughout the stories about prostitution in the press emerged as ‘the descriptions of the prostitutes, the descriptions of the places identified as places of prostitution and the time at which prostitution occurs.’⁸⁵⁷ These descriptions, Ryan asserted, are not only used to formulate ‘the prostitute’; they are also ‘selected to produce, and are heard/read as, evidence of intent to prostitute’ in prosecutions for prostitution-related offences like loitering and soliciting for the purpose of prostitution.⁸⁵⁸

While Ryan’s main focus was on press reporting of prostitution, as part of her research she interviewed a Dublin solicitor, ‘one of the main defenders of women who are identified as prostitutes’; she reported that this solicitor gave three lines of argument which would typically be advanced by Gardaí to the court in order to provide an ‘assembly of the crime of loitering for the purposes of prostitution’:

1. that the woman was dressed in black tights, black high heels and mini-skirt; (2) that she was standing in a known place for prostitution; and (3) that this occurred at a particular time of night.⁸⁵⁹

Thus, Ryan writes, ‘not only were appearance, place and time used by journalists to warrant the category ‘prostitute’ .. but [they were] also used by police officers in their verbalisations of how they suspected.... the assembly of a crime.’⁸⁶⁰ Ryan concludes her study with a wry quotation from Nickie Roberts, as follows:

When any woman can walk the streets at night, on her own, dressed as she pleases, without running the risk of being branded a whore, arrested for streetwalking, or raped and *then* branded a whore, we will know that the theory of women’s liberation from male violence has been translated into fact.⁸⁶¹

Ryan’s thesis supports the argument advanced by Mary Joe Frug, discussed in the previous chapter; namely that laws controlling public display of prostitution traditionally have the effect of terrorising women’s bodies, because they perpetuate among all women the fear of being mistaken for prostitutes.⁸⁶² As Ryan suggests, ‘the prostitute’ is an easily recognisable construction, identifiable merely through accounts of her physical/sartorial appearance; her presence in a particular location; and the time of that presence.⁸⁶³

This construction of prostitution did not change with the passage of the 1993 Act, despite its gender-neutral language; its continued adherence to the traditional model prohibiting only the visual display of prostitution; and its continued use of the terms ‘loitering’ and ‘soliciting’, meant that like the earlier legislation, it continued to contribute to a terrorised and sexualised construction of women.

The practical effect of the Act on those engaged in prostitution, and their perceptions of it, was the subject of a number of small-scale research studies conducted after 1993. In particular, after the Act came into force, the Women’s Health Project (WHP), which was established in 1991 to

⁸⁵⁷ Ryan, *ibid*, at 127.

⁸⁵⁸ Ryan, *ibid*, at 167.

⁸⁵⁹ Ryan, *ibid*, at 175-6.

⁸⁶⁰ Ryan, *ibid*, at 233.

⁸⁶¹ Ryan, *ibid*, at 234, quoting from Roberts, Nickie, *Whores in History: Prostitution in Western Society*. London: Grafton, 1993, at 358.

⁸⁶² Frug, Mary Joe, *op cit*.

⁸⁶³ Ryan, *op cit*, at 167.

provide medical services to those engaged in prostitution in Dublin, commissioned a number of reports on female prostitution.⁸⁶⁴

Its first report found that the new law had produced a more confrontational relationship between women and police, as the women were constantly being moved on. In a second report, women described an increasing reluctance to report attacks, because of their negative experiences with the gardai under the new law. In general, the reports found that the 1993 Act had negatively affected the women engaged in prostitution. They were moved on more frequently by the Garda Síochána under the Act; were more reluctant to report assaults on them; and had to spend longer hours engaged in prostitution to make the same money as before. The 1996 report stops short of recommending total decriminalisation, although this is clearly the preferred option of the women interviewed. The perceptions of the women interviewed for these reports were challenged by the Department of Justice, which claimed that 'there is no evidence.. to support [prostitutes'] fear of prosecution when reporting assaults.'⁸⁶⁵ Yet clearly women's fears remained valid after the introduction of the 1993 Act, as evidenced by the murder of a young woman engaged in prostitution, Sinead Kelly, on a Dublin street on 22nd June 1998.⁸⁶⁶

Indeed, in a study published in 2000, in which this author was involved, 30 women working as street prostitutes in Dublin were interviewed about their experience of the criminal law, and again the participants spoke of their fear of violence;⁸⁶⁷ 80 per cent of them had been subjected to violence of one form or another. They generally expressed confidence about police responses to complaints of violence. However, over 50 per cent of them had already been prosecuted under the Act, while the others felt it was only a matter of time before they too were arrested; most recommended some form of decriminalisation.

More recently, in the interdisciplinary report on prostitution commissioned by the IHRC and published in 2009, an empirical study was conducted seeking the views of some women and men engaged in prostitution as to appropriate legal models for regulation of prostitution. In total, seven individuals (four women and three men) participated in interviews; ten service providers participated in interviews; and a total of 34 organisations providing services to those engaged in prostitution also responded to a questionnaire.⁸⁶⁸

While there was generally no agreement among the respondents as to which legal model – decriminalisation or legalisation- should be adopted, there was 'consensus as to the need to regularise the situation. All agree that a change is necessary'.⁸⁶⁹ Many gaps in service provision were identified by the respondents, and the necessary improvements and additions to services recommended by the participants in the study included a 'continuum of care and support from prevention, harm reduction, sexual health services, counselling and support, education and retraining, to exit routes and strategies', alongside provision of alcohol and

⁸⁶⁴ O'Connor, Anne Marie, *The Health Needs of Women Working in Prostitution in the Republic of Ireland*. Dublin: Women's Health Project, 1994; and O'Connor, Anne Marie, *Women Working in Prostitution: Towards a Healthier Future*. Dublin: Women's Health Project, 1996.

⁸⁶⁵ *The Law on Sexual Offences: A Discussion Paper*. Government Publications, 1998, p. 95.

⁸⁶⁶ For reports of this death, see for example 'Women Dice with Death Nightly on Edge of the Banking Belt', *The Irish Times*, 27th June 1998.

⁸⁶⁷ Haughey, Caroline and Bacik, Ivana, *Final Report: A Study of Prostitution in Dublin*. Unpublished: Law School, TCD/Department of Justice, Equality and Law Reform, 2000. The study consisted of a series of interviews conducted by Caroline Haughey with women engaged in street prostitution in Dublin city centre.

⁸⁶⁸ Trinity College Dublin Centre for Gender and Women's Studies, *Interdisciplinary Report on Prostitution in Ireland*. Dublin: TCD, 2009, at 152.

⁸⁶⁹ At 153.

drug treatment services, rape and sexual abuse counselling, and inclusion, training and employment of current and former prostitutes as peer/outreach workers within services.⁸⁷⁰

The report found that Irish laws ‘continue to adhere to a clumsy model of prohibition that does not distinguish between the seller of sexual services or the buyer, and that does not afford sufficient protections to those vulnerable to sexual exploitation, in particular those coerced or trafficked into engaging in prostitution.’⁸⁷¹

The report stated further that

A review of Irish criminal law on prostitution reveals that the model of legal regulation on which domestic legal standards are based is that of prohibition, albeit focused upon prohibition of the public display of the act of selling sex, rather than prohibition on the sale of sex itself. While legislative change in 1993 was seen as relatively progressive at the time, it may now be regarded as outdated and insufficiently protective of the rights of those engaged in prostitution, particularly in the light of developments in human rights protections at international level and recent changes in Swedish law ..⁸⁷²

While the report could not obtain accurate numbers as to the numbers of persons engaged in prostitution, and could not make particular recommendations as to the legal changes necessary regarding prostitution, it did comment that ‘the human rights of those who engage in prostitution and those who are trafficked for the purposes of sexual exploitation are not being adequately protected’ and that ‘this is a situation that demands immediate action.’⁸⁷³ In this context, the report concluded that ‘from a human rights perspective, the ‘Swedish model’⁸⁷⁴, as it is known, is the one that most fully encapsulates human rights protections as provided for in United Nations (UN) human rights treaties.’⁸⁷⁵

In her thesis, Monica O’Connor notes that this report, and other small scale Irish research studies conducted with women in street prostitution in the early 1990s, made findings consistent with those in larger international studies, indicating common factors among the women so engaged which included ‘backgrounds of severe poverty, sexual abuse and early homelessness; a high level of physical and sexual violence on the streets by buyers and pimps; the presence of severe drug related problems; vulnerability to unsafe sexual practices; barriers to exiting; fears of reporting violence to the police and the negative impacts of being criminalized.’⁸⁷⁶ She says that these studies highlighted the range of coercive circumstances driving the entry of women and girls into on-street prostitution; but that by the 1990s and 2000s it had become clear that indoor prostitution was becoming a much bigger factor in the sex industry, with the Gardaí conducting a series of targeted operations in the early 2000s focusing on this area, and in particular on the trafficking of women and girls into Ireland for indoor prostitution. She notes that investigative journalists also carried out studies during

⁸⁷⁰ At 150.

⁸⁷¹ Trinity College Dublin Centre for Gender and Women’s Studies, *Interdisciplinary Repor, op cit*, at 102.

⁸⁷² *Ibid*, at 102.

⁸⁷³ At 154.

⁸⁷⁴ The Report explained by way of footnote that ‘The Swedish Law that Prohibits the Purchase of Sexual Services came into force on 1st January 1999. This law criminalises those who purchase sexual services but not the person engaged in prostitution. The law extends extraterritorial jurisdiction to the Swedish government, thus Swedish citizens engaged in purchasing sexual services abroad could be prosecuted if similar laws exist in those countries. The Law has widespread public support – a 2002 poll showed 80% support ratings (Ekberg, 2004: 1205).’

⁸⁷⁵ Trinity College Dublin Centre for Gender and Women’s Studies, *op cit*, at 15.

⁸⁷⁶ O’Connor Monica, *op cit*, at 84, citing the studies outlined above and also O’Connor, Anne Marie, O’Neill, Mary and Foran, Deirdre, *Drug Using Women in Prostitution*. Dublin: Women’s Health Project, 1999.

this time, exposing the extent to which organised criminal activity lay behind this increase in indoor prostitution.⁸⁷⁷

5.6.5 The 1993 Act: Conclusions

Certain conclusions as to the effect of the 1993 Act may be drawn from the data on reporting and conviction rates, and the findings of the reports discussed above. One effect of the 1993 Act appeared to be the routine dispersal of those engaged in prostitution, ordered to move on from certain areas by the Garda Síochána under pain of prosecution.⁸⁷⁸ This in turn may have led to the women becoming engaged in prostitution for longer hours, perhaps in areas that were also less safe or less well known to them. It may also have led to the increased use of brothels rather than ‘street’ prostitution, with clients being recruited over the internet or via coded advertisements – although much of this change would arguably have happened anyway given similar developments in other jurisdictions with a move away from street-based prostitution. All of these factors potentially increased the risk of violence to those engaged in prostitution; although as noted in Chapter 1, such risk is inherent within prostitution; as Bridgeman and Millns suggest: the ‘privatised nature of prostitution ensuring that the activities of prostitutes are performed out of public view creates the conditions wherein the prostitute is constantly at danger from sexual violence’.⁸⁷⁹

Of course, the focus of the 1993 Act upon the public manifestation of prostitution was not a new development; in its continued selective prohibition of prostitution-related activity, and its continued reliance upon the traditional concepts of ‘loitering’ and ‘soliciting’, it mirrored previous statute and case law. While its use of gender-neutral language was generally welcomed, Garda figures available have indicated that it was not enforced in practice in a gender-neutral way. Although it appeared for some time that men were being prosecuted along with women, the conviction rates have been so low, particularly in recent years, that it is difficult to draw any conclusions from the limited gender breakdown provided. The views expressed about the effects of the Act by women engaged in prostitution have also indicated that it could form a basis for Garda harassment. In addition, the system of increased penalties has been seen as counter-productive and as having the unfortunate effect of requiring that women re-engage in prostitution in order to pay the fines imposed.

In sum, the 1993 Act did not significantly change nor noticeably improve the conditions in which women engaged in prostitution in Ireland. Thus, in a comparative European study of prostitution laws in nine countries published in 2008, Kelly *et al* described Ireland as a ‘traditional regime’ with ‘little change in law or policy in recent years’, where the law ‘mainly targets women who sell sex’.⁸⁸⁰

Even prior to 2010, when a change in the law first began to be considered among Irish policy-makers, it had become clear that aspects of the 1993 Act, based as it was on the same concepts of ‘loitering’ and ‘soliciting’ traditionally used to control prostitution in earlier legislation, were unsatisfactory and that it was ineffective in tackling either demand for prostitution or supply of those engaged in prostitution. In addition, concerns about the increasing involvement of organised crime and the rise in numbers of women from other countries becoming engaged in prostitution were being expressed in a series of ways. In

⁸⁷⁷ Eg Reynolds, Paul, *Sex in the City: The Prostitution Racket in Ireland*. London: Pan Books, 2003, cited at O’Connor, *ibid*, at 87.

⁸⁷⁸ Under the offence created in section 8(2) of the 1993 Act, namely failure to move on having been directed to do so by a Garda.

⁸⁷⁹ Bridgeman and Millns, 1998, *op cit*, at 737.

⁸⁸⁰ Kelly, Liz, Coy, Maddy, and Davenport, Rebecca, *Shifting Sands: A Comparison of Prostitution Regimes across Nine Countries*. London: London Metropolitan University, 2008, at 22.

particular, an enhanced focus upon trafficking as a real issue within Irish prostitution had led to some changes in the law even before 2010.

5.7 Sex Trafficking: the Irish Context

Just as an increased focus has turned to the issue of trafficking internationally in recent years, as discussed in the previous chapter, so too in Ireland, debates on prostitution have in the last decade or so begun increasingly to focus on transnational aspects; a context in which many women and girls currently engaged in prostitution have been trafficked into Ireland.

However, as with prostitution itself, the exact figures are difficult to establish. In 2004, a study on trafficking by Conroy and Fitzgerald, conducted for the International Organisation of Migration, was published. This research looked into the extent of the problem of trafficking of unaccompanied minors into Ireland, examining the extent to which trafficking of minors into the State was then an issue, and noting also ‘an old history of trafficking in children from Ireland’.⁸⁸¹

Their report emphasised that uncertain legal status of child victims of trafficking posed dilemmas for planning their future. Their accommodation was unsatisfactory, the staffing level of social workers for their services within health boards was inadequate; and there was a high rate of disappearance of such children from the care of public authorities. The seriousness of the concerns raised by Conroy and others indicated the need to ensure adequate levels of human rights protections for those engaged in prostitution, particularly minors trafficked for sexual purposes.⁸⁸²

However, the first study attempting to estimate the overall extent of trafficking into Ireland was conducted by Ward and Wylie, published in 2007; it found only a minimum of 76 cases and an additional possible 75 cases of trafficking for sexual exploitation over a seven-year period, but acknowledged that accurate data was not obtainable.⁸⁸³ In 2008, the Trinity College Dublin report on prostitution commissioned by the IHRC commented that trafficking for the purposes of sexual exploitation ‘is a growing problem.....until now, Irish legislative provisions on trafficking have fallen well short of the requirements of international law. Legislation has tended to treat trafficked persons as illegal immigrants rather than as victims of human rights violations.’⁸⁸⁴

Following publication of this report, long-awaited Irish legislation on trafficking was passed, namely the Criminal Law (Trafficking) Act 2008, referred to above. This Act criminalises the

⁸⁸¹ Conroy, Pauline and Fitzgerald, Frances, *Separated Children Seeking Asylum: Health, Social and Educational Needs*. Dublin: Research for the Eastern Health Board and Crisis Pregnancy Agency, 2004, at 18; accessible at: <http://www.crisispregnancy.ie/pub/FinalproofedReport.doc>. In an historical context, the report noted for example that in the nineteenth century, girls aged between 14-18 had been transported out of Ireland to be placed in brothels in Australia and Tasmania.

⁸⁸² In the early 2000s a number of further studies on child trafficking revealed a high level of risk for separated children disappearing from state care; see O'Connor, *op cit*, at 89, citing Conroy, Pauline, *Trafficking in Unaccompanied Minors in Ireland*. Dublin: International Organization for Migration (IOM), 2003; Conroy, Pauline and Fitzgerald, Frances, *Separated Children Seeking Asylum: Health, Social and Educational Needs*. Dublin: Eastern Health Board and Crisis Pregnancy Agency, 2004.

⁸⁸³ Ward Eilís and Wylie, Gillian, *The Nature and Extent of Trafficking of Women into Ireland for the Purposes Of Sexual Exploitation 2000–2006: A report from Findings*. SSRS Research Papers and Reports, 39. SSRC: NUI Galway, 2007.

⁸⁸⁴ Trinity College Dublin Centre for Gender and Women's Studies, *op cit*, at 12.

trafficking of persons for sexual exploitation, and in section 1 defines ‘sexual exploitation’ to include prostitution.⁸⁸⁵

The Act provides much more severe penalties for trafficking-related offences than those which were set out in the 1993 legislation on prostitution, with a maximum penalty of life imprisonment provided in section 5 for those convicted of trafficking offences, where specified means of force or coercion to obtain consent were used.⁸⁸⁶ Section 5 has more recently been amended by section 26 of the 2017 Act, to provide for a new offence of paying for the prostitution services of a trafficked person.⁸⁸⁷

Clearly, there are notable differences between this trafficking-related soliciting offence in section 5 and the basic soliciting offence set out in section 7 of the 1993 Act. In particular, the 2008 provision refers to an offence committed in either a public or a private place, whereas the 1993 offence may only be committed in a public place. Moreover, the 2008 section provides that the trafficked person is not themselves guilty of an offence.⁸⁸⁸

The introduction of the trafficking legislation was generally welcomed in order to ensure compliance by Ireland with international obligations; but it was subject to ‘considerable criticism by NGOs and legal advocates’, largely because the protective measures for victims of trafficking were not contained in the legislation itself but rather in administrative procedures without the same binding legal force; so that, it has been suggested, victims not willing or able to co-operate in prosecutions for trafficking could still be subject to deportation if deemed unlawfully resident in the state.⁸⁸⁹

⁸⁸⁵ Its introduction was necessary in order to comply with EU Council Framework Decision of 19th July 2002 on Combating Trafficking in Human Beings and to give effect in part to the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons; and the 2005 Council of Europe Convention on Action Against Trafficking in Human Beings. Other aspects of the definition of ‘exploitation’ were amended by section 1 of the Criminal Law (Human Trafficking) (Amendment) Act 2013, but the definition of ‘sexual exploitation’ remained unchanged.

⁸⁸⁶ Section 5 of the Act created two new offences of solicitation in respect of trafficked persons, as follows:

- (1) Where, for the purposes of the prostitution of a trafficked person, a person (other than that trafficked person) solicits or importunes another person, including that trafficked person, in any place, he or she shall be guilty of an offence.

A person (other than the trafficked person in respect of whom the offence under subsection (1) is committed) who accepts, or agrees to accept a payment, right, interest or other benefit from a person for a purpose mentioned in subsection (1) shall be guilty of an offence. Section 26 of the 2017 Act subsequently amended this provision to add a new section 5(2A), as follows: ‘(2A) A person who pays, gives, offers or promises to pay or give a person (including the trafficked person) money or any other form of remuneration or consideration for the purposes of the prostitution of a trafficked person shall be guilty of an offence.’ A person found guilty of paying for the services of a victim of trafficking is liable for a fine of up to €5,000 or up to five years imprisonment, but lack of knowledge that the victim is trafficked may be used as a defence.

⁸⁸⁷ ‘(2A) A person who pays, gives, offers or promises to pay or give a person (including the trafficked person) money or any other form of remuneration or consideration for the purposes of the prostitution of a trafficked person shall be guilty of an offence.’

⁸⁸⁸ A defence to the 2008 offences is provided in section 5(4) where the defendant ‘did not know and had no reasonable grounds for believing, that the person in respect of whom the offence was committed was a trafficked person.’ The defendant bears the onus of establishing the defence; and it requires objective grounds alongside the subjective lack of knowledge.

⁸⁸⁹ O’Connor, at 90-1. The same year that the Act was introduced, an Anti-Human Trafficking Unit was set up in the Department of Justice and Equality (AHTU), in order to co-ordinate the state’s response to trafficking in human beings. A specialist unit within the Garda National Immigration Bureau (GNIB), the Human Trafficking Investigation and Co-Ordination Unit, now investigates reported trafficking cases; and works

The year after the Act's introduction, the 2009 Kelleher report, discussed above, provided a more detailed overview of the extent to which trafficking is endemic within prostitution in Ireland, the levels of prostitution being carried on generally, and the enormous sums of money involved.⁸⁹⁰

As with the prostitution-related offences discussed above, it appears that the low levels of trafficking offences being prosecuted in no way reflects the true extent of trafficking into Ireland for the purposes of sexual exploitation. Figures on trafficking are generally understood to be 'highly contested and considered to be fraught with definitional and methodological problems' but, as O'Connor writes, '...experts agree that the problem is *underestimation* due to a failure to identify people as trafficked, particularly women trafficked into the sex trade...'.⁸⁹¹

O'Connor and Yonkova have drawn a clear connection between the introduction of a sex purchase ban and effective measures to tackle sex trafficking in a 2019 discussion of trafficking in which they assert that 'the evidence increasingly indicates that attempts to address trafficking without addressing the wider demand for women and girls within the commercial sex trade of destination countries will inevitably fail'.⁸⁹² In concluding that the enforcement of a law criminalising purchase of sex will create a context which is less conducive to human trafficking, O'Connor and Yonkova contrast this approach with a legal framework in which prostitution is legalised or decriminalised and demand, including demand for trafficked women is thus increased; they note Sylvia Walby's 2016 trafficking study, which calculated that 'the Netherlands now has nine times the rate of prostitution in Sweden, and that Germany appears to have a rate of prostitution of between 30 and 40 times that of Sweden'.⁸⁹³

Insights into the experiences of some women who have been trafficked into Ireland are provided by Nusha Yonkova in a recent study seeking to understand best practice in gender-specific assistance to trafficked, sexually exploited women across the EU.⁸⁹⁴ Yonkova et al also carried out further research, funded by the EU Asylum, Migration and Integration Fund, into the experiences of trafficked women across different European states; they developed a series of best practice recommendations, including the need to ensure provision of gender-specific services such as legal assistance, 'safe and appropriate accommodation', training and education to those identified as victims of trafficking.⁸⁹⁵

Finally, although the topic of sex trafficking itself is not the focus of this thesis, it should be noted that Ireland has been subject to extensive international criticism, as well as criticism

together with the Health Service Executive (HSE) Anti-Human Trafficking Team and a Human Trafficking Legal Team set up by the Legal Aid Board (LAB).

⁸⁹⁰ Kelleher Associates, O'Connor, Monica, Pillinger, Jane, *Globalisation, Sex Trafficking and Prostitution: The Experiences of Migrant Women in Ireland*. Dublin: Immigrant Council of Ireland, 2009. This research estimated that approximately 1000 women were engaged in prostitution at any one time, mostly indoors rather than on the street, '87% to 97% of whom were migrant women...'; See O'Connor, *op cit*, at 87.

⁸⁹¹ O'Connor, Monica, *The Sex Economy*. Newcastle: Agenda Publishing, 2018, 20-3.

⁸⁹² O'Connor, Monica and Yonkova, Nusha, 'Gender, Prostitution and Trafficking for Sexual Exploitation' in Black, Lynsey and Dunne, Peter (eds), *Law and Gender in Modern Ireland*. Oxford: Hart, 2019, at 39.

⁸⁹³ *Ibid*, at 52, quoting Walby et al (2016), *op cit*.

⁸⁹⁴ Yonkova, Nusha, *A Study of gender-specific approaches to assistance of trafficked, sexually exploited women in Ireland, Bulgaria, UK and Croatia*, Doctoral research at University College Dublin: School of Social Policy, Social Work and Social Justice, 2019.

⁸⁹⁵ Yonkova, Nusha, Henderson, Mary and Okeke Campbell, Jennifer, *Assisting Trafficked Women: Best Practice Principles of Gender-Specific Legal Assistance and Integration Supports to Third-Country National Female Victims of Trafficking for Sexual Exploitation*. Dublin: Immigrant Council of Ireland, 2020, at 25-30.

from the Irish Human Rights and Equality Commission (IHREC), for ongoing state failure to provide sufficient supports and legal protections for victims of trafficking.⁸⁹⁶

5.8 Conclusions

A review of the development of Irish law on prostitution reveals a recurring theme, evident since the nineteenth century; namely a concern always with hiding evidence of the practice of prostitution from public view. The law has traditionally prohibited only public manifestations of the sale of sex, without criminalising the transaction itself. This approach is clearly evident in the framing of nineteenth century laws on prostitution, but Irish laws post-independence maintained this position and even reinforced it, within a framework of law-making examined in the previous chapter, that was notably repressive of women's sexuality and which continued to deny women autonomy in reproductive health in particular, maintaining strong censorship over sexual matters well into the twenty-first century; thus over many decades contributing to the construction of women in Ireland as 'weak, nurturing and sexy', in Frug's words.⁸⁹⁷

As outlined in the previous chapter, the text of the Irish Constitution adopted in 1937 clearly maternalises women, and following the insertion in 1983 of Article 40.3.3 (the Eighth Amendment), with its explicit devaluing of the lives of women, the Constitution proved particularly hostile to the advancement of women's rights to reproductive choice or to equality, at least until the repeal of that Amendment in 2018. It is argued that the constitutional text and judicial application of that text have thus contributed to the construction of the Irish 'woman' as 'weak, nurturing and sexy'. As Quinlan has written, women in Ireland who failed to conform to conventional religious and political models of sexuality were often subjected to 'intense and prolonged forms of social control';⁸⁹⁸ this control was supported and facilitated by the post-independence constitutional and legal framework. Thus, it is argued, based on the analysis in the previous chapter, that women were terrorised and sexualised, as well as being maternalised, by Irish laws post-1922.

Prostitution laws must be seen in the context of this highly gendered Irish legal framework, within which, as Mary Robinson and others have argued, women must use law strategically in order to force social change, while recognising the many challenges represented by a traditionally patriarchal legal culture. In this way, Irish laws on prostitution have for many decades fitted within Coy's framework of a gender regime; and also confirm Frug's thesis in their sexualisation, terrorisation and maternalisation of women.

In the 1990s, when reform of law on prostitution was considered, despite some thoughtful contributions from Oireachtas members during debates, rushed legislation changed little in practice beyond introducing gender-neutral offences, albeit still based upon the old concepts of 'loitering and soliciting'. The term 'common prostitute' was abolished but the stereotypical assumptions of appearance, time and place persisted in the prosecution of (mostly) women for prostitution-related offences.

⁸⁹⁶ In its 2020 transnational assessment of trafficking laws, the US State Department downgraded Ireland to its Tier 2 Watch List, due to a 'failure to meet the minimum standards for the elimination of trafficking'; US State Department, *Trafficking in Persons Report* (20th ed), 2020. See also Irish Human Rights and Equality Commission (IHREC), *Ireland's Actions against Trafficking in Human Beings*, Dublin: IHREC, October 2021, at <https://www.ihrec.ie/app/uploads/2021/10/Irelands-actions-against-trafficking-in-human-beings-IHREC-Report-to-GRETA-18102021.pdf>

⁸⁹⁷ (to use the analytical frameworks devised by Maddy Coy and Mary Joe Frug, both *op cit*).

⁸⁹⁸ Quinlan, 2016, *op cit*, at 503.

Prosecutions and convictions for such offences, never carried out in any significant numbers, dwindled further into the 2000s as further law reform began to be considered and the 1993 legislation became subject to greater criticism. In addition, increased focus internationally on the growing issue of trafficking, as more women from other jurisdictions became engaged in prostitution in Ireland, required the introduction of new anti-trafficking laws. The groundbreaking 2009 Kelleher report exposed for the first time the real extent of prostitution and of trafficking in this country, and the high numbers of migrant women engaged in the sale of sex, as prostitution moved both indoors and online. Thus, laws that had focused on curbing the public visibility of street-based prostitution became less relevant.

Additionally, during the late 2000s new discourses on prostitution, based on concepts of exploitation and coercion, came to the fore in academic and policy-making circles. The growing influence in the late 2000s in Ireland of these human rights and feminist discourses around prostitution as a breach of human rights, a structural ‘gender regime’ within which women’s consents and choices could be legally regarded as compromised, is considered further in the next chapter, in the context of the post-2010 momentum for law reform and the introduction of the 2017 Act. Both the context for the introduction of the new provisions in the Act, and the legislative debates on its provisions, are outlined and analysed; and it is argued that a number of themes emerge around the conceptualisation of consent in those debates. Through the analysis provided, it is argued in the next chapter that activists and legislators have challenged the ‘gender regime’ previously represented by Irish laws; and that the 2017 Act provisions represent a strategic use of the law for social change towards greater gender equality in the sense expressed by Mary Robinson decades ago.

CHAPTER 6 – PROSTITUTION LAW REFORM IN IRELAND POST-2010: DEBATES AND ANALYSIS

6.0 Introduction

By 2010, the 1993 legislation had been in place in Ireland for over a decade, and it had become clear that even with its gender-neutral provisions, the law was always going to be enforced more vigorously against women than against male clients. As the historical review of prostitution policy outlined in the previous chapter has shown, the 1993 Act was based upon the traditional view that in order to protect neighborhoods and 'respectable' women from harassment, the law must seek to hide the sex trade from public view. So the 1993 law, like earlier anti-prostitution measures, sought to target only the most visible manifestations of prostitution, not the private exploitation of women.

Gradually, over the years following its introduction, the 1993 Act came to be seen as outdated and insufficiently protective of the rights of those engaged in prostitution, particularly in the light of developments in human rights protections at international level and recent changes in Swedish law, as well as increased levels of feminist activism in Ireland around reproductive health rights, and seeking legal change for victims and survivors of sexual offences and domestic violence. Meanwhile, increased focus was placed upon the need to legislate against the phenomenon of human trafficking.⁸⁹⁹ As policy-makers and feminist activists internationally began to develop greater interest in the new approach to tackling prostitution and trafficking represented by the Swedish sex purchase ban, concerns grew in Ireland about the increasing numbers of migrant women engaged in prostitution, and the difficulty with distinguishing between those 'trafficked' and those 'coerced' into prostitution.

Thus, pressure began to mount from the non-governmental organisation (NGO) sector to conduct a review of prostitution law in Ireland, and a process of law reform consideration was embarked upon. After a series of preliminary debates in the Oireachtas in 2011 and 2012, the Justice Committee was tasked with preparing a report into law reform in this area. That report was published in 2013, and was followed by the introduction in 2015, and final passage in 2017, of new legislation on prostitution. This legislation, Part 4 of the Criminal Law (Sexual Offences) Act 2017, has effectively incorporated the Swedish approach into Irish law, by decriminalising those engaged in the selling of sex in public, and by criminalising specifically those who engage in the purchase of sex.

In this chapter, a timeline of the key moments leading up to the passage of the 2017 Act is provided, followed by an account of the policy-making and legislative process.⁹⁰⁰ A detailed discussion and analysis of the themes emerging from the legislative debates is then provided, based upon the Interpretive Policy Analysis (IPA) approach deployed by Harry Annison.⁹⁰¹ This analysis is framed by a feminist perspective, seeking to examine how those actors who supported and drove the law reform process did so on the basis of a particular understanding

⁸⁹⁹ Anti-trafficking provisions were introduced in Ireland through the Criminal Law (Trafficking) Act 2008 and the Criminal Law (Human Trafficking) (Amendment) Act 2013, discussed in previous chapters, but the prohibition on trafficking could be seen as having enshrined a false dichotomy in Irish law, between the person who 'consensually' enters prostitution and the person who is trafficked into sexual exploitation.

⁹⁰⁰ The author was a member of the Seanad during the full period of the law-making process examined in this chapter.

⁹⁰¹ Annison, Harry, *Dangerous Politics: Risk, Vulnerability and Penal Policy*. Oxford University Press, 2015. See discussion of this methodology in Chapter 2.

of consent which premises consent in its structural power context and which recognizes a conceptualization of consent as capable of being coerced or ‘compromised’.⁹⁰²

In the final substantive chapter (Chapter 7), a legal analysis is presented of the provisions in Part 4 of the 2017 Act and a brief review of the impact of the legislation since its enactment is also advanced, leading to the development of a series of conclusions based upon the empirical findings and literature review.

Fig 6.0 Timeline for Law-Making Process

2008	Publication of reports from TCD, Immigrant Council of Ireland
2010	Foundation of Turn Off the Red Light (TORL)
September 2010	Visit of Dignity Project Partners to Stockholm
February 2011	General Election
12 October 2011	Seanad debate on first prostitution motion proposed by Senator Zappone
18 April 2012	Seanad debate on second prostitution motion proposed by Senator Zappone
June 2012	Publication, Dept of Justice report ‘Future Direction of Prostitution Legislation’
November 2012	Visit to Stockholm of Oireachtas Justice Committee delegation
2012-2013	Oireachtas Justice Committee hearings on prostitution law reform
May 2013	Pringle private members bill on prostitution
June 2013	Publication of Oireachtas Justice Committee report
September - December 2013	Correspondence between Justice Minister and Committee on report
May 2014	Change of Justice Minister
September 2015	Publication of Criminal Law (Sexual Offences) Bill
6 October 2015	Introduction of Bill in Seanad; Second Stage Debate takes place ⁹⁰³
11 December 2015	Committee Stage debate in Seanad
14 January 2016	Resumed Committee Stage debate in Seanad
21 January 2016	Report and Final Stages in Seanad
28 January 2016	Bill begins debate in the Dáil; Second Stage debate (with only Minister and one other speaker)

⁹⁰² This understanding of consent fits within Coy’s depiction of prostitution as a structural ‘gender regime’: Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality: Theory, Research and Policy*. Surrey: Ashgate, 2012, at 4, referring to the model of ‘systemic gendered power inequalities’ developed by Connell, Raewyn, *Gender* (2nd ed). Cambridge: Polity Press, 2009. See discussion in previous chapters.

⁹⁰³ Legislation in the Irish parliament (Oireachtas) is taken through both Houses, Dáil (lower House) and Seanad (Senate or upper House); at ‘Second Stage’ a general debate on the principles of the Bill takes place, while amendments to the Bill are debated in detail at ‘Committee Stage’ and a final debate is then held at ‘Report Stage’, before the Bill passes onto the next House to proceed through the same three Stages; if amended in the second House, it must then be returned to the House in which it was commenced for final review before passage. In the case of the 2017 Act, it commenced its legislative journey in the Seanad, and was then referred onto the Dáil before being concluded in the Seanad where amendments made in the Dáil were considered at the final stage..

26 February 2016	General Election
5 October, 2-3 November 2016	Resumed Second Stage debate in the Dáil
3 November 2016	Referral to Dáil Select Committee
7 December 2016	Dáil Select Committee
1-2, 7 February 2017	Dáil Report Stage
14 February 2017	Final stage debate in Seanad (Referral back from Dáil); Bill passes both Houses
22 February 2017	Bill signed into law by President
27 March 2017	Part 4 of Bill (and many other provisions of Bill) commenced by SI 112/2017

6.1 Early Stages of Law Reform Process

The process of developing the 2017 law reform may be identified as having gone through a number of stages over a period of years following the passage of the 1993 Act.⁹⁰⁴ The first signs of the emergence of a radical feminist discourse on prostitution in Ireland came with the launch in 2002 of the Irish Observatory on Violence Against Women, an independent monitoring mechanism made up of NGOs, academics and others, which published a report in 2004 focusing on prostitution, stating that it was a ‘fundamental violation of women’s human rights’ and recommending adoption of the Swedish approach to law reform.⁹⁰⁵

Latham noted in 2007 that around the same time the Women’s Health Service was also moving towards seeing prostitution as a form of gender-based violence.⁹⁰⁶ O’Connor notes that by the mid- 2000s increasing numbers of trafficked and migrant women were coming to the Immigrant Council of Ireland.⁹⁰⁷ In 2008, an interdisciplinary report on prostitution in Ireland published by the Trinity College Dublin Centre for Gender and Women’s Studies, discussed in the previous chapter, concluded that the Swedish model ‘most fully encapsulates human rights protections as provided for in United Nations (UN) human rights treaties’.⁹⁰⁸

Shortly after that, a report was published by the Immigrant Council of Ireland documenting for the first time the experiences within prostitution of migrant women in Ireland.⁹⁰⁹ The report found the overwhelming majority of escorts advertising online to be of non-Irish

⁹⁰⁴ For a previously published discussion of these stages, see Bacik, Ivana, ‘Prostitution Law’ in Black, Lynsey and Dunne, Peter (eds), *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart Publishing, 2019, 21.

⁹⁰⁵ National Observatory on Violence Against Women, First Country Report from the Republic of Ireland, 2004, at 10, quoted in O’Connor, Monica, *Consent, Agency and Harm: A Phenomenological Inquiry into the Experience of Women in Prostitution and Women Trafficked for Sexual Exploitation in Ireland*. Dublin City University, Unpublished PhD Thesis, 2014, at 94 (for full text see file:///C:/Users/home/Downloads/irish_observatory_on_violence.pdf). See also O’Connor, Monica, ‘Choice, Agency, Consent and Coercion: Complex Issues in the Lives of Prostituted and Trafficked Women’ (2017) 62 *Women’s Studies International Forum* 8.

⁹⁰⁶ Latham, Linda, *Harm reduction is not enough; a feminist review of the Health Service Executive (HSE) Women’s Health Project*. Unpublished thesis for completion of Master’s Degree in Women’s studies, Dublin: University College Dublin, 2007, quoted in O’Connor, *ibid*, at 95.

⁹⁰⁷ O’Connor (2014), *op cit*, at 95.

⁹⁰⁸ Trinity College Dublin Centre for Gender and Women’s Studies, *Interdisciplinary Report on Prostitution in Ireland*. Dublin: TCD, 2009, at 15.

⁹⁰⁹ The Kelleher report, also discussed in the previous chapter; Kelleher Associates, O’Connor, Monica, Pillinger, Jane, *Globalisation, Sex Trafficking and Prostitution: The Experiences of Migrant Women in Ireland*. Dublin: Immigrant Council of Ireland, 2009; cited and discussed further in O’Connor, Monica and Yonkova, Nusha, ‘Gender, Prostitution and Trafficking for Sexual Exploitation’ in Black, Lynsey and Dunne, Peter (eds), *Law and Gender in Modern Ireland: Critique and Reform*. Oxford: Hart Publishing, 2019, 39.

nationalities, and also recommended the Swedish law. At the time of this publication, a Dignity Project was being developed (2009-10), funded under the EU's Daphne Programme, to improve policies and services for victims of trafficking.⁹¹⁰

Arising out of these initiatives, in 2010 a new organisation was formed, initiated by the ICI, called 'Turn Off the Red Light' (TORL). This became a campaigning coalition of 64 non-governmental organisations (NGOs), trade unions, political organisations and other groups advocating as a policy goal the reduction or elimination of prostitution by means of criminalising the purchase of sex. In 2011, the Department of Justice and Equality published a report on the possible adoption in Ireland of a Swedish-type approach to prostitution law, based on the visit undertaken to Stockholm by officials and others in September 2010.⁹¹¹

But an alternative perspective on prostitution was also emerging in Ireland at the same time, with the emergence of a 'sex work discourse'. This was heralded by the formation in 2006 of the Sex Workers Alliance Ireland (SWAI), which argued for a harm reduction model, opposed the criminalisation of the purchase of sex, and claimed that naming prostitution as a form of violence against women was 'fundamentalist feminist propaganda and untrue'.⁹¹²

A harm reduction approach was also advocated in a 2009 research publication from the National Advisory Committee on Drugs, which examined the risks being taken by drug-using sex workers through a study involving 37 participants.⁹¹³ The authors suggested the term 'sex worker' was preferable because it was 'considered important to respect study participants' right to self-identity'.⁹¹⁴ The recommendations of this study focused upon harm reduction, and in a later commentary by the same authors the participants they emphasised that the participants, despite being highly marginalised and at risk, 'certainly were not powerless to exercise their agency' including by requiring that clients used condoms, or by saying no to specific sexual acts with clients.⁹¹⁵

Speaking at a government-sponsored seminar on prostitution law in 2012, Ward took the same approach, arguing that the Swedish law had negative consequences for sex workers and that any apparent positive outcomes were unproven.⁹¹⁶

However, it soon became apparent that the momentum for legal change lay with the proponents of 'prostitution as exploitation'; a momentum accelerated by a change of

⁹¹⁰ O'Connor (2014), *op cit*, at 96; this project was led by the Immigrant Council of Ireland (ICI) and it facilitated a visit to Sweden by representatives from both governmental and non-governmental Irish organisations to share 'knowledge and experience of the Swedish approach.'

⁹¹¹ Department of Justice and Equality, Report of Visit of Dignity Project Partners to Stockholm 14-16 September 2010. Dublin: Government Publications, 2011.

⁹¹² See O'Connor (2014), *op cit*, at 98.

⁹¹³ Cox, Gemma and Whitaker, Teresa, *Drug Use, Sex Work and the Risk Environment in Dublin*. Dublin: Government Publications, 2009.

⁹¹⁴ *Ibid*, at 12. The report also noted that it was a term used by the United Nations and World Health Organisation.

⁹¹⁵ Whitaker, Teresa, Ryan, Paul, and Cox, Gemma, 'Stigmatization among drug-using sex workers accessing support services in Dublin.' (2011) 21(8) *Qualitative Health Research* 1086 – 1100, at 1095. See critique by O'Connor (2014), *op cit*, at 97. O'Connor is similarly critical of 2010 research by Cusick *et al*, reviewing drug services for those engaged in prostitution in Ireland and England, which recognised 'multiple deprivations' experienced by those so engaged but did not recognise that prostitution itself was a problem; the authors of that study argued that prohibiting or criminalising prostitution only served to drive it underground, thereby exposing sex workers to greater risk: Cusick, Linda, Mc Garry, Kathryn, Perry, Georgina and Kilcommins, Sian, 'Drug services for sex workers – approaches in England and Ireland.' (2010) 9(4) *Safer Communities* 32-39.

⁹¹⁶ Ward, Eilís, *Address to Department of Justice and Equality Seminar on Prostitution*, Dublin, 13th October 2012, quoted in O'Connor (2014), *op cit*, at 98.

government following the February 2011 General Election. The coalition that came to power then was made up of Fine Gael, the dominant right-wing party, and their smaller partner, the Labour Party, which had previously joined the TORL campaign.⁹¹⁷

Despite this, no reference to prostitution law was made in the 2011 Programme for Government. But the issue of prostitution soon came to the fore within parliamentary debates, when newly-appointed Senator Katherine Zappone, a member of the Independent group of senators, tabled a motion on human trafficking and prostitution in October 2011 in the Seanad, calling on the government to criminalise the purchase of sex.⁹¹⁸

The debate on this motion may be identified as the starting-point in the legislative process leading to the passage of Part 4 of the 2017 Act. A brief overview of that process is provided below, followed by an account of how the Interpretive Policy Analysis (IPA) approach,⁹¹⁹ framed by a feminist perspective, was applied to the text of the documents and transcripts of the debates in order to identify the principal themes underlying the debates, and to examine how those actors who drove the parliamentary reform process had done so through developing a particular understanding of consent as capable of being coerced or ‘compromised’ in certain structured settings and gendered contexts.

6.2 Oireachtas and Committee Debates on Prostitution, 2010-2013

In October 2011, proposing the first Seanad motion calling for adoption of the Nordic model, Senator Zappone said that she was doing so in order that the government would develop

effective and appropriate responses, inclusive of introducing legislation, to deal with prostitution and trafficking for sexual exploitation. We do so with an acute awareness

⁹¹⁷ See <https://www.turnofftheredlight.ie/who-we-are/>; Labour was the only political party to become members of TORL. Labour had joined the TORL campaign in 2010, having previously adopted a policy in favour of the Swedish model of legislation on prostitution, based on work carried out by Labour Women, the internal women’s organisation within the Party. In 2006, Labour Women had, jointly with then Labour justice spokesperson (later Labour leader) Brendan Howlin TD, published a ‘Violence against Women’ policy document which recommended examination of the so-called ‘Swedish model’ as a basis for legislation on prostitution:

See Labour Party, *Safety, Accountability and Responsibility*. www.labour.ie, 2006. See further Labour Women, *Submission on the Review of Legislation on Prostitution*, 2012: https://www.labour.ie/download/pdf/labour_women_submission_on_the_review_of_legislation_on_prostitution_august_2012.pdf

⁹¹⁸ Senator Zappone had been appointed by the Taoiseach Enda Kenny of Fine Gael as one of 11 ‘nominated members of Seanad Éireann’ in accordance with Article 18.3 of the Constitution; she was already well-known for her feminist activism and human rights work, having previously served as a member of the Irish Human Rights Commission between 2000-2011 and as Chief Executive of the National Women’s Council of Ireland from 1997-2000. Senator Zappone tabled two motions on human trafficking and prostitution in the Seanad; the first on 12 October 2011 and the second on 18 April 2012, each calling on the government to criminalise the purchase of sex; see full text of motions and debates at <https://www.oireachtas.ie/en/debates/debate/seanad/2011-10-12/7/> and <https://www.oireachtas.ie/en/debates/debate/seanad/2012-04-18/9/>

⁹¹⁹ See above and Annison, Harry, *Dangerous Politics: Risk, Vulnerability and Penal Policy*. Oxford University Press, 2015.

of the globalised nature of an industry, of which Ireland is a part, that exploits women and girls and some men and boys.⁹²⁰

However, not all senators supported the motion.⁹²¹ While the government Minister responding to the debate, Labour TD Kathleen Lynch, was supportive of the Zappone motion in principle, she argued instead in favour of a government counter-motion seeking more time for consultation on any change in the law and committing to embark upon a process of review of the law within six months.⁹²² The government counter-motion was thus passed.⁹²³ An internal discussion document was then prepared by the Department of Justice, but the government did not initiate any public review process over the following months and the document was not published within the time promised.

Thus, six months later, on 18 April 2012, a second motion was proposed by Senator Zappone specifying a clear timeline for publication of a report reviewing prostitution law. On that date, again a government counter-motion or amendment was put forward seeking more time for consultation. In proposing her second motion, Senator Zappone expressed frustration at the lack of urgency shown by the government.⁹²⁴ In response, Justice Minister Alan Shatter emphasised the government's commitment to embark on a consultation process to examine implementation of the Swedish model in Ireland, and promised that 'a detailed discussion document on the future direction of prostitution legislation designed to facilitate the planned consultation process will be published shortly.'⁹²⁵ Senator Zappone thus agreed to accept the government counter-motion without a vote.

In June 2012, in line with the commitment made by Minister Shatter, the government published a discussion document on 'Future Direction of Prostitution Legislation'⁹²⁶, recognised 'compelling reasons to review the criminal law on prostitution', citing in particular the changing nature of prostitution, and its move from a largely street-based activity to an indoor setting reliant on 'modern communication technologies'.⁹²⁷ Having reviewed different legal approaches to prostitution adopted in other jurisdictions, as well as international law requirements, the report suggested four possible options for legislative policy on prostitution.⁹²⁸

The Oireachtas Justice Committee was then requested by the Justice Minister to undertake public consultations and hearings on the 2012 discussion document; it received over 800 written submissions, of which approximately 80 per cent supported the 'Swedish model'. A

⁹²⁰ Debate on first Seanad motion, 12 October 201, at <https://www.oireachtas.ie/en/debates/debate/seanad/2011-10-12/7/>

⁹²¹ See for example speech by Senator Mary White of Fianna Fáil; Debate on first Seanad motion, 12 October 201, at <https://www.oireachtas.ie/en/debates/debate/seanad/2011-10-12/7/>

⁹²² Debate on first Seanad motion, 12 October 201, at <https://www.oireachtas.ie/en/debates/debate/seanad/2011-10-12/7/>

⁹²³ By 29 votes to 13.

⁹²⁴ Debate on second Seanad motion, 18 April 2012, at <https://www.oireachtas.ie/en/debates/debate/seanad/2012-04-18/9/>

⁹²⁵ *Ibid.*

⁹²⁶ Department of Justice and Equality, *Discussion Document on Future Direction of Prostitution Legislation*. Dublin: Government Publications, 2012.

⁹²⁷ *Ibid.*, at 4-5.

⁹²⁸ At 31, quoting from the South African Law Reform Commission, *Sexual Offences- Adult Prostitution*, Discussion Paper 0001/2009, Project 107, 172ff; first, the total-criminalisation approach, whereby all aspects of prostitution are criminalised; secondly, the partial-criminalisation approach, under which only some aspects are criminalised; thirdly, the non-criminalisation approach, which regulates prostitution through application of civil employment and welfare legislation; and lastly, the legalisation-regulation approach

delegation from the Committee visited Sweden in November 2012 to meet with individuals and organisations involved in implementation of the law there.⁹²⁹ The Committee then held four public hearings at which presentations were made by ‘26 organisations and individuals’.⁹³⁰

In addition to these public hearings, the Committee also held several private hearings with individuals formerly and currently engaged in prostitution.⁹³¹ At each public Committee hearing, between six and 11 Oireachtas members were present and engaged in questioning. Others may have been in attendance but did not speak.

From a careful reading of the Committee hearing transcripts, it is evident that while the preponderance of submissions and the majority of witnesses expressed views in support of Nordic model laws, nonetheless it is also clear that a contrary view was presented to Oireachtas members.⁹³² Following the Committee hearings, between February – June 2013 a series of private drafting meetings were held at which Committee members collaborated on the writing up of their findings and the preparation of the final written report.

While this work was ongoing, however, a private members’ bill seeking to criminalise the purchase of sexual services was introduced into the Dáil by (Independent left-wing) Deputy Thomas Pringle. This was debated at Second Stage on 3 May 2013.⁹³³ In total, seven TDs (including Pringle) spoke and voted in support of the Bill; four spoke positively or neutrally about it but voted against it (the government position); and a further four spoke and voted against the Bill, all of whom were TDs from the ‘far left’ or independent left. The Bill was ultimately defeated.⁹³⁴

6.3 Oireachtas Justice Committee Report, June 2013

Shortly after the vote on the Pringle Bill, the Justice Committee process came to a conclusion, culminating in the publication in June 2013 of a report recommending the adoption of Swedish model law in Ireland.⁹³⁵ The report found that prostitution ‘is a common phenomenon throughout Ireland.. available in towns and cities across the State every day of the year and has been a feature of Irish society for centuries.. provided mainly by poor or marginalised Irish women and availed of by Irish men of all social classes;’ however, in the last 20 years the report noted changes had occurred, with a move towards indoor-only prostitution and a situation where the ‘vast majority of women in prostitution in Ireland today are believed to be of non-Irish nationality’.⁹³⁶

⁹²⁹ This author was a member of that delegation.

⁹³⁰ The public hearings took place on: 12 December 2012, 16 and 23 January 2013 and 6 February 2013. See Oireachtas Justice Committee, *Report on Hearings and Submissions on the Review of Legislation on Prostitution*, June 2013, at 8. In fact the Chairperson’s Preface refers to 24 organisations and individuals, at 2; but on a careful analysis of the hearings, it appears that 16 organisations were represented, some by more than one individual; and a further 8 persons made presentations as individuals; some were also associated with particular organisations.

⁹³¹ These hearings were referred to in the subsequent report but transcripts are not available.

⁹³² See detailed overview of hearings set out in the Appendix.

⁹³³ <https://www.oireachtas.ie/en/debates/debate/dail/2013-05-03/2/> and <https://www.oireachtas.ie/en/debates/vote/dail/31/2013-05-07/1/>

⁹³⁴ The Bill was defeated by 80:38 votes on 7 May 2013.

⁹³⁵ Joint Oireachtas Committee on Justice, Defence and Equality, *Report on Hearings and Submissions on the Review of Legislation on Prostitution*. Dublin: Government Publications, June 2013, at 73.

⁹³⁶ *Ibid*, at 1-2.

The report referred to the review by the Department of Justice and Equality, adopting the same framework in that review; namely four broad approaches to prostitution legislation, namely total criminalisation; partial criminalisation; full decriminalisation; and legalisation and regulation.⁹³⁷ However, the Committee noted that ‘partial decriminalisation’ is an ambiguous term, since it may refer both to a system like that then in operation in Ireland,⁹³⁸ and also to the very different model adopted in Sweden. The report then considered the prevalence of prostitution in Ireland, citing the Kelleher report from 2009.⁹³⁹ The report also cited research conducted for a television documentary broadcast on RTE in February 2012.⁹⁴⁰ The report stated that the Committee had received five written submissions from members of the public stating that they had paid for sexual services.⁹⁴¹

The report proceeded to document the findings of the Committee based on the evidence presented to members both in written submissions and at the oral hearings. In considering the issue of entry into prostitution, the Committee heard ‘varying accounts of routes into prostitution and reasons for entering it’ but found ‘strong associations with backgrounds featuring poverty, limited education or training, physical or sexual abuse, family dysfunction, addiction, or homelessness.’⁹⁴² The report also noted statistics showing that ‘up to 75% of women in prostitution first became involved in it under the age of 18.... the prostitution of underage girls is a real and significant phenomenon.’⁹⁴³

As stated above, the Committee had held some hearings in private, during which direct evidence was heard from two women currently engaged in prostitution; and three women who had formerly been so engaged. While the submissions from those currently in prostitution expressed positive views, those who had left prostitution expressed very different experiences; the Committee noted that all three:

described their experiences of prostitution in terms of abhorrence and disgust. They told the Committee of the sense of powerlessness and worthlessness that was engendered by men who invaded and abused their bodies, who expected gross and demeaning demands to be met with enthusiasm and who treated them as disposable commodities.⁹⁴⁴

Evidence from academics and organisations like Ruhama that work with those in prostitution had ‘tended to corroborate the negative views reported by former prostitutes’.⁹⁴⁵ The Committee were told that ‘as many as 90% of women in prostitution would leave it

⁹³⁷ At 7.

⁹³⁸ (whereby the act of selling or buying sex itself was traditionally not criminalised, but many prostitution-related behaviours amounted to offences).

⁹³⁹ At 13.

⁹⁴⁰ At 13.

⁹⁴¹ The report also quoted the findings of a study indicating that 6 per cent of Irish men reported having ever paid a woman for sex.; at 15, quoting from Layte, Richard *et al*, *The Irish Study of Sexual Health and Relationships*. Dublin: Crisis Pregnancy Agency and Department of Health and Children, 2006.

⁹⁴² At 19. Research cited to the Committee included Cox, Gemma and Whitaker, Teresa, *Drug Use, Sex Work and the Risk Environment in Dublin*. Dublin: National Advisory Committee on Drugs, 2009; O’Neill, Mary and O’Connor, Ann-Marie, *Drug-Using Women Working in Prostitution*. Dublin: Eastern Health Board, 1999; Lawless, Kerry and Wayne, Anne, *The Next Step Initiative: Research on Barriers Affecting Women in Prostitution*. Dublin: TSA Consultancy/Ruhama, 2005.

⁹⁴³ At 20.

⁹⁴⁴ At 23.

⁹⁴⁵ At 25. See for example the submission of Kathryn McGarry quoted by the Committee based on her own research; she stated that ‘street prostitutes found their working environment highly stressful.. many felt their extra-legal status made it hard to report crime and to avoid danger and exploitation.’

immediately, given the means and opportunity⁹⁴⁶ and generally found that ‘pimping was pervasive in Irish prostitution.. Many contributors stressed.. the risks and reality of violence in prostitution.’⁹⁴⁷ The Committee heard evidence that ‘considerable psychological risks and conditions have been found to be associated with prostitution... women in prostitution have significantly higher rates of mortality than the general population.’⁹⁴⁸

The most substantive part of the report concerns the question of reform of the law on prostitution; and the Committee noted that

a large majority of contributors endorsed the view that the current law was inadequate to address the problems posed by prostitution. Contributors cited the increase in the number of prostitutes working in Ireland – particularly the high proportion of migrant women – increases in human trafficking, and the trend towards escort prostitution using the internet and mobile phones as issues that were not reflected in or addressed by current legislation.⁹⁴⁹

A majority of contributors, many of them associated with the TORL campaign, further expressed the view that ‘the objective of reform should be to eliminate prostitution or at least to reduce its prevalence to the greatest extent possible.’⁹⁵⁰ The report noted that those contributors favouring this goal ‘maintained that all prostitution occurs within a continuum of exploitation, coercion and deception.’⁹⁵¹ However, a minority of contributions challenged this view, and expressed a preference for decriminalisation or legalisation of prostitution.⁹⁵² Having analysed and considered the different approaches to law reform advocated to the Committee, the report concluded that ‘in the light of the best available national and international evidence, legislative and policy initiatives are urgently required to address the harm and exploitation in and caused by the toleration of prostitution’; and stated that the Committee had found

persuasive the evidence it [had] heard on the reduction of demand for prostitution in Sweden since the introduction of the ban on buying sex in 1999.. such a reduction in demand will lessen the incidence of harms associated with prostitution and – particularly in view of the predominance of migrant women in prostitution in Ireland – the economic basis for human trafficking into this State for the purpose of sexual exploitation. The Committee is also persuaded that the approach adopted in Sweden has had a strongly positive normative effect on social attitudes to sexuality and gender equality in that country, and that equivalent measures could and should be used to promote those values in Ireland.⁹⁵³

The report also stated that the Committee had ‘found compelling the accounts that it heard during its visit to Sweden from witnesses including police, officials and support personnel, and the evidence they were able to produce in favour of the Swedish Approach.’⁹⁵⁴

⁹⁴⁶ At 27.

⁹⁴⁷ At 26-7.

⁹⁴⁸ At 28-9.

⁹⁴⁹ At 39.

⁹⁵⁰ At 42.

⁹⁵¹ At 42.

⁹⁵² For example, the Sex Workers’ Alliance Ireland argued for a harm-reduction approach, as did academic Dr Kathryn McGarry, and Daniel McCarthy of the Gay Health Network; see 47.

⁹⁵³ At 69-70.

⁹⁵⁴ At 68.

Thus, the report concluded that

a ban in Ireland on the buying of sex that does not criminalise its sale will, as part of a multi-policy initiative including harm-reduction measures and initiatives to support exiting from prostitution, avoid an increase [sic] dangers associated with prostitution and will in the longer term reduce them in line with the prevalence of prostitution. The decriminalised status of those who sell sexual services is likely to help reduce stigma and barriers to seeking support from the Gardai and social services. Similarly, a reduction in demand for prostitution will (when accompanied by appropriate support and health services) reduce the pressure faced by prostitutes to engage in risky or dangerous sexual practices, and so promote public health and HIV prevention... measures that reduce demand for prostitution will also contribute to the State's fulfilment of its obligations to eliminate discrimination against women, to combat prostitution and sexual exploitation of children, to suppress the exploitation in prostitution of women, and to prevent and suppress human trafficking and the demand for it.⁹⁵⁵

Finally, the report recommended that provision should be made in law for

a summary offence penalising the purchase of sexual services of another person by means of prostitution, or any request, agreement or attempt to do so; it should at the same time be clarified that no offence is committed by the person whose sexual services are so sold..⁹⁵⁶

Other significant recommendations included the implementation by the State of 'properly resourced policies relating to health, education, training, housing and immigration status of men and women who work in prostitution so as to minimise harms risked or suffered by them and to support the exit from prostitution of those who wish to do so.'⁹⁵⁷

Correspondence as to the impact of the recommendations ensued between Minister Shatter and the Committee following the report, but no further relevant legislative or policy developments took place while he remained Minister.⁹⁵⁸ Some important issues highly relevant to the framework of the subsequent legislative change were however raised and addressed in the correspondence.

6.4 Oireachtas Debates on Criminal Law (Sexual Offences) Bill, 2015-2017

For some months after publication of the Justice Committee report in June 2013 there was little indication that its recommendations would be adopted; indeed the tone of Justice Minister Shatter's correspondence with the Committee suggested that he was sceptical about the conceptual basis for the Nordic model approach.⁹⁵⁹ However, following his resignation

⁹⁵⁵ At 70-71.

⁹⁵⁶ At 73.

⁹⁵⁷ At 74.

⁹⁵⁸ See A Shatter, *Letter to David Stanton TD*, 25 September 2013; D Stanton, *Letter of Response to Minister Shatter*, 6 November 2013; and, A Shatter, *Letter to David Stanton TD*, 1 December 2013. The Minister said in his final letter that he had sought advices from the Attorney General and the Minister for Health, www.oireachtas.ie/parliament/media/committees/justice/archivejustice/Addendum-to-Prostitution-Report.pdf.

⁹⁵⁹ See for example his comment that: 'great difficulty that.. arises in determining .. the extent to which prostitution in Ireland is engaged in voluntarily between consenting adults and the extent to which such activity is coerced by one means or another.' A Shatter, *Letter to David Stanton TD*, 25 September 2013.

(for unrelated reasons) in May 2014 and the ministerial appointment of Frances Fitzgerald TD, a marked change in government policy approach became discernible, with indications that the Justice Committee's recommendations would be accepted.⁹⁶⁰

Thus, when the heads of the Criminal Law (Sexual Offences) Bill were published in November 2014, new provisions criminalising the purchase of sexual services were included within it.⁹⁶¹ The Bill itself was not published until September 2015, nearly a year later, and again the new provisions were included within it (then in Part 3). As initiated, the Bill contained a total of 45 sections, divided into seven Parts; a wide range of substantive and procedural reforms relating to the prosecution of sexual offences generally were included, in particular new offences addressing sexual abuse and exploitation of children in Part 2.⁹⁶²

Only two sections were included in what was then Part 3 (entitled 'purchase of sexual services'); section 20 effectively sought to introduce a Nordic model law into Ireland, by creating a new offence, triable summarily only and subject to a fine as sanction, of 'payment etc for sexual activity with prostitute'. Section 21 amended section 5 of the Criminal Law (Human Trafficking) Act 2008 to insert a new offence (section 5(2A)) of paying for the prostitution of a trafficked person, subject to the same penalty (up to five years imprisonment where tried on indictment) as the pre-existing section 5 offence.

Because of its extensive scope and the substantive reforms it sought to effect across the trial of sexual offences more generally, the Bill was strongly welcomed, both by the TORL campaign and by rape crisis centres and victims' and children's rights groups. However, the provisions on prostitution were criticised by the SWAI.⁹⁶³

Prior to the introduction of the Bill, the process of change in Irish law had been overtaken by more rapid developments in Northern Ireland, with the enactment in January 2015 of a Nordic model law there.⁹⁶⁴ The law started life in the Stormont Assembly as a private members' bill introduced by Democratic Unionist Party (DUP) Peer Maurice Morrow and passed through the Assembly with support from Sinn Féin, but it was opposed by some academics, and by groups representing women in prostitution.⁹⁶⁵

⁹⁶⁰ Minister Fitzgerald is described by Ward as having been 'a long-standing TORL supporter', see E Ward, 'The Irish Parliament and Prostitution Law Reform: A Neo-Abolitionist Shoe-In?' in E Ward and G Wylie (eds), *Feminism, Prostitution and the State: The Politics of Neo-Abolitionism* (London, Routledge, 2017) 87. .

⁹⁶¹ Department of Justice and Equality, Press Release, 'Minister Fitzgerald Publishes Heads of New Criminal Law (Sexual Offences) Bill 2014', 27 November 2014, www.justice.ie/en/JELR/Pages/PR14000349.

⁹⁶² In addition, reform of the law on incest was addressed in what was then Part 4; new provisions on evidence in Part 5, and on Jurisdiction in Part 6.

⁹⁶³ See eg 'Sex Workers Hit Out at New Bill Criminalising Prostitution Clients' (The Journal, 23 September 2015) www.thejournal.ie/child-grooming-bill-2-2347763-Sep2015/.

⁹⁶⁴ The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, s 15 of this Act created the new offence of 'paying for sexual services of a person,' inserting a new Art 64A into the Sexual Offences (Northern Ireland) Order 2008. Art 64A (7) requires that a review be conducted of the operation of the new offence over a three-year period following its coming into effect.

⁹⁶⁵ See for example 'Law to Ban Paying for Sex in North Passes Final Stage in Stormont' *The Irish Times* (Dublin, 9 December 2014) www.irishtimes.com/news/social-affairs/law-to-ban-paying-for-sex-in-north-passes-final-stage-in-stormont-1.2031693. See also: S Huschke et al, 'Research into Prostitution in Northern Ireland' (Northern Ireland: Department of Justice, October 2014; http://www.academia.edu/17343071/Research_into_Prostitution_in_Northern_Ireland), which concluded

Opposition to the Nordic model approach was similarly expressed by the Irish branch of Amnesty International, which in August 2015 voted to support decriminalisation of prostitution.⁹⁶⁶ This position placed Amnesty in direct confrontation with the TORL campaign, which by then had over 70 Irish NGOs as affiliates. It meant however that by the date of the Bill's publication in September 2015, a concerted opposition to the introduction of the Nordic model had emerged in Ireland.⁹⁶⁷

The Bill finally came before the Seanad for its first (Second Stage) debate in October 2015. Introducing the Bill on 6 October 2015, Minister Fitzgerald referred to the proposed sex purchase ban as 'a matter which has already been the subject of considerable debate both inside and outside the Houses and beyond the State.'⁹⁶⁸ Despite some strongly argued speeches opposing the sex purchase ban, no vote was called and the Bill passed Second Stage.

However, it was to have a slow and tortuous process through the Oireachtas after that date, interrupted by the holding of a General Election in February 2016. By the time the Bill finally became law in February 2017, as will be seen, the prostitution-related provisions had been amended significantly and are included in what is now Part 4 of the 2017 Act.

A brief overview of its passage through both Houses is provided below, followed in the next section of this Chapter by an analysis of the debates themselves in order to identify emerging themes.

Following the passage of the Bill through Second Stage, Committee Stage debate in the Seanad took place over two separate dates, 11 December 2015 and 14 January 2016.⁹⁶⁹ During the Committee Stage debate on 11 December 2015, a total of nine Senators spoke; six supported the relevant sections in the Bill, while three were against. However, when an analysis is conducted of the words spoken on the prostitution provisions, it can be seen that the three speakers against the Bill contributed 58% of the total words spoken.⁹⁷⁰

Seven relevant amendments (out of a total of 48 Committee Stage amendments proposed to the Bill) were proposed to sections 20 and 21; three of these were technical changes proposed

that criminalisation of clients could endanger those engaged in prostitution and that 'Only 2% of the sex workers who responded to our survey supported the criminalisation of clients' (11). See also S Huschke, 'Victims Without a Choice? A Critical View on the Debate about Sex Work in Northern Ireland' (2016) 14 *Sexualities Research and Social Policy* 192; S Huschke and S Schubotz, 'Commercial Sex, Clients, and Christian Morals: Paying for Sex in Ireland' (2016) 19 *Sexualities* 869; S Huschke and E Ward, 'Stopping the Traffic? The Problem of Evidence and Legislating for the "Swedish Model" in Northern Ireland' (2017) 8 *Anti-Trafficking Review* 16.

⁹⁶⁶ Vote taken at an Amnesty International conference in Dublin on 11 August 2015; see K Holland, 'Amnesty Votes to Decriminalise Sex Work and Prostitution' *The Irish Times* (Dublin, 11 August 2015) <https://www.irishtimes.com/news/social-affairs/amnesty-votes-to-decriminalise-sex-work-and-prostitution-1.2313863>.

⁹⁶⁷ See eg: Fitzgerald, Sharron and McGarry, Kathryn, 'Problematizing Prostitution in Law and Policy in the Republic of Ireland' (2016) 25 *Social and Legal Studies* 289.

⁹⁶⁸ Seanad Second Stage debate, 6 October 2015:

<https://www.oireachtas.ie/en/debates/debate/seanad/2015-10-06/14/>

⁹⁶⁹ The prostitution provisions were only considered on the December date, with other Parts of the Bill under consideration on the second Committee Stage date).

⁹⁷⁰ Total words spoken by Senators Norris, Walsh and White (all anti) = 8,781 (58% of total 15,096 words spoken on the prostitution provisions at Seanad Committee Stage).

by Sinn Féin; two were amendments proposed by anti-reform Senator Mary White; and there were also two significant government amendments.⁹⁷¹

The first of these sought to amend a crucial definition provided in section 1(2) of the Criminal Law (Sexual Offences) Act 1993, by removing the phrase ‘offers his or her services as a prostitute to another person’ from the definition of ‘solicits or importunes for the purposes of prostitution.’ The effect of this amendment was to decriminalise those selling sex in public.

However, the second government amendment sought to re-criminalise ‘loitering in a public place for the purpose of offering his or her services as a prostitute’ through amending section 8 of the Criminal Justice (Public Order) Act 1994. Lengthy debate took place over the first government amendment and over an amendment from Senator Mary White requiring a review of the new provisions within two years of their enactment. No votes took place on any of the amendments, despite strong opposition to the sections in principle being expressed by Senators David Norris and Mary White.⁹⁷²

Again, no vote was called on the Bill itself, which proceeded to Report Stage in the Seanad on 21 January 2016, the government amendments having been passed.⁹⁷³ At Report Stage, four amendments were proposed to the prostitution sections (out of a total of 45 amendments to the entire Bill); three of these were technical amendments from Sinn Féin which were not pressed. A substantive government amendment was proposed (amendment 28), re-stating the new section 7A offence and increasing the penalty for other offences (organising prostitution, living on the earnings of prostitution and brothel-keeping) described by Minister Fitzgerald as being ‘central to the exploitation of vulnerable women and men who find themselves engaged in prostitution’.⁹⁷⁴

During Report Stage, six Senators contributed to the debate, with only one expressing opposition to the provisions on principle. However, his contribution far exceeded that of any other individual Senator, constituting 5,127 words, out of a total of 9,402 words spoken about prostitution during Report Stage (55%).⁹⁷⁵ The government amendment was declared carried, with Senator Norris the only dissenting voice. As passed by the Seanad, the numbering of sections in the Bill had changed due to other amendments not related to prostitution; thus the prostitution provisions became located in Part 4 (sections 24-26); section 24 created the new section 7A offence; section 25 created the new Public Order Act offence, and section 26 amended the 2008 Human Trafficking Act.

⁹⁷¹ <https://data.oireachtas.ie/ie/oireachtas/bill/2015/79/seanad/3/amendment/numberedList/eng/b7915s-scn.pdf>

⁹⁷² <https://www.oireachtas.ie/en/debates/debate/seanad/2015-12-11/6/>.

⁹⁷³ <https://www.oireachtas.ie/en/debates/debate/seanad/2016-01-21/22/>.

⁹⁷⁴ <https://data.oireachtas.ie/ie/oireachtas/bill/2015/79/seanad/4/amendment/numberedList/eng/b7915s-sm.pdf>; the government amendment also added the new section 7A offence of payment for sexual activity with a prostitute to the list of offences for which a person could be arrested without a warrant or required to give their name and address to a garda when asked to do so.

⁹⁷⁵ Independent Senator David Norris.

The Bill then proceeded to the Dáil without a vote, introduced there at Second Stage by Minister Fitzgerald on 28 January 2016.⁹⁷⁶ After the Minister's speech, only one other speaker contributed to the debate, Fianna Fáil Deputy Niall Collins, who expressed support for the prostitution provisions. The debate was then adjourned, and the Bill was not proceeded with any further by the outgoing government.

Further progress was interrupted by the dissolution of the Dáil and a change of government following the February 2016 General Election.⁹⁷⁷ Even following the re-appointment of Frances Fitzgerald TD as Minister for Justice, several months delay ensued before the Bill resumed debate in the Dáil; the re-started Second Stage Debate took place over three dates in October and November 2016.⁹⁷⁸ Over those dates, reservations were expressed by a range of TDs from a number of different political perspectives, as outlined in the next chapter. However, no vote was called on the legislation despite the concerns expressed about the prostitution provisions, and it then proceeded to Select Committee Stage in the Dáil on 7 December 2016.⁹⁷⁹

Thirteen amendments to Part 4 were put forward by different Opposition Deputies at Committee Stage on 7 December 2016.⁹⁸⁰ The debate at Select Committee was generally less adversarial than that at Second Stage, with more nuanced positions taken.⁹⁸¹ In particular, the government agreed to the deletion of section 25 (based on the government amendment passed in the Seanad, essentially re-creating the offence of offering to sell sex in public through amending public order legislation), which had been opposed by the four main Opposition parties.⁹⁸² No votes were called on amendments, and the bill proceeded to

⁹⁷⁶ <https://www.oireachtas.ie/en/debates/debate/dail/2016-01-28/29/> Only one other speaker (Deputy Niall Collins of Fianna Fáil) contributed to the debate on that date.

⁹⁷⁷ The General Election was held on 26 February 2016; the outgoing Fine Gael/Labour coalition government was replaced by an incoming Fine Gael-led minority government with support from Independent TDs. One of those Independent TDs was Katherine Zappone, formerly an Independent Senator; she became Minister for Children and Youth Affairs. Fine Gael TD Frances Fitzgerald TD, the outgoing Minister for Justice and Equality, was re-appointed Minister for Justice and Equality within the new government.

⁹⁷⁸ The dates were: 5 October 2016, 2 November 2016 and 3 November 2016. Over those dates, 22 speakers in total referred to the prostitution provisions. Three others spoke on the bill but did not refer to the prostitution provisions: Fine Gael TDs Josepha Madigan, John Deasy and Hildegard Naughton. Of the 22 speakers who spoke on the relevant provisions, 15 were supportive, while seven took a stance against. Three out of the 15 who spoke in support did however express some concerns about the reform; while one of the anti-reform TDs expressed conditional support for the principle behind the provisions. In total, 15 women and seven men spoke; nine out of 15 women were supportive of the provisions, and six out of the seven men. The total words spoken by the anti-reform TDs amounted to 49% of the total words spoken about the prostitution provisions at Second Stage.

⁹⁷⁹ https://www.oireachtas.ie/en/debates/debate/select_committee_on_justice_and_equality/2016-12-07/2/

⁹⁸⁰ Amendments numbered 11-23; out of a total of 108 amendments to the entire Bill.

⁹⁸¹ As is often the case at Select Committee. Opposition far-left Deputies Coppinger and Daly, in particular, acknowledged that constraints may exist where individuals exercise choices to enter prostitution; and ultimately, Minister Fitzgerald accepted the need for a review of the legislation. Seven speakers contributed in total; four were supportive of the provisions and three were against (others were present for votes but did not speak). A minority of women speakers (one out of three) were pro-reform, while a majority of men were supportive (three out of four). The three speakers against the reform contributed 49% of the total words spoken on the provisions at Committee Stage.

⁹⁸² Labour, the Social Democrats, Sinn Féin and the Green Party:

<https://data.oireachtas.ie/ie/oireachtas/bill/2015/79/dail/3/amendment/numberedList/eng/b79b15s-dcn.pdf>

Report Stage, with Part 4 consisting of just two provisions; section 25, which introduced the new offence of purchase of sexual services; and section 26, which inserted the amended offence of purchase of the prostitution of a trafficked person. Report Stage debates took place over three dates in the first week of February 2017.⁹⁸³

Despite the broad scope of provisions in the Bill beyond those dealing with prostitution, much of the Report Stage debate time over the three dates was taken up with debating Part 4.⁹⁸⁴ For example, on 1 February 2017, in proposing an amendment which would have had the effect of deleting section 25,⁹⁸⁵ Brid Smith TD (Solidarity-PBP) spoke about her profound objection to the criminalisation of sex purchase laws.⁹⁸⁶ However, the amendment was defeated by 100 votes to 10.⁹⁸⁷

While speakers from both government and opposition generally welcomed the insertion of a review provision, ultimately it was government amendment 17, providing for a review after three years, which was passed, despite some opposition calls for a review after two years. This followed the rejection of an amendment which would have provided for more detailed data and a review on the operation of the provisions after two years.⁹⁸⁸ The government amendment inserted a new section 27 into Part 4, providing for a review to be conducted within three years of the commencement of that Part.⁹⁸⁹ The debate was adjourned until 7 February 2017, but no further substantive debate on any prostitution-related amendments took place. At the end of Report Stage on 7 February 2017, however, a vote was called on the Bill itself, despite the general welcome for the non-prostitution related provisions. It was passed by 94 votes to six, with three abstentions.⁹⁹⁰

The Bill was then returned to the Seanad for its final stage for a single date, 14 February 2017.⁹⁹¹ Three out of the 70 amendments or changes that had been passed in the Dáil related

⁹⁸³ 1, 2 and 7 February 2017: <https://www.oireachtas.ie/en/debates/debate/dail/2017-02-01/34/>; <https://www.oireachtas.ie/en/debates/debate/dail/2017-02-02/19/> and <https://www.oireachtas.ie/en/debates/debate/dail/2017-02-07/27/>

⁹⁸⁴ A total of 16 amendments to Part 4 of the Bill were debated; two of these (amendments 12 and 17) were proposed by the government. Three amendments sought to amend the law on brothel-keeping to exempt from liability those in prostitution as individuals. Nine of the amendments concerned the need for a review of the legislation (including the government's amendment number 17) or for the insertion of supports to assist those seeking to exit prostitution.

⁹⁸⁵ Amendment 10; this would have had the effect of deleting the provision criminalising the purchase of sex.

⁹⁸⁶ Dáil Report Stage debate (day 1), 1 February 2017:

<https://www.oireachtas.ie/en/debates/debate/dail/2017-02-01/34/>

⁹⁸⁷ On the second date of the Report Stage debate (2 February 2017), a government amendment (number 12) to increase the maximum penalty for the offence of organisation of prostitution under section 9 of the 1993 Act was passed without a vote.

⁹⁸⁸ This was defeated by 103 votes to 14.

⁹⁸⁹ **Section 27 provides that:** (1) The Minister for Justice and Equality shall, not later than 3 years after the commencement of this Part, cause a report to be prepared on the operation of section 7A of the Act of 1993 and shall cause copies of the report to be laid before each House of the Oireachtas.

(2) The report shall include--

(a) information as to the number of arrests and convictions in respect of offences under section 7A of the Act of 1993 during the period from the commencement of that section, and
(b) an assessment of the impact of the operation of that section on the safety and well-being of persons who engage in sexual activity for payment.”.

⁹⁹⁰ The six TDs who opposed it were the two Green Party TDs and four left Independents; the three TDs who abstained were Mick Barry, Ruth Coppinger and Paul Murphy from Solidarity-PBP/AAA.

⁹⁹¹ A total of 70 amendments had been made to the Bill during the Dáil debates; all of these were before the Seanad, along with five amendments proposed by Independent Senators (three of which, proposed by

to Part 4 of the Bill.⁹⁹² A total of eight Senators spoke on the prostitution provisions in Part 4; two of those expressed opposition in principle to the Nordic model, in robust terms.⁹⁹³ However, no vote was called on any amendments, and the Bill thus passed on 14 February 2017 without a final vote as the Criminal Law (Sexual Offences) Act 2017. Eight days later, on 22 February 2017, it was signed into law by the President; Part 4 and many other provisions were commenced by statutory instrument on 27 March 2017.⁹⁹⁴

6.5 Oireachtas Debates: Prominent Themes

Following from the outline of the law-making process provided above, the sensibilities and motivations of key legislators as identifiable from the transcripts of debates during the law-making process are examined in the remainder of this chapter. As outlined in previous chapters, an interpretive policy analysis approach was deployed to assist in the close reading of multiple text sources, namely reports, submissions and discussions at Oireachtas Committee hearings, the Oireachtas debates themselves and a small number of ‘elite interviews’ with key players in the reform process (discussed below).

The texts were examined to find evidence of positions on prostitution taken by actors as identified in the literature (either pro or anti-Nordic model laws); and to identify what motivated individual actors to take one or other of these polarised positions. Through the application of this IPA approach, three prominent recurring themes were seen to emerge; namely, themes of individualised agency and choice premised upon the conception of consent as freely exercised choice (‘Consent as Free Choice’); of consent as conditional in a viewpoint that recognised prostitution as ‘work’, but not always freely chosen work (‘Conditional Consent: Prostitution as Work’); and of consent as capable of being coerced within structural power contexts and in conditions of gendered and intersectional exploitation (‘Consent in a Coercive Context’).

It is argued that a particular understanding of consent may be seen as underlying each of these three themes; and that, drawing on the literature analysed in preceding chapters, individual legislators engaged in the process may be seen as motivated by one or other of these three perspectives on consent, based on their express statements made during the process.

In considering these three themes, it is argued that those who spoke in opposition to the new law conveyed an understanding of consent as premised on individual agency or an exercise of free choice, whereas those who expressed views supportive of Nordic model laws

Senator Michael McDowell, related to the prostitution provisions). Several Senators were contributing on the Bill for the first time, having been newly elected in the 2016 Seanad Election that followed the February 2016 General Election. Seanad Report Stage back from Dáil, 14 February 2017:

<https://www.oireachtas.ie/en/debates/debate/seanad/2017-02-14/15/>

⁹⁹² The first (number 5) was an amendment to what was then section 24 (the Nordic model section; the amendment had increased the penalty for the 1993 Act section 9 offence of organisation of prostitution); the second was the deletion of the re-criminalisation of those engaged in prostitution (formerly in section 25); and the third was the insertion of section 27 (the three-year review provision).

⁹⁹³ The two were Independent Senators Michael McDowell and Lynn Ruane, whose contributions amounted to 49% of the words spoken during the debate - 6,254 (49% of total 12,704) words). The debate was lengthy, running from 4.45 – 9pm, and only concluded at 9pm on application of a ‘guillotine’ (ie a fixed time limit). The length of this debate was unusual; ‘Report Stage back from Dáil’ on any Bill in the Seanad is usually completed within an hour as the sole purpose is to confirm amendment/s made by the Dáil and strict procedural rules normally preclude any re-opening of substantive debate.

⁹⁹⁴ SI 112/2017.

did so on the basis of an implicit or explicit understanding of ‘consent’ as rooted in a structural context, and as capable of being coerced by power imbalances.

In some cases, of course, more nuanced positions were taken, with several speakers expressing uncertainty as to the appropriate model to be adopted, concern about the conceptualisation of prostitution as ‘work’, and a view of consent or choice that may be described as existing on a continuum, in keeping with Monica O’Connor’s articulation of a continuum framework for conceptualising consent, discussed in previous chapters.

In addition, the analysis of the texts may be seen to challenge the view expressed by some commentators that the introduction of Nordic model law in Ireland was inevitable because the minds of legislators had been implacably made up prior to the introduction of the Bill.⁹⁹⁵ Rather, it is clear from the analysis and elite interviews that key actors in the reform process reflected carefully on the positions they had taken; that many legislators were opposed to or concerned about aspects of the proposed reform; and that the factors they considered included the report from the Justice Committee; international evidence from other jurisdictions; and testimonies of those both in and who had exited from the sex trade. Throughout the analysis, the focus remained upon the statements made and positions taken by particular players at a particular time so that, in the words of Harry Annison previously cited, it would be possible to gain an ‘insight into the mind-set of the actor/s who have played a role in shaping’ the legal reform, and to enable an analysis of ‘the aims, beliefs and perceived constraints of criminal justice policymakers’.⁹⁹⁶

6.5.1 Consent as Free Choice

Opposition to the principle of criminalising the buyer was frequently expressed through the assertion of arguments around agency and consent, with speakers often referring to the voices of those engaged in the sex trade as being silenced by the debate and to their fears that a sex purchase ban would impinge upon individuals’ freely made choices to engage in the trade.⁹⁹⁷

In October 2015, for example, Opposition Senator Mary White (Fianna Fáil) spoke to disagree with her own Party’s position on the Bill, saying

..I believe that on this issue there is an alliance between extreme feminists and extreme conservatives...Women’s voices are too often sidelined and silenced in debates on sex work. Instead, women are often infantilised regarding their choice to sell sex, as something that they have been coerced into through circumstances. By only allowing voices that fit a particular victim frame to be heard, we deny women the opportunity to speak for themselves..⁹⁹⁸

⁹⁹⁵ See discussion in the next chapter of the academic literature on the 2017 Act, for example by Ward, Eilís in ‘The Irish Parliament and Prostitution Law: a Neo-Abolitionist Shoe-In?’ in Ward, Eilís and Wylie, Gillian (eds), *Feminism, Prostitution and the State: The Politics of Neo-Abolitionism*. Routledge, 2017.

⁹⁹⁶ Annison, *op cit*, at 297, 217.

⁹⁹⁷ Notably, those opposed to the reform did not frame their arguments in terms of the rights of (male) buyers of sex.

⁹⁹⁸ Seanad Second Stage debate, 6 October 2015:

<https://www.oireachtas.ie/en/debates/debate/seanad/2015-10-06/14/>

During Committee Stage debate in December 2015, Senator Jim White (Fianna Fáil)⁹⁹⁹, argued that

It is a mistake to say everybody involved in prostitution is being exploited or vulnerable. All the reports clearly show that a coterie of women participate in high-class escort agencies and charge very high fees for the sexual services they offer. ..¹⁰⁰⁰

In January 2016, Independent Senator David Norris commented in strongly opposing the new law, that

The majority of sex workers in sex worker-led organisations across the world, including those in Ireland, do not support the criminalisation of the purchase of sex.....¹⁰⁰¹

Trenchant opposition to the legislation was also expressed in the Dáil by Independent Deputy Mick Wallace, stating in October 2016 that:

I disagree very strongly with criminalising the purchase of consensual sex. If this Bill is successful, I believe it will signify the reinvolvement of the State in the private sexual lives of adult citizens for the first time since homosexuality was decriminalised over 20 years ago. ...Whether the subject is abortion or prostitution, symbolic legislation on grounds of either religious or sexual morality amounts to a folly and the State should not indulge in it, especially when the cost is the safety and health of the women involved.¹⁰⁰²

In November 2016, Brid Smith of Solidarity-People Before Profit, a far left party, asserted that:

The issue of consensual adult sex work should not be conflated with the issue of women and, indeed, children being trafficked and coerced into sex work or the issue of child abuse or pornography. They are different issues and the Bill attempts to adopt a one-size-fits-all approach, which is not an appropriate response.¹⁰⁰³

Concerns were raised on the same date by an Independent TD, Maureen O'Sullivan:

I would like to see an end to the buying and selling of sex, but I have to accept the reality that sex work happens and that there are sex workers who have decided that this is their work and that they want to be sex workers. Any sex workers I have met are totally and utterly against trafficking and forced prostitution. .. They are adamant

⁹⁹⁹ His speaking record had previously demonstrated support for a conservative Catholic perspective, particularly on abortion; see for example [Graphic descriptions of pregnancy termination by Senator Jim Walsh \(irishtimes.com\)](http://www.irishtimes.com/graphic-descriptions-of-pregnancy-termination-by-senator-jim-walsh)

¹⁰⁰⁰ Seanad Committee Stage debate, 11 December 2015:

<https://www.oireachtas.ie/en/debates/debate/seanad/2015-12-11/6/>

¹⁰⁰¹ Seanad Report Stage debate, 21 January 2016:

<https://www.oireachtas.ie/en/debates/debate/seanad/2016-01-21/22/>

¹⁰⁰² Dáil Second Stage debate, 5 October 2016: <https://www.oireachtas.ie/en/debates/debate/dail/2016-10-05/31/>

¹⁰⁰³ Dáil Second Stage debate resumed, 2 November 2016: <https://www.oireachtas.ie/en/debates/debate/dail/2016-11-02/29/>

that this Bill, by criminalising those who buy their services, will be "detrimental" to their safety and "will increase risk of abuse and violence".¹⁰⁰⁴

Independent Deputy Clare Daly commented at Committee stage in December 2016 that

The idea is that all sex work is discriminatory against women, violent and harmful to society and that if we outlaw it, it will be reduced or go away and that everything will be great. In reality, it is a very complex field. ...In concentrating too much on certain issues we are denying the narrative of thousands of sex workers worldwide who argue that they have made a choice. It might not be a great one and many of them see that it might not be the best one, but if they had other options, they would make another choice.¹⁰⁰⁵

At Report Stage in February 2017, Jonathan O'Brien TD (Sinn Féin) commented that

There is a significant difference between individuals who are forced into the industry by pimps, who are victims of trafficking and exploitation and the women who choose to be sex workers and to engage in such activity.¹⁰⁰⁶

A perception of prostitution as inevitable and an acceptance of stereotypes was also evident in many of the contributions opposing the Nordic model. For example, in April 2012 Senator Paschal Mooney of Fianna Fáil commented that 'prostitution has not gone away in Sweden. ... It is no wonder it is called the oldest profession in the world.'¹⁰⁰⁷

Justice Minister Alan Shatter had similarly remarked in an earlier debate that

the fact that the issue of prostitution is one that, in reality, has been part of the human world going back thousands of years. I am not sure we are going to invent a solution that other countries, going back through the millennia, have failed to find.¹⁰⁰⁸

In February 2017, Senator McDowell spoke in vehement terms, saying

... I believe in decriminalising prostitution. I do not believe that the mere act of payment one way or the other should have any criminal consequences and I believe the law should remain that way ... The oldest profession will not be suppressed by this. It will just be driven underground, sideways and every which way but it will not be suppressed.¹⁰⁰⁹

6.5.2 Conditional Consent: Prostitution as Work

¹⁰⁰⁴ Dáil Second Stage debate resumed, 2 November 2016: <https://www.oireachtas.ie/en/debates/debate/dail/2016-11-02/29/>

¹⁰⁰⁵ Dáil Select Committee Stage, 7 December 2016:

https://www.oireachtas.ie/en/debates/debate/select_committee_on_justice_and_equality/2016-12-07/2/

¹⁰⁰⁶ Dáil Report Stage debate (day 1), 1 February 2017:

<https://www.oireachtas.ie/en/debates/debate/dail/2017-02-01/34/>

¹⁰⁰⁷ Debate on second Seanad motion, 18 April 2012:

<https://www.oireachtas.ie/en/debates/debate/seanad/2012-04-18/9/>

¹⁰⁰⁸ Debate on second Seanad motion, 18 April 2012:

<https://www.oireachtas.ie/en/debates/debate/seanad/2012-04-18/9/>

¹⁰⁰⁹ Seanad Report Stage back from Dáil, 14 February 2017:

<https://www.oireachtas.ie/en/debates/debate/seanad/2017-02-14/15/>

As may be seen from the sample above, several legislators opposed to the new law expressed their perception of prostitution as an inevitable feature of society; and their view that entry into the sex trade was a choice that would always be made by some. In some cases, however, opposition to the law was expressed in a more nuanced manner, with several contributors to the debate expressing uncertainty as to the appropriate model to be adopted, even where they described prostitution as ‘work;’ their words reflecting an ambivalence to the conceptualisation of consent to sell sex as genuinely being freely or unconditionally provided. Some referred explicitly also to their concerns about the practical impact of the Nordic model in increasing potential for harm to those engaged in prostitution.

In one of the first debates in the Seanad in 2012, Justice Minister Alan Shatter for example cited the UNAIDS Advisory Group report of 2011 on HIV and sex work, noting that ‘it 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’.¹⁰¹⁰

Speaking for Sinn Féin on the same date, Senator David Cullinane stated that his party had ‘concerns about the Swedish approach.. because of the potential impact on people who work in the industry’ and also referred to ‘the potential for criminalisation to ..drive the whole industry further underground.’¹⁰¹¹

In May 2013, expressing strong opposition to the Pringle Bill in the Dáil, Independent Deputy Mick Wallace said that

Instead of eliminating prostitution, the unintended consequences of adopting the Swedish model in Ireland will be to drive sex work further underground, increasing risks for the women and men who sell sex and making it more difficult for them to access health services. For many, sex work is their only source of income and their means of providing for their families. Criminalising their clients will put these sex workers at increased risk of poverty, and lead to further stigmatisation and marginalisation.¹⁰¹²

For Sinn Féin, speaking in October 2016, Deputy Jonathan O’Brien expressed concerns about the provisions, saying that:

There are genuine fears among many sex workers that this legislation will result in them being further endangered and criminalised. ..¹⁰¹³

For the Green Party, Deputy Catherine Martin remarked in November 2016 that

.. The Nordic approach has received a significant level of criticism, particularly when it comes to the health and the safety of sex workers.... The Green Party is concerned that by criminalising the client, the more marginalised sex workers who continue to

¹⁰¹⁰ Debate on second Seanad motion, 18 April 2012:

<https://www.oireachtas.ie/en/debates/debate/seanad/2012-04-18/9/>

¹⁰¹¹ Debate on second Seanad motion, 18 April 2012:

<https://www.oireachtas.ie/en/debates/debate/seanad/2012-04-18/9/>

¹⁰¹² Dáil debate on Pringle Bill, 3 May 2013: <https://www.oireachtas.ie/en/debates/debate/dail/2013-05-03/2/>

¹⁰¹³ Dáil Second Stage debate, 5 October 2016: <https://www.oireachtas.ie/en/debates/debate/dail/2016-10-05/31/>

engage in prostitution will have to take on the burden of ensuring that the buyer of sex does not get arrested.¹⁰¹⁴

Similarly, Deputy Roisin Shortall of the Social Democrats noted on the same date that:

Many positive indications came out of the experience in Sweden initially but that was four or five years ago. At that stage, I was very strongly in support of the Turn Off the Red Light campaign. However, I have been forced to reconsider that a little. I have not completed my thinking on the matter but significant concerns have been raised.¹⁰¹⁵

At Report Stage in the Dáil in February 2017, Independent Deputy Catherine Connolly said that

I realise that more than 90% of the women involved in prostitution wish to exit it. That was very clear in their contribution to the Oireachtas joint committee. Quite a substantial number of the sex workers get into the sex industry below the age of 18 years. I have no hesitation in acknowledging openly that this is a very vulnerable segment. However... Criminalisation puts sex workers at risk of isolation and further danger as the power to set terms and conditions lies with the person facing risk of arrest.¹⁰¹⁶

Deputy Jan O'Sullivan of the Labour Party also spoke in similar terms on the same date:

There is a great deal of exploitation and for many sex workers it is not a free choice but they are in the industry for a variety of reasons that are not connected to freely choosing to be a sex worker. I accept some sex workers are in a position to make a free and unencumbered choice that is not exploitative. However, I contend a large number of sex workers are exploited and for that reason we .. support .. the Turn Off The Red Light campaign.¹⁰¹⁷

Deputy Ruth Coppinger (AAA) said during the same debate that

Nobody could argue that consent and purchasing consent are the same things. To say there are no sex workers or people involved in prostitution or the sex industry who are not vulnerable is whitewashing and sanitising the industry... Prostitution is the product of a society in which there is significant inequality .. As long as this continues to be the case, people will be pressured because of poverty, drug addiction and so on. There are people who have been able to make a decision to take part in

¹⁰¹⁴ Dáil Second Stage debate resumed, 2 November 2016: <https://www.oireachtas.ie/en/debates/debate/dail/2016-11-02/29/>

¹⁰¹⁵ Dáil Second Stage debate resumed, 2 November 2016: <https://www.oireachtas.ie/en/debates/debate/dail/2016-11-02/29/>

¹⁰¹⁶ Dáil Report Stage debate (day 1), 1 February 2017: <https://www.oireachtas.ie/en/debates/debate/dail/2017-02-01/34/>

¹⁰¹⁷ Dáil Report Stage debate (day 1), 1 February 2017: <https://www.oireachtas.ie/en/debates/debate/dail/2017-02-01/34/>

sex work, but they are in a minority and should not be over-represented in the general discussion.¹⁰¹⁸

Some contributors sought to raise the prospect of alternative models for the regulation of the sex trade. During the final Seanad debate in February 2017, for example, Senator Lynn Ruane asked

.. Why was there not a thorough examination of the legislative model of full decriminalisation, as obtains in New Zealand, considering it is the single model for which sex-worker-led organisations worldwide?... Amnesty International, which is the largest human rights NGO in the country, does not support it, so question marks still surround it.¹⁰¹⁹

6.5.3 Consent in a Coercive Context

Those who expressed views supportive of Nordic model laws during the legislative debates referred frequently to the exploitation they saw as inherent in the sex trade; often displaying an implicit or explicit understanding of ‘consent’ as rooted in its structural context, and as capable of being coerced by intersectional power imbalances.

In October 2011, for example, during the Seanad debate on the first of Senator Zappone’s motions on prostitution, Minister Kathleen Lynch commented that

Many of the women involved in prostitution have limited life choices, whether because of poverty or the circumstances of their lives. They are often vulnerable to manipulation and exploitation by others. It is hardly credible to believe they are providing sexual services for a commercial return as a result of a free choice and the physical and emotional consequences they suffer make this clear.¹⁰²⁰

In proposing her second Seanad motion on prostitution in April 2012, Senator Zappone referred to the global context for the sex trade, saying that

On each day of the six months that have passed more than 1,000 women and girls were made available for paid sex in Ireland. Irish research, conducted by the Immigrant Council of Ireland, has explored the intersection of migration, prostitution and sex trafficking. Some 97% of the women involved in prostitution in Ireland are migrant women...¹⁰²¹

Even the speaker proposing the government counter-motion on the same date, Senator Maurice Cummins, expressed an understanding of the international structural context, saying

¹⁰¹⁸ Dáil Report Stage debate (day 1), 1 February 2017:

<https://www.oireachtas.ie/en/debates/debate/dail/2017-02-01/34/>

¹⁰¹⁹ Seanad Report Stage back from Dáil, 14 February 2017:

<https://www.oireachtas.ie/en/debates/debate/seanad/2017-02-14/15/>

¹⁰²⁰ Debate on first Seanad motion, 12 October 2011:

<https://www.oireachtas.ie/en/debates/debate/seanad/2011-10-12/7/>

¹⁰²¹ Debate on second Seanad motion, 18 April 2012:

<https://www.oireachtas.ie/en/debates/debate/seanad/2012-04-18/9/>

It is an unfortunate reality that Ireland is part of a globalised industry that mostly exploits women and girls, but also some men and boys. These victims are experiencing a serious form of human rights abuse.¹⁰²²

Support for the April 2012 motion was expressed by Senator Jillian Van Turnhout, who commented, in challenging the argument against the Nordic model, that:

The most frequent argument I have heard against our call to the Government to criminalise the purchase of sex is that criminalisation would violate a woman's or man's right to self determination over his or her own body. .. I cannot agree with this argument. When we peel away the complex layers of how and why women and men sell their bodies for the sexual gratification of others, it is clear that their path into prostitution did not start with a simple exercise of self-determination.¹⁰²³

In proposing his private members bill to introduce Nordic model law in May 2013, Deputy Pringle said

For me it is simple: anything that contributes to gender inequality and allows for the purchase of one human being for the gratification of another is not only unacceptable, it is fundamentally and morally wrong.. In reality, very few women choose to willingly engage in prostitution, with most who are involved having very few real choices....Prostitutes would be safer under this legislation because they would be the victims, and thereby could report acts of violence and seek medical treatment without ramification. Once people accept that prostitution is a barrier to gender equality and a form of violence against women, their opinion changes.¹⁰²⁴

In her first speech introducing the Bill itself into the Seanad in October 2015, Minister Fitzgerald outlined the purpose of the relevant provisions as follows:

The purpose .. is primarily to target the trafficking and sexual exploitation of persons through prostitution.... However, even to leave aside this unquestionable objective, there is undoubtedly evidence of a wider exploitation of persons involved in prostitution outside of those trafficked such as those who are coerced or otherwise forced through circumstances to engage in the activity. The most direct way of combating this form of exploitation is to send the message to those who pay for these services and who ignore the exploitation of women and men involved that their behaviour is unacceptable and that it supports the exploitation of others.¹⁰²⁵

Responding to the first day of the Report Stage debate, Minister Fitzgerald referred to 'the normative effect [that the Swedish law] has had on male behaviour...' and 'how the market has decreased in Sweden.' She also pointed out the core principles behind the provisions, saying

¹⁰²² Debate on second Seanad motion, 18 April 2012:
<https://www.oireachtas.ie/en/debates/debate/seanad/2012-04-18/9/>

¹⁰²³ Debate on second Seanad motion, 18 April 2012:
<https://www.oireachtas.ie/en/debates/debate/seanad/2012-04-18/9/>

¹⁰²⁴ <https://www.oireachtas.ie/en/debates/debate/dail/2013-05-03/2>

¹⁰²⁵ Seanad Second Stage debate, 6 October 2015:
<https://www.oireachtas.ie/en/debates/debate/seanad/2015-10-06/14/>

This new offence is about targeting the demand which feeds both the trafficking and the exploitation of persons for the purposes of prostitution. It is expected that, in time, this will reduce the numbers of young women and young men in prostitution which will result in an overall reduction in levels of harm.¹⁰²⁶

Senators expressed support in similar terms for the new prostitution provisions, government Senator Catherine Noone referring for example to the emergence of an ‘all-island consensus on targeting the exploitative nature of prostitution’.¹⁰²⁷

Two Independent Senators from very different ideological perspectives, Fiach Mac Conghail and Ronan Mullen, also supported the Bill by reference to the exploitation and abuse inherent in the prostitution transaction, with Senator Mac Conghail¹⁰²⁸ for example saying

At the heart of this are human rights, equality and protection of the vulnerable....Prostitution encompasses layers of abuse.¹⁰²⁹

Senator Ronan Mullen¹⁰³⁰ expressed his support in similar terms, by saying

It is farcical and ridiculous to claim in any serious argument that there is some legitimate adult choice in the decision to enter prostitution. When one considers the lives, the background, the suffering, the self-esteem issues, the drug addiction - so many things which blight the lives of those involved in prostitution - it is clear that it is not a profession that anybody would willingly or freely enter into .. It is a sordid industry, one that corrupts people and entices .. In reality, in the back room, there is the direst exploitation of people and the deprivation of their human rights.¹⁰³¹

In January 2016, introducing the Bill in the Dáil, Justice Minister Frances Fitzgerald noted that the purpose of the prostitution provisions ‘is primarily to target the trafficking and sexual exploitation of persons through prostitution.. there is undoubtedly evidence of wider exploitation of persons involved in prostitution beyond those trafficked, such as those coerced or otherwise forced, through circumstances, to engage in the activity’.¹⁰³²

Fianna Fáil Deputy Niall Collins, who also expressed support for the prostitution provisions on that date, said that ‘organised criminality lies behind prostitution and people are making large, illegal profits on the back of a form of slavery and coercion’.¹⁰³³

¹⁰²⁶ Dáil Report Stage debate (day 1), 1 February 2017:

<https://www.oireachtas.ie/en/debates/debate/dail/2017-02-01/34/>

¹⁰²⁷ Seanad Second Stage debate, 6 October 2015:

<https://www.oireachtas.ie/en/debates/debate/seanad/2015-10-06/14/>

¹⁰²⁸ Independent; associated with liberal/left of centre politics.

¹⁰²⁹ Seanad Second Stage debate, 6 October 2015:

<https://www.oireachtas.ie/en/debates/debate/seanad/2015-10-06/14/>

¹⁰³⁰ Independent, associated with a conservative Catholic-influenced politics; from 1996-2001, he was a spokesperson for the Catholic Archdiocese of Dublin (see www.ronanmullen.ie)..

¹⁰³¹ Seanad Second Stage debate, 6 October 2015:

<https://www.oireachtas.ie/en/debates/debate/seanad/2015-10-06/14/>

¹⁰³² Dáil Second Stage debate, 28 January 2016: <https://www.oireachtas.ie/en/debates/debate/dail/2016-01-28/29/>

¹⁰³³ Dáil Second Stage debate, 28 January 2016: <https://www.oireachtas.ie/en/debates/debate/dail/2016-01-28/29/>

In October 2016 during Second Stage debate, Justice spokesperson for Fianna Fáil, Deputy Jim O’Callaghan, expressed his support for the provisions in forthright terms, saying that:

I have met representatives of organisations in favour of the legalisation of prostitution and who are opposed to the criminalisation of men who buy sexual services from women. They argue from a libertarian point of view that they should be permitted to sell their bodies to men in an ordinary commercial sense. I disagree with their analysis. The women who make that argument .. come from a small minority of the women involved in prostitution. They are not women who are forced into it because of economic circumstances. The majority of women involved in prostitution in this country come from migrant backgrounds, are vulnerable and do not want to be involved in prostitution... I believe that by permitting young men to purchase sex, we are allowing the presentation of women as sexual objects to continue. .. Everyone in this House knows that prostitution will continue after this legislation is passed. That is not a reason not to enact this legislation. It will send out a message that we are prepared to protect very vulnerable women who, because of economic circumstances, are driven into selling their bodies.¹⁰³⁴

Fine Gael Chief Whip Regina Doherty TD spoke strongly in November 2016 on the issue of consent:

Prostitution has in the past been seen as a transaction by consenting adults. .. My brain does not even understand how someone can think it is a consenting transaction. Rather, it is the exploitation of one vulnerable person - often not an adult - by an adult who is not vulnerable. That is not a consenting transaction. There is no equality of power between the two parties involved. It is not a service industry. It is a criminal enterprise selling the flesh of a human being, most often a woman, a child and sometimes a young man. It harks back to the days when slavery as a commercial transaction was acceptable..¹⁰³⁵

Labour Deputy Joan Burton said similarly that:

Prostitution is about the kind of money that people can make out of having women, children and men, particularly young men, in prostitution. Very few of them have the autonomy that some people like to indicate when they see this as a transaction where a service is exchanged for money voluntarily between people.¹⁰³⁶

Despite her critical approach to the provisions, a nuanced approach to the question of agency was expressed on the same date by far-left Anti-Austerity Alliance (AAA) TD, Ruth Coppinger:

I will hereafter use the words ‘sex workers’ rather than ‘prostitutes’, which is a misogynistic, loaded term in any case. However, that is not to say that an equal comparison can be made between selling one's labour and being compelled to sell one's body. Violence and rape are prevalent within prostitution. Socialists are

¹⁰³⁴ Dáil Second Stage debate, 5 October 2016: <https://www.oireachtas.ie/en/debates/debate/dail/2016-10-05/31/>

¹⁰³⁵ Dáil Second Stage debate resumed, 3 November 2016: <https://www.oireachtas.ie/en/debates/debate/dail/2016-11-03/6/>

¹⁰³⁶ Dáil Second Stage debate resumed, 3 November 2016: <https://www.oireachtas.ie/en/debates/debate/dail/2016-11-03/6/>

opposed to the sex industry as a massive, global, profit-making industry. Under capitalism, everything becomes a commodity, including women's bodies, as well as the bodies of trans people and vulnerable young males involved in prostitution. The industry is obviously gendered. It profits from sexism and oppression. It both reflects and then perpetuates the oppression of women and girls. Buying sex is an example of exerting one's power over another human being, and most of those who work in the sex industry do so due to a lack of choices: migrant women, poor women, women with addictions etc. Of course, a small minority does have the freedom to choose to be involved but it is overrepresented in many of the debates.... While I would be sympathetic to the idea of criminalising the purchase of sex in that it is wrong to purchase sex and criminalising it sends that message, I am very sceptical that it would have a positive impact unless it was accompanied by massively increased supports, health care, specially trained gardaí to report crimes, counselling for people, education and training, and language classes to assist women and vulnerable people to exit the sex trade.¹⁰³⁷

Strong arguments against the designation of prostitution as 'work' were however put forward by Fine Gael Minister of State Marcella Corcoran Kennedy during that November 2016 debate:

One important comment came from the Irish Congress of Trade Unions. This was to the effect that the term "sex worker" is not something that congress recognises as a form of work. Most of the women who have exited prostitution as well as those in prostitution see the term as a method of regularising or normalising the experience as something that is authentic or normal. I have a question for those who are trying to create the impression that being a prostitute is something that a child would aspire to or something that is a requirement for certain men who have certain needs as well as those who believe there are certain types of women who should be available to provide some type of service to them. I call on such people to ask themselves whether they would like their sisters, mothers or children to aspire to this marvellous new term of "sex worker". Is that what they feel? Do they believe some social good is done by contributing to the needs of certain men who require this?¹⁰³⁸

On the final date on which the Bill was debated at Second Stage in the Dáil (3 November 2016),¹⁰³⁹ independent left-wing Deputy Thomas Pringle expressed strong support for the provisions:

According to the Immigrant Council of Ireland's [prostitution] statistics .. between 87% and 98% .. are migrant women and many are from impoverished backgrounds. If sex work was a choice, surely that statistic would reflect the population of this country, but it definitely does not. Having informed myself of all views on the introduction of the criminalisation of the purchase of sex, I cannot help but think that if prostitution was a choice, why are the majority of those in prostitution coming

¹⁰³⁷ Dáil Second Stage debate resumed, 2 November 2016: <https://www.oireachtas.ie/en/debates/debate/dail/2016-11-02/29/>

¹⁰³⁸ Dáil Second Stage debate resumed, 3 November 2016:

<https://www.oireachtas.ie/en/debates/debate/dail/2016-11-03/6/>

¹⁰³⁹ <https://www.oireachtas.ie/en/debates/debate/dail/2016-11-03/6/>

from very vulnerable circumstances and from marginalised and targeted social groups?¹⁰⁴⁰

During the final Seanad debate in February 2017, newly-elected Senator, Independent Alice Mary Higgins, said that

.. I believe those who purchase sex should be prosecuted. Ultimately, they are supporting an exploitative, violent, international and highly lucrative business worth tens of millions, a business which both benefits from and contributes to gender and economic inequality and also to the marginalisation of those who are LGBTQ in our society.¹⁰⁴¹

6.6 Elite Interview Findings

The analysis of the parliamentary processes outlined above is supplemented by a small number of ‘elite interviews’ conducted with three key players identified during the debates; former Minister Frances Fitzgerald, former Chairperson of the Oireachtas Justice Committee David Stanton TD; and former Senator (and later Minister) Dr Katherine Zappone.¹⁰⁴² These interviews provide another layer of analysis, beyond that undertaken through the documentary and text analysis work, to assist in understanding motivations of key players in the change process. An analysis of the responses provided by these three key actors in the reform process enables several conclusions to be drawn.

First, all three provided thoughtful reflections on the main influences or information which had caused them to develop a view supportive of reform. The importance of the hearings conducted and evidence gathered by the Justice Committee was emphasised by all three, and both former Minister Fitzgerald and Deputy Stanton spoke also of the influence upon them of international evidence. Dr Zappone spoke of having met ‘some of the women who had been in prostitution and were supported by NGOs to make the choice to be free to exit, they gave their own analysis of enslavement.’

Former Minister Fitzgerald spoke of her professional experience, saying she ‘saw prostitution fitting into a pattern of abuse of women.’¹⁰⁴³ Deputy Stanton spoke of becoming convinced of the need for reform ‘following the [Committee hearings] process.’

¹⁰⁴⁰ Dáil Second Stage debate resumed, 3 November 2016: <https://www.oireachtas.ie/en/debates/debate/dail/2016-11-03/6/>

¹⁰⁴¹ Seanad Report Stage back from Dáil, 14 February 2017:

<https://www.oireachtas.ie/en/debates/debate/seanad/2017-02-14/15/>

¹⁰⁴² Namely former Minister for Justice Frances Fitzgerald, former Chairperson of the Oireachtas Justice Committee David Stanton TD; and former Minister for Children and Youth Affairs Dr Katherine Zappone. Frances Fitzgerald (now an MEP) was Minister for Justice between 2014-2017; David Stanton (now a TD) was Chairperson of the Oireachtas Justice Committee between 2011-2016; and Dr Katherine Zappone (formerly a TD and Minister for Children and Youth Affairs 2016-20) was the Independent Senator from 2011-2014 who instigated the motion on prostitution which paved the way for the law reform. Frances Fitzgerald and David Stanton are both members of Fine Gael, the majority party in government in both the 2011-2016 and 2016-2020 terms. Katherine Zappone was an Independent Senator from 2011-2016, and then became a Minister (albeit still Independent) in the Fine Gael-led government from 2016-2020. Details as to the rationale for selection of interviewees and the conduct of interviews are provided in the Methodology chapter.

¹⁰⁴³ Minister Fitzgerald had been a social worker prior to becoming an elected representative.

On the gendered aspect of the new law, Dr Zappone said that her motivation for initiating reform stemmed from seeing ‘unequal power relations between women and men and wanting to change that.’ Former Minister Fitzgerald and Deputy Stanton both spoke about the need to ensure that the message behind the new law would be adequately communicated so as to change perceptions about gender in society.

Minister Fitzgerald stated that ‘The ‘oldest profession’ view is a layer still deeply embedded if we scratch the surface. We need to send out the message that it’s not acceptable to think of women in that way’; Deputy Stanton asserted that, in his view, ‘We need to get the message across to men and boys that women are not objects to be bought and sold. Legalising prostitution sends a message that it’s ok to purchase sex, to treat women as sexual objects.’

Finally, Dr Zappone in particular raised concerns about the implementation of the law, asking reflective questions: ‘..have we negated women and men’s right to choose the work they want? Second, have we increased the likelihood of violence against them? Has it been effective? We don’t know. Has it made things worse? We don’t know.’

The responses provided by interviewees, together with the analysis of the parliamentary processes, serve to undermine the argument that the reform represented a ‘fait accompli’ by legislators whose minds had been implacably made up prior to the introduction of the Bill. Clearly, key actors in the reform process had reflected carefully on the positions they had taken.

Each spoke about the importance for them of the international evidence from other jurisdictions; the testimony of those women who had left the sex trade; and the evidence provided by those with particular knowledge about the extent of the trade, notably Gardai and investigative journalists.

For all three, the rationale for the reform was premised upon a broader perspective on gender relations in society, with the language of ‘enslavement’ (Dr Zappone); ‘modern day slavery’ (Deputy Stanton) and ‘abuse’ or ‘the reality of exploitation’ (Fitzgerald) being used. Dr Zappone said that in the course of the law reform process, she ‘was especially impressed by the men on our Committee and the women who came to the view that this was the best model to enable freedom for persons in prostitution and support change of behavior and of understanding of relationships of consent.’

All three commented on the potential for the new law to influence or even change gendered patterns of behaviour in Irish society, Fitzgerald referring for example to prostitution as ‘an equality issue’; Dr Zappone speaking of the law as being a way to ‘help challenge patriarchal systems in operation in the justice system’ and Deputy Stanton stating that ‘We need not to send a message to men and boys that it’s ok to purchase women for sex.’

The responses provided during interviews also provide support for the view that all three key decision-makers had adopted positions supportive of the Nordic model on the basis of an understanding of ‘consent’ as capable of being coerced by circumstances, rooted in a structural context.

6.7 Developing an Understanding of ‘Compromised Consent’

As outlined above, analysis of both the elite interview responses, and the Oireachtas debates on the provisions in Part 4 of the 2017 Act over the many months between its introduction

and eventual passage shows that robust opposition to the prostitution-related provisions was expressed by many legislators, and that the provisions were amended significantly during the legislative process.

The analysis also indicates that the motivation of the vast majority of those legislators who argued in its favour was patently not derived from an outdated moral code, or from religious conservatism, but rather was based upon recognition of prostitution as a manifestation of gender inequality and as exploitative of and causative of harm to the marginalised, notably women drawn from migrant communities; many legislators referred specifically to the broader context of inequality and exploitation, the ‘coercive context’ within which prostitution generally occurs.

Pro-reform legislators argued that the sex trade is inherently risky, particularly given the proven strong links with organised crime and coercive pimping practices, and the well-documented harms caused to women through prostitution itself; along with the evidence that most of those engaged in prostitution are women drawn from disadvantaged migrant communities who have few other ‘choices’ for economic survival.

The reform proponents also noted that the sellers of sex are themselves decriminalised under the Nordic model, and that sex ban laws should be accompanied by well-resourced provision of social supports to enable exit from prostitution. In addition, far from suggesting that the Nordic model approach would lead to the abolition of prostitution, legislators supporting the provisions were more likely to justify their introduction on the basis of harm reduction arguments; that Nordic model laws would contribute to the reduction of the harm caused to women in prostitution, in particular. Support was also expressed for the provisions on grounds of principle; indeed in the speeches in favour of the provisions throughout the debates, prostitution was frequently described as representing ‘exploitation’ or ‘exploitation of women’.

By contrast, those who opposed the provisions generally tended to refer to practical concerns, about the potential impact of the new law in driving prostitution ‘underground’ and causing greater harm or danger to women. Although some referred expressly to prostitution as a matter of ‘choice’ made by ‘sex workers’; or indeed to ‘consensual adult sex work’, most speakers were more nuanced in tone, demonstrating an awareness that, for most of those engaged in the sex trade, any choice or consent to do so had been highly constrained by circumstance. As Deputy Copping put it, ‘Nobody could argue that consent and purchasing consent are the same things’ and ‘most of those who work in the sex industry do so due to a lack of choices.’

Conversely, doubts about the practical effect of the legislation were expressed even by some of those legislators supportive of Nordic model laws; Deputy O’Brien for example referring to ‘genuine fears among many sex workers that this legislation will result in them being further endangered and criminalised’. While some speakers, like Senator White and Deputy Wallace, suggested that the legislation had derived from a religious or conservative initiative, in fact those legislators most associated with a conservative Catholic viewpoint did not all support the legislation; strong opposition to Part 4 was expressed by Senator Jim White, for example.

Similarly, the views of legislators identified as being on the left or from left-wing parties were divided between those most strongly supportive of the legislation (Senator Zappone, Deputy Pringle) and those most vocally against (Deputy Brid Smith, Deputy Mick Wallace, Senator

David Norris). Differences of view could also be discerned among the members of the two main centre-right parties, Fine Gael and Fianna Fáil. Indeed, the three key decision-makers interviewed, despite being drawn from different political perspectives, shared a clear view of prostitution as exploitation.¹⁰⁴⁴

While many speakers referred to the support for the new law from a wide range of civil society groups through the TORL campaign, towards the concluding stages of the debates, increased awareness of the divergence of view among civil society actors was expressed, which may be attributed to the adoption of an anti-Nordic model position by Amnesty International in August 2015; this was explicitly referenced during the last stage of the debates by Senator Lynn Ruane, for example.

Finally, another striking feature of the debates on the 2017 Act is the difference in language and tone from the views expressed by legislators during the course of debate on the prostitution-related provisions in the 1993 Act, considered in the previous chapter. While some Oireachtas members then spoke of concerns about ‘exploitation’ of prostituted women, and about the welfare of those women, the Minister at the time said they were about ‘the rights of women to be free from the harassment and fear of kerb crawling, to feel safe from being solicited’.¹⁰⁴⁵ By contrast, in the later 2017 Act debates there was no reference to any desire to protect ‘other’ women from being mistaken for ‘prostitutes.’

The traditional rationale for anti-prostitution laws, namely suppressing the visible manifestation of the sale of sex in public, had disappeared by the time the 2017 provisions were being debated. Instead, an acceptance that the 1993 model of regulation was not effective in either suppressing prostitution or protecting those engaged in it was clearly shared by all speakers, both for and against the 2017 provisions. Indeed, as discussed above, the distinction between those speakers who saw consent in the sex trade as a matter of ‘free choice’, and those for whom it was better described as ‘conditional’ or indeed as ‘coerced’ was not always clear-cut, indicating that, despite the polarised nature of much public discourse on the sex trade, legislative debates were more nuanced, with considerations of consent and choice often best portrayed as existing on a continuum.

Thus, while the public debate is often characterised as being polarised between those who view entry into prostitution as an exercise of ‘free choice’ and those who see it simply as ‘coerced’, in fact many legislators took a more nuanced approach, through acknowledging that even where it may be apparently consensual, consent and choice within the sex trade are in reality conditional.

6.8 Conclusions

As may be seen, the process leading to enactment of Part 4 of the 2017 Act was long and tortuous. From the foundation of the Turn Off the Red Light (TORL) campaign in 2010 to the commencement of Part 4 in March 2017, the adoption of Nordic model laws in Ireland was only effected after extensive consultation, Oireachtas committee hearings and protracted

¹⁰⁴⁴ Frances Fitzgerald and David Stanton are both members of the centre-right Fine Gael party, the majority party in government in both the 2011-2016 and 2016-2020 terms; Katherine Zappone remained Independent even when she served as a government Minister (2016-20). As a leading campaigner in the Marriage Equality referendum in 2015 and Repeal referendum in 2018, she was closely associated with left-wing and progressive causes.

¹⁰⁴⁵ *Seanad Debates*, 29th June 1993, Vol 137 (3) at 326; see previous chapters for discussion.

parliamentary debates, interrupted by changes in key political personnel and a General Election.

Moreover, an interpretive policy analysis of the Oireachtas debates on the provisions in Part 4 over the many months between its introduction and eventual passage shows that robust opposition to the prostitution-related provisions was expressed by many legislators, and that the provisions were amended significantly during the legislative process. Overall, a careful reading of the debates demonstrates a substantial awareness among legislators of the social and economic settings within which prostitution takes place; of the evidence presented to the Justice Committee, and of the different positions being taken by academics and civil society groups on Nordic model laws. While the ‘oldest profession’ cliché was used by some, both in 1993 and again in the debates on the 2017 Act, in 2017 many more speakers, from both sides of the debate, expressed an understanding of the complex nature of ‘consent’ and ‘choice’ in the context of the sex trade. That more nuanced understanding, it is argued, provides support for the legal conception of consent as capable of being compromised by coercive circumstances.

While a minority of legislators spoke strongly against the provisions on the basis of the perspective seeing entry to the sex trade as representing an exercise of free agency, others expressed a more nuanced view that prostitution was not necessarily freely chosen by all those engaged in selling sex, even where they characterised engagement in the sex trade as ‘work’. They might best be described as seeing consent to sell sex as conditional; dependent on circumstances but not necessarily freely exercised.

Reference was rarely made by any speakers to those (men) engaged in buying sex, or to their interests or voices. It is argued that, based upon the detailed consideration of the process leading to adoption of the 2017 Act provisions, and the themes identified from the text of the parliamentary debates through application of interpretive policy analysis, the premise for Part 4 can be understood through application of an understanding of ‘consent’ as capable of being coerced or compromised in certain structured and indeed gendered settings.

This understanding, it is argued, challenges the ‘gender regime’ previously represented by Irish laws; and is best understood within the context of other feminist campaigns in Ireland discussed in earlier chapters seeking changes to laws on consent, on sexual offences and on gender based violence.

In the next chapter, an analysis of the effect and impact of the 2017 Act within this context is provided, along with a review of the literature it has generated since enactment, and an assessment of potential future developments in Irish prostitution law and policy.

7.0 Introduction

In the previous chapter, the debates around the passage of Part 4 of the 2017 Act were evaluated and discussed through application of the interpretive policy analysis method, with conclusions presented as to the different conceptions of ‘consent’ upon which legislators relied in framing their views as to the merits of the legislative provisions. While a vocal minority of legislators spoke strongly against the new law on the basis that it curtailed the exercise of free agency by those who chose to enter prostitution (thus seeing consent to engage in the sex trade as an exercise of ‘free choice’), others expressed a more nuanced view that entry into prostitution was not necessarily freely chosen, even where they characterised it as work (‘conditional consent’). Those legislators who spoke in support of the new law were most likely to refer to the coercive context within which the sale and purchase of sex takes place (‘consent in a coercive context’).

From this analysis, it is argued that an understanding of consent as capable of being compromised in specific circumstances can be seen to emerge and to form a conceptual justification for the adoption of the new provisions. In this chapter, the provisions in Part 4 themselves are analysed, and their application and effect to date are discussed. Consideration is also given to the literature that Part 4 has already generated in Ireland since its enactment, and to the ongoing statutory review into the new prostitution law.

7.1 Relevant Provisions in Part 4 of the Criminal Law (Sexual Offences) Act 2017

The prostitution-related provisions of the 2017 Act are included within Part 4, entitled ‘Purchase of Sexual Services’; this Part comprises sections 25-27. Part 4, along with most of the Act’s other provisions, was commenced on 27 March 2017.¹⁰⁴⁶

The Nordic model is applied specifically through section 25(b) within Part 4, which inserts a new section 7A into the 1993 Act, creating a new offence of ‘payment etc for sexual activity with prostitute.’ Significantly, section 25(a) amends section 1 of the 1993 Act by deleting para (2)(a); so that the section 7 offence of soliciting or importuning no longer applies to a person who offers services as a prostitute to another person, but only now to clients or pimps – thus effectively decriminalising the sellers of sex in public.

The new section 7A offence is defined as follows in section 7A(1): ‘A person who pays, gives, offers or promises to pay or give a person (including a prostitute) money or any other form of remuneration or consideration for the purpose of engaging in sexual activity with a prostitute shall be guilty of an offence.’ The offence is capable only of being prosecuted summarily; the penalty in the case of a first offence is a Class E fine (up to €500), and in the case of a second or subsequent offence, a Class D fine (up to €1000).

Section 7A(2) defines ‘sexual activity’ as meaning ‘any activity where a reasonable person would consider that (a) whatever its circumstances or the purpose of any person in relation to it, the activity is because of its nature sexual, or (b) because of its nature the activity may

¹⁰⁴⁶ Commenced by way of SI 112/2017, Criminal Law (Sexual Offences) Act 2017 (Commencement) Order 2017.

be sexual and because of its circumstances or the purposes of any person in relation to it (or both) the activity is sexual.’

Section 25(c) increases the penalty for the offence of failure to comply with a garda direction to leave a place where a person is suspected of loitering for the purpose of prostitution.¹⁰⁴⁷ Previously the maximum penalty on a third or subsequent conviction was a €500 fine or four weeks in prison; but the new section 8(2) inserted by section 25(c) provides that even on a first conviction the maximum penalty is a Class D fine (up to €1000) or up to six months’ imprisonment. However, because of the amendment to section 1(2) of the 1993 Act, this provision no longer applies to a person who offers sex for sale. Thus, there is no longer provision for increased penalties for a second or subsequent conviction for the ‘refusal to move on’ offence under section 8. But most significantly, the scope of the ‘failure to move on’ offence has now been substantially curtailed, so that it no longer applies to those engaged in prostitution themselves.¹⁰⁴⁸

Section 25(d) – (f) provide for increased penalties for the offences defined in sections 9, 10 and 11 of the 1993 Act (namely organisation of prostitution; living on the earnings of prostitution; and brothel-keeping.¹⁰⁴⁹ Section 25(g) amends section 13 of the 1993 Act to include the section 7A offence among the list of offences for which the Gardai have power to arrest without warrant.

Section 26 amends section 5 of the Criminal Law (Human Trafficking) Act 2008 by inserting a new section 2A offence, as follows: ‘A person who pays, gives, offers or promises to pay or give a person (including the trafficked person) money or any other form of remuneration or consideration for the purposes of the prostitution of a trafficked person shall be guilty of an offence.’ This offence carries the same penalty as the pre-existing section 2 offence of accepting or agreeing to accept a payment in respect of the prostitution of a trafficked person. The penalty, provided for in section 5(3), is that of a fine of up to €5000 or 12 months imprisonment on summary conviction; and a fine or a term of imprisonment of up to five years for a conviction on indictment.

Section 27 is the review provision, added at Report Stage in the Dáil. Section 27(1) provides that the Minister for Justice and Equality shall, ‘not later than 3 years after the commencement of this Part, cause a report to be prepared on the operation of section 7A of the Act of 1993 and shall cause copies of the report to be laid before each House of the Oireachtas.’ Section 27(2) provides that the report must include ‘(a) information as to the number of arrests and convictions in respect of offences under section 7A of the Act of 1993 during the period from the commencement of that section, and (b) an assessment of the impact of the operation of that section on the safety and well-being of persons who engage in sexual activity for payment.’

That statutory review process is now underway and will be discussed further later in the chapter.

7.2 Critiques of Law-making Process and Commentary on Part 4

¹⁰⁴⁷ The offence provided for in section 8 of the 1993 Act, discussed in the previous chapter.

¹⁰⁴⁸ Before this amendment was passed, difficulties with the prosecution of the section 8 offence had arisen on a number of occasions; see discussion of relevant case law in the previous chapter.

¹⁰⁴⁹ See discussion of these increases in penalty, and these 1993 Act offences themselves, in Chapter 2.

The insights offered through analysis of parliamentary debates and interviews with key actors in the 2017 law reform process show a general awareness existed among legislators of fundamental disagreements within public and feminist discourse over the appropriate models of law reform, as discussed in earlier chapters. In particular, the adoption by Amnesty of an anti-Nordic model position during the course of the legislative process was referred to by several legislators in opposing or expressing concern about the provisions.

Opposition to the Nordic model had also been expressed prior to the introduction of the legislation by a leading academic commentator on sexual offences law in Ireland. In his 2013 textbook, Tom O'Malley expressed criticism both of the 1993 law and of the Swedish law, suggesting that an alternative decriminalisation approach should be adopted in Ireland.¹⁰⁵⁰

During the period immediately preceding the introduction of the 2017 legislation, several other academic commentators also expressed views highly critical of the Swedish approach; some focused specifically upon the 2015 law change in Northern Ireland.¹⁰⁵¹ Graham Ellison, for example, argued that the impetus for adopting the Swedish approach had emerged from an alliance between 'a section of the radical feminist movement *and* the Christian right based on their shared opposition to commercial sex'¹⁰⁵², in positing his thesis that elements of Stanley Cohen's moral panic thesis 'resonate clearly with developments in Northern Ireland' in the introduction of legislation criminalising demand. He suggested that sex trafficking had been conflated with prostitution; and that this 'problem' had been

hyped by the media and cracked down on hard by the authorities... the prostitution-trafficking issue has provided the ideal opportunity for secular feminists and moral entrepreneurs on the religious right to come together to campaign on the same issue..

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Other Irish academics also took a similar perspective in writing critically about the provisions during the legislative process. For example, writing about the bill as it was passing through the Oireachtas, Fitzgerald and McGarry argued that the representation of prostitution in Ireland in 'neo-abolitionist discourse' had tended to operate 'through gendered and racialized assumptions about sex workers and migrant women.'¹⁰⁵⁴ Similarly, David Ryan argued against the introduction of the law reform, suggesting that the 'client criminalisation model' would

¹⁰⁵⁰ O'Malley, Tom, *Sexual Offences*. Dublin: Round Hall Press, 2013 (2nd ed), at 204.

¹⁰⁵¹ See Huschke, Susan et al, 'Research into Prostitution in Northern Ireland' (Northern Ireland: Department of Justice, October 2014,

http://www.academia.edu/17343071/Research_into_Prostitution_in_Northern_Ireland), which concluded that criminalisation of clients could endanger those engaged in prostitution and that 'Only 2% of the sex workers who responded to our survey supported the criminalisation of clients' (11). See also Huschke, Susan, 'Victims Without a Choice? A Critical View on the Debate about Sex Work in Northern Ireland' (2016) 14 *Sexualities Research and Social Policy* 192; Huschke, Susan and Schubotz, Dirk, 'Commercial Sex, Clients, and Christian Morals: Paying for Sex in Ireland' (2016) 19 *Sexualities* 869; Huschke, Susan and Ward, Eilis, 'Stopping the Traffic? The Problem of Evidence and Legislating for the "Swedish Model" in Northern Ireland' (2017) 8 *Anti-Trafficking Review* 16.

¹⁰⁵² Ellison, Graham, 'Criminalizing the Payment for Sex in Northern Ireland: Sketching the Contours of a Moral Panic' (2017) 57 *Brit. J. Criminol.* 194-214 at 195.

¹⁰⁵³ Ellison, *ibid*, at 210-11. To support this assertion of a split in the US feminist movement, Ellison refers to Weitzer, Ronald, *Legalising Prostitution: From Illicit Vice to Lawful Business*. New York University Press, 2011; and Bernstein, Elizabeth, 'Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex and Rights' (2012) 41 *Theory and Society* 233-59.

¹⁰⁵⁴ Fitzgerald, Sharron and McGarry, Kathryn, 'Problematising Prostitution in Law and Policy in the Republic of Ireland' (2016) 25(3) *Social and Legal Studies* 289-309. See also: McGarry and Fitzgerald, 'The Politics of Injustice: Sex-Working Women, Feminism and Criminalizing Sex Purchase in Ireland' (2017) *Criminology & Criminal Justice*, DOI: 10.1177/1748895817743285.

not be effective in reducing levels of prostitution, and that decriminalisation represented ‘the most viable chance of practically addressing the needs of sex workers.’¹⁰⁵⁵

Writing during the same time period, Eilís Ward expressed specific criticism of the Oireachtas Justice Committee process, describing it as a ‘neo-abolitionist shoe-in’, arguing that

by the time the Committee’s work began, the political debate was, in fact, all but over. ToRL’s representation of the problem of prostitution (and its solution), had already been internalised by the political elite such that the Committee process closed down consideration of the range of policy options set out by the government ... and served to institutionalise neo-abolitionist discourse already hegemonic in Irish society.¹⁰⁵⁶

She asserts that the only political opposition at this stage was expressed by ‘Minister Shatter who... did not support neo-abolitionism but whose resignation, in time, cleared the way for his successor, a long-standing ToRL supporter, to move with the Committee’s recommendations.’¹⁰⁵⁷ In providing a brief review of the history of the relationship between feminist activism and the sex trade in Ireland, she argues that the second-wave feminist movement in Ireland offered a ‘gendered critique’ of prostitution, reflected in the reference to the material needs of women in prostitution discussed in the report of the Second Commission on the Status of Women in 1993; so that by the late 1990s ‘the repudiation of prohibitionism was unambiguous’, as ‘the state accepted that some women were in prostitution ‘voluntarily and willingly’ and reiterated its exclusive interest in the sex trade’s more intrusive aspects’.¹⁰⁵⁸ She argues that, generally during the latter half of the twentieth century, ‘the sex trade remained peripheral to both feminist and national politics’ in Ireland.¹⁰⁵⁹

This changed, however, in her view, with the establishment in 2001 of the Immigrant Council of Ireland ‘with financial assistance from the Religious Sisters of Ireland [*sic*], an order of Catholic nuns’, and its subsequent work devoted to ‘consensus building on the case for Ireland’s adoption of Swedish-style legislation... ToRL itself remained marginal in the public imagination until the mid-2000s but by around 2010 it claimed at least 1 million supporters.’¹⁰⁶⁰

Ward argues that key to the creation of the momentum for reform by the campaign was the publication in 2009 of the Kelleher report, providing support for the TORL characterisation

¹⁰⁵⁵ Ryan, David, ‘The proposed reform of prostitution law in Ireland – moral discourse and the perpetual exclusion of sex workers’ (2017) (27) (1) *Irish Criminal Law Journal* 12-23.

¹⁰⁵⁶ Ward, Eilís, ‘The Irish Parliament and Prostitution Law: a Neo-Abolitionist Shoe-In?’ in Ward, Eilís and Wylie, Gillian (eds), *Feminism, Prostitution and the State: The Politics of Neo-Abolitionism*. Routledge, 2017, at 86-7. See also Ward, Eilís and Wylie, G., ‘Reflexivities of Discomfort: Researching the Sex Trade and Sex Trafficking in Ireland’ (2014) 21 *European Journal of Women’s Studies* 251.

¹⁰⁵⁷ At 87.

¹⁰⁵⁸ At 89, citing the Report of the Department of Justice, Equality and Law Reform, 1998.

¹⁰⁵⁹ At 89.

¹⁰⁶⁰ At 90; based on the affiliation to ToRL of large membership organisations such as trade unions and the National Women’s Council of Ireland. The accusation that Catholic religious interests lay behind the work of TORL, based on the origin stories of the Immigrant Council of Ireland (established by Sister Stanislaus of the Religious Sisters of Charity Ireland) and of Ruhama (an organisation supporting women in exiting prostitution, also established by the same order) has been a consistent feature of the anti-reform lobby over the years; see for example the commentary on the Irish law reform in Mac, Juno and Smith, Molly, *Revolution Prostitution: the fight for sex workers’ rights*. London: Verso, 2018.

of prostitution as ‘a form of violence against women, caused by male power and a function of patriarchal power relations... inextricably linked in a causal relationship with trafficking’ to become widely accepted, creating a ‘regime of truth’.¹⁰⁶¹ Ward further notes that prior to the initiation of the consultation process on prostitution law reform by the Oireachtas Committee, all the major parties except one, and many independent Oireachtas members, had already committed to the adoption of the Swedish approach in law. She writes that the Oireachtas Committee hearings (in which she participated as a witness) betrayed a ‘dominance of neo-abolitionist thinking’ throughout, with a ‘concurrent and inter-related discursive loop .. [being] the invocation of prostitution’s oppressive paradigm and its causality to trafficking..¹⁰⁶²

Ward concludes by asserting that, even prior to the commencement of the Committee’s work, ‘neo-abolitionism had already been internalised by the political elite.... we can identify the manner in which no other outcome was, in the end, conceivable.’¹⁰⁶³ She writes scathingly of the presence in Ireland of ‘key femocrats, Katherine Zappone in the Senate and the Minister for Justice, Frances Fitzgerald (former director of the National Women’s Council)’ as key factors in the ultimate outcome, along with the absence of any ‘strong sex worker organisations’.¹⁰⁶⁴ Ward suggests, in her final commentary, that the pre-legislative process involved ‘a discursive collapse of the complex reality of prostitution and its relationship to other phenomena’ and that sex workers as a group were denied validity; she acknowledges that the ‘weak participation of sex workers in the process was partially a function of the organisational and financial deficiencies of the SWAI’ but that ‘neo-abolitionism’s essential exclusions were also at play.’¹⁰⁶⁵

The ideological basis of Ward’s arguments has been strongly challenged by Monica O’Connor, one of the authors of the Kelleher report, who has consistently re-asserted the conception of prostitution as a form of gendered exploitation. In her doctoral thesis concluded some years before the passage of the 2017 legislation, she argued that feminist research on violence against women ‘disputes the victim/agency dichotomy as simplistic and ill-informed, considering that in all contexts of domestic and sexual violence women make decisions, strategise and resist in order to survive.’¹⁰⁶⁶ O’Connor quoted Liz Kelly, who has written of the need to move away from the idea that ‘being a victim and having agency are incompatible’.¹⁰⁶⁷

Through the in-depth interviews she conducted during her doctoral research with Irish and trafficked women engaged in prostitution, O’Connor’s thesis sought to explore whether their experiences reflected the ‘rigid demarcation’ insisted upon by sex work advocates between those who choose prostitution and those who are coerced into it. She sought to establish whether their lives were better understood as ‘existing within the complex frame of a continuum, where choice, agency and consent co-exist alongside harm, coercion and

¹⁰⁶¹ At 90-91.

¹⁰⁶² At 94-95.

¹⁰⁶³ At 97.

¹⁰⁶⁴ At 97-98.

¹⁰⁶⁵ At 99.

¹⁰⁶⁶ O’Connor, Monica, *Consent, Agency and Harm: A Phenomenological Inquiry into the Experience of Women in Prostitution and Women Trafficked for Sexual Exploitation in Ireland*. Dublin City University, Unpublished PhD Thesis, 2014, at 26.

¹⁰⁶⁷ O’Connor, Monica, *ibid*, at 26, quoting from Kelly, Liz, ‘Paradoxical Progress: Responding to Sexual Violence’ (2008) 39 *Soundings: Journal of Politics and Culture* 128-135 at 135.

victimisation.¹⁰⁶⁸ Her analysis concluded by arguing that the best way of understanding and conceptualising prostitution and trafficking for sexual exploitation lies in the

‘theoretical framework of a continuum of sexual exploitation...[which] best facilitates a deeper understanding of how choice, agency and coercion co-exist within the circumscribed personal and socio-economic circumstances in which girls and women make decisions, prior to migrating or entering prostitution... sustaining a rigid demarcation between victims of trafficking and those who apparently “choose” to enter the industry may serve to place a burden of responsibility on prostituted women for the choices they made and the subsequent harm they experience, by ignoring the coercive context in which those choices were exercised.’¹⁰⁶⁹

O’Connor suggested that a careful analysis of ‘consent’ is required when examining prostitution policy; she argued that her findings highlight ‘the critical need to recognise the way consent is compromised within prostitution, the coercive context in which that consent is given, and that submission or acquiescence is not an indicator that the consent is wanted or non-abusive.’¹⁰⁷⁰ Thus, O’Connor concluded that sexual exploitation and criminal acts of abuse are endemic within prostitution and that pre-existing Irish law which distinguished between those women who ‘consented’ to enter prostitution and those who were trafficked into it, was ‘clearly indicating that those women who consent may be bought, regardless of the circumscribed circumstances in which that consent is gained, thus exonerating the buyer from responsibility or criminal sanction....’¹⁰⁷¹

The Nordic model represents a better approach, O’Connor argued, because it removes ‘consent as the defining factor for determining criminal acts of sexual exploitation, .. [demonstrating] a more integrated policy and legislative framework which recognises and addresses the harm to both prostituted and trafficked women.’¹⁰⁷²

Writing more recently, O’Connor argues further that qualitative studies into the experiences and accounts of women engaged in prostitution can ‘contribute to our understanding of consent as not being the defining factor in identifying sexual acts as unwanted, abusive, or violating. They highlight the critical need to recognise the coercive context in which consent is given and obtained in prostitution and that submission or acquiescence is not an indicator that the sex is wanted, desired, or non-abusive.....recognising the trauma of sexual victimisation does not imply that women are passive victims, nor does it undermine recognition of their agency, strategies of resistance, and capacity to survive.’¹⁰⁷³

As outlined in previous chapters, O’Connor’s research uses a continuum concept to describe how choice, agency and coercion can co-exist for women within prostitution, so that ‘consent’ is effectively compromised, as for women experiencing domestic violence. Based on her own empirical work, O’Connor argues that women’s own accounts of the lived experience of prostitution sex contribute to recognition of the ‘coercive context in which consent is given and obtained in prostitution’ and of ‘the importance of differentiating between adult consensual sex, implying mutual, desired sex and prostitution sex described

¹⁰⁶⁸ O’Connor, Monica, *ibid*, at 172.

¹⁰⁶⁹ *Ibid*, at 195.

¹⁰⁷⁰ *Ibid*, at 196.

¹⁰⁷¹ *Ibid*, at 201.

¹⁰⁷² At 201.

¹⁰⁷³ O’Connor, Monica, ‘Choice, Agency, Consent and Coercion: Complex Issues in the Lives of Prostituted and Trafficked Women’ (2017) 62 *Women’s Studies International Forum* 8-16 at 15.

by women in [her] study which is better defined as buyers gaining acquiescence to commit unwanted sexual acts'.¹⁰⁷⁴

While it is argued that O'Connor's work offers a substantial basis for challenging Ward's conceptualisation of prostitution more generally, it is also possible to critique Ward's scathing analysis of the Irish parliamentary process more specifically as lacking in substance. In particular, it is difficult to make sense of Ward's core objection to the deliberative process in which the Oireachtas Committee was engaged. She appears to resent the level of success achieved by the TORL campaign's advocacy work over the years preceding the Committee process; and to resent further the fact that the submissions to the Committee were overwhelmingly supportive of the Swedish approach.

However, given the strength of the TORL advocacy and the clear evidence that a political consensus had effectively been built around a particular position over those years, it is strange that Ward does not in her critique contemplate the possibility that there was substance to the TORL arguments. Nor does she really engage with the substance of the findings made by the Committee, which for example explicitly rejected her repeated assertions (made both in her evidence to the Committee and in the publication subsequently of her edited volume) that there had been a 'factual deficit' in terms of the extent of prostitution in Ireland.¹⁰⁷⁵

Indeed, as has been explored in the previous chapter, developments contemporaneous with and subsequent to the writing of Ward's analysis have contradicted further her assertions that a 'political elite' had arrived at a foregone conclusion on the legislation. The debates on the 2015 Bill as it progressed slowly through the Oireachtas, as analysed earlier in this thesis, indicate that, particularly with a change in government and make-up of the Oireachtas following the February 2016 General Election, it became and remained for some time a real possibility that the Bill might not become law in its original incarnation.

Although the Bill did eventually become law in 2017, some crucial amendments were made to its provisions on prostitution during its passage through the Oireachtas, not anticipated at the time it was introduced. Further, the high-profile adoption in August 2015 by the leading Irish NGO Amnesty of a position hostile to the Swedish approach also cast doubt on the ultimate passage into law of what ultimately became the 2017 Act (as former Minister Fitzgerald acknowledged in her interview conducted for this thesis).

Moreover, following the enactment of Part 4 in 2017, academic critique of its provisions continued unabated, with little evidence of the 'dominance of neo-abolitionist thinking' asserted by Ward in her 2017 critique.¹⁰⁷⁶ Shortly after passage of Part 4, Tom O'Malley suggested for example that, in adopting the new provisions,

[t]he Government succumbed to pressure to adopt the so-called Swedish model, the efficacy of which is debatable... From a policy perspective, it reflects a growing international tendency, at European level at least, to treat all those who work as prostitutes as victims rather than offenders.¹⁰⁷⁷

¹⁰⁷⁴ O'Connor (2017), *ibid* at 15.

¹⁰⁷⁵ See Committee correspondence with Minister Shatter, September-December 2013, discussed above.

¹⁰⁷⁶ Ward, *op cit*, at 94-95.

¹⁰⁷⁷ O'Malley, Tom, 'The New Law on Sexual Offences' (2017) 27(3) *Irish Criminal Law Journal* 78-89 at 88-9.

Similarly, writing in a 2018 collection of essays edited by Sharron Fitzgerald and Kathryn McGarry, Kate McGrew of the Sex Workers Alliance Ireland (SWAI) wrote that ‘With the passage of the new law in Ireland, the stigma around our work is now government sanctioned.’¹⁰⁷⁸ In the same collection, Fitzgerald and McGarry again expressed strong criticism of the process leading to the adoption of Part 4, characterising the consultation as ‘undemocratic’ and arguing both that ‘TORL legitimised the exclusion of current sex workers’ concerns in the reform process’ and that the Justice Committee report included a ‘justification to delegitimise, socially sanction and politically marginalise sex workers.’¹⁰⁷⁹

While acknowledging that ‘all sides in feminist prostitution politics highlight poverty as driving individuals into the sector’, Fitzgerald and McGarry argue that ‘some feminists never seem to fundamentally address ‘other’ women’s poverty beyond set-piece statements about the complexity of this issue’; and they state that they seek to put forward an ‘agenda for change’ to challenge what they term the ‘undemocratic practices [which] have long reinforced the inequalities sex workers face.’¹⁰⁸⁰ They say that their collection aims to provide ‘a solid foundation for an effectual agenda for change for sex workers guided by a social justice frame.’¹⁰⁸¹

A similar analysis, expressed in forthright terms, was also put forward in 2020 by Paul Ryan in his discussion of the narratives underlying what he calls ‘neo-abolitionist prostitution policy’.¹⁰⁸² He argues that the ‘long civil society campaign that convinced policy makers that the law was the solution to the exploitation and abuse perpetrated against women within the sex industry’ was based upon a ‘dominant narrative’ which relied on ‘a carceral feminism’.¹⁰⁸³ He cites the work of Elizabeth Bernstein, discussed in previous chapters, which he says documents ‘the shift from neo-liberal strategies criminalising poor women to versions of feminist activism that embrace the carceral state particularly in the areas of rape, sexual violence and more recently, human trafficking.’¹⁰⁸⁴

Ryan charts what he describes as the ‘rise of neo-abolitionism’ in Ireland, suggesting that the ‘broad alliance which was called *Turn off the Red Light* (ToRL) promoted a carceral feminism’ which he argues rests upon ‘a belief that all women would benefit from an extension of the penal state and increased police surveillance powers, a contention that has been heavily criticised for solely promoting the interests of white, middle-class heterosexual women.’¹⁰⁸⁵ He suggests that the Justice Committee process was dominated by a ‘discourse of coercion and helplessness’, with ‘an almost exclusive focus on the Nordic model’, and he (inaccurately) states that ‘[p]olicy alternatives such as the decriminalisation model favoured in New Zealand were neither presented nor discussed.’¹⁰⁸⁶

¹⁰⁷⁸ McGrew, Kate, Foreword in Fitzgerald, Sharron and McGarry, Kathryn (Eds), *Realising Justice for Sex Workers: an Agenda for Change*. Lanham, MD, US: Rowman and Littlefield, 2018, at xi.

¹⁰⁷⁹ Fitzgerald and McGarry, *ibid*, at xx-xxii.

¹⁰⁸⁰ *Ibid*, at xxiii.

¹⁰⁸¹ At xxvii.

¹⁰⁸² Ryan, Paul, ‘Contested Knowledge: Victim Narratives, Autobiography, and the Rise of Neo-Abolitionist Prostitution Policy in Ireland’ in Cullen, Pauline and Corcoran, Mary (Eds), *Producing Knowledge, Reproducing Gender: Power, Production and Practice in Contemporary Ireland*. Dublin: UCD Press, 2020.

¹⁰⁸³ At 130.

¹⁰⁸⁴ At 130, citing Bernstein, Elizabeth, ‘Carceral Politics as Gender Justice?: the ‘traffic in women’ and neo-liberal circuits of crime, sex and rights’ (2012) 41(3) *Theory and Society* 233-59.

¹⁰⁸⁵ At 133, citing Whalley, E. and Hackett, C., ‘Carceral Feminisms: the abolitionist project and undoing dominant feminisms’ (2017) 20(4) *Contemporary Justice Review* 456-73, at 457.

¹⁰⁸⁶ *Ibid*, at 134. In fact the Committee heard submissions from a range of perspectives, including those who favoured decriminalisation of prostitution; see discussion of the Committee process earlier in this chapter.

Ryan's central purpose is to criticise what he describes as the over-reliance by policy-makers on 'victim narratives'; he contrasts the 'rise of autobiographical survivor stories' such as that of Rachel Moran, with the 'alternative story-telling' approach of Kate McGrew.¹⁰⁸⁷ He argues that the testimony of survivors like Moran became a 'dominant narrative... central to the production of a particular gendered knowledge frame that relied heavily on a neo-abolitionist approach'.¹⁰⁸⁸ This frame, he argues, excludes 'the perspective of male and trans sex workers'.¹⁰⁸⁹ By contrast, he concludes that McGrew's very different story represents a 'new wave of digital storytelling..[of] sex work stories.. as nuanced and diverse as the means of communication'.¹⁰⁹⁰

Interestingly, Ryan stops short of suggesting that McGrew's story is more representative of the lived experiences of the majority of those engaged in prostitution; at most he argues that while 'neo-abolitionists' maintain that 'consent and choice are the prerogatives of a small minority', in fact studies 'suggest that the social class profile of those within the sex industry is wider than traditionally thought'.¹⁰⁹¹

In a similar critique, Ward argued in 2020 that the 'neo-abolitionist "Turn off the Red Light' campaign' used data to "flatten out' the complexity of sex workers lives and misrepresent the figures of the 'vulnerable prostituted woman' and the 'trafficking victim' as 'tragic, abject, a necessarily violated person and in need of 'protection' from the state'.¹⁰⁹²

7.3 The Impact of Part 4 on the Sex Trade in Ireland: Post Enactment Review

While the provisions in Part 4 have thus already generated extensive academic commentary, most analysis of the provisions since 2017, both critical and supportive, has been focused on influencing the outcome of the statutory review into the operation of Part 4.¹⁰⁹³ This review, delayed by the onset of the COVID-19 pandemic, was formally commenced by Minister for Justice Helen McEntee on 9 July 2020 with the publication of terms of reference

¹⁰⁸⁷ At 138-142; he relies here primarily upon drawing comparisons between the autobiography of Rachel Moran, a high-profile Irish campaigner for Nordic model laws internationally (Moran, Rachel, *Paid For: My Journey through Prostitution*. Dublin: Gill and MacMillan, 2013); and the different autobiographical story told by Kate McGrew (whom he describes at 144 as 'the public face of *Sex Workers Alliance Ireland*') on other media, notably through the reality television show *Connected* (RTE1, 2014) and the documentary *Paying For Sex* (RTE1, 2016).

¹⁰⁸⁸ At 142.

¹⁰⁸⁹ At 143. Here he notes findings that such individuals account for '9 per cent of all sex work advertising in Ireland' (Maginn, P. and Ellison, Graham, 'Male sex work in the Irish Republic and Northern Ireland' in Minichiello, V. and Scott, J. (Eds), *Male Sex Work and Society*. NY: Harrington Park Press, 2014); he also refers to his own research into migrant males in prostitution, in stating that the 'lived realities and experiences of men engaged in sex work bears (sic) little resemblance to the accounts of survivors of prostitution that frame the legal and political debate' (Ryan, Paul, *Male Sex Work in the Digital Age*. London: Palgrave, 2019).

¹⁰⁹⁰ *Ibid*, at 148.

¹⁰⁹¹ At 145-6; he cites Roberts et al, 'Sex Work and Students: an Exploratory Study' (2007) 31(4) *Journal of Further and Higher Education* 323-34, a UK study which found 'that 25 per cent of students surveyed knew a student who had worked or was working in some aspect of the industry' and his own research finding that 'just over two-thirds of the 28 participants' he had interviewed in a study into male prostitution were college-educated; see Ryan, 2019, *op cit*.

¹⁰⁹² Ward, Eilis, 'Framing figures' and the campaign for sex purchase criminalisation in Ireland: A Lakoffian analysis' (2020) 28(3) *Irish Journal of Sociology* 314-332, at <https://doi.org/10.1177/0791603520951754>

¹⁰⁹³ Section 27(1) of the 2017 Act requires the Minister for Justice, 'not later than 3 years after the commencement of this Part', to 'cause a report to be prepared on the operation of section 7A of the Act of 1993'.

and the appointment of Independent Expert, solicitor Maura Butler, to conduct the review.¹⁰⁹⁴

The terms of reference state that the review must provide both quantitative data on arrests and convictions and a qualitative assessment of ‘the extent to which the objectives of the Act have been achieved’ and not achieved, along with an assessment of ‘the impact of the Act’s operation on the safety and well-being of persons who engage in sexual activity for payment’.¹⁰⁹⁵ A public consultation with a deadline of 19 September 2020 was launched, and the review was initially projected to be completed within three months of its agreed start date, but no report has yet been published.¹⁰⁹⁶

However, pending completion of the statutory review process, several research studies into the impact of Part 4, along with commentaries on its effect on the sex trade in Ireland, have already been published. As early as July 2017, journalist Conor Gallagher drew a positive conclusion as to the impact of the new law, noting that

There is anecdotal evidence to suggest the new law change is having a small effect on the industry. There has been a drop in women advertising on the main sites and men looking to buy sex are becoming more cautious. They share advice on internet forums about not repeating out loud the address they’re going to. If visiting a prostitute in a hotel, they are warned never to wait in the lobby.¹⁰⁹⁷

In addition, shortly after the enactment of Part 4, Beegan and Moran concluded that the new law had a positive effect in that it ‘targets demand, challenges society’s attitudes to men’s violence against women and sends a clear message that the body cannot be sold, bought or violated’.¹⁰⁹⁸ Similar acknowledgement was provided in a 2018 EU-funded comparative report, commissioned by the Immigrant Council of Ireland, in which the Irish law reform is described as being ‘underpinned by principles of gender equality and human rights ...’¹⁰⁹⁹

Despite assertions about the impacts of the new law, extensive actual data on implementation of the new provisions is still however relatively scarce. One year on from the commencement of the relevant provisions, the Minister for Justice confirmed that a new incident category entitled ‘Purchase of Sex’ was being added to the Garda offence recording system (PULSE), in order ‘to provide a facility to capture all incidents relating to the purchase of sexual services’, and that the ‘Garda national protective services bureau is monitoring the impact of the offences and is developing initiatives to ensure adequate and proper enforcement’.¹¹⁰⁰ Then in January 2019 the first conviction for purchase of sex under Part 4

¹⁰⁹⁴ Department of Justice, ‘Minister McEntee Publishes Terms of Reference for the Review of Part 4’, 9 July 2020, [gov.ie - Minister McEntee publishes Terms of Reference for the Review of Part 4 of the Criminal Law \(Sexual Offences\) Act 2017 \(www.gov.ie\)](https://www.gov.ie/en/minister-mcentee-publishes-terms-of-reference-for-the-review-of-part-4-of-the-criminal-law-sexual-offences-act-2017/)

¹⁰⁹⁵ Department of Justice, Terms of Reference, *ibid*.

¹⁰⁹⁶ As of 10 January 2022. See

[https://www.justice.ie/en/JELR/Pages/Review_of_the_Operation_of_Part_4_of_the_Criminal_Law_\(Sexual_Offences\)_Act_2017](https://www.justice.ie/en/JELR/Pages/Review_of_the_Operation_of_Part_4_of_the_Criminal_Law_(Sexual_Offences)_Act_2017)

¹⁰⁹⁷ Gallagher, Conor, ‘Red-Light Ireland’, *The Irish Times*, 29 July 2017.

¹⁰⁹⁸ Beegan, Rebecca and Moran, Joe, ‘Prostitution and Sex Work: Situating Ireland’s New Law on Prostitution in the Radical and Liberal Feminist Paradigms’ (2017) 17 *Irish Journal of Applied Social Studies* 59 at 72.

¹⁰⁹⁹ Immigrant Council of Ireland, *Comparative Report: Disrupt Demand*. Dublin, 2018, at 29. See also Walby, Sylvia, et al, *The Study on the Gender Dimension of Trafficking in Human Beings*. Luxembourg: European Commission, 2016.

¹¹⁰⁰ Minister for Justice Charles Flanagan TD (Speech made in response to a Commencement matter raised by the author, Seanad Debate, 27 March 2018, vol 257, no 1).

was reported. A man prosecuted under section 7A for paying a woman for sex following a raid on a brothel in Blanchardstown, Dublin was convicted and fined €200 before Dublin District Court.¹¹⁰¹ However, many of those who had promoted the law reform process have become frustrated at the apparent lack of prosecutions for purchase generally, particularly as media reports have continued to suggest ongoing prosecutions for women themselves engaged in indoor prostitution, as before.

The Sex Workers Alliance Ireland (SWAI) have seized upon any such reports as evidence that women selling sex have continued to be targeted for prosecution even with the change in the law. For example, in June 2019 it was reported that two women in Kildare had been convicted and sentenced to imprisonment for brothel-keeping; SWAI was quoted as saying this incident showed that the 2017 law had not decriminalised sex workers and was ‘not fit for purpose’.¹¹⁰²

Also following up on this report, Clare Daly TD, one of the legislators who had been most strongly opposed to the new law, put down a Parliamentary Question in the Dáil on 13 June 2019 asking whether the 2017 Act provisions would be reviewed as a result of ‘the imprisonment of two sex workers, one pregnant, for working in a shared space under the charge of brothel keeping’.¹¹⁰³ In response, Minister for Justice Charles Flanagan TD stated that he could not comment on individual cases but noted that the 2017 Act had not introduced any new offence of brothel keeping, and that, as regards ‘decriminalising the offence of brothel-keeping, there are concerns that this could create a loophole that could be open to abuse by criminal gangs and others who wish to profit from prostitution.’ He noted however that within three years of the Act’s commencement, a report would be prepared on ‘the number of arrests and convictions in respect of the new offences, as well as an assessment of the impact on those who provide sexual services for payment.’

By October 2020, just three convictions under Part 4 for purchase of sexual services had been recorded, but police had also conducted a number of operations targeting demand for sexual services. This development was documented in an interim report authored by Geoffrey Shannon, commissioned by the government into the implementation of the legislation mid-way through the three year statutory review period.¹¹⁰⁴ This independent report noted the international context for the “equality” approach adopted in the 2017 Irish law, in which other jurisdictions have put in place a ‘wide range of institutional mechanisms and measures .. to ensure the success of all the objectives of the law’.¹¹⁰⁵

An empirical study also conducted in the context of the statutory review by the University College Dublin Sexual Exploitation Research Programme (SERP) in 2020 found that violence against women is endemic in prostitution; that evidence of pimping and profiteering by criminal gangs abounds; and that the introduction of the 2017 Act had not caused any surge in violence against persons in prostitution, despite claims to the contrary by some

¹¹⁰¹ Carswell, Simon and Gallagher, Conor, ‘Meath Man is First to be Convicted of Paying for Sex’, *The Irish Times*, 21st January 2019, <https://www.irishtimes.com/news/crime-and-law/meath-man-is-first-to-be-convicted-of-paying-for-sex-1.3765853>

¹¹⁰² Pollak, SORCHA, ‘Jailing of Sex Workers keeping Brothel Shows Laws ‘not fit for purpose’’, *The Irish Times*, 10 June 2019, <https://www.irishtimes.com/news/social-affairs/jailing-of-sex-workers-keeping-brothel-shows-law-not-fit-for-purpose-1.3921149>

¹¹⁰³ See <http://www.justice.ie/en/JELR/Pages/PQ-13-06-2019-94>

¹¹⁰⁴ Shannon, Geoffrey, *The Implementation of the Criminal Law (Sexual Offences) Act 2017, Part IV - An Interim Review*. Dublin: Official Publications, 2020.

¹¹⁰⁵ *Ibid*, at 7.

opponents of the legislation.¹¹⁰⁶ The report found that more than 650 women are advertised online for prostitution each year in Ireland, that the indoor sex trade is populated by mostly migrant women (94% of their sample); and that several hundred women access the two largest support services for women in prostitution each year, drawn from over 40 nationalities.¹¹⁰⁷ These women face the ‘constant risk of violence from a variety of sources’.¹¹⁰⁸

In this SERP study, the authors O’Connor and Breslin cite updated police data showing that while only 10 incidents of the new 2017 sex purchase offence were recorded by Gardaí (police) in 2018, a greatly increased figure of 92 such incidents were recorded in 2019.¹¹⁰⁹ Increased commitment to enforcement was also demonstrated by the taking of targeted ‘days of action’ by police over 2018-19, resulting in almost 100 sex buyers being stopped and questioned under Part 4 of the Act; although since then the outbreak of the Covid-19 pandemic had temporarily halted enforcement measures.¹¹¹⁰ The report also emphasised the need to develop exit strategies to support women in leaving the sex trade, and recommended the expunging of convictions for the sale of sex. This recommendation was accepted subsequently by Minister for Justice Helen McEntee, who in April 2021 announced her intention to expunge over 600 convictions for the ‘sale of sex’.¹¹¹¹

By contrast with the findings of the SERP study, a small-scale study commissioned by HIV Ireland and conducted by Paul Ryan and Kathryn McGarry, also published in 2020, which involved four focus groups with 26 individuals led by peers in the SWAI, found that the 2017 law had a negative impact; their findings suggest ‘that the authoritative gaze of the law is negatively impacting sex workers (*sic*) lived lives, and sex workers report feeling hampered in accessing justice, compounding the marginalisation they are experiencing’.¹¹¹²

A highly critical view of Part 4 was also recently put forward by Scoular and Fitzgerald, in referring to the Irish context while making a more general argument for decriminalisation of prostitution; they state that

Statistics from UglyMugs.ie—an Irish app where sex workers can confidentially report incidents of abuse and crime—reveal that violent crime against sex workers is up by 92 per cent since 2017, when the Republic of Ireland criminalised sex purchase .. At the time of writing, there have been just three convictions for sex purchase in the jurisdiction. This suggests that criminalisation is not working.¹¹¹³

¹¹⁰⁶ O’Connor, Monica and Breslin, Ruth, *Shifting the Burden of Criminality: an analysis of the Irish Sex Trade in the Context of Prostitution Law Reform*. Sexual Exploitation Research Programme (SERP), University College Dublin, 2020. On the claims to the contrary, see for example press statements issued by SWAI over 2019-21; www.SWAI.ie

¹¹⁰⁷ These two services are the NGO Ruhama; and the Health Service Executive (HSE) Women’s Health Service and Anti-Human Trafficking Team.

¹¹⁰⁸ *Ibid*, at 74.

¹¹⁰⁹ At 77.

¹¹¹⁰ At 81.

¹¹¹¹ See statement from the Minister, 25 April 2021: <https://www.gov.ie/en/press-release/dbc0f-minister-mcentee-announces-initiative-to-expunge-previous-convictions-for-sale-of-sex/>

¹¹¹² McGarry, Kathryn and Ryan, Paul, *Sex Worker Lives Under the Law*. HIV Ireland, 2020, at https://www.hivireland.ie/wp-content/uploads/HIV-Ireland_SexWorkerLives_FINAL.pdf, at 29.

¹¹¹³ Scoular, Jane and Fitzgerald, Sharron ‘Why decriminalise prostitution? Because law and justice aren’t always the same’ (2021) 10(4) *International Journal for Crime, Justice and Social Democracy* 56-65, at 60. Available from:

This assertion reflects the critiques of the 2017 law also made by SWAI and other anti-Nordic model organisations, which have since the enactment of Part 4 have been engaged in greatly increased levels of activism, seeking to promote the perspective that the new provisions have caused endangerment to ‘sex workers’; these assertions have had vastly heightened visibility, particularly on social media.¹¹¹⁴

The submission by Amnesty to the statutory review, for example, again cites a study based on Ugly Mugs data showing increased reporting of violent crimes by those engaged in the sex trade between 2015 and 2019; while the submission states that it ‘does not argue that there is a human right to buy sex or a human right to financially benefit from the sale of sex by another person’, it calls for ‘sex workers to be protected from individuals who seek to exploit and harm them’ and for ‘the decriminalisation of all aspects of adult consensual sex work due to the foreseeable barriers that criminalisation creates to the realisation of the human rights of sex workers’.¹¹¹⁵

Similar points were made by Amnesty in a report published in January 2022, which asserted that the criminalisation of those engaged in the sex trade had placed them more at risk of abuse and violence.¹¹¹⁶

However, many NGOs have expressed support for the new provisions, with the National Women’s Council (NWC) submission to the review, for example, stating that Part 4 of the Act ‘is an essential articulation of the Irish states’ commitment to reducing levels of sexual violence and exploitation of women and girls and vindicating their rights to be safe and secure.’¹¹¹⁷ Similarly, the organisation Ruhama in its submission to the review noted that the ‘introduction of the Equality model in Ireland is a progressive legislative development and has to be welcomed’, while expressing disappointment that ‘the first conviction for sex buying did not take place until 2019’.¹¹¹⁸ Ruhama also noted that following the enactment of Part 4, ‘Our service users now feel more confident approaching An Garda Síochána and experience better outcomes when doing so’, while calling for greater emphasis on comprehensive ‘statutory exit pathways [which] are essential to the implementation of the law as envisaged and successfully implemented in other jurisdictions’.¹¹¹⁹

Other studies conducted for the review process have focused upon the impact of COVID-19 on the sex trade. In a 2020 SERP study conducted for this purpose, Breslin found that the pandemic had ‘brought into very sharp relief the harmful and abusive nature of the Irish

https://www.researchgate.net/publication/356666492_Why_Decriminalise_Prostitution_Because_Law_and_Justice_Aren't_Always_the_Same_1 [accessed Dec 13 2021].

¹¹¹⁴ See for example SWAI press release, ‘Review will show that Current Law is a Failed Experiment’, 9 July 2020, at https://www.hivireland.ie/wp-content/uploads/HIV-Ireland_SexWorkerLives_FINAL.pdf

¹¹¹⁵ Amnesty International Ireland, *Submission to Dept of Justice*, 20 September 2020, at 3: <https://www.amnesty.ie/wp-content/uploads/2020/09/AI-Submission-on-sex-work-law-review-18092020.pdf>; citing R. Campbell, L. Smith, B. Leacy, M. Ryan and B. Stoica, ‘Not collateral damage: Trends in violence and hate crimes experienced by sex workers in the Republic of Ireland’ (2020) *Irish Journal of Sociology* 15, at: <https://journals.sagepub.com/doi/full/10.1177/0791603520939794>.

¹¹¹⁶ Amnesty International, *We Live Within a Violent System: structural violence against sex workers in Ireland*, 25 January 2022, at <https://www.amnesty.org/en/latest/news/2022/01/ireland-laws-criminalizing-sex-work-are-facilitating-the-targeting-and-abuse-of-sex-workers/>

¹¹¹⁷ NWC, *Submission to Dept of Justice Review*, 1 September 2020, at 1;

https://www.nwci.ie/images/uploads/NWC_Submission-Review_of_Part_IV_of_the_Criminal_Law_%28Sexual_Offences%29_Act_2017.pdf

¹¹¹⁸ Ruhama, *Annual Report 2020*, at 24: see <https://www.ruhama.ie/wp-content/uploads/Ruhama-Annual-Report-2020.pdf>

¹¹¹⁹ *Ibid* at 24.

sex trade.. Populated in the main by vulnerable migrant women, their vulnerabilities and the levels of danger and isolation they face within the trade were heightened even further by this global crisis.¹¹²⁰

The SERP analysis showed that while there was an initial decrease in the number of women advertised as selling sex during the pandemic and the first accompanying lockdown, the numbers began to rise again as the pandemic continued. Noting the significantly increased risks to the health of women in the sex trade posed by the pandemic, Breslin pointed out that the ‘exhortations and advice by both prostitution advertisers and ‘sex work’ advocates to ‘stay safe’ whilst seeing buyers, seemed to hinge on the false assumption that all women in prostitution are fully ‘independent’, and have control over their own environment, money and circumstances. This of course is not the case..’¹¹²¹ Breslin concluded that ‘what COVID-19 has highlighted more than ever before is that prostitution is not a solution to women’s poverty.’¹¹²²

In November 2020, Ruhama also published a report on the impact that the COVID-19 pandemic had upon women in the Irish sex trade, finding that

Covid-19 has had and continues to have a detrimental impact on the lives of women who sell sex on the street and in off street settings such as apartments, brothels, and selling images online. The pandemic has made a bad situation worse with the choices of those currently in prostitution becoming more limited and it has also led to more women being at risk of entering prostitution.¹¹²³

The report pointed out that ‘In the absence of a clearly defined and agreed model of exiting support in Ireland, COVID 19 has exacerbated the gap in services to assist an individual wishing to exit the sex trade’ and recommended a number of measures to improve levels of exit supports, concluding that ‘Eradicating women's poverty in Irish society’ is urgently required in order ‘to eliminate one of the key push factors for women entering the sex trade’.¹¹²⁴

In June 2021, Ruhama joined with the NWCi, the Immigrant Council of Ireland and other organisations in launching a new campaign to generate stronger support for Part 4: *Beyond Exploitation – Defending the human right not to be bought or sold for sex*. Strong emphasis at the launch was placed on the highly vulnerable Ruth Breslin of SERP pointed to her empirical research as having shown that 94% of women in the sex trade in Ireland are migrant women.¹¹²⁵

In October 2021, further Irish research was published by Breslin *et al*, again highlighting the predominance of migrant women in the Irish sex trade, and providing clear evidence of the

¹¹²⁰ Breslin, Ruth, *Exploitation ‘as Usual’: Emerging Evidence on the Impact of Covid-19 on Ireland’s Sex Trade*. Sexual Exploitation Research Programme (SERP), University College Dublin, 2020, at 38.

¹¹²¹ *Ibid*, at 38.

¹¹²² At 39.

¹¹²³ Ruhama, *Taking the Pulse on COVID19, the Experiences and Needs of Women in Prostitution during COVID 19: Forgotten Voices of the Pandemic*. Ruhama, Dublin, November 2020, at 4. See <https://www.ruhama.ie/wp-content/uploads/COVID-19-Doc-Ruhama-2.pdf>

¹¹²⁴ *Ibid*, at 8-9.

¹¹²⁵ See for example: O’Brien, Aoife, ‘Most sex workers and migrants and desperate to quit, campaigners say’, *The Times*, 22 June 2021: <https://www.thetimes.co.uk/article/most-sex-workers-are-migrants-and-desperate-to-quit-campaigners-say-9tl9693xq>

harms caused through prostitution.¹¹²⁶ In *Confronting the Harm*, an analysis of data is conducted, based upon 144 service user records of women who accessed the Women's Health Service over a four-year period; the medical files of 50 of those women; and interviews with women accessing the service and with staff of the service. The report found that the service is overwhelmingly used by migrant women; only 9 of the 144 women in the sample were Irish, with 26 different nationalities recorded. Nine women were transgender, but all self-identified as women. More than half had entered prostitution between the ages of 16 and 24; poverty and coercion were the key driving forces for most into the trade. Based on an in-depth analysis of the data, the report found that

it is difficult to conclude that prostitution is *anything but* seriously detrimental to women's health and wellbeing, particularly when it comes to their sexual, reproductive and mental health. Even before their first entry into prostitution, the women in the sample were already facing lives full of adversity, including in many cases poverty, separation from family, insecure immigration status, lack of stable accommodation, poor English language skills and a history of violence in their lives. It was these difficult life circumstances that led many into prostitution in the first instance, in an attempt to overcome such adversities, although in other cases women entered by force as a result of pimping and trafficking. Once involved, women's transience, social isolation and the constant, all-consuming pressure to keep moving and keep making money appear to compound their vulnerabilities... their experiences with buyers cause both bodily and emotional harm..¹¹²⁷

The report also found evidence that violence is endemic to the Irish sex trade, that exploitation of the women engaged in prostitution is rife and that third parties are profiting substantially from their exploitation. For virtually all the women in the sample, prostitution had not provided the solutions they had sought; and most were found to be keen to exit the trade as soon as possible. The authors thus recommended a series of measures aimed at strengthening the WHS and the other supports available to women seeking to exit the trade. While not engaging directly with the question of legal models for regulation of the trade, the report provides clear evidence of the immense harm caused to women through their engagement in the sex trade. The authors found that entry into prostitution is very largely coerced by circumstance if not by force; that the demands and expectations of buyers are causative of severe harms and pressures to women; and crucially that 'violence and the fear of violence is endemic to the sex trade..¹¹²⁸

The authors noted that women in prostitution in Ireland face 'the constant risk of violence from a variety of sources .. violence and the threats of violence are used by criminals, pimps, traffickers and buyers alike as a means to control women or ensure that they bend to their will.'¹¹²⁹ These findings provide further support for the view that the consent of those engaged in selling sex is best described as 'conditional'.

¹¹²⁶ Breslin, Ruth, Latham, Linda and O'Connor, Monica, *Confronting the Harm: documenting the prostitution experiences and impacts on health and wellbeing of women accessing the Health Service Executive Women's Health Service*. Dublin: University College Dublin Sexual Exploitation Research Programme (SERP), October 2021. The Women's Health Service (WHS) is the only dedicated health service for women in prostitution in Ireland, a public service run by the State national health authority, the Health Service Executive (HSE).

¹¹²⁷ Breslin *et al*, *ibid*, at 93.

¹¹²⁸ *Ibid*, at 59.

¹¹²⁹ At 59.

In recent years, new academic research focusing upon buyers and emerging in an Irish context, while not directly related to the statutory review, has also provided strong evidence to support the feminist case for the 2017 reform, based on a view of consent to engage in selling sex as being at best conditional. Based on her empirical study published in 2019 analysing the discourse of sex buyers on Irish and UK websites, Senent Julian found ‘evidence from the buyers themselves supporting the claims made by anti-prostitution researchers and survivors according to which it is a degrading and violent practice.’¹¹³⁰ She concluded that

Despite a deliberate, strategical co-optation of feminist terms, the aims and interests of the pro-prostitution lobby are intrinsically anti-feminist. .. its roots are firmly entrenched in socially and economically non-egalitarian, gendered conditions and, as our analysis revealed, it tells men they can buy a self-coerced, subservient role of women and potentially enact traditional gender roles without being effectively challenged.¹¹³¹

In a powerful polemic, Senent Julian argues that the massive international sex trade ‘does its job by spreading a discourse on prostitution based on a neoliberal co-optation of left-wing and feminist terms’.

This argument reflects the points made by Monica O’Connor, as outlined in previous chapters, in asserting the need to ‘ensure that we do not allow the language of sexual freedom, rights and diversity to be colonized by sex work academics in seeking to undermine those holding a position on the commodification of sex and sexuality.’¹¹³² O’Connor emphasises that ‘the right to sexual identity is premised upon the right to be the subject of one’s own sexuality, not the object of someone else’s, which is the basis of prostitution sex; being against prostitution is in fact a progressive struggle for a sexual ethic premised upon mutual, consensual and reciprocal sex between adults..’¹¹³³ Fundamentally, she thus concludes that ‘A core demand of feminism has always been women’s right to bodily autonomy and sexual integrity. It is difficult to sustain the sexual liberal argument that prostitution sex does not violate those rights when listening to the voices of women in prostitution and examining the evidence of immense harm they are subjected to...’¹¹³⁴

7.4 Potential Future Litigation

As yet, merely a few years after the coming into force of Part 4, there has been no court ruling on any definitional questions arising from its provisions. However, writing shortly after its enactment, Tom O’Malley suggested that ‘the unilateral prohibition on the purchase of sex may well be challenged on constitutional or human rights grounds.’¹¹³⁵ Were such a challenge to be taken, the Canadian judgment in *R v Anwar and Harvey*, referenced previously,

¹¹³⁰ Senent Julian, Rosa, ‘Tensions between feminist principles and the demand for prostitution in the neoliberal age: a critical analysis of sex buyers’ discourse’ (2019) 24(2) *RECERCA Magazine De Pensament I Anlisi* 109-128. <https://doi.org/10.6035/Recerca.2019.24.2.6>, at 123.

¹¹³¹ *Ibid* at 124.

¹¹³² O’Connor, Monica, *The Sex Economy*. Newcastle: Agenda Publishing, 2019, at 107-8.

¹¹³³ *Ibid* at 108.

¹¹³⁴ At 108.

¹¹³⁵ O’Malley, Tom, ‘The New Law on Sexual Offences’ (2017) 27(3) *Irish Criminal Law Journal* 78-89 at 88-9.

may offer certain insights as to its potential outcome, in emphasising the need to ensure a proportionate and evidence-based approach when legislating for the Nordic model.¹¹³⁶

In accordance with the approach taken in that case, the process whereby the law reform was introduced and the deliberations and recommendations of the Oireachtas Justice Committee as outlined earlier, would likely be of great significance to a court in considering any possible future Irish challenge. An evidence-based approach was clearly integral to the Committee process; indeed, the preponderance of strong submissions and evidence as to the vulnerability of the majority of women and girls in prostitution in Ireland, and the harms caused through prostitution, formed the basis for the Committee's core recommendation in 2013 that the purchase of sex should be criminalised.¹¹³⁷

Of significance also would be the correspondence between Minister Shatter and the Committee concerning hypothetical grounds for a legal or constitutional challenge to Nordic model laws, which ensued after the publication of the Committee's report. The Committee relied in this correspondence upon the Supreme Court judgment in *MD (a Minor) v. Ireland*.¹¹³⁸ In that case, the Court had upheld as constitutional the provision in section 5 of the Criminal Law (Sexual Offences) Act 2006 effectively granting girls an immunity from being convicted for the offence of engaging in a sexual act with a child under 17. A boy charged with this offence had challenged the provision as discriminatory on grounds of sex. However the provision was upheld by the Supreme Court, despite its apparently discriminatory effect, on the basis that the Oireachtas may deter activity it sees as harmful, even if the criminal burden falls on one party. In reaching its decision, the Court made very clear its view that in certain social policy issues the courts will defer to the Oireachtas.

The issue of prostitution is one such social policy issue. Where the Oireachtas had a clear evidence basis and acted proportionately in passing legislation in response to that, it may be concluded that the courts would be unlikely to strike down such legislation in this jurisdiction – a very different context to that in Canada.

One further issue arises from the Ontario judgment. At various points, McKay J emphasised his view that the impugned provisions 'actually make sex work more dangerous'; because they 'increase the risk of violence by preventing or restricting the way in which many effective safety measures can be implemented by sex workers'.¹¹³⁹ The risk that Nordic model laws might have this effect was also raised in the course of the correspondence between the Oireachtas Committee and the Justice Minister in Ireland,¹¹⁴⁰ when the Minister asked about '.. the Committee's views of the health issues .. relating to the introduction of the proposed Swedish model.'

The Committee responded to this comment by saying that, having considered all the evidence, they had concluded that

¹¹³⁶ Ontario Court of Justice, 21 February 2020.

¹¹³⁷ Joint Oireachtas Committee on Justice, Defence and Equality, *Review of Legislation on Prostitution* (Oireachtas Publications, 2013), at 1-2. See more detailed discussion of the Justice Committee's findings in part 1 of this article.

¹¹³⁸ [2012] IESC 10.

¹¹³⁹ Paras 213 and 209 of the judgment.

¹¹⁴⁰ See Shatter, Alan, *Letter to David Stanton TD*, 25 September 2013; D Stanton, *Letter of Response to Minister Shatter*, 6 November 2013; and, =Shatter, Alan, *Letter to David Stanton TD*, 1 December 2013. www.oireachtas.ie/parliament/media/committees/justice/archivejustice/Addendum-to-Prostitution-Report.pdf.

introducing legislation based on the Swedish approach would not pose any additional significant risks to health of those engaged in prostitution, or to their clients... [and that] the Irish experience shows that criminalisation of prostitution does not necessarily form a barrier to the provision of accessible health services for both sellers and buyers of sex.... if a Swedish approach were to be adopted here - namely the partial decriminalisation of prostitution (by decriminalising the sale of sex) – there is no evidence to suggest that this would pose any barrier to accessing health services for those engaged in prostitution.

Indeed, the Committee made clear that it had extensive evidence before it as to the harms associated with engaging in prostitution; and that on the basis of this evidence, it had taken the view that a policy seeking to reduce harm levels by tackling and diminishing levels of demand for prostitution would be a valid and proportionate approach. It may thus be anticipated that a ruling similar to that in *Anwar* would be unlikely in an Irish context, particularly given the view of the Supreme Court in *MD* as regards Oireachtas powers in legislating on social policy considerations.

But the question of how to legislate on prostitution has attracted such immense interest and controversy in both policy-making and academic settings that court decisions like that in *Anwar* will inevitably generate much commentary – particularly when there has been so little recent case law, with increased emphasis on statutory reform in different jurisdictions. Despite its limited practical impact, the Ontario case has been interpreted as striking a blow against Nordic model approaches. However, on careful reading, even if the court's findings are accepted, the judgment offers a clear way to 'save' such legislation by requiring that a proportionate and evidence-based approach be taken in formulating laws on this contentious topic.

7.5 Conclusions

While no litigation on the 2017 Irish provisions has been taken to date, and a fuller evaluation of their implementation through the statutory review process has yet to be concluded, it may already be seen that feminist debates on prostitution law have become so polarised that every assertion made about the impact of the 2017 law in Ireland is likely to be contested and some contradictory findings emerge from the empirical research conducted in the context of the statutory review. Yet it is important that any critique must take account of the national context for adoption of the Swedish approach. As McMenzie et al suggest in their examination of prostitution law in Northern Ireland,

while the Swedish model is often presented as being a coherent package 'made in Sweden', it has actually been transformed on its travels, adapted to local contexts and brought into wider assemblages when it 'lands'. So, in Northern Ireland, there are clear Swedish resonances in the [2015 Act] .. Yet there is a distinctive Northern Ireland 'flavour' to its take on the Swedish model that also incorporates influences from other parts of Ireland and the United Kingdom as well as wider ideas (such as those in radical feminism) whose geographical origins are difficult to pinpoint.¹¹⁴¹

There is a similarly distinctive national Irish 'flavour' to the 2017 law change. Not only did the passage of the Part 4 provisions take place at the same time as other feminist law reform campaigns around sex offence and domestic violence, but it also took place in a rapidly

¹¹⁴¹ McMenzie, L., Cook, I. and Laing, M., 'Criminological Policy Mobilities and Sex Work: Understanding the Movement of the 'Swedish Model' to Northern Ireland', (2019) *Brit. J. Criminol.* 59: 1199-1216, at 1212.

changing Irish society alongside key debates around the holding of what became the 2018 referendum on abortion. Many of the proposers and advocates for the new prostitution law were also heavily involved in those other feminist campaigns, and in their contributions on Part 4 they relied upon feminist equality-based arguments. In addition, broader concerns around social justice and workers' rights were also expressed by key supporters.

Throughout the lengthy parliamentary processes leading to the reform, the Minister and other legislators expressly referred to the bill's purpose in seeking to tackle exploitation of women, particularly migrant women, in situations where their apparent consent was compromised by the structural disadvantages they were experiencing. This provides support for the contention that the new Irish law is best seen as part of an international and national progressive feminist movement for change based on recognition of harm caused to women through prostitution and other gender regimes, rather than as the product of particular conservative or religious ideologies. Indeed, Kat Banyard has portrayed the Irish reform as a recent example of the way in which the growing feminist movement internationally to criminalise buyers of sex is having an impact on legal change.¹¹⁴²

Support for the same contention lies in the political reality that key champions of the reform, notably Senator Zappone and Minister Fitzgerald, had previously taken anti-clerical stances on women's rights and LGBT campaigns, in the context of constitutional referendums in 2015 on marriage equality and 2018 on abortion rights.¹¹⁴³ The NGOs signed up to the TORL campaign had long experience on intersectional human rights and feminist issues, with noteworthy support from the trade union movement.¹¹⁴⁴

The relevance of positions taken by individual political actors or different organisations on different policy issues may be questioned by advocates of the 'sexwork' approach who see the Nordic model as inherently conservative in denying women's moral agency.¹¹⁴⁵ But nonetheless, as Peter de Marneffe has argued, it is undoubtedly the case that a significant impetus for Nordic model laws in different jurisdictions derives broadly from a progressive 'left-leaning feminist' movement, which he contrasts with the more 'libertarian' perspective opposed to laws which limit individual liberty to reduce harm.¹¹⁴⁶ Sylvia Walby, whose work is also discussed in previous chapters, has similarly argued that feminist academic writings in favour of decriminalisation are best described as emerging from a 'neoliberal' turn in the academy; while such arguments are framed in terms of 'individual agency', she suggests that this masks the neoliberal gender regime based on exploitation which is the reality of commercialised sexuality.¹¹⁴⁷

As is argued in earlier chapters, the case for legalisation of prostitution is indeed most forcefully asserted from an explicitly neo-liberal belief-system, based upon support for what

¹¹⁴² Banyard, Kat, *Pimp State: Sex, Money and the Future of Equality*. London: Faber, 2016, at 230.

¹¹⁴³ Both were prominent in the 2015 marriage equality referendum campaign, unsuccessfully opposed by the Catholic Church, which resulted in legal recognition of the right of same-sex couples to marry; Katherine Zappone had previously asserted this right in a legal case taken against the State, in which this author acted as legal counsel: *Zappone & Gilligan v Revenue Commissioners* [2006] IEHC 404.

¹¹⁴⁴ The Irish Congress of Trade Unions (ICTU) and many individual unions all signed up to support the Nordic model prior to its introduction, 'Congress Supports Launch of "Turn Off the Red Light: End Prostitution in Ireland" Campaign' (2 February 2011) www.ictu.ie/equality/2011/02/02/congress-supports-launch-of-turn-off-the-red-light/.

¹¹⁴⁵ Sibley, Marcus, 'Owning Risk: Sex Worker Subjectivities and the Reimagining of Vulnerability and Victimhood' (2018) 58 *Brit. J. Criminol.* 1462

¹¹⁴⁶ De Marneffe, Peter, *Liberalism and Prostitution*. Oxford: Oxford University Press, 2010, at 155.

¹¹⁴⁷ Walby, *op cit*, 19-20.

may be described as a 'laissez-faire sex trade', as Marcus Sibley has written.¹¹⁴⁸ Just as the progressive label applied in the original Swedish context with the introduction of the Nordic model there in 1999, the contention that 'paternalistic' anti-prostitution laws may be justified from a progressive feminist perspective is borne out by the language used in the elite interviews conducted for the purpose of this thesis, and by much of the language used in the Oireachtas Committee report recommending the reform and in subsequent parliamentary debates. As discussed in the previous chapter, Minister Frances Fitzgerald and other legislators expressly referred throughout the legislative and policy-making process to a stated purpose of seeking to tackle exploitation, specifically exploitation of women.

By contrast, it is argued that the opposition to the 2017 law reform in Ireland has been most forcefully expressed by those asserting Sibley's 'sex worker subject as entrepreneurial in nature'.¹¹⁴⁹ While much political rhetoric opposing the reform has been expressed in terms of concern for the conditions within which those engaged in prostitution must sell sexual services, the core ideology underlying arguments against the reform is based upon what Sibley describes in the Canadian context as the 'ideological position that the state should have no, or very minimal, involvement in the regulation of sex workers...'¹¹⁵⁰

Thus, it is argued that de Marneffe's progressive/libertarian distinction, and Walby's characterisation of opposition to the Swedish approach as being rooted in neoliberal politics, are both apposite in an Irish context. While those proposing and advocating for the reform were cognisant of the gendered reality of prostitution, those against were much less likely to perceive the sex trade as a gendered regime (in Coy's terms). Those speaking for it were more likely to show an understanding of the coercive structures within which the sex trade is organised.

Indeed, what unites those arguing for legal prostitution is at its core an individualised understanding of consent and choice, divorced from its structural context. Many of the 'standpoint' arguments made in favour of legalising prostitution derive from a view that sex workers should essentially be free to trade in the marketplace; a classic liberal or libertarian perspective. Those who seek to tackle demand, by contrast, see the choices made and consents given by the majority of those engaged in prostitution within a broader context of profound inequalities based on gender, class and ethnicity. Within this context, as within a workplace hierarchy, consent may be compromised. Using O'Connor's notion of a continuum framework for conceptualising consent and an explicitly socialist strand of feminist theorising, communitarian and anti-individualist, it is argued that this understanding of consent is rooted in an appreciation of the importance of the social and economic structures within which individual choices are made. And it is this communitarian or contextualised understanding of consent which it is argued formed the basis for the approach taken by legislators in passing the 2017 provisions.

Thus, it is argued that the 2017 provisions may be justified as a valid and proportionate response by legislators to real evidence-based concerns and to social policy considerations around promoting gender equality. The new Irish law may be seen as a carefully considered evidence-based approach to legal reform, the culmination of a substantial process in which legislators and policy-makers engaged in extensive dialogue and debate on the merits of Nordic model reform proposals. In previous times, issues around defining laws on

¹¹⁴⁸ Sibley, Marcus, 'Owning Risk: Sex Worker Subjectivities and the Reimagining of Vulnerability and Victimhood' (2018) 58 Brit. J. Crim. 1462, discussing *Canada (Attorney General) v Bedford* [2013] 3 SCR 1101.

¹¹⁴⁹ At 1475.

¹¹⁵⁰ *Ibid*, at 1475.

prostitution were more usually seen as the preserve of the judiciary. But in recent years, responsibility for law-making has rightly been taken up by legislators. As the Supreme Court held in *MD*, ‘complex social issues .. are appropriately determined by the Oireachtas’.¹¹⁵¹ Prostitution is undoubtedly one such complex social issue.

It is thus more appropriate for legislators than for judges, in Ireland as elsewhere, to determine how best to address the complex social policy considerations involved in making laws applicable to those engaged in prostitution. Within this process, legislators are justified in turning the focus of the criminal law from the seller to the buyer of sex – a radical but proportionate change, long overdue to target proven widespread violence and exploitation in the sex trade.

Following from the outline of the law-making process in the previous chapter, the sensibilities and motivations of key legislators as identifiable from the transcripts of debates during the law-making process were examined, and it was argued that three prominent recurring themes emerge; namely, the conception of consent to sell sex as freely exercised choice (‘Consent as Free Choice’); of consent as conditional where prostitution was described as ‘work’, but not always freely chosen work (‘Conditional Consent: Prostitution as Work’); and of consent as capable of being coerced within structural power contexts (‘Consent in a Coercive Context’).

It was argued that the views expressed in favour of the 2017 reform, like the 1999 Swedish legislation, are best understood as being based upon a conception of consent as capable of being compromised by the existence of a coercive context; and that this understanding amounts to the recognition of prostitution as a practice of gender inequality incompatible with a gender equal society. While those opposed may argue that the reform has been ineffective in abolishing prostitution or in reducing or addressing any harms that it causes to those engaged in it, legislators are entitled to have regard to clear evidence of the harms caused through a tolerance or enabling of prostitution; and also entitled to adopt measures that, by tackling demand, are likely at least to have a reductive effect on those harms. And it is unarguable that the new law has ended the traditional double standard on prostitution, marking a significant shift from ‘public nuisance’ to ‘private exploitation’ in Irish legal and political discourse.

Finally, it is also argued that the growing influence in the late 2000s in Ireland of human rights and feminist discourses generally contributed to an emerging view among legislators that prostitution amounts to structural gendered exploitation; a ‘gender regime’ within which women’s consents and choices can be legally regarded as compromised. Indeed, it is argued that the 2017 law reform can be justified by reference to a feminist socialist theoretical framework based on this emerging understanding; that its introduction represents a strategic use of the law for social change towards greater gender equality in Ireland.

¹¹⁵¹ [2012] IESC 10 at para 54.

CHAPTER 8 - CONCLUSIONS

Throughout this thesis, the argument has been developed that a legal concept of ‘compromised consent’ can be a helpful framework in providing a feminist theoretical justification for the introduction of laws criminalising the purchase of sex – Nordic model laws.

This concept has been developed through several different strands of analysis.

First, it is supported by reference to the changed and changing understandings and definitions of consent in other legal settings deriving from feminist and victims’ rights groups campaigns around #MeToo, gender based violence and rape law reform.

Secondly, it is supported by recent developments in feminist legal theorising, specifically socialist, deconstructivist, intersectional and critical race theory, which again it is argued affirm the need for a more nuanced and contextualised understanding of consent within the sex trade.

Thirdly, it is supported by an analysis of the legislative process and parliamentary debates leading to the passage of Part 4 of the Criminal Law (Sexual Offences) Act 2017 in Ireland, which incorporated Nordic model laws in this jurisdiction.

In the first instance, the reconceptualisation of consent proposed within this thesis is derived from changed and changing understandings of consent in other established legal frameworks. Indeed, the law already recognises that ‘no means no’, but that a ‘yes’ can be conditional in certain coercive contexts. When existing and developing legal conceptions of consent within the contexts of rape law, domestic and gender-based violence are explored, it can be seen that an apparent consent to sex may not always be legally valid in criminal law; where the person who appears to consent is under-age or has been trafficked, for example. This insight applies in other legal settings too, notably in workplace sexual harassment cases where the legal framework is premised on the notion that an apparent consent can be compromised in circumstances where a power imbalance is exploited by the harasser.

Thus, as the #MeToo movement, victim-led and feminist campaigns on gender-based violence have established, consent may be compromised in a profoundly unequal setting. And as these new understandings about consent in the context of sex offence laws and gender based violence have emerged, and as statutory definitions have been developed and revised, the definition of consent in law has changed, just as ‘contemporary discourses of feminine and masculine sexuality’ are changing.¹¹⁵²

Now, it seems hopelessly outdated to believe that mere submission might equal consent; or that evidence of force should be required to vitiate consent. Our understanding of consent today has become more nuanced, more contextualised in most legal settings including those of domestic violence and workplace sexual harassment. We now understand that a person only consents to a sexual act, in the language of the Irish statutory definition, if she or he ‘freely and voluntarily agrees to engage in’ that act.¹¹⁵³

¹¹⁵² Lacey, Nicola, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*. Oxford: Hart, 1998, at 100.

¹¹⁵³ Criminal Law (Sexual Offences) Act 2017, section 48 (inserting a new section 9(1) into the Criminal Law (Rape) (Amendment) Act 1990).

It may be concluded therefore that understandings of consent in sex offence laws across different jurisdictions, now including Ireland, are increasingly reliant on insisting that ‘active steps’ be taken to ascertain if consent is present, in accordance with the ‘affirmative consent’ concept, or the principle underlying what Leahy describes as the ‘new communicative model of consent’.¹¹⁵⁴

This new and more victim-focused understanding of consent must then apply within the setting of prostituted sex. It is entirely consistent with the evolution of the legal concept of consent in a range of different settings to see consent given within the context of the sex trade as capable of being ‘compromised’ by that context.

It is argued that this conception of consent as capable of being legally compromised in different exploitative contexts must therefore be applied in considering the case of prostitution. Indeed, it is proposed that a conception of compromised consent, based upon the experiences of those marginalised and without power, should be central to academic and political discourse on the global sex trade.

In other words, where sex is bought and sold under conditions of structural gender inequality, it is submitted that the seller’s consent may best be understood as legally compromised, and that this understanding can justify the introduction of ‘Nordic model’ laws criminalising the purchase of sex.

Further, it is argued that this re-conceptualisation of consent as a legal concept may be justified specifically by reference to contemporary feminist theorising, which enables development of an evidence-based premise for the emergence of the legal concept of ‘compromised consent’ as supported by current socialist feminist criminological theorising and new critical race feminist analysis.

Socialist feminist theorising, in the words of James Messerschmidt, sees ‘power (in terms of gender and class) [as] central for understanding’ different criminalised behaviours.¹¹⁵⁵ Carole Pateman has applied this perspective to prostitution, ‘an integral part of patriarchal capitalism’ generating ‘an enormous global demand from men that women’s bodies be available for purchase, just like any other commodity in the market.’¹¹⁵⁶

Building on analysis by Pateman and others, Coy has outlined how powerful new socialist and critical race feminist analyses have highlighted prostitution as ‘an abusive element of white supremacist capitalist patriarchy, rooted in racism and colonization’.¹¹⁵⁷ Indeed, throughout this thesis, Maddy Coy’s conception of prostitution as constituting a ‘gender regime’ is relied upon, as is Monica O’Connor’s use of a continuum framework for conceptualising consent.¹¹⁵⁸

This growing scholarship has undoubtedly strengthened the intersectional aspects of radical and socialist feminist critiques of prostitution as exploitation. Recent feminist analyses have

¹¹⁵⁴ Leahy, 2019, *op cit*, at 18.

¹¹⁵⁵ Messerschmidt, James, *Masculinities and Crime*. Lanham, MD: Rowman and Littlefield, 1993, at 56.

¹¹⁵⁶ Pateman, Carole, ‘What’s Wrong with Prostitution?’ (1999) 27 *Women’s Studies Quarterly* 53-64, at 63.

¹¹⁵⁷ Coy, Maddy, Smiley, Cherry and Tyler, Meagan, ‘Challenging the “Prostitution Problem”: Dissenting Voices, Sex Buyers, and the Myth of Neutrality in Prostitution Research’ (2019)48 *Archives of Sexual Behaviour* 1931, at 1935.

¹¹⁵⁸ See Coy, Maddy, Coy, Maddy (ed), *Prostitution, Harm and Gender Inequality: Theory, Research and Policy*. Surrey: Ashgate, 2012, and O’Connor, Monica, *The Sex Economy*. Newcastle: Agenda Publishing, 2019.

explored the ‘big money’ and massive capitalist interests behind the global sex trade, and the organised crime network contexts within which it is carried out internationally; as Malina Bhattacharya writes, women in the sex trade are ‘caught in a vast network of a world-wide multi-billion dollar business...’.¹¹⁵⁹ This feminist scholarship, increasingly focused on the economics of the sex trade, has helped to generate evidence that prostitution amounts to intersectional exploitation on grounds of class and ethnicity; not just of women and girls by reference to their gender, but of the most disadvantaged women and girls in every society.

Applying this understanding then, Nordic model laws which seek to reduce demand by men for the purchase of sex from women may be justified in affording substantive recognition to the gendered and intersectional contexts and power structures within which consent is given. Such laws recognise prostitution as a form of structured private exploitation within which consent is compromised, in a context of gender and intersectional inequality. And they recognise the self-evident truth that consent which is bought is not consent which is ‘freely and voluntarily’ given.

Those who advocate for such laws thus see the choices made and consents given by most of those engaged in prostitution within a broader structural setting of profound inequalities based on gender, class and ethnicity. Within this context, as within a workplace hierarchy, consent may be compromised. The sex in this context is not wanted, desired or mutual sex – and may be the predicate for legal recourse.

By contrast, what unites those arguing for legalised prostitution is at its core an individualised understanding of consent and choice, divorced from its context. Many arguments made in favour of legalising prostitution derive from a view that sex workers should essentially be free to trade in the marketplace; a classic liberal or libertarian perspective. Such arguments fail to address the social and economic structures within which individual choices are made and consents given, with an emphasis upon prioritising individual agency over broader contexts; they rely upon an abstract and de-contextualised understanding of the meaning of ‘consent’ in law and in fact.

Indeed, the dominance of the ‘sex work’ argument within academic discourse has been attributed by Sylvia Walby and others to a marked shift towards a libertarian perspective in scholarship generally. Within this discourse, apologists for the vastly profitable global sex industry may be seen to use the language of feminism to mask a sinister form of control over women – control exerted by and in the interests of a particular form of neo-liberal capitalism.¹¹⁶⁰

For now, although the ‘sex work’ perspective remains dominant in academic discourse, it is clear that the view of prostitution as an inherently exploitative ‘gender regime’ within which consent is compromised has exerted greater influence than the ‘sex work’ approach, and has been more persuasive for civil society and policy-makers, in Ireland and in many other jurisdictions.

¹¹⁵⁹ Bhattacharya, Malina, ‘Neither ‘Free’ nor ‘Equal’ Work: a Marxist Feminist Perspective on Prostitution (2016) 1(1) *Indian Journal of Women and Social Change* 82-92, at 84.

¹¹⁶⁰ See for example Senent Julian, Rosa, ‘Tensions between feminist principles and the demand for prostitution in the neoliberal age: a critical analysis of sex buyers’ discourse’ (2019) 24(2) *Revista de Pensament i Anàlisi* 109-128.

Although critics like Ronald Weitzer suggest that such policy-makers are motivated by conservative or religious ideology,¹¹⁶¹ Peter De Marneffe argues that the more significant impetus for the introduction of Nordic model laws in different jurisdictions derives from progressive movements, just as it did in Sweden in 1999, from 'left-leaning feminists who see prostitution as a form of violence against women.. [and who] are not sexual traditionalists or religious conservatives.'¹¹⁶²

It is argued that this also holds true in an Irish context, borne out by the analysis of the legislative process and parliamentary debates leading to passage of Part 4 of the 2017 Act; along with analysis of other recent feminist law reform campaigns around domestic violence, rape and sexual harassment in Ireland. The 2017 Irish reform, like the original 1999 Swedish law, must be understood not only in a national setting, but also within an international context as representing the recognition of prostitution as gendered exploitation.

Its introduction followed an organised feminist and trade union-led campaign, which took place within a very particular national context, in a country moving from a conservative religious-dominated culture of secrecy and repression around sexuality towards a more equal society with a sexual culture informed by strong principles of mutuality. Prior to the introduction of the 2017 Act, and historically since before independence, Irish laws on prostitution had fitted within Coy's framework of a gender regime. These highly gendered prostitution laws were aimed at curbing the visible manifestation of the sale of sex, and applying Frug's analysis, they had contributed to the sexualisation, terrorisation and maternalisation of women.¹¹⁶³

The social movement that has taken place in Ireland over recent decades in liberalising attitudes to sexuality generally has informed recognition among feminist activists that the law can and should intervene to prevent harm, where choices are coerced and consent compromised through the exploitation of inequalities. Just as this recognition was present within campaigns around abortion law reform, so it is argued that it represented a motivating factor for those legislators and policy-makers most centrally involved in the passage of the 2017 Act.

Within this thesis, therefore, an Interpretive Policy Analysis was applied in seeking to explore the mind-set, beliefs and motivations of policy-makers in the bringing about of Part 4 of the 2017 Act, in order to uncover the meanings attached to the adoption of the particular policy on prostitution embodied in those provisions.

Three prominent recurring themes emerge through an examination of the sensibilities and views of key legislators as identifiable from the transcripts of debates during the law-making process; namely, themes of individualised agency and choice premised upon the conception of consent as freely exercised choice ('Consent as Free Choice'); of consent as conditional in a viewpoint that recognised prostitution as 'work', but not always freely chosen work ('Conditional Consent: Prostitution as Work'); and of consent as capable of being coerced within structural power contexts and in conditions of gendered and intersectional exploitation ('Consent in a Coercive Context').

¹¹⁶¹ Weitzer, Ronald, *Legalising Prostitution: From Illicit Vice to Lawful Business*. New York University Press, 2011.

¹¹⁶² De Marneffe, Peter, *Liberalism and Prostitution*. Oxford: Oxford University Press, 2010, at 155.

¹¹⁶³ Frug, Mary Joe, 'A Postmodern Feminist Legal Manifesto (an unfinished draft)' (1992) 105 *Harvard Law Review* 1045.

Through an identification and evaluation of these themes, and writing from an ‘insider’ perspective, it is argued that, in the mind-set of the key actors who steered through the 2017 Act, its meaning was based upon what is identifiably, in the words of De Marneffe, a ‘left-leaning feminist’ understanding of ‘consent’ as capable of being compromised by certain structural and gendered power contexts.¹¹⁶⁴

Drawing upon and informed by other feminist campaigns and legal frameworks addressing sexual harassment, sexual and domestic violence, the law reform can be characterised as being based upon this reconceptualisation of ‘compromised consent’.

This new and more victim-focused understanding of consent must then apply within the setting of prostituted sex. It is entirely consistent with the evolution of the legal concept of consent in a range of different settings to see consent given within the context of the sex trade as capable of being ‘compromised’ by that context.

Indeed, it is impossible to argue, even for the most ardent proponents for legalising ‘sex work’, that those persons who sell sex do so in a context of mutual desire. At best, they maintain a focus on consent as an expression of *individual* choice; thereby disregarding the intersectional gendered *collective* context within which prostitution takes place worldwide. Their version of ‘consent’, based on the notion that a ‘right’ to sell sex is an assertion of autonomy by women, if adopted in law would in reality undermine all the contemporary feminist discourse on consent in other settings.

If sex is not desired by a woman, if it is unwanted and unwelcome, even harmful; then why should the law presume that woman’s ‘consent’ within the context of the sex trade is legally valid? Such a presumption directly undermines and devalues the statutory formulae for consent and the principles of ‘affirmative consent’ that have been so hard-won by feminist activists.

In this thesis, it is therefore argued that a (re)conceptualisation of consent as capable of being compromised within certain settings can

- (a) be uncovered as a theme both from an overview of feminist campaigning and developing understandings of consent in other legal settings, and from an analysis of parliamentary debates and the law-making process leading to the introduction of Nordic model laws in Ireland; and
- (b) that this identified re-conceptualisation of consent can also be justified from an explicitly socialist strand of feminist theorising, communitarian and anti-individualist, rooted in an understanding of social and economic structural context as the framework within which individual choices are made.

Thus, it is argued that the 2017 prostitution law, like other recent changes to Irish laws on gender-based violence and sexual offences, notably the introduction of a statutory definition of consent, may be justified theoretically from a robust socialist feminist perspective. Through the introduction of Part 4, feminist activists and legislators have challenged the ‘gender regime’ previously represented by Irish laws and have recognised that apparent consent may be compromised in certain coercive contexts. In challenging intersectional gender exploitation, the new law represents a strategic feminist use of legislation for social change towards greater gender equality in Ireland.

¹¹⁶⁴ *Op Cit*, at 155.

APPENDIX

Documentation supporting Ethics Committee Application:

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1. Application Form, April/May 2018 (and see attached)

TRINITY COLLEGE DUBLIN
SCHOOL OF LAW
ETHICS APPROVAL APPLICATION

Researcher: Ivana Bacik

Supervisor: Professor Mary Rogan

1. Title of Project:

An Analysis of the Legislative Process behind Recent Prostitution Law Changes in Ireland

2. Purpose of project including academic rationale

This study is being undertaken by Ivana Bacik as doctoral research towards a PhD, supervised by Dr Mary Rogan, School of Law, Trinity College Dublin. The study is designed to examine how recent legislative debates on changes to Irish prostitution law reflect a particular construction of 'woman', gender and the 'prostitute' in Ireland. It will assess:

1. The factors which influenced and motivated key policy-makers and legislators in their contribution to the debates on legal change;
2. The underlying constructions of 'woman', gender and 'the prostitute' which are associated with these factors.

The policy-making and legislative processes culminating in the passage of the relevant prostitution-related provisions in the Criminal Law (Sexual Offences) Act 2017 will be examined, in order to examine how the law reform process has contributed to a particular construction of gender, in keeping with the postmodern legal analysis of prostitution adopted by Mary Joe Frug. While extensive academic literature on prostitution law and policy-making has been generated from other jurisdictions, this is an area that is understudied in Ireland. The purpose of this study is to inform public understanding of the motivation behind the policy change, and how it may reflect particular constructions of gender in society. It is envisaged that academic publications and presentations will arise from the research.

3. Brief description of methods and measurements to be used

The method utilised will be an interpretive policy analysis methodology framed by a feminist perspective, drawing on the method deployed by Harry Annison in his study on the process of introducing the indeterminate sentence of imprisonment for public protection (IPP) in England and Wales. His book, *Dangerous Politics: Risk, Vulnerability and Penal Policy*, draws on interviews with those involved in devising and operating the IPP sentence project, in order to trace 'the genesis, development, amendment and eventual abolition' of the sentence.¹¹⁶⁵ Annison's research includes insights gained from interviews conducted 'with senior ministers, officials, and other 'powerful' individuals', which he notes are generally termed 'elite interviews', drawing from Richards' description of elite interviewees as 'A group of individuals who hold, or have held, a privileged position in society and, as such, as far as a political scientist is concerned, are likely to have had more influence on political outcomes than general members of the public'.¹¹⁶⁶

¹¹⁶⁵ Annison, Harry, *Dangerous Politics: Risk, Vulnerability and Penal Policy*. Oxford University Press, 2015, at vii, xi.

¹¹⁶⁶ *Ibid*, at Appendix, 207; quoting from Richards, D. 'Elite Interviewing: Approaches and Pitfalls' (1996) 16 *Politics* 199-204, at 199.

In this study, following Annison's work, it is proposed to conduct four 'elite interviews' with key players engaged in the law reform process, including government Ministers and former Ministers. The proposed interviews will only form part of the research, which will also involve analysis of publicly available reports, publications, texts from Oireachtas Committee hearings and parliamentary debates. The interviews will be used to provide another layer of analysis to assist in understanding motivations of key players in the change process. A list of the topics to be covered in the interviews is provided by way of an appendix to this document.

4. Participants - recruitment methods, number, age, gender, exclusion/inclusion criteria, including statistical justification for numbers of participants

As stated above, it is intended to conduct four 'elite interviews' with key players engaged in the law reform process, including government Ministers and former Ministers (two women and two men). The relevant interviewees have been identified based on their central and leading role in the legislative change process, based upon matters on the public record and upon the researcher's own personal knowledge of the process.

Contact will be made with the interviewees by way of formal letter and follow-up emails and telephone communications. Interviews will be conducted at a venue of the interviewee's choice, likely to be their offices in each case. Interviews will be conducted on a one-to-one basis. In this context, the safety of the researcher and interviewee have been considered, and any health and safety issues arising are considered to be negligible.

5. Debriefing arrangements

Given the nature of the interviews, their subject matter (related only to the interviewees' professional roles) and the status of the interviewees, it is not anticipated that formal debriefing arrangements will be required. However, a Participant Information Sheet has been prepared (enclosed) and will be provided to each interviewee prior to their being asked to sign the Participant Consent Form (also enclosed); the researcher's personal contact details are included on the information sheet which will be left with the interviewee should any issues arise post-interview.

6. A clear concise statement of the ethical considerations raised by the project and how you intend to deal with them
 - A key ethical consideration relates to the status of the interviewer/researcher; this PhD is explicitly 'insider research', that is it constitutes research conducted by one of those individuals who was directly involved in the law reform process as an activist and legislator. There are other examples in Irish scholarship of 'insider' criminological research, for example the doctoral thesis exploring the practice of sentencing to community service among District Judges conducted by serving District Judge David Riordan; and specifically in the context of prostitution, the doctoral research conducted by leading law reform advocate and activist Monica O'Connor into the experiences of women in prostitution.¹¹⁶⁷ As a lifelong feminist

¹¹⁶⁷ See Riordan, David, *The Role of the Community Service Order and the Suspended Sentence in Ireland: a Judicial Perspective*. University College Dublin, Unpublished PhD Thesis, 2009, at <https://cora.ucc.ie/handle/10468/734>. See further O'Connor, Monica, *Consent, Agency and Harm: A Phenomenological Inquiry into the Experience of Women in Prostitution and Women Trafficked for Sexual Exploitation in Ireland*. Dublin City University, Unpublished PhD Thesis, 2014.

activist who, like O'Connor, has a long history in campaigning on reproductive rights and abortion law reform, this researcher shared her puzzlement at the divisions among feminists on the issue of prostitution, and this too was a motivational force in coming to undertake this research. However, the researcher acknowledges that ethical considerations arise, due to having worked closely with the relevant interviewees in the process of law reform; hence the thesis will include a specific declaration that this is 'insider research' and this will also be acknowledged directly with the interviewees at the commencement and conclusion of each interview. In addition, the researcher will be keeping a reflective journal throughout the process of the research in order to ensure a continued focus upon the issue of insider status. Throughout the process, the researcher will also engage in peer debriefing with the supervisor, and transcripts of the interviews will be shown to the supervisor for a second review to ensure again that a check is kept on this issue.

- A second ethical consideration concerns data storage. The researcher will be recording the interviews and will bring an audio recorder to the interviews for this purpose. The interview will be audio recorded and later transcribed by the researcher. Transcription services may be used if necessary, but they will be from Trinity College Dublin-preferred suppliers, bound by the usual academic regulations. Original recordings of the interview sessions will be stored securely and then destroyed following transcription, and the transcript and/or notes of interview will be stored on an encrypted computer in Trinity College Dublin Law School in a password-protected file for five years following the end of the project. The data will be kept in a locked cabinet in a locked office to which only the researcher and supervisor have access. Data will be destroyed immediately if so requested by the participant.
 - A final consideration concerns confidentiality of the responses provided during the interviews. The Participant Information Sheet explicitly states that the researcher would like to be able to attribute quotes to the interviewee, but only with their consent. If any of the interviewees are not happy to have any or any particular quotes attributed to them, their wishes will be respected. Participants/interviewees are also informed explicitly that they may withdraw from the study at any time.
7. Cite any relevant legislation relevant to the project with the method of compliance e.g. Data Protection Act etc.

Data storage, retention and disposal will be in accordance with regulations as set out by Trinity College Dublin and as required under the Data Protection Acts. In particular, original recordings of the interview sessions will be stored securely and then destroyed following transcription, and the transcript and/or notes of interview will be stored on an encrypted computer in Trinity College Dublin Law School in a password-protected file for five years following the end of the project. The data will be kept in a locked cabinet in a locked office to which only the researcher and supervisor have access. Data will be destroyed immediately if so requested by the participant.

8. Appendix – Themes/Topics to be covered in Interviews

Interviewees will be asked questions about the factors they think influenced and motivated key policy-makers and legislators like themselves in the debates on changes to Irish law on prostitution. In particular, the following topics will be covered in each interview:

- The interviewee's involvement in the law change process

- The interviewee's views on the proposed change to prostitution law in advance of the policy-making and legislative process and the influences that shaped or motivated these particular views
- The interviewee's views on the proposed change to prostitution law following conclusion of the process and the influences that shaped or motivated these particular views
- The information or messages that had most impact for the interviewee in shaping or motivating their views in the law change process

2. Ethics Committee Decision, June 2018

Faculty of Arts, Humanities and Social Sciences Research Ethics Committee Decision Project

Title: An Analysis of the Legislative Process behind Recent Prostitution Law Changes in Ireland

Name of Lead Researcher: Ivana Bacik

Name of Supervisor: Mary Rogan

Estimated start date of survey/research: June/July 2018

Date of Committee meeting: 5 June 2018

Committee: Directors of Research: Prof Jacob Erickson (Chair) Prof Ruth Barton Prof Ann Devitt Prof Daniel Geary Prof Agustín Bénétrix Prof Gloria Kirwan Secretary: Dr Nicole Volmering

Summary of Discussion and further clarifications: The Committee requests the following minor clarifications:

- The Committee raised concerns regarding the PI's ability to guarantee anonymity within such a small community. The Participant Consent form should adequately reflect the potential risk of identification.
- Participants should also be informed up to what point participants may withdraw from the study. This should be added to both the Participant Information Sheet and the Consent form.
- The PI's signature is missing from part A.

Decision: The applicant's research proposal is approved in principle provided that the above points are actioned and a revised application form is forwarded to the Committee.

3. Revised Ethics Application, July 2018 (see attached)

4. Participant Consent and Information Forms (revised), July 2018

**TRINITY COLLEGE DUBLIN
SCHOOL OF LAW
PARTICIPANT CONSENT FORM**

Researcher: Ivana Bacik

Supervisor: Professor Mary Rogan

Research Title: An Analysis of the Legislative Process behind Recent Prostitution Law
Changes in Ireland

If you consent to participate in this research, you consent to participating in an interview with the researcher present lasting approximately one hour. Your interview will be audio recorded and later transcribed. Original recordings of the interview session will be stored securely and then destroyed following transcription, however the transcript and/or notes of your interview will be stored on an encrypted computer in Trinity College Dublin Law School in a password-protected file for five years following the end of the project. The data will be kept in a locked cabinet in a locked office to which only the researcher and supervisor have access.

Participant Declaration

- I have read, or have had read to me, the briefing sheet for this project and I understand the contents. I have had the opportunity to ask questions and all of my questions have been answered to my satisfaction. I understand that quotes may be attributed to me, with my consent.
- I am over 18 years of age, competent to provide consent, and I freely volunteer to participate.
- I am aware of my ethical and legal rights as a participant and I understand that I may withdraw from the study at any time up to submission of the thesis.
- I agree that my data can be used for research purposes and I have no objection to the use of my data for academic publications and project dissemination activities.

Participant Name:

Participant Signature:

Date:

Statement of Researcher's Responsibility

I have explained the nature and purpose of this research study, the procedures to be undertaken and any risks that may be involved. I have offered to answer any questions and fully answered such questions. I believe that the participant understands my explanation and has freely given informed consent.

Researcher's Signature:

Date:

**TRINITY COLLEGE DUBLIN
SCHOOL OF LAW
INFORMATION FOR PARTICIPANT**

Researcher: Ivana Bacik

Supervisor: Professor Mary Rogan

Research Title: An Analysis of the Legislative Process behind Recent Prostitution Law
Changes in Ireland

BACKGROUND OF RESEARCH:

The study is designed to examine how recent legislative debates on changes to Irish prostitution law reflect a particular construction of ‘woman’, gender and the ‘prostitute’ in Ireland. It will assess:

1. The factors which influenced and motivated key policy-makers and legislators in their contribution to the debates on legal change;
2. The underlying constructions of ‘woman’, gender and ‘the prostitute’ in Ireland which are associated with these factors.

This study is being undertaken by Ivana Bacik as doctoral research towards a PhD, supervised by Dr Mary Rogan, School of Law, Trinity College Dublin.

PROCEDURES FOR THIS STUDY:

If you agree to participate, this will involve you taking part in an interview with the researcher. This will be at a place agreed between you and the researcher. The interview is expected to last no longer than 60 minutes.

You will be asked questions about the factors you think influenced and motivated key policy-makers and legislators like yourself in the debates on change to Irish law on prostitution.

I would like to record your interview on an audio file, but only with your consent. I would also like to be able to attribute quotes to you, but again only with your consent. You may withdraw from the study at any time up to the submission of the thesis.

If you consent to participate in this research, your interview will be audio recorded and later transcribed. Original recordings of the interview session will be stored securely and then destroyed following transcription, however the transcript and/or notes of your interview will be stored on an encrypted computer in Trinity College Dublin Law School in a password-protected file for five years following the end of the project. The data will be kept in a locked cabinet in a locked office to which only the researcher and supervisor have access.

What if I have further questions?

If you have any questions about this research please ask the researcher. Contact details below.

THANK YOU FOR READING THIS

Contact details for the researcher:

Ivana Bacik icbacik@tcd.ie Tel: +353 1 896 2299 Mobile: +353 86 813 3751

5. Interview Template, October 2018 (see attached)

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