

Submission to the Department of Justice's Review of Part 4 of the *Sexual Offences Act 2017*

Introduction

We welcome this opportunity to contribute to the Department's review of Part 4 of the *Sexual Offences Act 2017*. We are a diverse group of academics who bring our collective knowledge, experience and expertise to bear on the topic: we comprise lawyers, sociologists, criminologists, historians, economists, medics, nurses, psychologists, media studies scholars and more. Our perspectives, views and conclusions are based on our collective knowledge and understanding of the issue and the context.

The 2017 Act contained a package of measures aimed at tackling various forms of sexual violence. Many of these were progressive and marked a move towards a more equal Ireland. For example, the Act is renowned for creating the first statutory definition of consent to a sexual act.¹ Part 4 of the Act deals with the purchase of sexual services. In this submission we argue that there are a number of fundamental flaws with Part 4 that mean it should be repealed. The current law makes sex work more dangerous. It increases sex workers' vulnerability to sexual violence, assaults, coercion, and financial abuse, and makes it more difficult for them to seek protection from the gardaí and the courts for assaults committed against them.

We argue that the legal framework around sex work must be aimed at harm reduction. We argue that the laws and regulations relating to the sale and purchase and organisation of sex work should be repealed in order to achieve that objective.

Providing an effective policy and legal response is essential. While numbers are difficult to come by, Ugly Mugs indicate that 6-7,000 sex workers interact with their services annually across the whole island. Many sex workers may not be members of Ugly Mugs, so this is most likely an underestimate. The number of people affected by the legal and policy response is, therefore, not insignificant. As feminist lawyers we are deeply aware of the gendered nature of much sex work and its harmful effects on many women and girls. We are also aware that sex workers are not a homogenous group; men, boys, trans, queer and intersex people are sex workers; and that people have different reasons for engaging in sex work. Devising a singular policy response is very difficult. We argue that this review and the Department should engage in extensive sensitive engagement with sex workers in order to hear in more detail from them about how the law can better protect them.

Engaging with the issue of sex work is fraught with difficulties, intersecting as it does issues of public health, autonomy, individual safety, as well as some core questions concerning feminism. While we understand the intention of criminalising of the buyer was to signal the wrongfulness of sexual violence and exploitation of sex workers, we do not agree that it is actually making sex workers lives better. Rather we submit that it is actively creating a climate of risk and danger that harms sex workers' safety.

¹ Section 48, amending s9 of the *Criminal Law (Rape) (Amendment) Act 1990*.

A Harm Reduction Approach

At the centre of any state response to sex work should be a desire to reduce harm. Broadly speaking, there are two categories of harm involved:

Harm to sex workers: This is the primary category of harm. Sex workers are vulnerable to a number of types of victimisation, including sexual violence, assaults, coercion, exploitation and negative health impacts.

Harm to broader society: Equality: Sex work can contribute to a culture in which sexual violence, particularly that against women and girls, is normalised.

Public health: Sex work may contribute to the spread of sexually transmitted diseases.

Harm reduction was recognised by the Commission on the Future of Policing in Ireland as a core policing objective. Indeed, the Commission stated:

“The prevention of harm should be explicitly identified as a core objective of policing. Not only would this align with the reality of what police actually do every day, but it is linked to the broader policing objectives to keep the community safe, ensure order, reduce and detect crime, and vindicate the human rights of all. People in the categories listed above are all too often the victims of crime – sexual and physical abuse, trafficking, exploitation, fraud, stalking and harassment, hate crimes and so on. Identifying harm prevention as a specific core police objective will therefore help reduce crime, fear and victimisation.”²

This also aligns with the position adopted by the World Health Organisation.³ The current legal framework criminalises sex work. Criminalisation means that these harms are not reduced, but rather the risk of each of these is increased.

The Criminalisation of Sex Work in Ireland

The criminalisation of sex work has a long history in post-independence Ireland.⁴ The *Criminal Law (Amendment) Act 1935* made it an offence to keep a brothel (s.13) and loitering with the intent of prostitution (s.16). Following the decision of the Supreme Court in *King v. AG* [1981]⁵ which found the term ‘loitering’ to be so vague as to be unconstitutional, the numbers of prosecutions for prostitution fell from over 600 a year to zero.⁶ The *Criminal Law (Sexual Offences) Act 1993* addressed the gap in the law by creating a number of relevant offences, all of which targeted the seller of sex:

- s. 7: soliciting or importuning for the purposes of prostitution;⁷
- S.8: failing to move on, once asked by a garda who suspects a person is loitering for the purpose of prostitution;
- S.9: directing, organising, controlling prostitution;

² Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland* (2018) p. 13.

³ <https://www.who.int/gender/documents/sexworkers.pdf>

⁴ It was previously an offence under *the Criminal Law (Amendment) Act 1885*.

⁵ [1981] IR 233.

⁶ The *King* case concerned s4 of the Vagrancy Act 1824, as amended, but it was clear that the as it was clear that the. ruling also applied to s.16 of the 1935 Act.

⁷ This provision also criminalised the buyer of sex or anyone acting on behalf of the buyer or the seller.

- S.10: living on earnings of prostitution;
- S.11: brothel keeping. A brothel is simply defined as 2 or more people working together. This provision means that any two sex workers who work together for their safety are treated by the law as operating a brothel.

Thus, while the 1993 Act does not criminalise the selling of sex, it does criminalise all related activities such that it is not possible to work as a sex worker in Ireland without committing a criminal offence. This leaves sex workers in an extremely precarious and vulnerable position, whereby any attempt by them to seek help from gardaí or the State, risks them being brought within the net of the criminal process.

Part 4 of the Criminal Law (Sexual Offences) Act 2017

The 2017 Act criminalised the purchase of sex, with the stated aim of focusing criminalising efforts on the buyer of sex and protecting vulnerable persons. Introducing the Bill to the Oireachtas in October 2015, Minister Fitzgerald stated:

“First, let me be clear on what these provisions do. It will be an offence for a person to pay, offer or promise to pay a person for the purpose of engaging in sexual activity with a prostitute. The person providing the sexual service, the prostitute, will not be subject to an offence. The purpose of introducing these provisions is primarily to target the trafficking and sexual exploitation of persons through prostitution.”⁸

The Bill was thus presented to the Oireachtas as intending to criminalise the buyer, rather the seller of sex. However, the legislation did not repeal the offences created by the Criminal Law (Sexual Offences) 1993 Act described above. Soliciting, working together, living off the earnings, or engaging in surrounding activities are all still criminalised. The 2017 Act did not affect any of these offences. Rather, the Act increased the maximum sanctions applicable; for example, the Act raised the maximum penalty for a first offence under s8 (failure to move) from a low fine⁹ to 6 months imprisonment and a Class D fine.¹⁰

Not only did the 2017 Act strengthen the penal provisions applicable to sex workers, it also created additional risks of harm to their health and safety. Because a purchaser risks conviction under the 2017 Act, the purchaser may push the seller to engage in more risky behaviour. There is more at stake for the purchaser in engaging in this conduct. One study by Krüsi et al found that criminalisation of the purchaser forced women to work longer hours and it severely impact on their safety strategies.¹¹ They found women spent less time screening and negotiating with clients, were willing to engage in less safe sex (e.g. without condoms) and engaged in activities in less well lit, more isolated areas where there is a less accessible help.

The available evidence suggests that sex workers’ safety has been dramatically reduced. Between March 2015 and March 2017, 385 violent crimes were reported to Ugly Mugs. From March 2017 to March 2019, this had risen to 740, a very worrying level.¹² This would align with the view expressed by the World Health Organisation that “Law enforcement authorities

⁸ Criminal Law (Sexual Offences) Bill 2015 Seanad Second Stage Debate, Thursday 28 January 2016.

⁹ IR£250 in the 1993 Act.

¹⁰ S25(c) *Criminal Law (Sexual Offences) Act 2017*.

¹¹ Krüsi, Andrea, et al. "Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study." *BMJ open* 4.6 (2014): e005191.

¹² Ugly Mugs, “Crime has almost doubled in eth two years since the new law came in” available at <https://uglymugs.ie/wp-content/uploads/um-statement-26-mar-2019.pdf>

and laws governing prostitution have, in some cases, increased the risk of violence against sex workers rather than protected them against it.”¹³

Official statistics do not tell us how many sex workers have reported offences, or how many sex workers have been prosecuted for offences.

We know that the numbers of prostitution offences recorded has dramatically increased since the introduction of the Act

	2016	2017	2018	2019
Prostitution offences	34	39	37	112

(Source: www.cso.ie)

While the CSO does not provide breakdowns of which offences these relate to, media coverage would suggest that this increase is not solely due to prosecution of buyers: The Irish Examiner indicated in August 2019, that 14 files had been sent to the DPP that year (<https://www.irishexaminer.com/news/arid-30946966.html>)

This piece further compares the prosecuting of buyers and sellers and suggests more sellers were being prosecuted (<https://www.irishexaminer.com/news/arid-30920913.html>)

Indeed, reporting in early 2020 Geoffrey Shannon noted that just 4 individuals had been prosecuted for the purchase of sex.¹⁴

A further issue is the emerging evidence that in Ireland, this criminalisation of sex workers is gendered, and tends to be directed at female and queer, rather than male, sex workers. This is an issue explored by Ryan.¹⁵ This evidence would suggest that men, often because of how they engage in sex work, are less likely to be prosecuted.

Thus it is not clear that the law is achieving what it was intended to do: to criminalise the buyer of sex and protect sex workers from abuse and exploitation.

Policing and Harm Reduction

Under the current law the physical, housing and legal safety of sex workers is at risk.

Sex workers have stated that gardaí investigating crimes related to sex work have been retaining condoms found at the scene, as proof of sex work (see Policed in Ireland podcast, episode 2).¹⁶ This has incentivised clients to demand sex without condoms which has drastic consequences for the safety of the sex worker and for public health. Sex workers have also complained that gardaí have worked with landlords to facilitate the eviction of sex workers from tenancies. It is unclear why the gardaí would facilitate such evictions, and those evictions may well be the consequence of the status of sex work under Irish law.

Alternative Approaches

Protecting those who are vulnerable does not simply mean not prosecuting them. It requires further steps of providing them with the supports needed to live safer lives. This requires

¹³ <https://www.who.int/gender/documents/sexworkers.pdf>

¹⁴ <https://www.immigrantcouncil.ie/sites/default/files/2020-01/2020HLWGInterimReportSOA2017ByGeoffreyShannon.pdf>

¹⁵ Paul Ryan, *Male Sex Work in a Digital Age: Curated Lives* (2019) Palgrave.

¹⁶ <https://tortoiseshack.ie/policed-in-ireland-sex-work-ep-2/>

enabling the access of supports and services, reporting crimes committed to them. This is not practically possible while the law criminalises sex workers. They will not report these issue whilst they fear being criminalised.

However, criminalising the buyer has similar consequences: sex workers will not report to the police if this will drive away the buyer, their sole source of income and survival.

Alternative approaches can generate enhanced safety for the sex worker. Research supports this position. Published in the *British Journal of Criminology*, Armstrong has written of how, after full decriminalisation of both buyer and seller occurred in New Zealand:

- crimes against sex workers were more likely to be solved;
- perpetrators of such crimes received lengthier sentences;
- positive relationships between police and sex workers were achieved, enabling sex workers to report crimes and share information;
- eventually led to safer conditions for sex workers.¹⁷

In Liverpool attacks against sex workers were declared a 'hate crime' in 2006 by Merseyside Police and the impact has been hugely positive. Ellison and Smith have written about this.¹⁸

We acknowledge the intersection between this issue and that of human trafficking and exploitation. However, for all of the reasons outlined above we do not believe that the current laws enhance the safety of trafficked and exploited persons. Further, there is already a legislative framework under which those crimes can be prosecuted. If it is the case that this is not proving effective, it should be revised. The answer is not to conflate these two issues.

Concerns that the endorsement of sex work may contribute to a culture of commodification of women's bodies and thereby, rape culture, are legitimate. Indeed, some of us were initially attracted by the feminist ideals underpinning the Nordic Model. However, as feminists, we also know the importance of finding out how the law is experienced by those subjected to it, especially when we are talking about marginalised people operating in a highly gendered and racialised field. Theory and practice do not match on this occasion. We are convinced, from listening to and reading sex workers' accounts of their experiences, that the 2017 Act and how it is policed have not lead to greater protection of sex workers or greater equality of women and girls. Instead they have increased the threats faced by sex workers and increases their marginalisation. Criminalisation neither reduces the occurrence of sex work nor the danger that those involved in it face. Nor has it reduced the incidence of sexual violence in society.

The State's obligations to protect its subjects require an approach that prioritises the safety of sex workers, while supporting and facilitating their withdrawal from this industry. The current legal framework places sex workers at odds with the police and the criminal process and risks their health and their safety. Research clearly shows that the most effective way to enhance their safety is to improve their relationship with police and the criminal justice system.

Conclusion

We submit:

¹⁷ Armstrong, Lynzi. "From law enforcement to protection? Interactions between sex workers and police in a decriminalized street-based sex industry." *British Journal of Criminology* 57.3 (2017): 570-588.

¹⁸ Ellison, Graham, and Lucy Smith. "Hate crime legislation and violence against sex workers in Ireland: Lessons in policy and practice." *Critical Perspectives on Hate Crime*. Palgrave Macmillan, London, 2017. 179-207.

1. the 2017 Act continues to criminalise the selling of sex, contrary to the stated intention of the Minister;
2. rather than protecting sex workers and exploited persons, the criminalisation of the purchasing of sex has, in fact, placed sex workers at risk of greater harm;
3. this includes placing trafficked and exploited persons at greater risk. A legislative framework directed at trafficking and exploitation is the preferable avenue for combatting these crimes;
4. there is no evidence to suggest that criminalisation of sex work in Ireland has contributed to the reduction of harm against women and girls more broadly, nor has it reduced public health concerns;
5. the most effective way to achieve the prevention of harm is through decriminalisation of sex work, coupled with active state support of services that engage and assist sex workers;
6. this review should engage in further consultation with sex workers, in order to hear in more detail from them about how the law can better protect them;
7. the laws and regulations which criminalise the sale, purchase and organisation of sex work should be repealed as soon as possible.

Yours sincerely,

1. Dr Vicky Conway, Associate Professor, School of Law and Government, DCU.
2. Dr Sinéad Ring, Assistant Professor, Dept of Law, Maynooth University.
3. Dr Paolo Rivetti, Associate Professor, School of Law and Government, DCU.
4. Dr Ronan Condon, Assistant Professor, School of Law and Government, DCU.
5. Dr James Gallen, Assistant Professor, School of Law and Government, DCU.
6. Dr Orla Lynch, Senior Lecturer in Criminology and Asc. Dean of Graduates Studies at University College Cork.
7. Dr Danny Marks, Assistant Professor, School of Law and Government, DCU..
8. Prof Claire Hamilton, Department of Law, Maynooth University.
9. Judy Walsh, Head of Social Justice and Lecturer, UCD School of Social Policy, Social Work and Social Justice.
10. Dr Mary McAuliffe, Assistant Professor, UCD Gender Studies.
11. Dr Aurelie Siccard, Researcher, School of Law and Government, DCU.
12. Dr Lynsey Black, Assistant Professor School of Law, Maynooth University.
13. Dr David Gibson, Assistant Professor, School of Human Development, DCU.
14. Dr Kevin J Denny, Associate Professor, School of Economics & Geary Institute for Public Policy, University College Dublin.
15. Dr Katharina Swirak, Lecturer, School of Sociology and Philosophy, UCC.
16. Dr Grace Walsh, Whitaker Institute for Innovation and Societal Change, NUI, Galway.
17. Gearoidin McEvoy, doctoral student, School of Law and Government, DCU.
18. Dr Sinéad Kennedy, Department of English, Maynooth University.
19. Dr Jennifer Schweppe, Senior Lecturer in Law, University of Limerick.
20. Dr Deirdre McGowan Head of Law, Assistant Head of School of Languages, Technological University Dublin.
21. Moign Khawaja, PhD Candidate & Teaching Assistant, School of Law & Government Dublin City University (DCU)
22. Dr Stephanie Rains, Associate Professor, Dept of Media Studies, Maynooth University
23. Dr Eoin O'Malley, Associate Professor, School of Law and Government, DCU.
24. Prof Eilionóir Flynn, School of Law, NUI Galway.
25. Dr Cian Ó Concubhair, Assistant Professor, School of Law, Maynooth University.
26. Dr Ciara Bracken-Roche, Assistant Professor, Dept of Law, Maynooth University.
27. Dr Ian D. Marder, Lecturer in Criminology, Department of Law, Maynooth University.
28. Dr Sandra Duffy, Irish Centre for Human Rights, NUI Galway.

29. Claire McGettrick, PhD Candidate, UCD School of Sociology, Irish Research Council Government of Ireland Postgraduate Scholar.
30. Niamh Wade, IRC Postgraduate Scholar, Department of Law, Maynooth University.
31. TJ McIntyre, Associate Professor, Sutherland School of Law, UCD.
32. Hazel Larkin, Doctoral Student, School of History and Geography, DCU.
33. Prof PK Plunkett, Clinical Professor of Emergency Medicine, Trinity College Dublin.
34. Dr Caroline West, Lecturer, The Open College.
35. Dr Catherine Connolly, Postdoctoral Fellow, School of Law and Government, DCU.
36. Dr Kylie Jarrett, Associate Professor, Media Studies, Maynooth University.
37. Emma Burns, Doctoral Researcher, Centre for Disability Law & Policy, NUI Galway.
38. Dr Debbie Ging, Associate Professor, School of Communications, DCU.
39. Dr Paul Ryan, Assistant Professor, Department of Sociology, Maynooth University.
40. Dr Nicola Fox Hamilton, Psychology Lecturer, Institute of Art, Design and Technology, Dun Laoghaire.
41. Dr Thomas Strong, Lecturer, Department of Anthropology, Maynooth University.
42. Dr Arpita Chakraborty, IRC Enterprise Postdoctoral Fellow, DCU
43. Professor Tobias Lock, Department of Law, Maynooth University.
44. Dr Katherine O'Donnell, Associate Professor, School of Philosophy, UCD.
45. Dr Louise Crowley, Senior Lecturer, School of Law, UCC.
46. John P. Gilmore, Assistant Professor of Nursing, University College Dublin.
47. Hasret Cetinkaya, Doctoral Candidate, Irish Centre for Human Rights, NUI Galway.
48. Dr Michael Connolly, Joint Associate Professor of Clinical Nursing, UCD School of Nursing, Midwifery and Health Systems.
49. Dr Kate Frazer, UCD School of Nursing, Midwifery and Health Systems.
50. Dr Maria O'Brien, School of Communications, Dublin City University.
51. Dr Kathryn McGarry, Lecturer, Department of Applied Social Studies, Maynooth University.
52. Dr Laurence Cox, Associate Professor of Sociology, Maynooth University.
53. Doris Murphy, PhD candidate, Sociology and Women's Studies, UCC.
54. Dr Sindy Joyce, Sociologist.
55. Dr Edel Hughes, Assistant Professor, School of Law, NUI Galway.
56. Dr Anne Mulhall, Co-Director, UCD Centre for Gender, Feminisms & Sexualities.
57. Dr Kate Dawson, Postdoctoral Fellow, NUI Galway.
58. Dr James Fitzgerald, Assistant Professor, School of Law and Government, DCU.
59. Dr Erika Biagini, Assistant Professor, School of Law and Government, DCU.
60. Judith Finlay-McAlester, PhD candidate, Classics and Law, Trinity College Dublin.
61. Dr Tanya Lokot, Assistant Professor, School of Communications, DCU.
62. Dr Theresa O'Keefe, Department of Sociology and Criminology, UCC.
63. Dr Sheamus Sweeney, Independent Scholar.
64. Gerry Kennedy, BL, Associate Lecturer, Faculty of Law, Griffith College Dublin, Secretary of Dublin AIDS Alliance.
65. Dr Tanya Ní Mhuirthile, Assistant Professor, School of Law and Governance, DCU.
66. Dr Sara O'Sullivan, Associate Professor, UCD School of Sociology.
67. Caoimhe Kiernan, Senior Research Assistant, PhD candidate, Technological University Dublin.
68. Professor Linda Connolly, Professor of Sociology and Director, Maynooth University Social Sciences Institute.
69. Professor Nicholas Daly, School of English, Drama and Film, UCD.
70. Dr Adam McAuley, Assistant Professor, School of Law and Government, DCU
71. Dr Fiona Donson, Lecturer, School of Law and Director of the Centre for Criminal Justice and Human Right, University College Cork.
72. Dr. Sharae Deckard, Assistant Professor, School of English, Drama and Film Studies, UCD.
73. Hilary Darcy, independent scholar.
74. Professor Porscha Fermanis, School of English, Drama and Film, UCD.

75. Dr Eoin O'Mahony, independent scholar.
76. Dr Coleman A. Dennehy, Humanities Institute Research Associate, UCD.
77. Professor Maggie O'Neill, School of Sociology and Criminology, UCC.
78. Dr Avril Brandon, Lecturer/Assistant Professor in Criminology, Department of Law, Maynooth University.
79. Dr Diarmuid Griffin, Lecturer in Law, NUI Galway.
80. Professor Gary Murphy, School of Law and Government, DCU.