Written evidence submitted by The International Policing and Justice Institute

The International Policing and Justice Institute is a professional practice and research organ or the University of Derby, set up in November of 2015. It is home of the Gangmasters Licensing Authority and members have worked as part of Derby’s Anti-Trafficking Partnership, as well as working and researching internationally in the area of human trafficking. Its members include a range of law enforcement and legal sector experts. It is more broadly connected with civil society locally and internationally. It is politically independent and is not funded by any organisation which has a specific interest in the area of the consultation.

Prostitution and Consent to Sexual Acts

The Institute believes that the assumed legal fiction and public preconception that acceptance of payment for sexual services itself constitutes consent to sexual intercourse (or sexual activity) needs to be subject to explicit statutory clarification.

Sexual consent within prostitution still needs to be specific to the particular time of the act, needs to be continuing and related to the factors affecting the individual’s to consent and the mens rea of the defendant.

The fact a person takes money for sexual services or offers to have sex for money does not itself indicate true consent to a sexual act, nor does it give open consent to any and all sexual acts. Consent, whether or not involving a financial transaction, is a matter of fact, rather than being inferred from a transaction.

With the increasing use of “dating apps” which may or may not involve a transaction of agreement to rules, we can see a clear modern analogy, If A lists themselves on a sex site and agrees to meet a person for sex (subject to anonymity), does that mean that at the moment of the act commencing and at all times thereafter, consent is deemed to have been given? A’s consent is specific to the sexual act, not to the transaction that brought it about.

Payment for sexual services should be given evidential weight only as one of the circumstances surrounding the sexual act. Because a person works within the sex industry is no more evidence of consent to a specific sexual act than being married constitutes consent to a specific sex act within marriage.

Users of sexual services for payment should not be entitled to be free from investigations and prosecution for serious sexual offences and rape, merely by dint of the fact they have paid the person they have had sex with or a third party for sexual services. The fact that you pay a vulnerable person to pretend that they consent to rape or sexual abuse should not be seen as evidence of actual consent.

The effectiveness of s53A in protecting against exploitation in prostitution


“The offence under section 53A Sexual Offences Act (paying for the sexual services of a prostitute) is one which the police can decide whether to charge or to issue a caution. Although we remain
supportive of the intentions behind the introduction of this offence in the protection of those involved in prostitution from harm and exploitation, challenges remain in enforcing the offence. This is reflected in the low (and falling) numbers of offences."

Only 3 prosecutions were made under this offence in 2013-2014 and none the previous year. The offence is constructed in such a way as to limit its effectiveness in practice.

“53A Paying for sexual services of a prostitute subjected to force etc.
(1) A person (A) commits an offence if—
   (a) A makes or promises payment for the sexual services of a prostitute (B),
   (b) a third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and
   (c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

(2) The following are irrelevant—
   (a) where in the world the sexual services are to be provided and whether those services are provided,
   (b) whether A is, or ought to be, aware that C has engaged in exploitative conduct.

(3) C engages in exploitative conduct if—
   (a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or
   (b) C practises any form of deception.

(4) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale”

The section, in practice is subject to a police discretion whether to charge or caution. The evidential threshold in relation to the mens rea of A is actually relatively low (specifically with the inclusion of 2b). 2b) in effect creates a strict liability which probably would not sit comfortably with many lawyers or judges. If an element of guilt relates to circumstances which determine the actus reus of the crime of which the person may not be aware, then this would be perceived as being oppressive. Common practice in the UK justice system is therefore to “compensate” for such unfairness through other means – e.g. the exercise of discretion, de facto rigour in other areas of evidence.

We would therefore propose that the section is changed to remove ss2b) in the interests of the rule of law and human rights.
However, the definition of “exploitation” in 3) is narrow and fails to fit in with the reality of sexual exploitation. It has been taken from trafficking definitions and does not represent the reality of sexual exploitation. We propose the section should include:

- The offer of inducements of payment, drugs or benefits to third parties (including family)
- The exploitation of vulnerability, arising from age, disability, addiction, destitution

The circumstances and context of sexual service provision often make it obvious that workers in the industry are being exploited and through coercion, necessity, vulnerability or intoxication are not capable of truly forming consent, despite their ability to take payment.

An aggravated version of s53A, where the circumstances of where and how services are procured would make it obvious to a reasonable person that the sex worker may be subject to exploitation would be needed. This would remove the requirement of victims to give evidence because objective evidence, such as the conditions of sex workers, the nature of the transaction and forensic and investigative intelligence would enable prosecutions of users, who are benefiting from exploitation. An objective test, such as used in the context of hate crime, would enable prosecutions of those who willingly participate in the reality of the exploitative part of the sex industry.

**The Economics of Sexual Exploitation**

The Institute further proposes that civil restitution should be available to any person who can evidence that another has profited from them being exploited for the purposes of prostitution (within the broader definition of exploitation, above), regardless of whether the person who has so profited has been or may be convicted of a criminal offence.

The moneys recovered should be free of taxation, but where an order is made, the person so profiting should be liable for such taxes, and where relevant, other liabilities as a business/employer, including pension contribution, national insurance payments and minimum or living wage as may have been payable on their supposed earning. Such earnings should be recoverable notwithstanding the exploited individual may not be legally entitled to work in the UK.

We believe that HMRC and other enforcement agencies can assist in countering sexual exploitation and the economic and social impact it has on the economy.

**Conclusion**

Removing demand for exploited sex workers and putting the obligation on consumers of sexual services to exercise the same level of judgement as required of those engaging in sexual behaviour that is not transactional is logical and fair.

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