Written evidence submitted by Claire de Than

My submission concerns human rights law, in particular disability rights, and urges that a principled approach needs to be taken to the issue of whether sex work requires criminalisation in the UK at all.

The most relevant human rights guarantee for English law is the European Convention on Human Rights (ECHR). Under Article 8 of the Convention, as incorporated by the Human Rights Act 1998, everyone has the right to respect for their private life, family life, home and correspondence. The European Court of Human Rights has held that Article 8 protects sexual autonomy, confidentiality, dignity, forming and maintaining personal relationships and allowing them to develop normally; in Pretty v UK the Court stated that “Elements such as sexual life fall within the personal sphere protected by Article 8.... Article 8 also protects a right to personal development and the right to establish and develop relationships with other human beings and the outside world.” The rights protected go beyond sex lives, and include, essentially, a right for a person to have fun in their preferred ways, with others or alone, as long as they are not hurting others. These rights may only be limited by the State if the State has a legitimate aim such as preventing crime or upholding the rights of others, and if the measures taken are a proportionate response to a pressing social need. In ADT v UK and Dudgeon v UK the Court stated that there would need to be very strong reasons to justify regulating consensual sexual acts (and other intimate acts) carried out in private. Further, the State must take action to enable people to exercise their sexual autonomy rights, for example by passing laws or providing resources. Where existing legislation prevents a person from expressing themselves sexually, there may well be a violation of Article 8, as in X v UK.

So, it can now be said that there is an equal right for all adults to consensual sexual activity in private, including the right to choose what relationship their conduct has to reproduction, and whether it is linked to any relationship or intimacy.

Article 14 of the ECHR also bans discrimination on any unjustified ground in the enjoyment of the other Convention rights, but is not a particularly useful or well-used right yet. However, further developments are underway; advocacy for the sexual expression rights of disabled people has increased greatly in recent years. Another aspect of international law which is much more promising for disability rights in the future is the United Nations Convention on the Rights of Persons with Disabilities (the Disability Convention), which was ratified by the UK in June 2009. Under that Convention disabled people must be able to enjoy, on the same basis as others, the same rights as others. The Convention aims to ensure, protect and enable the human rights, dignity and freedom of disabled people. But it is not yet enforceable in the UK courts and has caused disagreement as to its impact on English law. However, the Government has to report to the UN regularly, guaranteeing that it is complying with the Convention’s requirements, and so at the very least it gives ammunition for pressing politicians to improve the law. Article 12 of the Disability Convention states that “that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life” and that States “shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” In other words, even when a person lacks mental capacity under the definitions used in the UK, they still have the same rights as everyone else, and are entitled to support to make decisions about their lives. Article 23 of the Disability Convention requires States to “take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others” and Article 24 protects health-related rights. But there is still work to be done by disability rights advocates: unfortunately, some States involved in the drafting process for the Disability Convention objected to the planned inclusion of a requirement that “persons with disabilities are not denied the equal opportunity to experience their
sexuality, have sexual and other intimate relationships, and experience parenthood”, and so there is no explicit reference to the right to sexual expression in the Disability Convention.

Other UN statements have recognized the sexual rights of disabled people with some powerful language: the United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities from 1993 are not legally binding and cannot be enforced in the UK but, again could be used effectively in disability rights advocacy. Rule 9 of the Standard Rules goes further than the Disability Convention, stating that “States should promote (persons with disabilities’) right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships......Persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood. Taking into account that persons with disabilities may experience difficulties in getting married and setting up a family, States should encourage the availability of appropriate counselling. Persons with disabilities must have the same access as others to family-planning methods, as well as to information in accessible form on the sexual functioning of their bodies....”

In the UK, the Equality Act 2010 imposes a duty on public authorities to promote equality for disabled people by treating them more favourably if necessary, and requires the making of reasonable adjustments for disabilities. This could be helpful in arguing that education, information or equipment is necessary for a person to be able to enjoy their right to sexual expression.

So, everyone has the right to sexual expression in private, alone or consensually with others, to have relationships if they choose, and of the type of their choosing. They also have the right to friendship, fun, and a social life. Disabled people have the right to be given education and information to support choices about the sexual expression they wish to have in their private lives, and the State must provide such information and support when it is needed for sexual expression. These are powerful rights which should only be restricted when it is necessary to do so, and any restrictions must be proportionate. However, sadly there is much still to be done before these rights are enjoyed equally in practice by all disabled people. I submit that some people with disabilities require support before they are able to enjoy their human right to intimate expression, and that criminalisation of sex work for either clients or sex workers would be an unjustifiable infringement of their rights. Some couples with physical disabilities require physical positioning by a third party before they are able to have sex and, due to the complexities of the current relevant criminal law, a sex worker or sexual surrogate is the best choice of person to provide such assistance. Other people with disabilities have limited opportunities for finding a partner and so rely on sex workers before they can have any sexual expression, as organisations such as the Sexual Health and Disability Alliance, of which I am Vice Chair, can testify. Criminalising such people or those who help them would be a huge step backwards for equality law. Decriminalising brothels run as cooperatives of sex workers, and legitimising sexual surrogacy in the UK, would be major improvements for both the safety of sex workers and for people whose disabilities inhibit sexual expression. The criminal law on sex work is a mess and requires a radical overhaul in order to make it compliant with human rights, regardless of whether they are British rights, ECHR rights, or UN rights. However that overhaul should be towards minimum criminalisation, not shifting of criminal liability to clients or creation of new crimes.

Finally, I wish to urge a principled approach to discussions about criminalisation. Paul Roberts has argued in ‘The Philosophical Foundations of Consent in the Criminal Law’ (1997) 17 OJLS 389 that In order to determine whether a particular form of conduct should be criminalized it is always necessary to pose two quite separate questions:

(1) Is there a good (moral) reason to justify extending the criminal law to this particular conduct?
(2) Should this conduct be criminalized all things considered (with particular reference to other moral principles and the pragmatics of law enforcement)?

I have argued elsewhere that a third stage needs to be added:

(3) if the answer to each of the first two is affirmative: How should this conduct be criminalised, all things considered?

My view is that there is no good reason to criminalise consensual sexual behaviour in private between consenting adults who understand the nature of what they are doing and its potential risks, if any, for them. Criminal law should show respect for sexual autonomy and difference. This is supported by human rights case law, as discussed above. People are allowed to choose for themselves the risks which they wish to run in their private lives, even if they appear to be making unwise decisions; see *Ivison v UK* and the Mental Capacity Act 2005. There may be good reasons for criminalising sexual behaviour in public, but not in any form which risks direct or indirect discrimination against people with disabilities, nor which risks the safety of sex workers.

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