Written evidence submitted by
Harriet Wistrich, Birnberg Peirce and Partners, solicitors

Executive summary

1. These submissions focus on a discrete issue concerned with the
criminalisation of prostitution which we consider is capable of reform
(some general comments are made at the conclusion as to other
aspects of the inquiry’s terms of reference).
2. It is submitted that the retention and disclosure of convictions arising
from being a prostitute are potentially unlawful and a huge barrier to
women who wish to exit from what is essentially an abusive trade.
3. In particular the retention and disclosure of criminal convictions impact
on the ability of such women to find suitable employment and it also
impacts on their ability engage in family life.
4. We ask the committee to consider legal reform to remedy this problem.
5. We advocate, therefore, the decriminalisation of prostituted women, but
not the decriminalisation of those who benefit from the exploitation of
women who are prostituted (such as pimps and brothel owners).

The authors

6. These submissions are made by Harriet Wistrich, a solicitor of twenty
years experience employed by Birnberg Peirce and Partners. She
specialises in civil rights issues and in particular holding the state to
account around issues of violence against women. She has, for
example acted for women who brought a successful claim establishing
the precedent that the police have a duty to effectively investigate rape.
She has also acted for eight women who were deceived into long term
intimate sexual relationships with undercover police officers and
provided evidence in respect of that issue to the Home Affairs Select
Committee, three years ago. She is currently advising a number of
former prostituted women in a proposed legal challenge regarding the
specific issue of the retention and disclosure of criminal records
relating to prostitution. The issues raised in these cases are pertinent to the terms of reference of this Inquiry. The views expressed are those of the author rather than specifically made on behalf of the firm. The contents of Appendix 2 which provides a detailed legal analysis of the law has been drafted by Karon Monaghan QC of Matrix Chambers.

Relevant Factual information

7. In Appendix 1 of these submissions, we set out three anonymised case studies which are typical of a wider group of women who have not as yet provided consent to share details of their stories. However it is estimated that there are thousands of mainly, but not exclusively, women who share similar experiences. The three women whose case studies are included are potentially willing to give evidence to the Inquiry alongside their legal adviser/s.

8. In summary, these three were born in the late 1960s and early 1970s and raised in different cities in England. Their experiences may be reminiscent of those of the modern day victims of child sexual exploitation and grooming. (The HASC has recently inquired into this issue). Each woman had a difficult family background which led to them running away from home and/or being placed in care. Each was targeted by pimps who initially befriended them but then groomed them for prostitution. Each of them were made to work on the streets and in brothels in their home towns and they were trafficked around the country. Each was subjected to violence and abuse from their pimps and sometimes their punters. Each, as a consequence of being prostituted has an extremely long list of criminal convictions, primarily for soliciting and loitering and related offences. Each had great difficulty exiting prostitution, not least because they were unable to obtain alternative employment and, as a consequence, continued working as a prostitute even when not under the direct control of a pimp. Each has now exited from prostitution but still find, sometimes many years later, that their lives are greatly impacted as a
consequence of the retention and disclosure of criminal records. Each has been enabled to exit from prostitution with the support of specialist women’s services with an understanding of the abusive nature of prostitution.

9. Incidentally, despite offences for soliciting not being categorised as sexual offences, each woman has been separately told that offences for soliciting and loitering are “sexual offences” and this will therefore prohibit them from working in certain caring professions and/or participating in their children’s school activities. It is in fact not correct that such offences are categorized as sexual offences, they are not. Although, because they have multiple convictions they are discloseable in enhanced record checks. However, the widely held belief that such offences are sexual offences, is deeply stigmatising and further inhibits women who have exited prostitution from participating fully in society.

10. As a matter of law, if anyone wishes to apply for a job or participate in certain voluntary activities involving children and vulnerable adults, they are required to obtain an enhanced criminal records check. Although, the presence of criminal convictions for prostitution is not a necessarily a bar to such employment or activity, the existence of those records will be disclosed and may require an explanation. Interestingly two of the women have described how when they received their enhanced criminal record check in the post, they took to their bed and experienced a profound degree of distress and shock. Each of the women have asked why they are required to explain what they see as evidence of their abuse to an employer or school teacher.

11. As will be seen from the case studies, women who have engaged in prostitution over a period of years, invariably have acquired scores if not hundreds of convictions for soliciting and loitering. Interestingly, despite the repeat nature of these ‘offences’, the punishment, which is invariably a small fine, does not become more severe. What becomes clear is that the criminal law has been used essentially to deal with
what is seen as a public nuisance, namely to clean up the streets. Sometimes women are arrested several times over the course of a weekend, when a particular clean up operation is in progress. If this is the purpose of the law against soliciting, it is difficult to understand, why these criminal convictions should become disclosable, in some cases decades after the convictions were acquired.

**Legal context**

12. It is submitted that the retention and disclosure of criminal records for prostitution related offences of those that have been prostituted, as distinct from those that have profited from the sale of sex, is unlawful and in urgent need of legislative reform. Appendix 2 sets out an analysis of the legal context and argument as to why the retention and disclosure of these convictions is arguably in unlawful.

13. In summary women who have engaged in prostitution are likely to have multiple convictions (usually for soliciting). Many women who have engaged in prostitution, like the three women in the case studies at Appendix 1, will meet the definition of victims of trafficking (as most recently set out in Section 2 of the Modern Slavery Act 2015).

14. For a variety of jobs and volunteer activities, especially jobs and activities involving working with children and vulnerable adults, these convictions are disclosable (and will be disclosed pursuant to the statutory arrangements described in Appendix 2). There is no time limit after which such convictions become ‘spent’ for these purposes.

15. The disclosure provisions are likely to violate Articles 8 (“private life”) and 14 (“non-discrimination”) of the Convention (Scheduled to the Human Rights Act 1998).

16. Where the convictions concerned arise out of being trafficked into prostitution, the fact of them, their retention and disclosure will violate a
number of anti-trafficking instruments, including Article 4 of the Convention.

**Comments on other questions raised in the Inquiry’s terms of reference**

17. We believe that the experiences of the women whose case studies are provided in Appendix 1 are typical of the majority of women who have engaged in prostitution. We consider, therefore, that prostitution is largely an extremely abusive and dangerous trade and the government should make every effort to tackle the abuse, prevent the growth of this industry and assist women exiting from prostitution. Legalisation or decriminalisation of all aspects of prostitution would almost certainly lead to a growth in demand and supply and therefore to an increase in the numbers of those exploited within it. We believe that an appropriate version of the Nordic Model which criminalises the buyers and exploiters of prostitutes and decriminalises those who are prostituted is the proper way to address the problem of prostitution.
APPENDIX 1

A

A was born in 1973, and raised in Leeds. Her mother suffered from mental illness and her father sexually abused her. As a consequence of a dysfunctional family life, A started running away from home and was taken into care when aged 12. She was raped by two boys and although she reported it, nothing was done. Men in their 20s used to hang around outside the children's home in their cars, playing music and offering cigarettes to the girls. They were pimps who groomed the vulnerable girls in the home, offering them presents and protection against other men.

A was targeted by a pimp in his late 20s who had sex with her when she was 14 and started calling himself her boyfriend, wining and dining her, buying her clothes presents. After about 3 months he started making her have sex with his friends to "repay" him and then sent her on to the street to work as a prostitute. She kept being picked up by the police so as a consequence her pimp moved her to London where she was locked in with other girls and made to sell sex. Her pimp was violent towards her and threatened more violence if she ran away. A customer called the police at her request and she was rescued and returned to a secure children's home in Leeds.

She kept running away to her pimp who, she believed, loved her despite his violence and exploitation of her. Eventually she disclosed information about her violent pimp to a care worker and this was reported to the police but they said, "they needed statements from three working girls" to pursue a prosecution.

She was filmed for a pornographic video which came to the attention of the police. She was arrested in relation to it although the matter was not pursued further.

She started being picked up for soliciting and cautioned by the police. She appeared at juvenile court on a few occasions. At 16, A ran away to Bradford and met a man who soon became her pimp. She became pregnant and had her first child at 16. The child was eventually removed from her and placed in foster care and subsequently adopted. A continued to be pimped, she was placed under a care order until she was 18. She then got together with another pimp, who encouraged her to take heroin. She became addicted and remained in prostitution during her twenties. Some of her customers were police officers. She became pregnant again
and tried to come off heroin. But her child was removed and she went back onto heroin. Eventually, in 1998, A started a rehabilitation programme and became stable on methadone. She gave birth to another child in 2001.

A was not confident to look for other jobs but she found through the projects that supported her that she could use talking about her experiences of abuse as a way into work. She started using her experiences and got some paid work speaking with students studying social work, in particular at Leeds University where she would teach them how to learn the signs of victims of sexual abuse and grooming. She also visited New Hall prison to raise awareness on these issues with young offenders. However, she was informed that any CRB check (as it was then) would have resulted in the disclosure of her soliciting offences which, she was told, were regarded as sexual offences. When more stringent regulations in respect of CRB/DBS checks came into place, she was told she could no longer go to New Hall prison to speak to young offenders.

A was told that the new regulations relating to DBS checks meant that adults attending school premises needed to have a criminal records check and as these convictions are disclosed as sexual offences, she would no longer be allowed on school grounds unless she is escorted by a teacher. This has affected her ability to discuss her son’s education and, as he suffers from a number of health conditions, this has caused real difficulties for them both.

A has considered other employment also, but was informed by the Job Centre that due to her convictions she could not obtain any jobs where a criminal records check needed to be conducted. Eventually, A felt that she had to stop applying for jobs because she was frightened that she would be interviewed and did not want to discuss her past.

A has 64 convictions of which 57 are for prostitution. The other offences are directly related to her experience of being prostituted.

B

B was born in Bradford in 1968. She started to run away from home at about age 14. This was as a result of a history of child sexual abuse and being bullied at school. At the age 15 she ran away from home, and met an older man who initially treated her as his girlfriend. She stayed at a flat rented by him. He started pimping her out
initially to men at the local baths. If she refused to comply he would become violent. He took her to London and then back to Brighton. He made her sell sex on the streets or arranged for punters to come to the flat. Later he put her in a brothel in Leeds. Another pimp moved in posing as a knight in shining armour rescuing her from the first pimp. But he too was violent. She was arrested for soliciting and attended juvenile court. At age 17 she was sent to a residential home. But she was soon back on the streets getting convictions for soliciting and loitering, with no-one intervening.

When aged 21, she escaped to stay with a friend. She applied for a college course in childcare, passed the access course, and did a placement at a local primary school in Shipley. However, when the school received her CRB check she was told that with that sort of criminal record it wasn't an appropriate environment for her to be in and she was frog-marched off premises.

Her pimp found her and beat her up so badly she was hospitalised. She went to a women's refuge. Then moved back to Bradford. As B felt she had no opportunity to obtain a proper job, she was persuaded by an associate to commit a credit card theft. She was caught and sent to prison. This is the only conviction she has for an offence that is not directly connected to prostitution.

She remained in prostitution for a further few years, feeling she had no other way of earning a living. She worked in brothels all over the country. However, in the 1990s a female relative was murdered in her own home, she was 17. At age 14 she had been groomed and introduced to heroin. She was working as a prostitute, and a punter murdered her. When B heard about her death she contacted her family (from whom she had been estranged) and they told her she should come home. After that she became pregnant with her son and raising him and connected with women's groups campaigning against male violence gave her strength to get away from her previous life.

However, even after 20 years she finds having a criminal record still greatly impedes her ability to find suitable employment and fully integrate into society. She considered work in the social care/social work field as she felt she would have a lot of understanding and compassion and could give something back. Twice she applied to do a social work degree, at Huddersfield University and Bradford, but was put off when she told them about her criminal convictions and they told her not to bother.
because “a prostitution offence doesn’t come under Rehabilitation of Offenders Act.” They told her they’re under the umbrella of sexual offences. They said there’s no point because she wouldn’t even be able to get a placement.

She spoke out publicly about the harms of prostitution others affected avoid it or exit sooner. She got offered a job with a women’s project in London helping women exit from prostitution.

She returned to Bradford and obtained some employment with a sexual health project based in the community that she was brought up in. After 5 years she was made redundant. After being made redundant, the youth workers in the community were worried that her work in this area would be lost and proposed that Bradford Youth Service (the local authority) could, fund her work. She had to disclose her convictions on the application form. When her DBS record came back she felt absolutely humiliated. She was told she had to meet with the managers and explain the DBS. She had to explain her life story to two men, even though the last conviction was 30 years ago. She felt that she was essentially having to explain how she was abused to two strangers. It was humiliating.

Every time she has had to apply for a DBS she becomes traumatised when it is delivered and takes to her bed. Often she avoids applying for jobs as she can’t face having to disclose this information.

She considers that she is discriminated against in the job market and is effectively only able to work with people who know of her campaigning and work around the issue of prostitution.

She is also affected in other areas. For instance she wanted to be on PTA at her son’s school and had to explain her criminal records to head teacher. It was humiliating.

B has 49 prostitution offences on her record and one conviction for non prostitution related offences linked to her experience of prostitution and inability to exit.

C

C grew up in a city in the Midlands and was subjected to family violence and abuse. She started to run away from home. At the age of 14 and a half, she was living with
a woman on a nearby street in the red light area. This woman was involved in prostitution. C would look after her child in return for free board and lodgings. She had a violent and abusive pimp and moved in circles of prostitution and pimping. After some time, C was also made to work on the streets. Over the next 16 years, C was involved in prostitution, always on the street and always with one pimp or another some in the guise of boyfriends and some of them older, notoriously violent and criminally involved. She was trafficked around different localities across UK for prostitution by the pimp(s)/partner(s)

C was arrested on numerous occasions, her first conviction was in March 1988 when she was 15 and her last was in October 2002. She has 97 convictions mainly for soliciting and loitering under Street Offences Act 1959. Some relate to shoplifting and robbery. These came about as a result of duress from pimps who pressurised her to make money at times when police operations prevented her from working on the streets.

Between the ages of 25 and 30, C gradually began to work towards exiting prostitution, with the help of a supportive project.

C eventually found work with Eaves, a charity working on all forms of violence against women and girls which was in the process of setting up the Poppy project for victims of trafficking. She describes this job as a life-saver. After this, she found work with an organisation working with ex-offenders. Later she found work with another women’s charity working specifically around issues of prostitution.

Although C has managed to obtain work in these organisations, she had also applied for several other public sector jobs well within her capacities but in each case had got nowhere and never received any constructive feedback and in one knew she had been passed over for someone younger, less experienced, whom she herself had trained up. She had applied to learning trust, office administration, housing, teaching assistant, support worker jobs, bus driver, homelessness projects etc. She had also prepared a long letter to include explaining her criminal record though she does not feel she should have to do so.

C was encouraged to attend a course by her project support worker and did so, she did well at it and wished to go on to university and do a social work or related course. She was informed that she would never be able to go to university because of her
criminal record for “sexual offences”. This was a major knock back for her. She has repeatedly heard her records described as sexual offences and been told that they will never be spent.

She finds receiving her DBS reports hugely debilitating and experiences it as incredibly unfair and crippling. It makes her “just want to go to bed and hide”. Since exiting prostitution, she has had no other offence or penalty or problem with the law at all. Indeed, as she describes it, she has to be extra scrupulous all the time both to overcome people’s assumptions about her, to prove herself and because the slightest slip could bring all this tumbling down on her head. She feels she is still being punished for her past and always will be and yet she was never a risk to anyone but herself. She describes always having self-doubt and being afraid of being caught out or knocked back.

C wanted to be a school governor at her children’s school but did not dare even put herself forward for the role as she knew this would bring up her DBS.
Appendix 2: Legal analysis

(a) Loitering/soliciting
1. “Loitering or soliciting” for the purposes of prostitution is criminalised by section 1, Street Offences Act 1959 (as amended by the Policing and Crime Act 2009, section 16). Offences under section 1, Street Offences Act 1959 are recordable (see, National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule).

2. Section 1 of the 1959 Act provides that “it shall be an offence for a person aged 18 or over (whether male or female) persistently to loiter or solicit in a street or public place for the purpose of prostitution”. The requirement that any “loitering” or “soliciting” be “persistent” arises out of an amendment made by the Policing and Crime Act 2009 (in force from 2010). Conduct is “persistent” if it takes place on two or more occasions in any period of three months (section 1(4), 1959 Act). Prior to 2010 the offence was committed without any requirement for “persistence”. A court’s sentencing powers in respect of this offence are limited. On summary conviction a fine may not exceed level 2 on the standard scale or for an offence committed after a previous conviction, to a fine of an amount not exceeding level 3 on that scale (section 1(2), 1959 Act).\(^1\) Sentencing for this offence is generally lenient. However, there is a significant penalty attached by reason of the continuing retention of the information pertaining to the convictions and the impact they have on future employment opportunities.

(b) Rehabilitation of Offenders Act
3. The Rehabilitation of Offenders Act 1974 provides that after a period of time, the criminal convictions of a person are in most cases “spent”. Once a conviction has become “spent”, the person concerned becomes a “rehabilitated person” and, subject to exemptions, is not obliged to disclose that conviction in response to a question by, for example, a prospective employer, and a prospective employer is not entitled to make a decision prejudicial to that “rehabilitated person” by reference to that “spent” conviction or to any failure to disclose it (Sections 1 and 4, 1974 Act).

\(^1\) The “standard scale of fines” is prescribed by section 37, Criminal Justice Act 1982 and level 2 is £500 and level 3, £1,000.
4. In the case of conditional discharges the “rehabilitation period” (at the end of which the conviction becomes “spent”) is one year from the date of conviction or at the end of the period during which the conditional discharge has effect. In the case of an absolute discharge, the rehabilitation period is 6 months. In the case of a sentence of imprisonment for a term not exceeding 6 months, the period is 7 years. Otherwise, the rehabilitation period is 5 years (and that would include convictions resulting in the imposition of a fine).

(c) The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975

5. As can be seen from above, ordinarily a woman is not required to declare any spent convictions (for soliciting or otherwise) when applying for a job and an employer cannot treat her adversely in consequence of any such conviction. However, very importantly, the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, SI 1975/1023 creates exemptions from the protections contained in the Rehabilitation of Offenders Act 1974.

6. The Order is complex but in essence the protection in section 4(2) and paragraph 3(3) of Schedule 2 of the 1974 Act does not apply to certain occupations, where the person questioned is informed at the time the question is asked that, by virtue of the Order, spent convictions are to be disclosed. Those occupations are wide and varied but include those where care services are to be provided to vulnerable adults, work in children’s home, some child minding roles, amongst many others (Article 3 read with Schedule 1).

7. Exceptions to these exemptions are provided for in the Order in the case of “protected convictions.” A “protected conviction” must not be a (i) a “listed offence”; (ii) one where a custodial sentence was imposed in respect of the

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2 “(3) Where a question seeking information with respect to a person's previous cautions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority— (a) the question shall be treated as not relating to spent cautions or to any ancillary circumstances, and the answer may be framed accordingly; and (b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent caution or any ancillary circumstances in his answer to the question.”

3 And protected “cautions” which are more liberal in that cautions are protected “if it was given to a person for an offence other than a listed offence and (a) where the person was under 18 years at the time the caution was given, two years or more have passed since the date on which the caution was given; or (b) where the person was 18 years or over at the time the caution was given, six years or more have passed since the date on which the caution was given”; Article 2A(1).
offence and (iii) will only be protected if the person has not been convicted of any other offence at any time and, (iv) where the person was under 18 years old at the time of the conviction, 5 years and 6 months or more have passed since the date of the conviction, or, if 18 or over at the time of the conviction, 11 years of more have passed since the date of the conviction (Article 2A(2)-(4)). The “listed offences” referred to are not likely to be relevant to the issues which these submissions address.  

8. Further, and importantly, the provisions addressing “protected convictions,” as is apparent from above, will not protect a person with more than one conviction. This means that a person with more than one soliciting conviction will be subject to the exemptions in relation to spent convictions in cases where they are applying for a wide range of jobs, as referred to above, and will be required to disclose them (Article 3 read with Schedule 1).

(d) Police Act 1997

9. Sections 113A and 113B of the Police Act 1997 identify the circumstances in which the Disclosure and Barring Service (“DBS”) must issue a criminal record certificate (“a CRC”) and an Enhanced Criminal Record Certificate, respectively. A CRC must include relevant matters recorded on the Police National Computer (“PNC”) and an ECRC must include relevant matters recorded on the PNC and information about the person on local police records which they reasonably believe to be relevant and ought to be included (“soft intelligence”) (section 113A(3)(a) and section 113B(3)(a)(4), respectively).

10. In summary, a CRC or ECRC must be issued in the following circumstances:

(a) the application for it is made by the person who is to be the subject of it
(b) the application is countersigned by a person listed in a register, maintained by the DBS, of persons likely to ask “exempted questions”
(c) the application is accompanied by a statement by the registered person that the certificate is required for the purposes of an “exempted question” and, in the case of an ECRC, for a “prescribed purpose”. An “exempted question” is a question to which exemption from protection arises under the 1975 Order. A “prescribed purpose” is a purpose prescribed in regulation 5A of the Police Act 1997

4 The exceptions in respect of “protected convictions” do not apply in relation to a small number of occupations (eg judges, DPP, police constables etc; Article 3ZA and Schedule 2, Part II)
(Criminal Records) Regulations 2002 (SI 2002/233) (as inserted by paragraph 1 of Schedule 1 to the Police Act 1997 (Criminal Records) (Amendment) Regulations 2006 (SI 2006/748)) which sets out a list overlapping with, but not co-extensive with, the list in the 1975 Order, of situations in which the registered person proposes to consider the applicant’s suitability for specified positions. These include providing health or social care (for example, in a care home) and working with children. As what convictions will be disclosed, provision is made reflecting, broadly, the provisions under the 1975 Order (so only those which are not “protected convictions”).

(e) Article 8

11. Article 8, Sch 1, Human Rights Act 1998 (“HRA”) provides that:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

12. Article 8 is engaged in a case where a person is required to disclose the existence of a spent conviction (R (T) v Chief Constable of Greater Manchester Police [2015] AC 49) and the same is likely to be true of the retention of such data.

13. Further, the provisions regarding disclosure set out above have been held by the courts not to be “in accordance with law” and therefore breach Article 8. This is because of their arbitrary character (including the failure to draw any distinction on the basis of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought, and the absence of any mechanism for independent review of a decision to disclose data under section 113A, Police Act 1997) (R (T) v Chief Constable of Greater Manchester Police [2015] AC

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5 It should be noted that this summary reflects the changes made to the legislation in 2013 in consequences of the Court of Appeal decision in R (T) v Chief Constable of Greater Manchester Police (which was later the subject of an appeal to the Supreme Court which is referred to below).
49). They also cannot be justified because of the indiscriminate nature of the provisions.

14. While amendments were made to the disclosure provisions in 2013, the arrangements still breach Article 8 because they remain too wide ranging in their application. They require all convictions whether or not truly relevant to the job sought and whatever the circumstances in which they were committed, their age etc - and because disclosure is always required where the person concerned has more than one conviction (and in the case of prostitution, women will usually be subject to more than one conviction): (PA) v Secretary of State for Justice and O’s [2016] EWHC 89 (Admin)).

(f) Article 14

15. In addition to Article 8, Article 14 (the Convention’s non-discrimination guarantee) is also engaged in relation to the issues raised by these submissions. Article 14 provides that:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

16. Article 14 is engaged only where the complaint falls with the “ambit” of one or other Convention rights (see eg Abdulaziz, Cabales and Balkandali v. UK (1985) 7 EHRR). However, the arbitrary disclosure provisions described above plainly fall within the ambit of Article 8 (T and P and A) and thus Article 14 is engaged.

17. “Discrimination” under Article 14 covers both direct and all forms of “indirect” discrimination.

18. Further, Article 14 may require that certain classes of person (here prostituted women) are treated differently, where their particular circumstances warrant it, if discrimination is to be avoided. Thus in Thlimmenos v. Greece (2001) 31 EHRR 15 the Grand Chamber held that:

“The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights
guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification.... However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.” [44].

19. Further, the ECtHR has made clear that “a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group... and that discrimination potentially contrary to the Convention may result from a de facto situation” (Opuz v. Turkey (2010) 50 EHRR 28, [183] citing DH & O’rs v. Czech Republic (2008) 47 EHRR 3, [175]).

20. The ECtHR has held too, in Opuz, that “when considering the definition and scope of discrimination against women, in addition to the more general meaning of discrimination as determined in its case-law..., the Court has to have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women” (at [185]); this includes Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”6) (at [186]).

21. CEDAW’s committee7 has recognized the gendered nature of prostitution (specifically when addressing trafficking under Article 6, CEDAW and see General recommendation No 19, (“Violence Against Women”)). Also gendered forms of violence (which prostitution arguably is) fall within the scope of Article 14 (Opuz v. Turkey (2010) 50 EHRR 28).

22. The disclosure provisions outlined above are arguably gender discriminatory. This is because, firstly, the requirement to disclose all convictions whatever the

6 Article 1, “... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”
circumstances where there are convictions for more than one offence impacts severely on those who have engaged in prostitution (overwhelmingly likely to be women\(^8\)) since they are especially likely to have multiple convictions because of the nature of prostitution. Accordingly, even if the provisions could be justified generally, because of their gender discriminatory impact, an exception ought to be made in the case of prostitution related offences (see, Thlimmenos, above: "the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."). Secondly, since many of the jobs for which disclosure of spent convictions is required are those within (broadly) the caring professions where women are disproportionately employed, the disclosure requirement may disproportionately impact on women for that reason too. They are not the only occupations where disclosure is required but it would be helpful to undertake an analysis of the composition (by gender) of the occupations to which the disclosure requirements apply to test whether or not the impact of the disclosure requirements fall most adversely on those occupations that are dominated by women.

23. The discriminatory effects of the disclosure provisions are very unlikely to be regarded as justified given their arbitrary nature (see above) and most especially because gender is a "suspect" class and so "very weighty" reasons are required to justify any discrimination (see eg Abdulaziz, Cabales and Balkandali v. UK (1985) 7 EHRR 471, 501, [78] ("very weighty reasons" required because "the advancement of the equality of the sexes is today a major goal in the member States"). Further, in determining whether justification is made, the UKs regional and international anti-trafficking obligations will be taken into account (just as is the case with CEDAW). These are addressed below.

24. Finally under Article 14, arguably the criminalisation of soliciting *per se* is gender discriminatory. This is because prostitutes are overwhelmingly women and thus their criminalisation arguably constitutes discrimination under the broad meaning given to that expression under Article 14 (see above, "a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory"). Since prostitution is a form

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\(^8\) And certainly if trafficked, see Article 17, Council of Europe Convention on Action against Trafficking in Human Beings.
of violence against women and given its close relationship with trafficking (see CEDAW General Recommendation 19, above), such discrimination would be difficult to justify. Criminalisation impedes a woman’s ability to exit prostitution (see, R Matthews et al, “Exiting Prostitution: A Study in Female Desistance” (2014) Palgrave Macmillan, 56 et seq). Further, also relevant to the assessment of justification under Article 8 and Article 14 (see, for example Opuz), is the fact that CEDAW General Recommendation 19 anticipates that rehabilitative measures will be taken by States to ensure that those of who have engaged in prostitution can safely exit it (paragraph 24h). The disclosure provisions described can frustrate the possibility of “rehabilitation”.

(g) Trafficking

25. There are numerous human rights instruments addressing trafficking. There is also a considerable volume of evidence indicating that much prostitution results from internal and cross-border trafficking (R Matthews et al, “Exiting Prostitution: A Study in Female Desistance” (2014) Palgrave Macmillan, 56 et seq). Criminalising women for offences arising in consequence of trafficking arguably violates various anti-trafficking provisions. Further, the retention of data concerning the same may similarly violate States’ obligations to take steps to rehabilitate victims of trafficking (including trafficking for sexual exploitation). For the avoidance of doubt, “trafficking” in the sense that it is used in the context of the legal instruments below includes cross-border and internal trafficking (see for example Council of Europe Convention on Action against Trafficking in Human Being, Article 2 and Modern Slavery Act 2015, section 2).

26. These instruments addressing trafficking are extensive. The main ones are addressed here.

27. Firstly, Article 6 of CEDAW provides that: “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.” The CEDAW Committee has by their General Recommendation 19 emphasised the need to introduce measures directed at rehabilitating women engaged in prostitution as a means of giving effect to this obligation. Though the UK has signed and ratified CEDAW, it does not have direct effect in the UK courts. However, it will be used to inform the meaning to be given to domestic and regional anti-trafficking measures.
28. More compelling is Article 4(2) of the Convention which provides that: “No one shall be required to perform forced or compulsory labour.” This covers trafficking (Rantsev v Cyprus and Russia (2010) ECHR 22).

29. Further, Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings provides under the heading “Non Punishment Provisions”:

“Each party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities to the extent that they have been compelled to do so.”

30. Article 26 must now be considered in the context of the more recent EU Directive 2011/36/EU on “preventing and combating trafficking in human beings and protecting its victims” (which is directly effective: Hounga v Allen and A’or [2014] 1 WLR 2889, para 61), Article 8 of which provides that:

“Non-prosecution or non-application of penalties to the victim
Member States shall, in accordance the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.”

31. “Compelled”, for these purposes, is not limited to the circumstances in which the English common law defences of duress and necessity apply (R v M(L), B(M) and G(D) (2011) 1 Cr.App.R.).

32. Article 2 provides that:

“Offences concerning trafficking in human beings
1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable:
The recruitment, transportation, transfer, harbouring or reception of
persons, including the exchange or transfer of control over those
persons, by means of the threat or use of force or other forms of
coercion, of abduction, of fraud, of deception, of the abuse of power or
of a position of vulnerability or of the giving or receiving of payments
or benefits to achieve the consent of a person having control over
another person, for the purpose of exploitation.

2. A position of vulnerability means a situation in which the person
concerned has no real or acceptable alternative but to submit to the
abuse involved.

3. Exploitation shall include, as a minimum, the exploitation of the
prostitution of others or other forms of sexual exploitation, forced
labour or services, including begging, slavery or practices similar to
slavery, servitude, or the exploitation of criminal activities, or the
removal of organs.

4. The consent of a victim of trafficking in human beings to the
exploitation, whether intended or actual, shall be irrelevant where any
of the means set forth in paragraph 1 has been used.

33. Plainly in the case of women trafficked into prostitution to prosecute them for
prostitution related offences arising out of that trafficking would violate the non-
penalisation provisions set out above and any prosecution would amount to “an
abuse of process” (R v S [2014] EWCA Crim 2919). That is so even where a
victim of trafficking has “consented” to engaging in the criminal conduct

34. Conviction and retention of data concerning such convictions would also violate
the obligations on States set out in the above instruments to provide support
and in the case of trafficked women.

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