

Regulation of the Sex Industry from a Criminal Law Perspective

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Abstract

This thesis examines the sex industry as a whole with the intention of establishing that prostitution should not be marginalised but integrated within the criminal law and regulated as other Sexual Entertainment Venues.

I first establish a framework of analysis needed to illuminate the constraints put upon the different elements of commercial sexual activities. This framework stems from the Sexual Offences Act (SOA) 2003, the primary statute that regulates all sexual activities, whether commercial or non-commercial. It has four elements: consent, nature, purpose and visibility.

By means of ‘black letter’ law and case histories, I then explore three areas within the sex industry: pornography, live sexual entertainment and prostitution in order to show that the element of consent is consistent throughout and relies solely on the SOA 2003 and is linked directly to the nature of the sexual activities. The nature of the sexual activities has its basis in non-commercial sexual activities, but is regulated in the sex industry in such a way that the nature differs between each commercial area. By contrast, the purpose remains constant in commercial sexual activities although it is at odds with non-commercial. All aspects of consensual sexual activities, whether commercial or non-commercial, must not be visible for unintended viewers. However, advertising of commercial sex is possible and thus visible, with the exception of prostitution. With regards to prostitution, legislation criminalises prostitutes who advertise and their mere presence constitutes a form of advertising. The public presence of prostitutes as well as the presence of their clients also creates the grounds for public nuisance.

I then suggest, based on the above information, that statutory legislation could include the use of brothels, this stems from the New Zealand model, in order to respond to issues raised about consent and visibility, as well as extend the protection offered to prostitutes to other sectors of the sex industry when they are confronted with the issue of consent.

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- Canada

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- Australia

Occupational Health and Safety Act 1998

- New Zealand

Prostitution Reform Act 2003

Regularly used abbreviations used within the thesis:

Sexual Offences Act 2003 (SOA 2003)

Sexual Offences Act 1959 (SOA 1959)

New Zealand Model (NZ model)

Prostitution Reform Act 2003 (PRA 2003)

Introduction

The sex industry is regulated by ‘a patchwork quilt of provisions ancient and modern that works because people make it do so, not because there is a coherence and structure’.¹ It is this ‘patchwork quilt’ of legislation that lends itself to creating a legal exceptionalism with regards to prostitution. The purpose of the thesis is twofold: to compare legislation relating to sexual activity in non-commercial situations with sexual activity within the sex industry to show us that prostitution is treated differently in law; and propose a new structure where pornography, live sexual entertainment and prostitution, if regulated in the same manner as one another, would provide coherence in the law.

It is the unsatisfactory nature of this ‘patchwork quilt of provisions’ with its lack of coherence and structure that leads to the question of whether there is a justification for the legal exceptionalism relating to prostitution. My hypothesis is that new legislation based primarily on the NZ model for regulating sex work would address these issues. I suggest that this model together with aspects of the policing taking place in Leeds, may be a useful template for the creation of new legislation in this area. Both the NZ model and details of the practice in Leeds will be analysed in Chapter 5.

This thesis offers an original contribution to knowledge by looking at all aspects of sexual activity as a whole instead of focusing on a single or dual aspect of the sex industry. Research to date has not had such influence to help lawmakers formulate an approach that does not echo the Nordic model where prostitutes are discriminated against by comparison to other sex workers. In doing so it aims to demonstrate that by regulating prostitution, which will include legalising brothels, the legislation surrounding the sex industry can be rationalised. It is intended that the findings of this thesis can be added to a body of work (including among others the work of Urquhart) which may help to influence policy makers who seek to reform outmoded legislation in this country. In this way, prostitutes will no longer be discriminated against through legislation and will be treated in the same way as other sex workers. The current discriminatory nature of legislation against prostitution will be discussed in depth in Chapter 4.

¹ Home Office, ‘Setting the Boundaries: Reforming the Law on Sex Offences’ HMSO (July 2000) para 0.2

To help clarify the descriptions which follow, I propose to use four conceptual connectors: consent, nature, purpose and visibility. All forms of sexual activity, whether commercial or non-commercial, are interlinked by these four conceptual connectors and furthermore the connectors highlight the discrepancies between the treatment of prostitutes as compared to other workers in the sex industry.

These connectors will be used as tools to link the first four chapters: Chapter 1 presents the legislation that surrounds non-commercial sexual activity and provides the foundation for the following Chapters 2 – 4 covering commercial sexual activity. By comparing the legislation that surrounds the four connectors, it can be shown that legislation sets aside prostitution and imposes a legal exceptionalism: this means that a prostitute can on the one hand be classed as a sex worker, and on the other hand be treated differently in order to prevent a street prostitute from working.

0.1 The background

This thesis will show that from a criminal law perspective: (1) there are disparities in regulating the three mainstream forms of sexual entertainment: pornography, live sexual entertainment and prostitution; (2) prostitution is excluded from being a legitimate industry despite the fact that prostitution is not of itself illegal; and (3) to advocate, as a consequence, that there is a potential for new legislation, based on the NZ model for regulating the sex industry, that would treat prostitution as it does pornography and live sexual entertainment by permitting prostitutes to work together within brothels. For the purposes of this thesis the term ‘live sexual entertainment’ includes telephone chat lines, striptease and burlesque, pole and lap dancing (collectively referred to as exotic dancing) and peep shows.

One could argue that the criminal law respects private relationships and is not there to be the moral arbiter of what sexual relationships should be acceptable or not, at least beyond ensuring compliance with the principle of harm. In that respect, criminal law could be expected to regulate equally non-commercial sexual activities and the different forms of commercial sexual activities. After all, the key statute regulating sexual activities, the Sexual Offences Act (SOA) 2003, does not mention or distinguish the purpose of the sexual activity. The SOA 2003 provides a basic framework on the assumption, albeit never stated, that it applies to all sexual activities, including those commercially motivated. For example, the

prohibition of rape established in s1 of the SOA 2003, in theory, protects any victim, including a sex worker or a performer of pornography.

However, the criminal law is devised in such a way as to treat non-commercial sexual activities differently to commercial sexual activities. When it comes to consensual commercial sexual activities, specific legislation comes into play, depending on the type of commercial activities considered. Thus, criminal law, despite some regulatory commonalities, separates non-commercial from commercial sexual activities. By using non-commercial sexual activity as the starting point I will show that legislation regarding non-commercial activity forms the basis for the regulation of all sexual activities to ensure that the activity harms neither the persons involved, nor any person who does not consent to witness such activities.

The sex industry is the commercialisation of sexual activity such as found in pornography, live sexual entertainment which includes nude dancing and telephone sex, and prostitution. Non-commercial sexual activity relates to sexual activity between two people without any financial transaction and can include couples in a relationship as well as casual sex. The sexual activity itself is not limited to sexual intercourse and can include activities such as oral sex and mutual masturbation. The term ‘sexual’ includes penetration, touching or any other activity where a reasonable person would consider the circumstance and nature of the activity to be sexual.² Whilst appreciating that prostitution and prostitute are pejorative terms, these terms will be relied on in this thesis in order to differentiate from other sex workers and because they are the terms used in cases and statutes.

0.2 The Reasoning for the Project

The unsatisfactory ‘patchwork quilt of provisions’³ that creates legal exceptionalism with regards to prostitution is the primary reason for proposing new legislation. This can be shown by the scattered nature of the legislation regulating non-commercial and commercial sexual activities. Each commercial activity is regulated by its own specific statute or set of

² Sexual Offences Act 2003 s78

³ Home Office, ‘Setting the Boundaries: Reforming the Law on Sex Offences’ HMSO (July 2000) para 0.2

statutes, established in apparent isolation from each other. There is no single umbrella statute for commercial sexual activities.

The scattered nature of the criminal law is reflected in academic literature where the academic diversity leads, at times, to opacity as to how criminal law effectively deals with commercial sexual activities. Between those in favour of total decriminalisation of all sex workers to those wanting the criminalisation of all sex work or just some elements of it, the debate on how the law approaches and should approach commercial sexual activities is highly charged in terms of moral attitudes, emotional considerations and economic approaches.

The academic discourses stemming from sociological and socio-legal work in academia at times overlap with the political discourses emanating from Parliament and Governments. However, the political discourse is subject specific in its approach and has remained steadfast insofar as the activities that surround prostitution are criminalised. The discourses have changed historically from the prostitute being the *criminal* to being the victim.

By starting with an analysis of legislation that surrounds non-commercial sexual activity this thesis offers an original contribution by dividing the different types of commercial sexual activity into four conceptual hooks: consent, nature, purpose and visibility. This gives the opportunity to look at the sex industry in total; instead of focusing on single aspects in isolation. This thesis offers a proposal that moves away from creating victims and criminals by addressing the issues of safety and respect for all sex workers. The proposal will be based on the New Zealand model and the experiment taking place in Leeds where prostitutes can work without fear of arrest by police and suggests new legislation that will be wide enough to encapsulate all sex workers.

Sociologists and feminists offer some very influential discourses regarding the sex industry, but, as with the government, the discourses tend to focus mostly on single issues. Sociologists and feminists agree that the negative connotations in the language used to objectify women should be removed with the more positive term 'sex worker' now used widely instead of the perjorative term prostitute.⁴ But there is a divergence of opinion between the academic writers with regards to whether the sex industry should be legitimised.

⁴ Carol Leigh, 'Inventing Sex Work' in Nagel J, *Whores and other Feminists* (Routledge 2010) p225

The following arguments will be offered in the same order as the subjects within the thesis, beginning with pornography, then live sexual entertainment and finally prostitution.

Arguments against pornography state that it oppresses not only those women who appear in the pornographic media but *all* women and should therefore be banned.⁵ Pornographic films direct the frequent use of abusive language and behaviour almost exclusively toward women⁶ by utilising gender-based stereotypes of male dominance and female submission.⁷ Pornography, it is argued, contributes to feelings of hostility toward women,⁸ and it is suggested that the regular exposure to violent or degrading pornography reinforces the culture of misogyny.⁹ The Government introduced an amendment to the Criminal Justice and Immigration Act 2008 criminalising the possession of extreme pornography. Extreme pornography is not about ‘fluffy Ann Summer’s handcuffs’¹⁰ but is the depiction of graphic sexual abuse. The question whether all or only some pornography should be banned is a difficult one given that those in favour of banning pornography would argue ‘The case against banning the possession of such material is deeply flawed and misleading’¹¹

The counter argument to banning pornography is that ‘far greater harm is done in restricting production of or access to pornography’¹² because the argument that pornography is *bad* perpetuates a sense of shame as it ignores the fact that women are also capable of enjoying pornography.¹³ Arguments for banning pornography are nothing more than a reactionary doctrine that mirrors right-wing politics. Indeed, promoting censorship ultimately endangers sexual expression, and the blaming of pornographic images diverts attention away from the

⁵ See for instance: MacKinnon C and Dworkin A, *The Reasons Why: Essays on the New Civil Rights Law recognising Pornography as Sex Discrimination* (Women Against Pornography 1985)

⁶ Robert Jensen, *Getting Off: Pornography and the End of Masculinity* (South End Press. 2007) p53

⁷ D Cornell, ‘Pornography’s Temptation’ in D Cornell (ed) *Feminism and Pornography*, (Oxford University Press 2000) p554

⁸ Robert Jensen, *Getting Off: Pornography and the End of Masculinity* (South End Press 2007) p50

⁹ D Cornell, ‘Pornography and Rape: A Causal Model.’ *Political Psychology*, Vol. 9, No. 1 (Mar., 1988), pp. 41-73 p49

¹⁰ Sasha Rakoff (director of lobby group Object) talking to Katy Taylor, ‘Criminalising extreme porn: Feminists are split over government plans to ban so-called extreme porn’ <http://www.newstatesman.com/uk-politics/2008/10/extreme-porn-violence-women> 28th October 2008 (accessed 20th March 2017)

¹¹ Katy Taylor, ‘Criminalising extreme porn: Feminists are split over government plans to ban so-called extreme porn’ <http://www.newstatesman.com/uk-politics/2008/10/extreme-porn-violence-women> 28th October 2008 (accessed 20th March 2017)

¹² Purcell N, ‘Feminism and Pornography: Building Sensitive Research and Analytic Approaches’ *Electronic Journal of Human Sexuality*, (May 2009) Vol 12 www.ejhs.org (accessed 20th March 2017)

¹³ Hollibaugh A, ‘Seducing Women into a ‘Lifestyle of Vaginal Fisting’: Lesbian Sex Gets *Virtually* Dangerous.’ in *Feminism and Pornography*, D. Cornell (ed) (Oxford University Press 2000) p334

actual perpetrators of harm.¹⁴ The arguments for and against pornography fail to consider what impact banning or censoring pornography would have on the sex industry as a whole. If pornography was completely banned on the basis that it discriminated against women, this in turn would have a causal effect on live sexual entertainment and prostitution for the very same reason.

The discourses surrounding the live sexual entertainment industry show that telephone sex workers are less commonly researched but it is argued that there are physical risks as well as financial benefits.¹⁵ The usage of telephone sex calls has changed due to the availability of mass media via the internet. The computer is now the first port of call for online sexual activity¹⁶ and the sexual activity is akin to that of a peep show.

The basis of the arguments against live sexual entertainment in the form of lap and pole dancing are that live sexual entertainment is about selling intimacy, sexuality and body. This argument is supported by the campaign group 'Object'¹⁷ who argue that lap and pole dancing is in reality dancers who are virtually naked in front of repulsive individuals.¹⁸ It is argued that the pole and lap dancers are not in control because they have little or no choice who to dance for, especially if the dancer needs the money. But this is not to say lap and pole dancing should be banned. Instead boys at school should be taught to cherish women and respect their bodies.¹⁹ Object, argued that exotic dancing clubs normalises the sexual objectification of women and in their 'stripping the illusion' campaign state that buying a woman is not the same as buying a cup of tea.²⁰

The government, acting in response to the complaints regarding the increase of exotic dancing venues following the Licencing Act 2003, changed the licencing rules so that licensed lap and pole dancing clubs were put in the same category as sex shops and not cafes.

¹⁴ Strossen N, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* Scribner (1995) p60

¹⁵ Weitzer R *Sex for Sale: Prostitution, Pornography, and the Sex Industry* (2nd ed Routledge 2000) p17

¹⁶ Wysocki D, 'Let your Fingers do the Talking: Sex on an Adult Chat-line' *Sexualities* vol 1 (4) 425, 428

¹⁷ A human rights group that challenges the increasing sexual objectification of women in the media and popular culture

¹⁸ Hayashi Danna J, Leveque S, *Stripped: The Bare Reality of Lap Dancing* (Clairview Books 2011) p13

¹⁹ Hayashi Danna J, Leveque S, *Stripped: The Bare Reality of Lap Dancing* (Clairview Books 2011) p77

²⁰ Object 'Stripping the Illusion: Frequently Asked Questions' p2 (para 3) object.org.uk

<https://www.yumpu.com/en/document/view/24876984/lap-dancing-faq-2010pdf-object> (accessed 17th February 2017)

It is argued that an increase in venues because of the Licensing Act 2003 is a perception ‘due to the increased *visibility*’ and not because of a ‘*quantitative* increase.’²¹ Despite management and dancers distancing themselves from the term ‘sex work’ it can be shown that lap/pole dancing is part of the sex industry given that the ‘labour characteristics, along with the marginal and stigmatized nature ... definitively place stripping within a broader range of sex markets...’²²

The perceived proliferation of live sexual entertainment leads us to a similar argument regarding prostitution. Prostitution can be distinguished by its many forms with each having its own moral level, nonetheless it is still commercial sexual exploitation.²³ By setting economic terms prostitutes are denied their rights to be able to signal, initiate or agree to have contractual sex.²⁴

In line with religious commentaries parliamentary discourses reflect the moral authoritarianism²⁵ shaping public policy by the myths that surround prostitution.²⁶ This can be seen in the Wolfenden Report where the ‘problem’ of prostitution is the harmfulness or nuisance caused by ‘its effects’²⁷ and this has ‘underpinned the key critique to official discourse, and in particular, feminist conceptions of both the problem of prostitution and its regulation.’²⁸ The policies perpetuate the myth that the prostitute is in some way to blame for her choices. When regulatory frameworks move the concept of blame and harm from the prostitute to the client then ‘myth acceptance is understood to provide the key to identifying victim-blame.’²⁹ It can, therefore, be seen that the political discourse is shaped from the rhetoric that prostitution is a form of victimhood rather than empowerment. Until a space is created where the construction of “victims” is altered such rhetoric will prevent other discourses from opening up any new policy options that are currently outside the

²¹ Sanders T and Hardy K *Flexible Workers: Labour, Regulation and the Political Economy of the Stripping Industry* (Routledge 2014) p14

²² *ibid* p18

²³ MacKinnon C, ‘Trafficking, Prostitution and Inequality’ (2011) *Harvard Civil Rights-Civil Liberties Law Review* Vol 46 p271-309 ,272

²⁴ Alexander P, ‘Feminism, Sex Workers, and Human Rights’ in Nagle J, (editor) *Whores and Other Feminists* (Routledge 1997) p83

²⁵ Phoenix J & Oerton S *Illicit and Illegal* (Willan Publishing 2005) p14

²⁶ Weitzer R, *Sex for Sale: Prostitution, Pornography, and the Sex Industry* (2nd ed Routledge 2000) p33

²⁷ *Ibid* p84

²⁸ Weitzer R, *Sex for Sale: Prostitution, Pornography, and the Sex Industry* (2nd ed Routledge 2000) p84

²⁹ Gurnham D, ‘Victim-blame as a symptom of rape myth acceptance? Another look at how young people in England understand sexual consent’ *Legal Studies*, (2016) Vol. 36:2 pp. 258–278, 258

parliamentary discursive framework.³⁰ It is the ‘quasi-official discourses’³¹ outside the traditional sites of moral [state] authority³² that underpin informal sex regulation and create the reforms.³³ Prostitutes are discriminated against on the basis that prostitution creates a public nuisance, in other words it is a crime to be sexually assertive.³⁴ This particular discourse is shaped by a central public v private distinction whereas the victimhood of the prostitute is shaped by the moral ordered discourse drawn on a ‘‘more complex synthesis of international human rights rhetoric, religious orthodoxies and a feminist perspective on sexual domination’.³⁵

Alongside the arguments asserting that prostitution is a form of victimhood by putting the focus on the client, there is another connection made between prostitution and crime. This can be seen with the introduction of legislation such as the Modern Slavery Act 2015 which repeals and replaces offences of human trafficking arising under section 59A Sexual Offences Act 2003 against trafficking. This thesis does not concentrate on trafficked prostitution but at this juncture it notes that ss 57 – 59 of the Sexual Offences Act 2003 (replacing the repealed s145 of the Nationality, Immigration and Asylum Act 2002) criminalises human trafficking for exploitation. The provisions within s58³⁶ criminalises trafficking within the UK which is not without interpretative difficulties because of the notion that most workers who work for agencies have been trafficked.³⁷ It is the use of language such as ‘internal trafficking’ as used by the UK Human Trafficking Centre³⁸ that blurs the distinction between trafficked and non-trafficked prostitutes and promotes the connection between prostitution and crime.

³⁰ Kantola J & Squires J, ‘Discourses Surrounding Prostitution Policies in the UK’ *European Journal of Women’s Studies* (2004) Vol 11 No 1 pp77 – 101, 96

³¹ Phoenix J, *Regulating Sex for Sale: Prostitution Policy Reform in the UK* Policy Press (2009) p103

³² *Ibid* p197

³³ *Ibid* p103

³⁴ Alexander P, ‘Feminism, Sex Workers, and Human Rights’ in Nagle J, (editor) *Whores and Other Feminists* Routledge (1997) p84

³⁵ *Ibid* p84

³⁶ Section 58 Sexual Offences Act 2003: (1)A person commits an offence if he intentionally arranges or facilitates travel within the United Kingdom by another person (B) and either— (a)he intends to do anything to or in respect of B, during or after the journey and in any part of the world, which if done will involve the commission of a relevant offence, or (b)he believes that another person is likely to do something to or in respect of B, during or after the journey and in any part of the world, which if done will involve the commission of a relevant offence.

³⁷ Summers G ‘Sex and the City: The law – Part 1’ *Criminal Law and Justice Weekly* (2010) 174 JPN 373 at 374; see also Weitzer R, ‘Legalising Prostitution’ *The British Journal of Criminology* Br J Criminol (2009) 49(1):88-109 , 90

³⁸ The UKHTC define themselves as: a multi-agency centre that provides a central point for the development of expertise and cooperation in relation to the trafficking of human beings.

Non-trafficked prostitutes also work for agencies³⁹ because an agency ‘will generally afford a degree of protection not available to a street worker’⁴⁰ and the prostitute will travel from place to place within the UK. When looking at the role of an agency it is a ‘classic fit for the s53 offence of ‘controlling prostitution for gain’⁴¹ but the agency is also liable within the s58 offence ‘even in circumstances where she arranges her own transport’⁴² because the agency (and the taxi driver) could be said to be ‘intentionally facilitating travel’.⁴³

When comparing how the law is implemented, it is ‘time to stop assuming that traditional feminist analysis of sexual oppression alone exhausts all possible interpretations of commercial sex.’⁴⁴ Academic discourses from both sides of the argument, to ban or decriminalise, do so on the basis that women who work in the sex industry are discriminated against and that their civil rights are violated.

One problem is that sociologists, although they acknowledge the legitimacy of sexual activities within the sex industry and particularly prostitution, find it difficult to translate the issues into legal terms. There is also a diversity among academics with regard to the sex industry compounded by the fact that some authors focus on specific areas of commercial sex, notably prostitution while others have a more general approach whilst considering different forms of commercial sexual activities. By looking at regulation of sex work as a whole⁴⁵ this thesis engages in dialogue regarding sex work in total and not as individual industries, and by taking into consideration a ‘pragmatic approach to safety’⁴⁶ motivated by the damaging consequences of criminalising either the prostitute or the client it builds a framework that considers the issues solely from a criminal law perspective.

0.3 Methodology

Faced with the diversity of political discourse, legislative instruments and academic arguments, this thesis analyses the regulation of the sex industry from a criminal law perspective. Although pornography (excluding extreme pornography), exotic dancing and the

³⁹ Gary Summers ‘Sex and the City: The law – Part 1’ *Criminal Law and Justice Weekly* (2010) 174 JPN 373 at 374

⁴⁰ *Ibid* at 375

⁴¹ *Ibid* at 375

⁴² *Ibid* at 375

⁴³ *Ibid* at 375

⁴⁴ Nagle J (ed) *Whores and other Feminists* (Routledge 1997) p2

⁴⁵ Scouler J and Sanders T, ‘Introduction: The Changing Social and Legal Context of Sexual Commerce: Why Regulation Matters’ *Journal of Law and Society* (March 2010) Vol 37 No1 pp1 - 11

⁴⁶ Johnson J and Dalton D, *Policing Sex* (Routledge 2012) p144

sale of sex are not illegal, by looking at the way the criminal law regulates non-commercial sexual activities, that is, sexual activity between two people without any financial transaction, it is seen that it shapes the regulation of commercial sexual activities. By doing this the thesis shows that there are commonalities throughout all forms of sexual activities including consent, the nature and the purpose of the activity and privacy and observing how each area of the sex industry is regulated by different statutes and to different effects.

This thesis thus starts by establishing a framework of analysis by utilizing the four conceptual elements: consent, nature, purpose and visibility that occur in non-commercial and commercial sexual activity and are used in each chapter to compare how the legislation regulates the three mainstream areas of the sex industry, pornography, live sexual entertainment and prostitution, which are set out in accordance to the distance between the viewer and the sex worker. For pornography (Chapter 2), there is no contact or communication; for live sexual entertainment (Chapter 3) the viewer is in the same vicinity (except for telephone sex chat lines), but cannot touch the sex worker; and for prostitution (Chapter 4) there is physicality between the client and sex worker. This framework and order of analysis allows the comparison of not only commercial and non-commercial sex, but also between the various forms of commercial activities in order to show that the criminal law does not regulate all commercial sexual activities in a consistent manner; instead it marginalises prostitution from the other forms of commercial sex.

Chapter 1 will show that the SOA 2003 gives the definition of consent to be used for *all* forms of sexual activities, commercial and non-commercial, and criminalises sexual activity that has occurred without consent. The SOA 2003 establishes a minimum age for sexual activities and provides boundaries for persons engaging in sexual activities who have a limited mental capacity. A second area discussed within Chapter 1 is the issue raised by behaviour: the problem regarding drunken consent and the relatively new concept of conditional consent.

The nature of non-commercial sexual activity is directly connected to consent because consent is regulated in such a way that certain activities are forbidden such as the intentional exposure of genitalia;⁴⁷ or intercourse with an animal.⁴⁸ The prohibitions outlined in Chapter

⁴⁷ Sexual Offences Act 2003 s66

1 provide the basis for non-commercial sexual activities in the sex industry. The nature of sexual activity is not directly defined in either Criminal or Civil law statutes, nonetheless both statutes and case law carry certain restrictions, such as the criminalisation of necrophilia and where the activity involves an unwitting or unwilling partner or where the sexual activities may create harm. The criminal law sets boundaries with regards to the nature of the sexual activity whereas the civil law sets out criteria that must be fulfilled for a marriage to be consummated. In this instance intercourse must be full and complete, where the erect penis must enter the vagina fully and for a reasonable amount of time. Non-consummation would be grounds for annulment and extra marital sexual activities provide grounds for divorce. By outlining the Criminal and Civil law in Chapter 1 regarding the nature of non-commercial sexual activity, we can see that the Criminal law focusses on prohibiting certain activities whereas the Civil law focus on activities that must be performed for the benefit of marriage. It is from here the foundations are built for the remaining chapters.

There are also constraints regarding visibility and although there is no law against nudity or having sexual intercourse outside, the law does prohibit public lewdness and private sexual activity which when capable of being viewed by a non-consenting third party becomes public sexual activity. Visibility is connected to the previous elements: consent, nature and purpose and s66 of the SOA 2003 legislates against certain sexual acts such as exposure (deliberate showing of genitals to a non-consenting viewer).

Chapters 2, 3 and 4 will concentrate on commercial sexual activity and how the same sexual activity analysed in Chapter 1, when conducted in a commercial setting, falls within the law. By applying the same conceptual tools, consent, nature, purpose and visibility we can see that as with non-commercial sexual activity discussed in Chapter 1, as per s74 of the SOA 2003, consent can only be given where the party ‘agrees by choice, and has the freedom and capacity to make that choice’. The difference being that for commercial sexual activity the age of consent is set higher than for non-commercial sexual activity. However, as noted in Chapter 1, s9 of the SOA 2003 the age of consent is set at sixteen but with regards to the sex industry s42 of the SOA 2003 sets the upper age of a child to be eighteen and subsequently limits all participants who work within the sex industry to being over eighteen years of age.

Chapter 2 will show that in pornography consent is direct between the actress and the producer and filming/photographic crew and indirect, insofar as there is an implied consent,

⁴⁸ Sexual Offences Act 2003 s70

between the actress and the viewer. The subject of consent will be divided into three sections: the performers, the producers and the viewer.

The nature of pornographic sexual activity is the same as it is in Chapter 1 but in addition it is also regulated by the Obscene Publications Act 1959, the Criminal Justice and Immigration Act 2008⁴⁹ and the Coroners and Justice Act 2009.

It is the purpose of pornography that differs from non-commercial sexual activity because pornography is commercial. It is produced to make a financial profit by means of providing material (books, pictures or films) that sexually arouse the viewer.

Visibility of pornography is divided into two sections: the permitted visibility and the constraints of displaying or possessing pornographic material. Criminalising the possession of pornographic material is a recent legislative development. The Criminal Justice and Immigration Act 2008 prohibits the possession of an image that portrays in an explicit and realistic way an image that: involves an act which threatens a person's life⁵⁰, an act which results, or is likely to result in serious injury to a person's anus, breasts or genitals,⁵¹ sexual interference with a human corpse,⁵² intercourse or oral sex with an animal (whether dead or alive)⁵³ and a reasonable person would think that any such person or animal was real.⁵⁴

Chapter 3 compares various types of live sexual entertainment, including telephone sex chat lines, exotic dancing and peep shows. Consent for all forms of live sexual entertainment is also restricted to 18 years of age as per s42 of the Sexual Offences Act 2003 but is protected by the same means as non-commercial sexual activity. Consent for participants who work as striptease dancers or lap dancers is also limited by the regulations imposed by the Local Authority by means of a rule setting a specific distance between the viewer and the dancer so that the person working within the sex industry can only consent to be watched. Consent is implied between the dancer and the viewer but the stated consent between dancer and management raises issues which will also be addressed in Chapter 4.

The nature of the sexual activity in the live sexual entertainment industry varies depending on which form of sexual entertainment is being discussed. For telephone sex chat lines the

⁴⁹ Criminal Justice and Immigration Act 2008 c4

⁵⁰ Criminal Justice and Immigration Act 2008 s7 (a)

⁵¹ Criminal Justice and Immigration Act 2008 s7(b)

⁵² Criminal Justice and Immigration Act 2008 s7(c)

⁵³ Criminal Justice and Immigration Act 2008 s7(d)

⁵⁴ Criminal Justice and Immigration Act 2008 s7 (e)

nature is verbal erotica whereas for the striptease dancers and lap dancers the nature is also erotica but this time it is visual. The dancer, if she keeps within the regulatory guidelines, goes no further than to remove clothing in a sexually provocative manner. It is the nature of the peep show artist that is more like that of a pornographic actress than of a burlesque dancer because the peep show artist can include self-masturbation for the viewer to watch.

The purpose of live sexual entertainment carries a dual purpose. Primarily this is profit achieved through the secondary purpose, sexual arousal. However, the level of sexual arousal is limited by its environs: for burlesque the viewer must behave with a modicum of decorum, whereas whilst watching a peepshow or engaging with a sex chat-line operator the level of sexual arousal has no limits.

The secondary purpose, sexual arousal, is limited because of the direct link between purpose and visibility and Chapter 3 explores that link by showing that the law has different rules for peepshows that have a solitary viewer as compared to striptease which can have a much larger audience.

Visibility is also connected to the nature and purpose of live sexual entertainment and although there are similarities with Chapter 2, the live sexual entertainment industry is regulated by the Local Government (Miscellaneous Provisions) Act 1982.

Chapter 4 draws on the information set out in the previous chapters to show how prostitution is marginalised. Starting with consent, as with Chapters 2 and 3 consent can only be given by a prostitute who is over the age of 18. But there are difficulties a prostitute encounters with the problem of withdrawing consent that are different to the sex-workers in Chapters 2 and 3. Drawing on similarities with Chapter 1 the issue of the presumption of permanent consent is raised with respect to a prostitute and a wife noting that the presumption was abolished for married women in 1992 whereas the presumption for prostitutes was not abolished until the SOA 2003. This is because s74 makes no distinction regarding whether the woman is a prostitute or not but the interpretation of s74 carries its own set of difficulties when considering whether a prostitute has the freedom and capacity to consent. Chapter 4 also focuses on payment and whether it vitiates the prostitute's consent.

A second issue is the vulnerability of women who are drunk or on drugs. A comparison is also drawn between the prostitute and the live sexual entertainments worker regarding withdrawing consent. All women are entitled to withdraw consent but it is the women

engaging in non-commercial sexual activity and prostitutes who are physically vulnerable whereas the women who engage in pornography and live sexual entertainment are economically vulnerable if they choose to withdraw consent.

The nature of the sexual activity of a prostitute can be distinguished from the nature of non-commercial sexual activity by comparing how a woman in matrimony, to use the polite vernacular ‘gives’ herself to one man, to the exclusion of all others, whereas a prostitute offers herself to all men. A prostitute can perform any sexual activity from sex talk to sexual intercourse.

The purpose of non-commercial consensual sexual activity is largely for procreation and pleasure (the two may be mutual). The purpose of the sexual activity in prostitution is, unlike non-commercial sexual activity, largely to make money, the same as pornography and live sexual entertainment. The difference being that for lap dancing or peep shows making a profit involves prolonging sexual satisfaction whereas for a prostitute it is the opposite, a prostitute needs to sexually satisfy her client as quickly as possible in order to engage with the next client.

It is the issue of visibility that sets the prostitute aside from other sex workers and from women who do not work in the sex industry. Non-commercial *al fresco* sexual activity is permitted unless it causes distress to non-consenting witnesses. Similarly pornographic films and live sexual entertainment must be viewed in such a way that non-consenting viewers cannot see them; but all may be advertised. But the laws against soliciting prevent prostitutes from advertising. Scantily clad women may stand in the entrance of pornographic cinemas and live sexual entertainment venues as a form of advertisement but prostitutes may not congregate in any place.

Having looked at the framework by using the four conceptual elements, consent, nature, purpose and visibility, Chapter 5 will examine how the law treats the prostitute as ‘other’ and proposes new legislation based on the NZ model (the Prostitution Reform Act 2003) to set out a new framework that provides an equal status for all sex workers based on those of Chapter 1.

Chapter 5 containing the proposal is divided into four parts: The New Zealand Model; arguments against the New Zealand model and rebuttals thereof, the proposal; arguments against the proposal and rebuttals of those arguments. The New Zealand Model will be used

as the basis to propose that brothels should be legally permitted for prostitution to be aligned with the rest of the sex industry. By providing arguments and rebuttals regarding the New Zealand model and using arguments and rebuttals against legalising prostitution this thesis will show that there is merit in the proposal.

0.4 The Findings

The four elements, consent, nature, purpose and visibility, each set within the four different topics show, by looking at the similarities and differences within the framework of this thesis, that the criminal law does not regulate all commercial sexual activities in a consistent manner. Instead it separates prostitution from the other forms of commercial sex by criminalising the actions that surround prostitution. Therefore, it is in need of an overhaul where all sex industry regulations are placed under an ‘umbrella’ statute that treats all commercial sexual activities equally; thereby creating a safe, legal environment for the prostitutes as well as other sex workers to work in.

The proposal in Chapter 5 is offered in line with the NZ model, whilst arguing for an all-encompassing Act of Parliament that not only legalises prostitution, but also puts it into the same legal framework as other forms of sexual activities within the sex industry.

The statute can then regulate all forms of commercial sexual activities uniformly and provide a legitimate argument for the use of brothels to respond to issues raised about consent and visibility, as well as extend the protection offered to prostitutes to other sectors of the sex industry when they are also confronted with issues of consent. It will also acknowledge that the purpose of prostitution, like pornography and live sexual entertainment, is for profit. But the statute will ensure that the profit benefits the sex workers as a whole and not only management, thus again alleviating the need for a sex worker to be under fiscal pressure to consent.

Chapter One – Establishing the framework for permissible and non-permissible sex.

Introduction

On the premise that no commercial sexual activity is *per se* illegal, the purpose of this chapter is to establish our framework of analysis for this thesis by exploring sexual relations and the restrictions imposed by criminal law in light of the four main themes: consent, nature, purpose, and visibility.

These four themes are central to the primary statute that covers sexual activities and that is at the heart of this chapter: the SOA 2003. Written in neutral language, the SOA 2003 does not specifically refer to the purpose of the activity, bar in s76, which refers to deception as to the nature and purpose of the sexual act; and in s52 which clearly notes that the purpose of prostitution is for ‘gain’.⁵⁵ Therefore, the SOA 2003 is built on the premise that its regulation of sex applies to both commercial and non-commercial sexual activities, unless otherwise specified. Although in practice, the basis for regulating sexual activities remains enshrouded within non-commercial sexual activities. Non-commercial sexual activity is, as the SOA 2003 s73 defines, any activity a reasonable person would consider to be sexual, if the nature is sexual or if the person’s purpose in relation to the activity is sexual that is not for financial gain. Non-commercial sexual activity is often connected to a romantic relationship. However, it would be more reasonable to argue that ‘paid sex is not a sad substitute’⁵⁶ for non-commercial ‘intimate, private and romantic’⁵⁷ sex. Nonetheless non-commercial sexual activity in this instance is sexual activity within marriage, partnerships and casual relationships and can include sexual intercourse, mutual masturbation and oral sex.

⁵⁵ See Sexual Offences Act 2003 sections 51 – 55 for soliciting and causing, inciting and controlling prostitution for gain. See sections 57 – 59 for trafficking. And section 76 for the conclusive presumption.

⁵⁶ Hayes S, Carpenter B & Dwyer A *Sex, Crime and Morality* (Routledge 2012) p101

⁵⁷ Hayes S, Carpenter B & Dwyer A *Sex, Crime and Morality* (Routledge 2012) p102

The four themes of consent, nature, purpose and visibility shaping the restrictions on sexual activities in the SOA 2003 remain constant in all forms of sexual activities, commercial or non-commercial. Thus, they set the parameters of our demonstration in Chapters 2 to 4 on how the criminal law works in relation to commercial sexual activities.

My focus is on the current restrictions on sexual activities that criminal law today creates regarding these four themes. The shift from previous legislation to current legislation shows how both government and public attitudes change regarding certain sexual activities. Permissible sex in English criminal law had variations depending on gender within different situations. Male homosexual relations were against the law, whether consent was given or not; whereas the law was silent with regards to female homosexuals (lesbians). The notion of a sexual encounter was ‘phallogentric’ because it was ‘*something done by the man and consented to by the woman*’.⁵⁸ Today the criminal law is arguably gender neutral.⁵⁹ Notably, same-sex sexual activity, of whichever gender, carries the same constraints as heterosexual activity. Yet, the past continues to inform the present and examining current criminal law cannot be completely detached from references to past restrictions. This is necessary in order to shed light on the significance of the possibility of future changes in legislating the sex industry as a whole and making prostitution inclusive.

Whether in the past or today, and as noted in the introduction to the thesis, the four themes are interconnected. Central to all sexual activities is the concept of consent. However, establishing consent does not suffice to render all sexual activities permissible in English criminal law. The nature of the act also contains certain prohibitions, notably it must not cause harm to either participant or be performed on the dead or on animals. Although the nature of the act is restricted by the criminal law, the criminal law is indifferent regarding the purpose⁶⁰ of the sexual act; it matters not whether it is purely for enjoyment, for procreation or for income. However, the act carries an expectation of privacy which needs to be defined as it does not solely depend on location, but rather on what is capable of being in public view.

⁵⁸ John Stannard ‘The Emotional Dynamics of Consent’ *The Journal of Criminal law* (2015) Vol 79(6) 422-436, 435; see also Naffine N, ‘Possession: Erotic Love in the Law of Rape’ (1994) 57 *MLR* 10, 24 – 25 and N Gooch ‘The Feminisation of the Male Rape Victim (2005) 12 *UCL Jurisprudence Review* 196, 200 - 202

⁵⁹ The criminal law is interpreted in gender neutral terms but it is arguable that as Stannard notes “the law’s notion of sexual encounter is basically ‘phallogentric’ in the sense that it is something ‘done’ by the man...” John Stannard ‘The Emotional Dynamics of Consent’ *The Journal of Criminal law* (2015) Vol 79(6) 422-436, 435

⁶⁰ With the exception of deception as per the Sexual Offences Act 2003 s76(2) provides the conclusive presumption that the complainant did not consent to the relevant act if ‘the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act’ or ‘by impersonating a person known personally to the complainant.’

The sexual activities must be confined to areas where other members of the public would not be offended.

Section 1 - The required consent

This section focuses on the first of the four themes: consent. In this section consent will be shown in relation to non-commercial sexual activity in order to set the foundation for the following chapters.

To establish a sexual offence it must be shown that consent to the sexual activity was not given. Prior to the Sexual Offences Act 2003 neither common law nor statute gave a definition of consent, instead the law relied on a *lack* of consent. From the 17th Century until the Sexual Offences Act 1956 lack of consent in rape cases was formulated through common law as ‘against her will’⁶¹ per Blackstones definition of rape: the ‘carnal knowledge of a woman forcibly and against her will.’⁶² It was not until the Sexual Offences (Amendment) Act 1976⁶³ that the terms moved from ‘against her will’ to ‘without consent.’⁶⁴ The inclusion of she ‘does not consent to it’ found in the SOA 1976 was to provide a guide for the jury to ascertain whether the defendant was guilty (or not) of the charge of rape.

The SOA 2003 provides a positive statutory definition of consent in s74: where an agreement is made by choice with the freedom and capacity to make that choice.⁶⁵ Section 74 written in gender neutral terms puts the ability to consent of either party central to any sexual activity.

To gain an insight into consent’s significance for all sexual activities, this section will further discuss the SOA 2003 giving a statutory definition to consent (1.1) and consider the difficulties surrounding consent. Consent is restricted by age (1.2) and ability (1.3). It has also been shaped by civil law with regards to underage marriage (because of the minimum age of consent) consummation and bigamy (1.4), and continues to be influenced by environment and behaviours, raising issues as to whether consent can be given if the person is drunk or when outside pressure is exercised (1.6). Finally, consent can be given upon certain

⁶¹ Saunders T and Cox F *The Criminal Law Consolidation Acts, 1861* (John Crockford London 1861) p233

⁶² Sir William Blackstone, *Commentaries on the laws of England (1765 – 1769)* Book 4 Chapter 15
<http://www.lonang.com/exlibris/blackstone/bla-415.htm> (accessed 20th March 2017)

⁶³ Herein SOA 1976

⁶⁴ SOA 1976 s1(1)(a) ‘he has unlawful sexual intercourse with a woman who at the time of the intercourse *does not consent to it*’ (my italics)

⁶⁵ SOA 2003 s74

conditions (1.6), not the least that of the nature of the sexual activities, the second criteria of our framework.

1.1. The first statutory definition of consent

The change and move to a positive definition of consent in the SOA 2003 stemmed from the findings of the Home Office, published in the report: *Setting the Boundaries: Reforming the Law on Sex Offences, Volume 1* (2000).⁶⁶ It was recognised that the law in its present state was in need of change in order to ‘provide coherent and clear sex offences which protect individuals ...’⁶⁷ enabling abusers to be appropriately punished whilst remaining ‘fair and non-discriminatory in accordance with the European Convention on Human Rights and the Human Rights Act 1998’.⁶⁸ Therefore a statute was required that shifted away from law that ‘dates from a hundred years ago and more, when society and the roles of men and women were perceived very differently’⁶⁹ to one that provided a definition of consent and refined the meaning in order to strengthen and modernise law on sexual offences. It was a clear demonstration of the government’s intentions to reform the law on sexual offences coupled with stronger measures of protection with regard to the public from sexual offending. The resultant framework was intended to clarify the concept of consent rather than change its meaning, as defined in the case of *R v Olugboja* (1982),⁷⁰ and to effectively eradicate the so called ‘rapists charter’ stemming from *R v Morgan* (1976)⁷¹ where, it was held, there could be defence in the mistaken but genuine and honest belief that consent had been given.

Hence, the definition within s74 is: ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice’ which is then supported by s75 outlining the evidential presumptions where the prosecution proves that the defendant is aware that the circumstances within s75 existed. The complainant will be presumed not to have consented to the relevant act and the defendant will be presumed not to have reasonably believed that the complainant consented. Section 76 offers a new scope of presumptions where it can be conclusively presumed that the complainant did not consent. It may be said that s76 is no

⁶⁶ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences, Volume 1* (HMSO 2000)

⁶⁷ *Ibid* at paragraph 0.3

⁶⁸ *Ibid* at paragraph 0.3

⁶⁹ *Ibid* at paragraph 1.1.2

⁷⁰ *R v Olugboja* [1982] QB 321; *R v Olugboja* [1981] 73 Cr App R 344

⁷¹ *R v Morgan* [1976] AC 182

more than a statutory formulation of the common law as it existed prior to 2003'.⁷² Nonetheless, it offers a framework for offering a broader protection due to the capacity for wider interpretation.

Section 74 contains two important elements in order to make a choice as to whether to give or withdraw consent: freedom and capacity. Where there is a lack of freedom or capacity, then consent cannot be given or assumed to be given. The text within s74 states that 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice' but the statute recognises that there are certain exceptions that must be taken into consideration. The lack of capacity can negate consent by two means: by the lack of mental ability to exercise choice and by age restrictions. Therefore, capacity to consent to sexual activities falls within two areas: the legal restrictions with regards to age, physical or mental capacity and problems such as drunken capacity.

1.2 Age restrictions

The legal provisions for age restrictions are primarily targeted at adults in order to protect children from sexual abuse. Campaigns by people such as Peter Tatchell⁷³ to reduce the age of consent to lower than sixteen have been unsuccessful, with the government's recommendations reflecting the cultural ideology that it would be morally wrong to lower it. This is despite the Office for National Statistics (ONS) saying that the rate of teenage pregnancies is now lower,⁷⁴ and various Members of Parliament arguing that it was 'ludicrous' to consider lowering the age of consent at a time when teenage pregnancy rates were still soaring.⁷⁵ Thus promulgating the argument that if the age limit was reduced, the pregnancy rate would rise exponentially. The legal restrictions of age in relation to sexual consent reflect the cultural understanding of what age is considered appropriate.

⁷² Selfe D, 'The meaning of consent within the Sexual Offences Act 2003' *The Criminal Lawyer* (2003) Issue 178, pp 3-5

⁷³ Tatchell P, 'Why the Age of Consent Should be Lowered to 14' *The Libertarian Alliance* <http://www.freedominapuritanage.co.uk/why-the-age-of-consent-should-be-lowered-to-14/> (accessed 20th March 2017)

⁷⁴ Office for National Statistics, 'Population and Health Reference Tables, Autumn 2012: Quarterly conceptions data' <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcn%3A77-273239> (Aug 2012) (accessed 20th November 2012)

⁷⁵ Walker K and Harris S 'Age of consent storm over BBC debate about making sex legal for girls under 16' <http://www.dailymail.co.uk/news/article-1215164/BBC-Radio-4-host-debate-letting-girls-16-sex.html#ixzz2CmbJicq4> (22nd September 2009) (accessed 20th November 2012)

The Sexual Offences Act 2003 sets the minimum age of consent at sixteen, and the offender must ‘reasonably believe’ the girl is over sixteen; but if the girl is under thirteen, then the ‘reasonable belief’ element fails and whether the child consented or not is irrelevant,⁷⁶ and an offence has been committed. The SOA 2003 does not fundamentally change the age of consent for girls, whereas it implements a significant shift for boys by applying equal age restrictions for boys as for girls. The purpose of treating boys equally to girls is to maintain equality with regards to the capacity to consent to homosexual activities.

The problem when drafting the SOA 2003 was that instead of having two separate groups of sexual offences applicable: one for under 13 year olds and the other for children aged from 13 to 16, it contained ‘a new list of no less than 11 specific offences.’ The resultant SOA 2003 is overly complex and the result is that there is no distinction between pedophilia and teenage sexual exploration.

Some acts between children ‘usually thought to be normal and proper, and others at least not seriously wrong’⁷⁷ have been criminalised with actions such as two 15 year olds kissing or “heavy petting” carrying a potential prison sentence of up to five years. This contrasts with 15 year olds who are ‘Gillick’ competent being able to receive contraceptive advice and treatment if the health professional believes it is in the young person’s best medical interest. A ‘widely respected’⁷⁸ study shows that first sexual experiences, such as kissing can happen around the age of 14 for girls and 13 for boys⁷⁹ and sexual activity often starts before the age of 16.

The over-complication of the SOA 2003 and Home Office guidance stating that there is no intention to prosecute teenagers under the age of 16 where they are of similar age and they both mutually agree leads to situations where not only teenagers but professionals are confused. In 2011 the *Times* sex counsellor advised a mother that ‘Technically a 15-year-old boy who has consensual sex with a 14-year-old girl has committed a crime that carries a two-year prison sentence’ but the counsellor was incorrect: the boy *and* the girl would be equally liable under s9 and s13 of the SOA 2003.

⁷⁶ Sexual Offences Act 2003 c42 s9

⁷⁷ Spencer J ‘The Sexual Offences Act 2003: (2) Child and family offences *Criminal Law Review* (2004) Crim LR 347 at 354

⁷⁸ *ibid* 354

⁷⁹ Erens, McManus, Prescott, Field et al., *National Survey of Sexual Attitudes and Lifestyles II* (National Centre for Social Research 2003) p5

In *R v G* [2008]⁸⁰ a boy pleaded guilty to a charge under s5 SOA 2003 (Rape of a child under 13). The boy was 15 at the time of the offence and he had consensual sexual intercourse with a 12 year old girl who had told him she was also 15. This case raised the question of whether prosecution violated the defendant's rights under Article 8. The House of Lords said that because the conduct was appropriately criminalised (sexual intercourse with a child under 13) it cannot be viewed as "private" and Article 8(2) provides for the state to interfere with Article 8 rights 'for the protection of public health and morals.' But in *R v G* the rape was no more than a technical legal sense and did not accurately describe what the defendant had done.⁸¹

In *R v G* [2008] the girl lied about her age. Lord Norton in 1883 believed that it wasn't young girls that needed protection from men but that men needed protecting from immoral girls who might seduce and trap them.⁸² The reliance on the fact that the girl lied about her age in *R v G* [2008] and the judicial observations in *R v C and others* [2011]⁸³ bears 'modern echoes of the past.'⁸⁴ In *R v C* [2011] six men, aged between 18 and 21, took two 12 year old girls to a park and had sex with them. The men were convicted of raping two children under the age of 13 contrary to s5 SOA 2003. On appeal of sentence Lord Moses contradicts himself. On the one hand he notes that 'the important and difficult question ...[is] ...to reflect the gravity which Parliament undoubtedly viewed such offences ... by describing those offences as "rape" notwithstanding the consent of the victim'⁸⁵ He also acknowledged that 'Parliament has chosen to describe all offences with girls under the age of 13, where penetration of some sort takes place, as rape, with a maximum of life imprisonment'⁸⁶ and he reflected that '[t]here are then mitigating factors where the victim is under 16 and sexual activity between two children was mutually agreed and experimental.'⁸⁷

But in this instance the sexual activity was not between two children. All six of the defendants were adult. However, Moses LJ saw fit to note that 'the facts are wholly different

⁸⁰ *R v G* [2008] UKHL 37

⁸¹ Du Boise-Pedain A 'Underage defendants, child sex offences and human rights' *Cambridge Law Journal* (2009) CLJ 22 at 24

⁸² HL 1883 [280] col. 1390-1

⁸³ *R v C* [2011] EWCA Crim 2153

⁸⁴ Stevenson K "'It's what "girls of indifferent character" do ...'" Complications concerning the legal age of consent in light of *R v C* (2011)' *Journal of Criminal Law* (2012) J Crim L 130 at

⁸⁵ *R v Ashley Dwayne Charles and Others* [2012] 1 Cr App R (S) 74 at paragraph 2

⁸⁶ *R v Ashley Dwayne Charles and Others* [2012] 1 Cr App R (S) 74 at paragraph 24

⁸⁷ *R v Ashley Dwayne Charles and Others* [2012] 1 Cr App R (S) 74 at paragraph 25

from those envisaged in the guideline⁸⁸ ...[and] ... the guidelines did not cover this type of case.’⁸⁹

Instead Moses LJ’s commentary throughout the Appeal is one that echoes the sentiment of Lord Norton. He started by noting that ‘The appearance of the girls is important’⁹⁰ and that there was nothing ‘to suggest they were under 16’⁹¹ He pointed out that on one occasion the girls had time to escape⁹² but made no allowances for the fact that the girls were a long way from where they were originally picked up and were now in a ‘highly vulnerable situation’⁹³ where it is likely they thought they could not extricate themselves.

Moses LJ in his judgment failed to avoid stereotypical assessments. He relied on the appearance of the girls and how easy it is to fool a man into thinking she is older than she actually is. Section 5 of the SOA 2003 states that sexual intercourse with a child under 13 is rape. It fails to explicitly state that s5 is a strict liability offence but when looking at the same offence with a child aged between 13 – 16, s10 states that the defendant is guilty if he ‘does not reasonably believe’ that the victim is 16 or over. Moses LJ accepted the defendant’s argument that because of the way the girls were dressed they could ‘reasonably believe’ that they were over 16. His argument applies to s10 but does not fit s5 although it was on this basis he allowed the appeal and quashed the imprisonment sentences substituting them for suspended sentences.

The two cases show that both received the same penalty, although in *R v G* a boy of 15 engaged in consensual sex with his girlfriend who he thought was 15 whereas in *R v C* there was ‘a clear imbalance of power’⁹⁴ with six men having sordid casual sex ‘simply to salt [their] appetites.’⁹⁵

The SOA 2003 makes no distinction between teenage sex, an imbalance of (sexual) power between young adults and children and pedophiles. During the drafting of the bill for the

⁸⁸ *R v Ashley Dwayne Charles and Others* [2012] 1 Cr App R (S) 74 at paragraph 26

⁸⁹ *R v Ashley Dwayne Charles and Others* [2012] 1 Cr App R (S) 74 at paragraph 27

⁹⁰ *R v Ashley Dwayne Charles and Others* [2012] 1 Cr App R (S) 74 at paragraph 8

⁹¹ *R v Ashley Dwayne Charles and Others* [2012] 1 Cr App R (S) 74 at paragraph 8

⁹² *R v Ashley Dwayne Charles and Others* [2012] 1 Cr App R (S) 74 at paragraph 10

⁹³ Stevenson K “‘It’s what “girls of indifferent character” do ...” Complications concerning the legal age of consent in light of *R v C* (2011)’ *Journal of Criminal Law* (2012) J Crim L 130, 136

⁹⁴ *R v Ashley Dwayne Charles and Others* [2012] 1 Cr App R (S) 74 at paragraph 22

⁹⁵ *R v Ashley Dwayne Charles and Others* [2012] 1 Cr App R (S) 74 at paragraph 22

SOA 2003, Paul Goggins MP challenged anyone who could write a clause that criminalised pedophilia activity without criminalising normal teen sex.⁹⁶ Goggins directed the Crown Prosecution Service to exercise appropriate discretion with regards to teen sex. The discretion toward teen sex that Goggins sought was ignored and the result was “legislative overkill”⁹⁷ that prohibits all sexual activity with a child under 16 including consensual teen sex. A simple solution could have been, as Bois-Pedain and J Spencer both suggest, to take the example of French law which separates the offence of consensual underage sex between minors and that of defendants over the age of 18.

The age restrictions change when the child is in a fiduciary relationship with the sexual partner. Section 16 outlines the abuse of trust if they intentionally⁹⁸ touch the child in a sexual⁹⁹ manner. The Act outlines a fiduciary relationship as ‘one of trust’ and clearly states in s22(2) that a person has a fiduciary responsibility to children under the age of eighteen ‘if he is regularly involved in caring for, training, supervising or being in sole charge of such persons’.

Regarding homosexual relationships, the SOA 2003 put them on par with heterosexual relationships. Again, this is a significant break with past approaches, and demonstrates well how the government has responded to social mores. Consent has moved from being prevented due to homosexual relations being illegal pre-Wolfenden Report 1956, to having a minimum age set at 21 (the then age of majority) as per the SOA 1967. The Criminal Justice and Public Order Act 1994 reduced the age to eighteen and the Sexual Offences (Amendment) Act 2000 finally set the minimum age at sixteen, an age that the SOA 2003 did not modify.

Regarding lesbian relationships, prosecutions were extremely rare even though the law was not silent. The Criminal Law Amendment Act 1880, ‘a piece of legislation often overlooked in histories of sex offences,’¹⁰⁰ raised the minimum age for behaviour considered to be sexual (such as kissing and mutual masturbation) to 13 and effectively removed the defence of consent as a defence from the Offences Against the Person Act 1861. The Criminal Law

96 HC, 15 July 2003, col. 248.

97 Spencer J.R. ‘The Sexual Offences Act 2003: (2) Child and family offences’ *Criminal Law Review* (2004) Crim. L.R. 347 at 354

98 Sexual Offences Act 2003 c42 s16(1)(a)

99 Sexual Offences Act 2003 c42 s16(1)(b)

¹⁰⁰ Waites M, ‘Inventing a ‘Lesbian Age of Consent’? The History of the Minimum Age for Sex between Women in the UK’ *Social and Legal Studies* (2002) Vol 11(3) 323 – 342 , 326

Amendment Act 1880 was not gender specific and therefore had ‘the potential to encompass non-coercive sex between females’¹⁰¹ but makes no reference to, or definition of, the term lesbian. The Criminal Law Amendment Act 1922 raised the age of consent for sexual behaviour considered to be sexual to 16 thus creating the minimum age of consent law regulating lesbian sexual behaviour. Relying on the crime of indecent assault Parliament was able to avoid ‘drawing public attention to the existence of lesbianism’¹⁰² and the age of sexual consent between two women ‘was thus conceived within the prevailing rationale of silence and concealment.’¹⁰³

The silence was broken with the introduction of the SOA 2003. Although s1 is an offence specifically perpetrated by men, ss2, 3 and 4 create the gender neutral offences ‘assault by penetration,’¹⁰⁴ sexual assault¹⁰⁵ and causing a person to engage in sexual activity without consent.¹⁰⁶ If two women engage in sexual activities, they are also bound by ss2, 3 and 4 and their consent is required with the same proviso’s set in s74. The SOA 2003 puts lesbian relationships on the same legal footing as heterosexual and homosexual relationships.

The Offences against the Person Act 1861 protected girls under the age of 12 and the SOA 2003, criminalised any sexual activity with a child under the age of 13. The SOA 2003 also continues to restrict the minimum age of consent to sixteen. Previous legislation was written in gender specific terms but the intention of the SOA 2003 is to treat consent to all sexual activity equally. There are further limitations to consent in s30, where the person has either mental (learning) difficulties and s74 protects those with physical difficulties.

1.3 Capacity to consent – mental and physical disabilities

The SOA 1956, using language dating from the Mental Deficiency Act 1913, prohibited intercourse with an idiot or imbecile¹⁰⁷ or a defective¹⁰⁸ who was under care or treatment. However, s8(2) offered the rebuttal that ‘a man is not guilty ...if he does not know and has no reason to suspect her to be a defective’.

¹⁰¹ Waites M, ‘Inventing a ‘Lesbian Age of Consent’? The History of the Minimum Age for Sex between Women in the UK’ *Social and Legal Studies* (2002) Vol 11(3) 323 – 342, 326

¹⁰² *ibid* 332

¹⁰³ *ibid* 332

¹⁰⁴ Sexual Offences Act 2003 c42 s2

¹⁰⁵ Sexual Offences Act 2003 c42 s3

¹⁰⁶ Sexual Offences Act 2003 c42 s4

¹⁰⁷ Sexual Offences Act 1956 c69 s7

¹⁰⁸ Sexual Offences Act 1956 c69 s8

The SOA 2003 also considers disability as negating consent. The SOA 2003 states that a person commits an offence if he intentionally¹⁰⁹ sexually¹¹⁰ touches a person who is unable to refuse because of a reason related to a mental disorder¹¹¹ or is unable to refuse¹¹² because that person lacks the mental capacity¹¹³ to choose whether to agree to the touching or is unable to communicate.¹¹⁴

Although the law is clear regarding mental capacity, it is not so clear or protective for persons with a physical disability. The disability relies on lack of communication: s75(2)(e) supplies the evidential presumption that ‘because of the complainant’s physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented’.

When discussing physical disability and communication, s75(2)(e) states that ‘because of the complainant’s disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented.’ Section 75(2)(e) is vague: as Jenny McEwan asks: ‘what are the facts the prosecution need to prove in order for the presumption to arise?’¹¹⁵ Does it mean that the complainant must be unable to communicate by any method whatsoever?¹¹⁶ The wording does not state that the complainant must be mute, it says that the complainant must be unable to communicate due to a physical disability. A person with physical disabilities can utilize many different methods of communication depending on the level of the disability, to be able to consent or to withdraw consent, but the problem arises because this relies on the need for the person ‘with whom they are trying to communicate to understand them’ and because the courts must take into account whether the particular disability impeded communication.

The reliance depends on proof of being unconscious or physically incapable of giving consent as opposed to taking into consideration that the lack of consent may be in the form of gestures. Given the English Supreme Court’s ruling on *Bree* (2007),¹¹⁷ and subsequent cases involving drunkenness and consent, which is discussed later in this chapter, such a narrow

¹⁰⁹ Sexual Offences Act 2003 c42 s30 (1)(a)

¹¹⁰ Sexual Offences Act 2003 c42 s30(b)

¹¹¹ Sexual Offences Act 2003 c42 s30(c)

¹¹² Sexual Offences Act 2003 c42 s30 (2)

¹¹³ Sexual Offences Act 2003 c42 s30(2)(a)

¹¹⁴ Sexual Offences Act 2003 c42 s30 (2)(b)

¹¹⁵ McEwan J, ‘Proving Consent in Sexual Cases: Legislative Change and Cultural Evolution’ *International Journal of Evidence and Proof* (2005) 9 E&P 1 – 28, 16

¹¹⁶ *ibid* 16

¹¹⁷ *R v Bree* [2007] EWCA Crim 804

view on what consent is could be possible. Yet, in *R v Cooper* (2009)¹¹⁸ Lord Rodger distinguishes the difference between the mental incapacity to communicate and physical incapacity when he states that the SOA 2003 ‘had in mind an inability to communicate [and] there is no warrant at all for limiting it to a physical inability to communicate’.¹¹⁹

The law therefore should protect people with disabilities—either mental or physical—within the framework of the SOA 2003 for both non-commercial and commercial sexual activities. This issue is not discussed in this thesis, not because it would not be relevant to the commercial sex industry: certain niche markets cater for people who have fetishes for sexual activities with disabled women,¹²⁰ but rather because the issue covers limited situations that fall outside the remit of this thesis. Following on from the ability to consent due to mental and/or physical difficulties, the civil law also puts separate constraints upon consent but limits it to marriage. These limits lend themselves to the criminal law if breached.

1.4 Consent to a sexual act within marriage

Consent to a sexual act within marriage was and is still partially shaped by the civil law of marriage. Civil law continues to lend two factors within marriage to the application of the criminal law: firstly, the minimum age for marriage is 16, the minimum age of consent is set at the same age: 16. Secondly an unconsummated marriage provides grounds for the marriage to be voided, and bigamy negates the validity of the second (or subsequent) marriage(s).

Criminal law makes no distinction as to whether consent to a sexual act occurs in or outside of marriage. Lack of consent in either situation following from *R v R*¹²¹ and s74 of the SOA 2003 is rape. Criminal law also makes no marital distinction with regards to the lack of consent where there is a risk of transmission of disease. However as shown in *R v B* [2006]¹²² the transmission of an STI¹²³ would cause serious bodily harm and therefore amount to GBH and not rape. *R v Golding* [2014]¹²⁴ widens the margins of ‘really serious harm’ within s20 of the Offences Against the Person Act 1861 to include genital herpes

¹¹⁸ *R v Cooper* [2009] UKHL 42

¹¹⁹ *R v Cooper* [2009] 4 All Er 1033 per Lord Rodger at 1043

¹²⁰ Gary L Albrecht *Encyclopedia of Disability* Vol 1 Sage Publications (2006) p1437

¹²¹ *R v R* [1992] 1 A.C. 599

¹²² *R v B* [2006] EWCA Crim 2945 CA

¹²³ Sexually Transmitted Disease

¹²⁴ *R v Golding* [2014] EWCA Crim 889

where the defendant did not disclose his diagnosis of genital herpes to the victim and consequently passed the virus to her. By not disclosing his condition the complainant could not make an informed decision whether or not she wanted to risk acquiring herpes. However, if the victim does in fact consent to the risk, this will provide a defence under s.20 as held in *R v Dica* [2004].¹²⁵

1.5 Issues raised by behaviour

The statutory definition of consent is found within s74 of the SOA 2003 where it states that ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice’.¹²⁷ Nonetheless, the issue of consent often leads to deciphering whether a woman is consenting in certain complex situations. The Home Office review¹²⁸ from which the SOA 2003 ensued made it clear that consent was to be something given on equal terms, and not given by the weaker person to the stronger. The intention was to break with prior interpretations of consent.

As mentioned earlier, consent or, more appropriately, lack of consent, was formulated by the courts as ‘against her will’.¹²⁹ Lack of consent was portrayed as being shown by the woman struggling to get away and/or screaming for help; however, this has been shown not necessarily to be the way women inevitably manifest their lack of consent in the given circumstance. This legal understanding of ‘lack of consent’ prior to 2003 has reflected social attitudes where the woman was not perceived as a victim of predatory sex but instead was considered to be ‘provocative’¹³⁰ and ‘asking for it.’¹³¹ The SOA 2003 has aimed to break this ‘blame the woman’ social attitude that the law partially integrated when the victim is drunk or influenced by the defendant’s behaviour. To do so the SOA 2003 contains three important requirements: a statutory definition of consent, linked to a test for reasonable belief, combined with an evidential or conclusive presumption about consent. Nevertheless,

¹²⁵ *R v Dica* [2004] 2 Cr. App. R. 28.

¹²⁷ Sexual Offences Act 2003 s74

¹²⁸ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences, Volume 1* (2000) para. 2.10.3

¹²⁹ See Sir Matthew Hale’s History of the Pleas of the Crown: rape is “the carnal knowledge of any woman above the age of ten years against her will, and of a woman-child under the age of ten years with or against her will”

¹³⁰ Seligman C, Brickman J, and Koulack D, “Rape and Physical Attractiveness: Assigning Responsibility to Victims,” *Journal of Personality* (December 1977) Vol 45, no. 4: 554–563.

¹³¹ See Kimberly Fairchild ‘But Look at What she was Wearing! Victim Blaming and Street Harassment’, in Tarrant, Shira (ed) *Gender, Sex, and Politics* (Routledge 2015)

the law has its shortcomings, not the least because the ‘blame the woman’ culture has not completely disappeared from our society including in Parliament.¹³²

1.5.1 Consent in light of drunken behaviour

The prevailing view with respect to drunken consent is led by a focus on the issue of consent rather than the *capacity* to consent.

Prior to 2003, the common law, in *Malone* (1998),¹³³ recognised that some victims may freeze or may be unable to positively dissent, protest, or resist because of being too drunk. However, as the jury had to decide, social attitudes to drunkenness could lead to a finding of consent rather than lack of consent. The SOA 2003 aimed to break this pattern, but the first case seemed to point to a failure to do so. In *R v Dougal* (2005) in a Crown Court case in Swansea,¹³⁴ *Dougal* led to the popular but ‘controversial’¹³⁵ belief that there could be no charge of rape if the complainant gave consent whilst drunk as ‘drunken consent is still consent’.

The Court of Appeal in *Bree* (2007)¹³⁶ did not challenge the essence of the legal principle, but provided the opportunity to re-interpret ‘the once broad definition’¹³⁷ of “a drunken consent is still consent” to one where stereotypical assumptions of victim guilt are removed. The Court of Appeal noted that the SOA 2003 provided a clear definition of consent for the purposes of rape, and by defining it with reference to ‘capacity to make that choice sufficiently addresses the issue of consent ...’ agreeing that the definition of consent within s74 is written in, what the Government intended to be, a clear and concise format: ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice’. However, it became immediately apparent that there were no definitions for the terms

¹³² See for example, Bill Aitken, a leading conservative member of the Scottish Parliament, who claimed that drunken women falsely claim rape in case ‘somebody talks...and the word gets back to the boyfriend’, in K. Scott, “Tory MSP Bill Aitken resigns from Holyrood over rape comments”, *The Guardian*, 21 February 2011, <http://www.theguardian.com/politics/2011/feb/21/msp-bill-aitken-resigns-rape-comments> (accessed 09 June 2016)

¹³³ [1998] 2 Cr App R 44

¹³⁴ *R v Dougal*, (Unreported)Swansea Crown Court (2005)

¹³⁵ Simpson B ‘Why has the Concept of Consent Proven so Difficult to Clarify?’ *Journal of Criminal Law* (2016) JCL 80 (97) p98

¹³⁶ *R v Bree* [2007] EWCA Crim 804

¹³⁷ Simpson B ‘Why has the Concept of Consent Proven so Difficult to Clarify?’ *Journal of Criminal Law* (2016) JCL 80 (97) p104

‘freedom’, ‘capacity’ or ‘choice’ to be found in s74, and as Simpson notes, s74 contains a vague undefined language, and requires a more drastic interpretation.¹³⁸

Sir Igor Judge P stated that the ‘phrase [‘drunken consent is still consent’] lacks delicacy, but ... it provides a useful shorthand encapsulating the legal position’ and drew a distinction between someone who through drink lacks capacity to consent and someone who retains the capacity to consent:

‘If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting ... However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape’.¹³⁹

Bree however, does not stop at this juncture; Sir Igor also made the significant statement: ‘We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious’. This statement could be interpreted that *Bree*, although limited by its own parameters, left it open for the court in future cases to direct the jury to consider the balance between the level of s75(d) where capacity is lost if the victim is either unconscious or asleep and s74 where the person is so drunk (but awake) that they have lost the ‘freedom’ to make a ‘choice’.

Elvin suggests that the state of legal interpretation of s74 left by *Bree* is not without criticism¹⁴⁰ and as Wallerstein argues, the rationale “a drunken consent is still consent” should not be recognised¹⁴¹ as consent and Simester maintains such phraseology should not be used.¹⁴²

The ‘vague undefined language of s74’¹⁴³ creates inconsistent directions to the jury. Finch and Munro found that jurors carry prejudicial notions that women bear some responsibility.¹⁴⁴

¹³⁸ *ibid* 99

¹³⁹ *R v Bree* [2007] EWCA Crim 256 at 34

¹⁴⁰ J. Elvin, ‘The Concept of Consent under the Sexual Offences Act 2003’ (2008) 72(6) JCL 516, 524.

¹⁴¹ S. Wallerstein, ‘A Drunken Consent is Still Consent—or Is It? A Critical Analysis of the Law on a Drunken Consent to Sex Following *Bree*’ (2009) 73(4) JCL 318, 322

¹⁴² A.P. Simester et al., *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, (5th edn Hart Publishing: Oxford, 2013).

¹⁴³ Simpson B ‘Why has the Concept of Consent Proven so Difficult to Clarify?’ *Journal of Criminal Law* (2016) JCL 80 (97) p99

¹⁴⁴ Finch E and Munro V, ‘Breaking Boundaries? Sexual Consent in the Jury room’ (2006) 26 *Legal Studies* 303, 314 - 315

The 2005 Amnesty International study¹⁴⁵ found that the public attitude toward drunk victim responsibility echoed Finch and Munro's research. In contradiction to Loveless¹⁴⁶, to prevent jurors from bias and continuing to interpret the law incorrectly, further guidance by way of 'express provisions on voluntary intoxication' is needed to establish that the complainant suffered a lack of awareness, understanding and ability.¹⁴⁷ This will not create 'further complications.'¹⁴⁸

The issue of intoxication and consent in relation to s74 and s75 was considered by the Home Office following the proposal in *Setting the Boundaries* of a further presumption to cover situations where the complainant is 'too affected by alcohol to give free agreement'. The government rejected the proposal to avoid 'mischievous accusations'¹⁴⁹ arguing that legislative clarification or reform of the status of voluntarily intoxicated and incapacitated victims is unnecessary.¹⁵⁰

The practicalities of balancing the level between s75(d) and s74 were reviewed in the Crown Court in Caernarvon in *R v Evans and McDonald* (2012)¹⁵¹ where the defendant was accused of rape and CCTV footage showed a young woman who was extremely drunk, yet clearly not unconscious. The issue was whether she was so drunk she was incapable of giving consent. Judge Hughes noted when handing down the guilty verdict that she was: '...extremely intoxicated. CCTV footage shows ...the extent of her intoxication when she stumbled into your friend. As the jury have found, she was in no condition to have sexual intercourse. When you arrived at the hotel you must have realised that'.¹⁵² The comments from the judge show that the courts are prepared to move away from the dicta in *Bree* and widen the scope of 'freedom and capacity to make that choice' as found in s74.¹⁵³

¹⁴⁵ Amnesty International, 'UK: New poll finds a third of people believe women who flirt partially responsible for being raped' <https://www.amnesty.org.uk/press-releases/uk-new-poll-finds-third-people-believe-women-who-flirt-partially-responsible-being> (accessed 25th February 2017)

¹⁴⁶ Loveless J *Criminal Law* (3rd ed Oxford University Press 2012) p522

¹⁴⁷ J. Elvin, 'Intoxication, Capacity to Consent, and the Sexual Offences Act 2003' (2008) 19 King's Law Journal 151, 152–3.

¹⁴⁸ Loveless J *Criminal Law* (3rd ed Oxford University Press 2012) p522

¹⁴⁹ Rumney P, 'False Allegations of Rape' (2004) 65(1) CLJ 125.

¹⁵⁰ J. Rozenberg, 'Law on Consent in Rape Cases is Clear Enough', *Daily Telegraph* (19 June 2007). Available at: <http://www.telegraph.co.uk/news/uknews/1554994/Law-on-consent-in-rape-cases-is-clear-enough.html> (accessed 25th February 2017).

¹⁵¹ *R v Evans and McDonald*, Caernarvon Crown Court, not reported, (24th April 2012)

<http://www.bbc.co.uk/news/uk-wales-17781842> (accessed 16 September 2014)

¹⁵² *Ibid*

¹⁵³ The Court of Appeal quashed Evans conviction on the basis that relevant and admissible evidence not available at trial had come to light which undermined the safety of the conviction. However, the Court of Appeal ordered a Crown Court re-trial on the allegation of rape.

The recent case of *R v Tamberou* (2014)¹⁵⁴ confirms that drunkenness can vitiate consent and that the lapse of memory resulting from a drunken state cannot be interpreted as the woman having consented.

The jury was entitled to consider absence of consent and to distinguish it from evidence of absence of memory. Both [defendants] in interview conceded that the complainant was very drunk. There was no evidence of her flirting or inviting, let alone instigating, intimate contact, with the appellant. Her evidence was that she would not have consented to intercourse with him, although, by reason solely of her absence of memory, she felt unable to exclude her consent.¹⁵⁵

Furthermore, during sentencing, Hayward J encouraged anyone ‘who has been a victim of sexual assault ...to report it to the police [who will] take the report seriously and give the victim all the support they need to make sure the offender is brought to justice’.¹⁵⁶ This statement is in tune with the message the Crown Prosecution Service (CPS) has tried to communicate recently. At the National Rape Conference in January 2015, the CPS was assessing the issue of consent and the myths and stereotypes that have surrounded the issue of consent and concluded that because there is still far too much variation in the way that forces move a complaint of rape through the system, ‘toolkits’ would be provided to clarify the situation where a potential victim either may have been unable to consent or where consent could not reasonably be considered to have been given. Police and prosecutors must make sure they ask in every case where consent is the issue: how did the suspect know the complainant was saying ‘yes’ and doing so freely and knowingly.¹⁵⁷

Helen Reece argues that ‘there is little evidence that the rape myths are widespread’¹⁵⁸ nonetheless, a victim-blaming poster from NHS/Home Office declared that: ‘One in Three Reported Rapes Happens When the Victim has been Drinking.’¹⁵⁹ The Director of Public

¹⁵⁴ *R v Tamberou* (Seedy) [2014] EWCA Crim 954

¹⁵⁵ *R v Tamberou* (Seedy) [2014] EWCA Crim 954 at 16 per Lady Justice Rafferty

¹⁵⁶ *R v Tamberou* (Seedy) (2013) Lewes Crown Court (not reported) Finn Scott-Delaney, ‘Two Men Sentenced for Eastbourne Rape’ *The Argus* (Newspaper) 20th June 2013,

http://www.theargus.co.uk/news/10497138.Two_men_sentenced_for_Eastbourne_rape/

¹⁵⁷

http://www.cps.gov.uk/news/latest_news/cps_and_police_focus_on_consent_at_first_joint_national_rape_conference/

¹⁵⁸ Reece H, ‘Debating Rape Myths’ (2014) *LSE Law, Society and Economy Working Papers 21/2014* London School of Economics and Political Science Law Department

¹⁵⁹ Gurnham D, ‘Victim-blame as a symptom of rape myth acceptance? Another look at how young people in England understand sexual consent’ *Legal Studies*, (2016) Vol. 36:2 258-278, 259

Prosecutions, Alison Saunders, expressly refers to how the ‘blame the victim’ social attitudes have influenced the law on consent in sexual offences and states that ‘For too long society has blamed rape victims for confusing the issue of consent—by drinking or dressing provocatively for example—but it is not they who are confused, it is society itself and we must challenge that. Consent to sexual activity is not a grey area—in law it is clearly defined and must be given fully and freely’. She added, ‘It is not a crime to drink, but it is a crime for a rapist to target someone who is no longer capable of consenting to sex though drink. These tools take us well beyond the old saying “no means no”’.¹⁶⁰ Thus the comments by Judge Hayward and the Crown Prosecution Service go some way to ensuring that s74 is interpreted such that the woman has the freedom and capacity to make a choice whether to consent or withdraw consent. In instances where the woman is incapacitated through alcohol, as Saunders noted ‘We want police and prosecutors to make sure they ask in every case where consent is the issue - how did the suspect know the complainant was saying yes and doing so freely and knowingly?’. The interpretation of s74 SOA 2003 could succeed in breaking with prior perceptions of what consent could be when the victim is drunk without ‘further instructions, directions and the additional defining of legal concepts’ since the decisions in *Bree* and *Tambedou* have helped to move away from the notion of “drunken consent.” This may not be the case when the offender uses non-physical means to inhibit or incapacitate consent, a situation more likely to happen than not since, as DPP Saunders recognised, not all rapists are men wearing ‘a balaclava in a dark alley. We know that most rapists know their victim...’.¹⁶¹

1.5.2 Behaviours inhibiting or incapacitating consent

The scope of ‘freedom and capacity to make that choice’ within s74 of the SOA 2003 can be limited by four forms of external factors: violence, fear, social pressure and deception.

Violence in the SOA 2003 is the physical force exerted towards the victim and is recognised through the rebuttable presumptions of s75(2)(a), (b) and (c), where the defendant used or caused the victim to fear violence or detained the victim. The presumption is that the physical imbalance between the victim and the defendant vitiates the former’s consent, but the defendant can rebut it, a scenario that will arise for example when the persons engage in

¹⁶⁰ The Crown Prosecution Service, ‘CPS and Police focus on consent at first joint National Rape Conference’ [http://www.cps.gov.uk/news/latest_news/cps_and_police_focus_on_consent_at_first_joint_national_rape_conference/ \(25 January 2015\) \(accessed 09 June 2016\)](http://www.cps.gov.uk/news/latest_news/cps_and_police_focus_on_consent_at_first_joint_national_rape_conference/ (25 January 2015) (accessed 09 June 2016))

¹⁶¹ *Ibid.*

sado-masochism. Consent to violence as a circumstance surrounding the sexual activities is possible, providing that the degree of harm does not reach a threshold negating consent. The starting point regarding infliction of harm for sexual gratification is *R v Brown* (1994).¹⁶² In *Brown* the House of Lords answered the question of whether prosecution must prove lack of consent in the negative holding that consent could not be a defence to offences under sections 20 and 47 of the Offences against the Person Act 1861. The result is that consent does not preclude a conviction unless it is for 'good reason'.¹⁶³

However, lack of consent can stem from the victim's fear without the defendant having exercised physical violence. The simple presence of the defendant may inhibit the victim into expressing her lack of consent. The problem rests on how to prove the absence of consent when the victim has remained passive and submitted to the sexual activities without having expressed her fear and unwillingness to engage in those sexual activities. Prior to the SOA 2003, the law was ambiguous and in effect worked against the victim. In *DPP v Morgan* [1976]¹⁶⁴ the House of Lords held that as a general point of law, genuine belief of consent negated any intention to rape. That the victim was passive and unable to express lack of consent could be interpreted by the defendant as the victim having consented even when the facts demonstrated that the belief in consent was unreasonable. *Morgan* became known as the 'rapist's charter'¹⁶⁵ and the furore prompted the then Home Secretary to promise government action. The 'action' was an Advisory Group set up 'to give urgent consideration to the law of rape in the light of recent public concern'.¹⁶⁶ The Advisory Group recommended that the law governing rape as set out in the House of Lords judgment in *Morgan* be set out in statutory form but it was not until the SOA 2003 that the promised action fully materialised.

In between, where the woman does not show any physical or verbal signs of consent, the debate focused on whether submission was consent or a sign of coercion and lack of consent, such as in *R v Olugboja* (1982).¹⁶⁷ In *Olugboja*, the victim was so frightened she offered absolutely no resistance but did not consent. It was held that a woman does not have to actively resist in order to show a lack of consent; indeed, the jury distinguished that her very passivity was an indication of lack of consent. Dunn LJ noted that consent was different to

¹⁶² [1994] 1 AC 212, [1993] 2 WLR 556.

¹⁶³ Attorney-General's Reference (No. 6 of 1980) [1981] QB 715 per Lord Lane

¹⁶⁴ *DPP v Morgan* [1976] AC 182 A man persuaded his friends that his wife was willing to have sex with them and informed them that her struggles and screams were an indication of enjoyment

¹⁶⁵ EM Curley 'Excusing Rape' *Philosophy & Public Affairs* (Summer 1976) Vol 5 No4 p325

¹⁶⁶ Report of the Advisory Group on the Law of Rape (1975) Cmnd. 6352

¹⁶⁷ *R v Olugboja* [1982] QB 321; *R v Olugboja* [1981] 73 Cr App R 344

mere submission and said: ‘...every consent involves a submission, but it by no means follows that a mere submission involves consent’.¹⁶⁸ Consequently, *Olugboja* significantly foils any assumption that rape automatically involves some degree of open physical resistance by the victim before or while the offender rapes her.

Nevertheless, prior to 2003, in the absence of a definition of what consent was, there was room for social attitudes not favourable to victims of sexual offences to take precedence within the jury room and whilst consent was to be given its ‘ordinary meaning’, the term ‘should not be left to a jury without some further direction’.¹⁶⁹ The distinction between consent and non-consent is ‘... to be drawn in a given case for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case’.¹⁷⁰ This approach was problematic because ‘[t]he concept of consent has, in reality, no single clear “ordinary meaning”’¹⁷¹ and as a consequence, the ‘further direction’ offered to the jury provided a large amount of discretion. ‘The gradations of submission are infinite’¹⁷² and if the law does not provide clear and objective directions, it leaves the door open for subjectivity and social attitudes condemning the victim rather than the offender.

The common law distinction between submission and consent, as outlined in *Olugboja*, has been replaced by statute law via s74 SOA 2003 and its positive definition of consent. However, the notions of ‘choice’ and ‘freedom’ that form the definition have yet to be fully explored in cases such as *Olugboja* or where other subtler pressures might invalidate consent. As Claire de Than et al. note, the submission secured by promises of advancement, such as the actress and the casting couch scenario is likely to be regarded as consent.¹⁷³ This type of non-physical pressure generating fear and passivity for the victim creates the problem for the jury to decipher whether a woman does consent against the ‘she asked for it’ culture borne of male chauvinism.¹⁷⁴ It is a fine line to draw between the ‘greedy’ wannabe actress and the woman who feels she has no alternative, and it is this type of cultural view the courts must now ensure that the jury does not carry into the deliberation room. Section 74 of the SOA

¹⁶⁸ R v *Olugboja* [1982] Q.B. 320, 332 per Dunn LJ

¹⁶⁹ [1982] 2 QB 320 at 332.

¹⁷⁰ Criminal Law Revision Committee, Working Paper on Sexual Offences (October 1980)

¹⁷¹ Elliott C and De Than C, ‘The Case for a Rational Reconstruction of Consent in Criminal Law’ (2007) 70 MLR 225, 238

¹⁷² De Than C and Heaton R, *Criminal Law*, (4th Ed, Oxford University Press 2013) p101

¹⁷³ *Ibid*

¹⁷⁴ Carol Withey ‘Female Rape—an Ongoing Concern: Strategies for Improving Reporting and Conviction Levels’ *Journal of Criminal Law* JCL 71 (54) 1 February 2007

2003 offers a definition of consent and ss75 and 76 offer presumptions in order that the jury should be able to interpret consent as something that is given or withdrawn and not have to rely on the moral standards that question whether ‘she asked for it’ or was the sexual activities ‘against her will’ meaning that there should be some sort of physical evidence to show a struggle or fight ensued. In that sense, compared to the law prior 2003, s74 SOA represents a step forward.

However, it has not resolved the matter fully. Section 74 gives little guidance as to when or how the individual has the freedom or capacity to choose if they are not caught within the constraints of age or the presumptions of ss75 and s76. There is no guidance where the victim in a more social setting is subjected to typically persuasive factors. These factors can include cajoling by a man who is not violent or openly threatening but nonetheless persistent; or where the cajoling is combined with the liberal plying of alcohol or drugs. It could be argued that s74 is sufficient with regards to coercion as the choice and freedom elements would be removed. However, it is still left for the courts to direct the jury to ascertain whether the submission equated to lack of consent and where freedom and capacity reside. As shown in the research by Vanessa Munro,¹⁷⁵ juries still have pre-conceptions with regard to the necessity of struggle despite the fact that s74 of the SOA 2003 now includes submission within its definition. These terms of freedom and choice are more likely to be interpreted narrowly¹⁷⁶ and lend themselves to integrating the jury’s social prejudices, despite there being a demonstrable lack of consent.¹⁷⁷ As Susan Leahy notes ‘[the SOA 2003] does not really improve the prospects of obtaining a conviction for sexual coercion without extrinsic physical violence’.¹⁷⁸

So, whilst s74 defines consent, and breaks with the previous law that contains ‘little general guidance ... as to the meaning of consent’,¹⁷⁹ it creates ambiguity by failing to offer a definition of ‘freedom’ and ‘choice’ within its remit. The SOA 2003 fails to explain to what extent social conditions may constrain an individual’s choice and how they are accounted for,

¹⁷⁵ Ellison L and Munro V, ‘Reacting to Rape’ *Br J Criminol* (2009) 49(2): 202-219

¹⁷⁶ Finch E and Munro V, ‘Breaking Boundaries? Sexual Consent in the Jury Room’ 26 *Legal Studies* 303, 318 (2006)

¹⁷⁷ Kelly Liz, ‘A Gap or a Chasm? Attrition in Reported Rape Cases’ Home Office Research Study 293: (2005) (U.K.), <http://www.homeoffice.gov.uk/rds/pdfs05/hors293.pdf> (accessed 7th May 2012) (Link no longer available)

¹⁷⁸ Leahy S, ‘No means No’, But Where’s the Force? Addressing the Challenges of Formally Recognising Non-violent Sexual Coercion as a Serious Criminal Offence’ *Journal of Criminal Law*, JCL 78 (309) August 2014

¹⁷⁹ Home Office, ‘Protecting the Public - Strengthening Protection against Sex Offenders and Reforming the Law on Sexual Offences’, The Stationery Office CM5668, paragraph 30

if they are. As such, it falls short of the Government's intention to 'make statutory provision on this issue that is clear and unambiguous'¹⁸⁰ as expressed in the Government report '*Protecting the Public*'.¹⁸¹

The same conclusion can apply to s76 and its conclusive presumption of lack of consent in case of fraud or deception. Prior to the SOA 2003, the common law recognised deception as vitiating consent. In non-commercial incidences, often the deception takes place where the perpetrator pretends to be a person carrying a qualification such as a man posing as a doctor,¹⁸² or having some medical knowledge¹⁸³ or similarly, in *R v Tassbaum* (2000),¹⁸⁴ where the 'nature and quality' of the act vitiated consent, the defendant carried out an examination on the breasts of three women pretending to be conducting a study on breast cancer. The House of Lords noted that the women were consenting to a medical examination and not to the defendant's indecent behaviour, thus 'there was consent to the nature of the act but not its quality'.¹⁸⁵

Building on the common law, s76 (2)(a) of the SOA 2003 creates the conclusive presumption where the defendant intentionally deceives the complainant as to the nature or purpose of the relevant sexual act. This means that actions such as *Tassbaum* would be criminal or indeed anyone who intentionally tells the woman that penetration (either digitally or by the penis) is necessary for medical reasons when in fact it is for his own sexual gratification. Section 76(b) offers a conclusive presumption about consent by criminalising deception where the perpetrator 'intentionally induced the complainant to consent ... by impersonating a person known personally to the complainant'. This presumption is intentionally narrow and does not apply in a number of cases.

For example, in *R v Jheeta* [2007]¹⁸⁶, the defendant, who was the victim's boyfriend, sent text messages to the victim, pretending that they were from the police, threatening that he would likely commit suicide if she failed to have sexual intercourse with him. Charged with rape, it was held that s76 could not be applied as the victim was not deceived as to the nature and purpose of the act: she consented to the sexual nature of the activity and for the purpose of

¹⁸⁰ *Ibid* at paragraph 30

¹⁸¹ Home Office, 'Protecting the Public - Strengthening Protection against Sex Offenders and Reforming the Law on Sexual Offences', The Stationery Office CM5668

¹⁸² *R v Flattery* (1877) 2 Q. B. D. 410.

¹⁸³ *The King v Williams*. - [1923] 1 K.B. 340

¹⁸⁴ *R v Tassbaum* [2000] Crim Lr 686

¹⁸⁵ *R v Tassbaum* [2000] EWCA Crim 90 at [38] per Vice President Rose LJ

¹⁸⁶ *R v Jheeta* [2007] 2 Cr App R 34

sexual gratification. However, she was still deceived, but that deception fell under s74 rather than s76 because although s76 does not contain an exhaustive list of deceptions, in *Jheeta* s74 was considered subject to s76.¹⁸⁷ The court held that she did not have 'a free choice, or consent for the purposes of the Act'.¹⁸⁸

A further form of deception is the recent judicial expansion of criminal liability for sexual fraud resulting in a 'witch hunt'¹⁸⁹ of five gender fraud cases¹⁹⁰ that were successfully prosecuted between 2012 and 2015. In each of these cases the 'gender fraud' was perpetrated by a person whose gender identity led the female complainants to believe that the defendant in each case was a male and not a female, resulting in 'a gap between belief and reality.'¹⁹¹

In *R v McNally* [2013]¹⁹² the court held that 'deception as to gender can vitiate consent' under s74 but not under s76. In this instance *McNally* identifying as a male when aged 13, met up online with a 12-year-old girl. Several years later when *McNally* was 17 they met up and in a dark room they kissed and *McNally* digitally penetrated the young woman and performed oral sex. All the while the young woman believed *McNally* to be a boy until a friend of the family discovered a bra and strap-on dildo in *McNally*'s overnight bag and the police were called.

McNally pleaded guilty to six counts of assault by penetration contrary to [s2](#) of the SOA 2003. Part of a lawyer's responsibility is to advise the client (without bias) with regards to how the client wishes to plead. Why *McNally* chose to plead guilty, or was advised to plead guilty, warrants further analysis but is too wide for this thesis. Alex Sharpe suggests that 'pleading guilty ... is not the same thing as being guilty'¹⁹³ and the 'kids accused of gender fraud'¹⁹⁴ suffered from 'internalised shame.'¹⁹⁵ Alex Sharpe also argues that the 'recent

¹⁸⁷ Simpson B, 'Why has the Concept of Consent Proven so Difficult to Clarify?' *Journal of Criminal Law* (2016) JCL 80 (97) at 100

¹⁸⁸ *R v Jheeta* [2007] EWCA Crim 3098, at para 29

¹⁸⁹ Sharpe A, 'The dark truth behind the convictions for "gender fraud" *New Statesman*

<http://www.newstatesman.com/politics/feminism/2015/12/dark-truth-behind-convictions-gender-fraud>

¹⁹⁰ *R v Gemma Barker* [2012], *R v Chris Wilson* [2013] *R v Justine McNally* [2013] *R v Gayle newland* [2015] and *R v Kyran Lee (Mason)* [2015]

¹⁹¹ Sharpe A, 'The dark truth behind the convictions for "gender fraud" *New Statesman*

<http://www.newstatesman.com/politics/feminism/2015/12/dark-truth-behind-convictions-gender-fraud>

¹⁹² *R v McNally* [2013] EWCA Crim 1051

¹⁹³ Sharpe A, 'The dark truth behind the convictions for "gender fraud" *New Statesman*

<http://www.newstatesman.com/politics/feminism/2015/12/dark-truth-behind-convictions-gender-fraud>

¹⁹⁴ Sharpe A, 'The dark truth behind the convictions for "gender fraud" *New Statesman*

<http://www.newstatesman.com/politics/feminism/2015/12/dark-truth-behind-convictions-gender-fraud>

¹⁹⁵ Sharpe A, 'The dark truth behind the convictions for "gender fraud" *New Statesman*

<http://www.newstatesman.com/politics/feminism/2015/12/dark-truth-behind-convictions-gender-fraud>

spate of criminal prosecutions of LGBT youth ...calls for rigorous analysis in its own right.’¹⁹⁶

The problem is that s74, by not defining freedom and choice, leaves the door open to various interpretations of what circumstances would be acceptable as deception, including subjective interpretations based on social attitudes and prejudices. The lack of definition within s74 generates a situation where a form of ‘state violence’¹⁹⁷ is created because of the distinction made between ‘the fleshy and the non-fleshy penis in legal constructions of consent.’¹⁹⁸

It is my contention that s74, with the presumptions set in s75 and s76, does not sufficiently address the issue of submission because of the subjective test (albeit with an objective element) of reasonable belief. So, although an attack or threat of violence is caught within s74 because violence removes choice and freedom, this is not without its own criticism: the circumstances set out in s75 and 76 in conjunction with s74 create a hierarchy where fraud or deception scores higher than threats of violence which can be rebuttable. Deception in the form of gender deception should not relate to the concept of ‘gender deviance’ but should look at the gender identity of the defendant and whether there was an emotional involvement with the complainant. As Sharpe notes: ‘it is important to recognise that for some transgender men, a prosthesis is experienced as a penis.’¹⁹⁹ The issue of gender fraud is fraught with cisgender autonomy and the state should not be used as a tool for women to ‘mobilise against other men with whom a woman chooses to have sex.’²⁰⁰

A final area showing the difficulties within the SOA 2003 with regard to consent is ‘conditional consent’.

1.6 Conditional consent

Conditional consent is an emerging concept where it is held that the consent given contains an express condition. When one looks at the commercial sex industry it is shown that consent

¹⁹⁶ Sharpe A, ‘The dark truth behind the convictions for “gender fraud” *New Statesman*
<http://www.newstatesman.com/politics/feminism/2015/12/dark-truth-behind-convictions-gender-fraud>

¹⁹⁷ Sharpe A, ‘The dark truth behind the convictions for “gender fraud” *New Statesman*
<http://www.newstatesman.com/politics/feminism/2015/12/dark-truth-behind-convictions-gender-fraud>

¹⁹⁸ Sharpe A, ‘The dark truth behind the convictions for “gender fraud” *New Statesman*
<http://www.newstatesman.com/politics/feminism/2015/12/dark-truth-behind-convictions-gender-fraud>

¹⁹⁹ Sharpe A, ‘The dark truth behind the convictions for “gender fraud” *New Statesman*
<http://www.newstatesman.com/politics/feminism/2015/12/dark-truth-behind-convictions-gender-fraud>

²⁰⁰ Sharpe A, ‘The dark truth behind the convictions for “gender fraud” *New Statesman*
<http://www.newstatesman.com/politics/feminism/2015/12/dark-truth-behind-convictions-gender-fraud>

is often given for certain areas of sexual activities, i.e. viewing only, and is not given for any other form of sexual activities i.e. touching or intercourse. An example of non-commercial conditional consent can be shown in *Assange v Swedish Prosecution Authority* [2011]²⁰¹ where the woman made it clear that she only consented to intercourse if Assange used a condom.

In the *Assange* case, Sir John Thomas was of the opinion that unless the condom accidentally split or came off, intercourse without a condom in the circumstances set within *Assange* ‘would therefore amount to an offence under the Sexual Offences Act 2003’²⁰² and although s76 was too narrow, s74 could be relied on in this instance.

Again, an example of conditional consent, and the issue of choice when it is pitted against intention, can be seen in *R (on the application of F) v DPP* [2013]²⁰³ where the woman consented to intercourse on the condition that her husband would not ejaculate inside her. Her husband told her he had a perfect right to ejaculate if he wanted and proceeded to have intercourse. Subsequently she became pregnant. Prosecution in the first instance refused to proceed with the charge of rape on the basis that there was no reasonable prospect for conviction. The decision was taken to Judicial Review and the Divisional Court said that the crucial factor was that she was deprived of choice and therefore her consent was negated. It was not a matter of the man intending to withdraw but ejaculating either prematurely or accidentally, but whether the man *intended* to ejaculate despite the condition imposed not to.²⁰⁴

These two cases create a new concept of conditional consent. It could be argued that the concept creates a gap between the Court’s understanding of rape against that of the public, similar to that of the ‘mock jurors’ who did not ‘leave their personal prejudices and stereotypical preconceptions behind them when they enter[ed] the courtroom’.²⁰⁵ The argument also resonates when the age of consent was set at sixteen: assessing the difference between a girl under sixteen to one who is sixteen or over was ‘too difficult to establish’. In cases of conditional consent there is ‘clearly a strong public interest in requiring men to

²⁰¹ *Assange v Swedish Prosecution Authority* [2011] EWCH 2849

²⁰² *Assange v Swedish Prosecution Authority* [2011] EWCH 2849 per Sir J Thomas at [86]

²⁰³ *R (on the application of F) v DPP* [2013] EWHC 945

²⁰⁴ *R (on the application of F) v DPP* [2013] EWHC 945 at [26]

²⁰⁵ Ellison and Munro ‘Reacting to Rape’ *British Journal of Criminology* BR J Criminol (2009) 49(2): 202-219

respect the wishes of their sexual partners'²⁰⁶ but similarly to the stereotype where it is difficult to ascertain the age of a girl, the courts have to address the concept of conditional consent where the man assumes that although the request to either not ejaculate or to wear a condom has been made, it is his prerogative to ignore such a request.²⁰⁷ To date conditional consent is restricted to consent to sexual activity excluding ejaculation and sexual activity on the condition a condom is used.

Another emerging behaviour, 'revenge porn', could be looked at under the prism of conditional consent. Revenge porn, which is not commercial pornography, is the public sharing of sexually explicit communications, usually in the form of pictures, sent via social media without the consent of the subject of the photograph or other materials. McGlynn describes this behaviour as 'just one form of a range of gendered, sexualized forms of abuse'²⁰⁸ and instead of referring to it as 'revenge porn' it should be known for what it is: 'image-based sexual abuse.'²⁰⁹ Revenge porn, or image-based sexual abuse, is when private, sexual images are share widely onto the internet and the 'images generally attract comment most of which is extremely abusive and the abuse is sexualized.'²¹⁰

Consent would have been given for the original image to be taken and sent to the intended recipient. It is part of the practice of 'sexting' where an image is generated by an individual (an intimate 'selfie') either as a result of a request or sent to a recipient who has not requested it.²¹¹ The sender and recipient are either already in an intimate relationship or in the case of the unsolicited intimate selfie, the sender anticipates an intimate relationship. This type of

²⁰⁶ Doig G and Wortley N, 'Divisional Court: Conditional Consent? An Emerging Concept in the Law of Rape: *R (on the application of F) v DPP and A [2013] EWHC 945 (Admin)*' *Journal of Criminal Law* (2013) JCL 77 (286)

²⁰⁷ The defendant in *R (on the application of F) v DPP and A [2013] EWHC 945 (Admin)* aware that his wife would not consent to him ejaculating inside her vagina said 'I'll do it if I want.'

²⁰⁸ McGlynn C, Rackley E and Houghton R 'Beyond "Revenge Porn": the continuum of Image-Bases Sexual Abuse' *Feminist Legal Studies* (2017) pp 1 – 27 at 2 (published online)

http://download.springer.com/static/pdf/385/art%253A10.1007%252Fs10691-017-9343-2.pdf?originUrl=http%3A%2F%2Flink.springer.com%2Farticle%2F10.1007%2Fs10691-017-9343-2&token2=exp=1489845131~acl=%2Fstatic%2Fpdf%2F385%2Fart%25253A10.1007%25252Fs10691-017-9343-2.pdf%3ForiginUrl%3Dhttp%253A%252F%252Flink.springer.com%252Farticle%252F10.1007%252Fs10691-017-9343-2*~hmac=0f2b3fb92fa4023ef4de28cb21fb04c80a771afdee674331434b25073964536c accessed 18th March 2017)

²⁰⁹ Ibid p2

²¹⁰ McGlynn C 'More than a breach of privacy: image-based sexual abuse and the Irish Law Reform Commission on harmful communications' Forthcoming paper in Association of Criminal Justice Research and Development Association (ed) *Cybercrime – 19th annual Conference report* (AJCRD 2017) p2

²¹¹ Sexting is also a cultural phenomenon among young teenagers – see Andy Phippen 'New social media offences under the Criminal Justices and Courts Act and Serious Crime Bill: the cultural context' *Entertainment Law Review* Ent. LR 2015 26(3) 82-87'

conditional consent where the consent has not extended to the sharing of the images by the recipient with others than themselves is an offence within s33 of the Criminal Justice and Courts Act 2015 alongside the Communications Act 2003, the Malicious Communications Act 1988 and the Protection from Harassment Act 1997 [Protection from Harassment Act 1997](#) and is not caught within the SOA 2003.

New technologies and the omnipresence of the Internet means that the image is subsequently (often after the break-up of the intimate relationship) re-distributed, without the consent of the victim, often via social media to third parties. The images are distributed by several means: changing the profile picture on Facebook as in *R v Humphrey* (2015),²¹² 'Whatsapp' profile picture as per *R v Duffin* (2015),²¹³ to that of the intimate picture of the victim is not uncommon. Not all images are posted on the Internet, in *R v Brimson* (2015)²¹⁴ the pictures were posted on the inside and outside of a supermarket. The intention of posting such pictures is to humiliate the victim by causing as much distress as possible. The SOA 2003 does not cover this situation. This is a failing of the Government in resisting the label sexual offences with regard to revenge porn. As McGlynn notes the images are sexual and the harm caused is because the images are sexual. 'It is a plain fact that non-sexual images simply do not have the same potency to cause harm and abuse.' Instead revenge porn is dealt with by s1 of the Malicious Communications Act 1988, which provides the offence of sending letters, et cetera, to another person with the intent to cause distress; the Communications Act 2003 and the more recent Criminal Justice and Courts Act 2015.

The Malicious Communications Act was written at a time before social media had become popularised and was primarily to criminalise hate mail. Furthermore, s127 of the Communications Act 2003 widened the scope and criminalised anyone who sent a message or other matter that is grossly offensive. The wording of the previous Acts was too narrow to protect the victim because the reliance was upon the content of the image. The modifications in the Criminal Justice and Courts Act 2015 created a wider scope. Although the reliance is still on the content being such that the photograph 'shows all or part of an individual's exposed genitals or pubic area',²¹⁵ it does not have to be obscene as required by the Malicious Communications Act 2003. The Criminal Justice and Courts Act 2015 also carries an expectation of privacy if, as defined by s35(2), 'it shows something that is not of a kind

²¹² *R v Humphrey* (2015) Unreported, St Albans Magistrates Court (24th July 2015)

²¹³ *R v Duffin* (2015) Unreported, Bristol Magistrates Court (17th July 2015)

²¹⁴ *R v Brimson* (2015) Unreported, Woodspring Magistrates Court (30th July 2015)

²¹⁵ Criminal Justice and Courts Act 2015 s35(3)(a)

ordinarily seen in public'. McGlynn notes the shortcoming of the provision within the Criminal Justice and Courts Act 2015 that it is 'restricted to disclosure only, does not cover threats, and the intent requirement cannot be satisfied by recklessly causing distress.'²¹⁶

Prima facie revenge porn is a civil matter, although as Pegg notes 'we have seen a steady creep of criminal law into private relations'²¹⁷ where in revenge porn the photograph is taken with the subject's consent but is disclosed publicly. The crux of the offence is 'the later, non-consensual disclosure of that image.'²¹⁸ Here the criterion of consent interplays with the fourth element of our framework, visibility.

It is shown that with regards to sexting and the subsequent revenge porn, consent, and the lack thereof, falls into two distinct classes: where the consent is conditional and the picture is either taken by someone other than the subject or the subject themselves, and where no consent has been given at all because the subject of the picture was unaware the photo or video was being taken as was the case *R v Kennedy* (2015)²¹⁹ or in *R v Asagba* (2015)²²⁰ where the victim was asleep when the pictures were taken. In either scenario the picture (or video) is of a nature such 'that a reasonable person would consider to be sexual'.²²¹

However, consent, despite whether it is conditional (you can take and keep the picture but do not show it to anyone else), or absent (you cannot take a picture), could still be lacking because of the expectation of privacy. Therefore, although conditional consent may be considered of a lesser quality, the law regards the conditional consent with the same rigour as general consent.

This section has established that although the law prohibits non-consensual sexual activities, the courts and Parliament were loath to define consent. It was not until the SOA 2003 that the definition of consent finally gained statutory recognition. There are still legal difficulties within the drafting of s74 as establishing consent in relation to freedom and choice remains reliant on judicial interpretation and directions given to the jury. In turn, and despite the presumptions of s75 and s76, how to understand s74 requirements leaves the door open to

²¹⁶ McGlynn C, Rackley E and Houghton R 'Beyond "Revenge Porn": the continuum of Image-Bases Sexual Abuse' *Feminist Legal Studies* (2017) pp 1 – 27 at 2 (published online) p2 fn1

²¹⁷ Pegg S, 'Wrong on Revenge Porn' *Law Society Gazette* (2015) LS Gaz, 23 Feb, 8 (2) at 2

²¹⁸ Pegg S, 'Wrong on Revenge Porn' *Law Society Gazette* (2015) LS Gaz, 23 Feb, 8 (2) at 2

²¹⁹ *R v Kennedy* (2015) Unreported, Cardiff Magistrates Court (6th July 2015)

²²⁰ *R v Asagba* (2015) Unreported, Reading Magistrates Court (16th May 2015)

²²¹ Sexual Offences Act 2003 s78

integrating social attitudes, some of which can be prejudicial to women, into the definition of the law.

Furthermore, an interesting development is that of conditional consent, where consent to the sexual activities by A is formulated upon the compliance by B to certain conditions: either as to the nature of the sexual actual (no ejaculation) or with regards to the visibility or lack of visibility of the act (no picture taken or no picture sent to third parties). In those cases, that are concerned with non-commercial relationships, the breach by B of the condition(s) formulated by A has been interpreted as negating consent by A. A is considered to have been deprived of choice as per s74 SOA 2003.

In the guidelines within the 2003 White Paper prior to the SOA 2003,²²² the Government clearly acknowledges that within all sexual encounters the issue of consent is central to establishing whether a sexual offence has or not taken place.

Elliott and DeThan criticise the fact that the definition of consent is limited to sexual offences and argue that there should be a unified definition in all areas of criminal law saying ‘all relevant offences should use a single core statutory definition of consent so that the boundaries of criminality are stated more effectively’.²²³ This criticism, given the government’s obligation to regulate against harm, is relevant when considering non-sexual offences under the Offences against the Person Act 1861. Elliott and De Than state that it creates ‘artificial and illogical distinctions’ especially when in practice domestic violence and sexual offences are often linked. Nonetheless, parameters have been established within s74 of the SOA 2003 regarding sexual consent, but not without certain difficulties remaining in the interpretation of s74, especially with regards to capacity. The parameters fail when considering the issue of consent with regards to transference of sexually transmitted diseases, instead this is caught within the Offences Against the Person Act 1861 and does not capture the ‘freedom and choice’ of s74.

The recent development of conditional consent plays a fundamental role in commercial sexual activities as often, especially for prostitution, consent is conditional. It also demonstrates how consent is linked to the nature of the act by its implicitness. The following

²²² White Paper ‘Protecting the Public: strengthening protection against sex offenders and reforming the law on sexual offences’ Cm 5668 November 2002

²²³ Elliott C and De Than C, ‘The case for a Rational Reconstruction of Consent in Criminal Law’ (2007) 70(2) MLR 225 at 249

section explores the nature of non-commercial sexual activities in order to show how the law regulates the nature of commercial sexual activity.

Section 2 - The nature of the sexual activities

The second conceptual connector is the nature of the sexual activities. The law regulating non-commercial sexual activity offers the foundation for regulating commercial sexual activity where the same restrictions apply but with additional restrictions depending on which area of the sex industry is involved.

The offences in the SOA 2003 depend on the activity being sexual as defined in s78. Section 78 of the SOA 2003 defines 'sexual' as something a 'reasonable person' would consider to be sexual and this includes (but is not exhaustive) penetration, touching *or any other activity* (my italics). Thus, the definition is reliant on 'a reasonable person' considering the activity along with the circumstances and purpose to be sexual. However, the exact nature of the sexual activities, other than penetration and touching is not defined, yet deserves more attention given that the commercial sex industry can involve a number of sexual acts.

Criminal law hardly sets any restrictions with regards to the nature of the sexual activities, even if historically it did (2.1). Today, the boundaries concern essentially the sexual activities with an unwitting partner (2.2), and when the sexual activities may create harm (2.3). I also review the approach to sexual activities in the civil law of marriage (2.4) to show how sexual activity in the form of consummation is obligatory.

2.1 The changes of legal and moral attitude toward the nature of the sexual act

Historically anal and oral intercourse was not permissible at all by law. The prohibition shows the interplay between the nature of the act and the third criteria of our framework, the purpose of the sexual activities. Indeed, the rationale for prohibiting these forms of sexual activity was that it was not conducive to procreation, and therefore the church banned it within marriage.

Oral and anal intercourse were decriminalised first by the SOA 1967, which decriminalised homosexuality, then by the Criminal Justice and Public Order Act 1994, consolidated by the

SOA 2003. The decriminalisation of anal intercourse removes the state interference for sexual activities that does not have procreation as the primary purpose.

Prior to the SOA 1956, ‘there was no specific provision that applied when a man compelled his wife to perform acts of bestiality.’²²⁴ Section 12(1) criminalised a person who committed ‘buggery with another person or with an animal’ thus the term buggery is employed instead of bestiality. Section 69 of the SOA 2003 modifies the wording of the SOA 1956 as it decriminalises buggery with another person. It continues to criminalise sexual activities involving an animal with the addition of when a person intentionally performs an act of penetration with his penis²²⁵ in the vagina or anus of a living animal²²⁶ or if a person intentionally causes a human vagina or anus to be penetrated²²⁷ by the penis of a living animal.²²⁸ The SOA 2003 s69 criminalises sexual activity with an animal but there does not appear to be a provision against either penetrating or being penetrated by the penis of a dead animal.

It may be argued that the majority of people probably feel ‘some sort of repulsion at the idea of another human enjoying sexual intercourse with a non-human’.²²⁹ The criminalisation of bestiality was justified because of a lacuna in the law and on morality. The Home Office in *Setting the Boundaries* noted that ‘that there was no specific provision that applied when a man compelled his wife to perform acts of bestiality’²³⁰ and morally it was ‘an act that offended against the dignity of animals and of people’²³¹ that reflected a ‘profoundly disturbed behaviour’²³² of which ‘society had a profound abhorrence for this behaviour.’²³³

Within the SOA 2003, sexual activity is defined as ‘penetration, touching or any other activity’²³⁴ if a reasonable person would consider that²³⁵ it is because of its nature sexual²³⁶ or

²²⁴ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences, Volume 1* (2000) para 2.30.1

²²⁵ Sexual Offences Act 2003 c42 s69(1)(a)

²²⁶ Sexual Offences Act 2003 c42 s69 (1) (b)

²²⁷ Sexual Offences Act 2003 c42 s69 (2)(a)

²²⁸ Sexual Offences Act 2003 c42 s69 (2)(b)

²²⁹ Jones I, ‘A Beastly Provision: Why the Offence of ‘Intercourse with an Animal’ Must Be Butchered’ JCL 75 (528) (2011)

²³⁰ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences, Volume 1* (2000) para 2.20.1

²³¹ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences, Volume 1* (2000) para 8.5.3

²³² Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences, Volume 1* (2000) para 8.5.3

²³³ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences, Volume 1* (2000) para 8.5.3

²³⁴ Sexual Offences Act 2003 c42 s78(1)

²³⁵ Sexual Offences Act 2003 c42 s78(1)

²³⁶ Sexual Offences Act 2003 c42 s78(1)(a)

because of its circumstances or purpose is sexual'.²³⁷ The statutory definition is thus reliant on the jury to act as the 'reasonable person' and decide whether the activity is sexual based on their perception of the views of modern society. This broad definition of the nature of sexual activities rests on the assumption, never stated, that the person is a human being and is not dead. If the sexual activities involve a non-human or a corpse, then criminal law reinserts some boundaries.

Necrophilia is the erotic attraction to corpses and is not dependent on a distinction between private or public sexual activities. The SOA 2003 s70 criminalises an intentional 'act of penetration with a part of his body or anything else ... of a dead person... and the penetration is sexual'. The offence precludes any sexual act and certainly prohibits a person from penetrating any part of the deceased's body with his penis, finger or any other object. It is understandable that the penetration must be sexual; otherwise autopsies would be criminalised and morticians would not be able to embalm the body. However, the SOA 2003 is not designed to cover situations where a person dies during sexual intercourse. The SOA 2003 was designed to protect bodies in a mortuary or in situations where the defendant is reckless as to whether the body is alive or dead.

Sexual activities involving the use of objects instead of humans or animals in private is not prohibited. The issue is whether the object could cause harm, but the sale and possession of objects (sex toys) is not prohibited, as shown in *R (Ann Summers) v Jobcentre Plus*.²³⁸

2.2 Sexual activities involving an unwitting partner.

Sexual activity involving an unwitting partner is not about touching or penetration. The nature of the activity is by means of gaining pleasure from viewing and is therefore interconnected with visibility. Voyeurism or 'flashing' or 'peeping' is not restricted by location despite both practices usually being performed in open spaces—the essence is the very fact that the complainant is unwitting.

Until 2003, there was no legislation against voyeurism although it was regarded as nuisance under common law where distress had been caused. The law offered no remedy 'unless the proceedings were recorded and could be considered as indecent or obscene material'.²³⁹ To

²³⁷ Sexual Offences Act 2003 c42 s78(1)(b)

²³⁸ *R (on the application of Ann Summers Ltd) v Jobcentre Plus* - [2003] All ER (D) 235 (Jun)

²³⁹ Home Office 'Setting the Boundaries' The Stationery Office, 2000 para 8.3.1

resolve this gap in the law, the Home Office Review Panel recommended in *'Setting the Boundaries'*²⁴⁰ in 2000 for, 'a new offence of voyeurism to deal with the observation of people without their knowledge or consent when they have a reasonable expectation of privacy'.²⁴¹ Consequently voyeurism became a criminal offence as defined in the SOA 2003.²⁴² Voyeurism in the form of 'peeping Toms' is criminalised as opposed to the form of voyeurism within a swingers party, where watching sexual activities is as enjoyed by some as partaking is for others. The party is held in private and consent to being viewed is given, and so the voyeurism within a swingers' party would be outside the constraints of the SOA 2003.

The location of voyeurs is irrelevant. Some voyeurs, such as *R v Richardson-Blake* (2014)²⁴³ watch from within a private space. The facts in *Richardson-Blake* are that the defendant planted a hidden camera in the female changing rooms at Abingdon police station. Upon pleading guilty to s67 of the SOA 2003, his sentencing was referred to Crown Court where Judge Pringle said: 'This was probably one of the worst abuses of trust that you could commit'.²⁴⁴ The comment by Judge Pringle shows how the criminal law is interpreted by the courts with the victim's expectation of privacy at the forefront. The person in the changing room had an expectation of privacy and therefore trusted that nobody would spy on her getting changed. Tony Doyle argues that when voyeurism is detected it can 'do grave harm and to that extent should be severely punished'²⁴⁵ but he maintains that 'perfect voyeurism', where the person being watched is completely unaware, creates no harm. He suggests that privacy belongs to the victim and should act as 'a shield that can protect [them] from embarrassment'²⁴⁶ and although he is arguing that voyeurism before becoming noticed is a victimless hobby his argument regarding the shield must apply to all victims. This thesis concentrates on the capacity for autonomy whereas a voyeur uses the victim for his own ends disregarding the victim's autonomy. Gardner argues that sexual crime diminishes 'people's

²⁴⁰ *Ibid*

²⁴¹ Home Office 'Setting the Boundaries' The Stationery Office, 2000 para 0.22

²⁴² Sexual Offences Act 2003 c42 s67

²⁴³ *R v Richardson-Blake* Oxford Magistrates' Court (unreported) 3rd March 2014

²⁴⁴ Nimmo J, 'Peeping Tom who filmed women in changing room at Abingdon Police Station sent to jail' Oxford Mail (04 April 2014)

http://www.oxfordmail.co.uk/news/yourtown/abingdon/11125907.Peeping_Tom_who_filmed_women_in_changing_room_at_Abingdon_Police_Station_sent_to_jail/ (accessed 09 June 2016)

²⁴⁵ Doyle T 'Privacy and perfect voyeurism' (2009) *Ethics, Information and Technology* Volume 11 pp181-189, 181

²⁴⁶ *Ibid* 181

sense of ease with their living environment'²⁴⁷ and 'the right to sexual autonomy, the right at the centre of ... modern [criminal] law.'²⁴⁸

Another form of sexual activity that involves an unwitting partner is 'flashing,' a form of 'paraphilia involving exposing one's genitals to a stranger'.²⁴⁹ The modern form of 'flashing' is reminiscent of *R v Sedley* (1663),²⁵⁰ given that *Sedley* whilst standing semi-naked on a balcony, urinating into bottles and then throwing them at the crowd below, would have had also shown his genitals to the crowd below his balcony. The SOA 2003 criminalises anyone who intentionally exposes his genitals²⁵¹ and intends for someone to see them and cause them alarm or distress.²⁵² These two examples, voyeurism and flashing, although reliant on the criminal law definition for what is public or visible, also depend on the element that the other person involved is unwitting.

2.3 Criminal law approach to a sexual act potentially involving harm

John Stannard suggests emotions play a part in the criminal law and that the law is not an 'emotion-free' zone where reason is king.²⁵³ The nature of sexual activities, as seen in the previous sections, relies on consent, and the consent, according to Stannard may be granted because of three types of emotion: fear, hope and love,²⁵⁴ or at the very least some kind of relationship. The harm caused and thus the level of harm that may occur or feared to occur also governs the nature of the activity.

In the following three cases there was a relationship between the defendant and victim and consent was freely given. Yet, in two cases, it was considered that the nature of the act consented to, because of the potential harm or actual harm, was not legal.

Briefly the limitation of criminal law can first be seen in *R v Brown*²⁵⁵ (where a group of homosexuals participated in sado-masochistic practices), followed by a relaxation in *R v*

²⁴⁷ Gardner J, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) p30

²⁴⁸ *ibid* 32

²⁴⁹ Dr. L. F. Lowenstein 'Exhibitionism' 171 JPN 10, (2007)

²⁵⁰ *R v Sedley* (1663) 17 St Tr 153

²⁵¹ Sexual Offences Act 2003 ch 42 s66 (1)(a)

²⁵² Sexual Offences Act 2003 ch 42 s66 (1)(b)

²⁵³ Stannard J, 'The Emotional Dynamics of Consent' (2015) *Journal of Criminal Law* Volume 79:6 pp 422

²⁵⁴ Stannard J, 'The Emotional Dynamics of Consent' (2015) *Journal of Criminal Law* Volume 79:6 pp 422

²⁵⁵ *R v Brown* [1993] 2 All ER 75

*Wilson*²⁵⁶ (a married couple practice sado-masochist practices) and a ‘step too far’ in *R v Emmett*²⁵⁷ (where a heterosexual couple also participated in sado-masochistic practices).

Brown, the landmark case, limited the level of participatory consensual (homosexual) sado-masochistic behaviour so that the behaviour does not exceed causing harm above the level of assault as per s47 of the Offences against the Person Act 1861, and that such behaviour, despite being consensual and in private, was not protected by Article 8 of the European Convention on Human Rights.

An interesting move happened between *Brown* and *Emmett*. In *R v Wilson* the case consisted of a married couple where the husband consensually branded his initials on his wife’s buttocks. The courts distinguished *Wilson* on the grounds that the branding was, for want of better words, a loving adornment given from husband to wife and amounted to no more than a tattoo. The level of harm was not seen to be as great as that in *Brown* and the case gave the appearance of the courts taking a step back from the strict criteria within *Brown*. A second criticism of the *Wilson/Brown* cases was that it showed a marked distinction in how the courts treat a heterosexual married couple as opposed to a group of homosexual men.²⁵⁸ In *Emmett* the male of the unmarried heterosexual couple poured lighter fluid on his fiancée’s breasts and set light to it. The result was severe burns to her chest. The courts held that this was indeed a step too far and relying on *Brown* held that these were not acts to which lawful consent could be given. In *Emmett* it can be seen that the courts followed Lord Jauncy and Lord Lowry’s dicta in *Brown* arguing that *Emmett* went beyond the point where there is a realistic risk of injury that is more than trivial or transient. Thus the degree of potential harm and unpredictability to injury gave cause for the criminal law to intervene and the line is now drawn so that at the level of harm must be below that of Actual Bodily Harm as per s47 Offences Against the Person Act 1861. The logic for distinguishing *Emmett* from *Wilson* is vague, with the Court of Appeal arguing that ‘this was not tattooing’ and ‘it was not something which absented pain or dangerousness ...’ but in *Wilson* the branding surely must have caused ‘pain or dangerousness.’ The Court of Appeal ruled that it was not ‘in the public

²⁵⁶ *R v Wilson*[1996] 3 WLR 125

²⁵⁷ *R v Emmett* [1999] EWCA Crim 1710,

²⁵⁸ See De Than C and Tattersall B ‘Palm Tree Justice and the Strange Death of Precedent’ JCL 65 pp 262 – 268 at 266 who note that the *Wilson* decision ‘throws the whole issue into confusion, especially as it seems to endorse the concept that serious physical harm with consent can be tolerated in non-sexual matters but not in sexual ones, particularly if those who commit it are homosexual. Surely either both are permissible, or neither?’ see also Grigolo M ‘Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject’ *European Journal of International Law* Eur J Int Law (2003) 14(5) 1023 at 1034

interest' that private activities of married couples should be sanctioned by the criminal law and concentrated on the issue of 'adornment' as with tattoos instead of the infliction of pain.

These three cases created a delineation of what is and what is not lawful for a couple to be able to consent to. Suffice to say that any harm that is calculated to interfere with the health or comfort of the victim which includes injuries ranging from minor cuts, bruising or a brief loss of consciousness to broken teeth or multiple bruising would amount to ABH and as per s47 of the Offences Against the Person Act 1861.

Brown, Wilson and *Emmett* show how inherently linked consent and nature are, both inside and outside of marriage. There is no special defence for sado-masochism, either inside or outside marriage, because the risk of allowing people to indulge in consensual sexual torture may lead to a situation where sado-masochistic tastes are 'better satisfied where consent is absent'.²⁵⁹ However, this argument, based on the *Brown* case, is not about what the law *is* but what it *ought* to be²⁶⁰ and clearly represents the fact that the judges did not like or approve of such sexual activities for various reasons; the primary one being one of public policy, but they failed to answer why public policy should prevent adults of full mental capacity consenting to sado-masochistic sexual activity that involves harm.²⁶¹ Nonetheless, the judges held that if such activities should sustain serious injury or threatened public interest then the criminal law must be invoked and that freedom of (sexual) expression would not offer a good enough reason to justify the said harm. Public policy, considering the positive public reaction to "50 Shades" may need to be readdressed for issues that involve consensual sado-masochistic sexual activity.

One argument against reviewing public policy is that a statutory reversal of *Brown* would render the position of battered people worse than it now is because the abuser could say that the victim consented to a higher degree of harm than under the current law, and it would be one word against another.

A second area of harm, and one where the decision is contentious, is the current position regarding someone who passes HIV without informing their sexual partner that they carry the virus. In *R v Dica* [2004]²⁶² it was held that *Dica* had inflicted grievous bodily harm under

²⁵⁹ W Wilson *Criminal Law* (4th ed, Longman Pearson 2011) p306

²⁶⁰ *Ibid*

²⁶¹ Stannard J, 'The Emotional Dynamics of Consent' (2015) *Journal of Criminal Law* Volume 79:6 p 422

²⁶² *R v Dica* [2004] EWCA Crim 1103

s20 of the Offences against the Person Act 1861. In *Dica* the courts distinguishes *Brown* and as Sharon Cowan notes, ‘for entirely the wrong reasons.’²⁶³ She notes that *Brown* was about serious violence for sexual gratification whereas in *Dica* the courts separated the two forms of harm by making ‘an explicit assumption’ that passing HIV is a normal risk in normal sex. But as Cowan notes the distinction rests ‘on a very traditional, conservative and heteronormative view of what sex is really supposed to be about’.²⁶⁴

People may engage in sexual activities with implied assumptions that if not fulfilled would not vitiate consent, but, as in the HIV cases, would inflict GBH. Furthermore, if the civil law of marriage considers that consent to sexual intercourse within marriage does not include consent to a risk of harm and on the contrary vitiates the contract of marriage, maybe the criminal law could look at the issue of engaging in sexual activities as associated with objective conditions such as not engaging in unsafe sex. Conditional consent upon the use of condom is already recognised by case law. In *Assange* the failure to use a condom was an active deception because it was made clear that consent was conditional on the use of a condom. The use of condom has two functions: avoiding procreation and avoiding sexually transmitted diseases. So the question must be asked: why recognise conditional consent with regard to condoms but not when the issue is regarding the question of transmitting HIV. Likewise, consent may not be given to BDSM sexual activity where harm may occur, but the law does not recognise that consent can be vitiated by sexual activity that could cause death by HIV. As Cowan notes ‘combine this [policy reasons of public health] in the HIV cases, [with] the abuse of trust and lack of respect for sexual autonomy ...and we may well have a stronger case for the criminalisation of *Dica* (non-consensual violence) than for *Brown* (consensual sex).’²⁶⁵

2.4 Civil law boundaries on the nature of the sexual activities within marriage

The legal basis of marriage consists of three elements: consent to marry, the contract of marriage and, capacity to consummate the marriage. It is the third aspect that I will engage with. Cretny et al. notes: ‘physical capacity is as much a basic requirement as the intellectual

²⁶³ Cowan S, ‘The Pain of Pleasure: Consent and the Criminalisation of Sado-masochistic “Assaults”’ in Chalmers J, Leverick F and Farmer L (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon*, (Edinburgh University Press Ltd 2010) p134

²⁶⁴ *ibid*

²⁶⁵ *ibid*

capacity to consent to it is'.²⁶⁶ Consummation of marriage is indeed necessary for the marriage to be valid, but consummation has a very specific meaning in the civil law regarding marriage: it is a particular form of sexual activity. It must be full intercourse, the penis must fully enter the vagina, and until 1950, as shown when discussing transgender and same sex marriage, the purpose of consummation was no more than a form of encouragement for married couples to produce children.²⁶⁷

The absence of full sexual intercourse did not and still does not have a bearing on criminal law. There is no criminal offence for not complying with the civil law when applied to consummating a marriage. However, the nature of the sexual activities required for a marriage to be valid matters for the thesis. First, because the civil law restrictions on the nature of the sexual activities do not match those of criminal law, especially with regards to rape which is not limited to full intercourse. Second, because the focus on full intercourse for the purpose of procreation, allied to the prohibition of sex outside marriage, had the effect of making prostitutes outcasts; as prostitutes were considered to be engaging in full intercourse for money instead of for procreation. Although prostitution was not illegal, socially the prostitute was considered to be breaking the boundaries of society. I explore those themes further in Chapter 4, but to do so, I need to establish those civil law boundaries within marriage to show the importance of coitus (sexual intercourse) in marriage and why intercourse outside marriage equates with the moral repugnance toward prostitution.

The importance of sexual intercourse within civil law is directly linked to the fact that a marriage is void unless consummation (sexual intercourse) takes place after the ceremony and if intercourse takes place outside the marriage it provides grounds for divorce, thus embracing the moral ideology of heterosexual monogamy.

Within marriage, legislation through common law states that vaginal penetration must be performed in order to consummate the marriage. Thus, non-consummation (no sexual intercourse between husband and wife) would be grounds for annulment. The Church and the Courts insist on 'ordinary and complete'²⁶⁸ sexual intercourse, that is the male maintaining an erection and fully penetrating the female vagina for a reasonable amount of time²⁶⁹ and,

²⁶⁶ Cretney et al *Principles of Family Law* Sweet & Maxwell 7th Edition page 50

²⁶⁷ *Baxter v Baxter* [1948] AC 274

²⁶⁸ *D v A* (1845) 1 Rob Ecc 279 referring to Dr Lushington

²⁶⁹ *R v R* [1952] 1 All ER 1194; *W v W* [1967] 1 WLR 1554.

although orgasm may be desired, it is not obligatory.²⁷⁰ What is evident is that intercourse prior to the marriage is deemed irrelevant.²⁷¹

Consummation should not however be confused with the definition of sexual activities. The legal definition of *sex* is not found within the statutes and case law of marriage. Case law gives the definition of what is required to *consummate* a marriage and both statutes and case law also show that sex (meaning intercourse) outside the marriage by one of the partners can be used as evidence in order to obtain a divorce. Although there is no legal definition of what sex *is* within marriage, there are definitions within case law to ascertain what type of sex *is not* permissible within marriage.

At this juncture it is interesting to note that the courts are satisfied that consummation has taken place by the penis being fully inserted into the vagina whereas in a case of rape or adultery the mere touch of the penis to the vagina suffices. With regards to rape, as per s79 of the SOA 2003, penetration is a continuing act from entry to withdrawal²⁷² and that the vagina includes the vulva²⁷³ and therefore the criminal law is satisfied if the penis does not enter fully, whereas in civil law to consummate a marriage intercourse must be *full*, in other words the penis must penetrate the vagina fully.

The emphasis on penile penetration of the vagina is reflected by the State, and in law with regards to heterosexual couples but it is silent with regards to same sex couples and lack of consummation is not grounds for voiding a same sex marriage. The Marriage (Same Sex Couples) Act 2013²⁷⁴(s1(1)) permits same sex couples to marry. The Government noted that by not creating a law insisting on consummation for same sex marriages it would not be ‘altering the legal position [of annulment] unnecessarily’²⁷⁵ but Herring suggests that ‘It may have been that the government felt uncomfortable in defining what amounted to consummation within the context of a same sex couple.’²⁷⁶ The Government is equally shy when outlining what form of non-marital same sex activity constitutes adultery.

²⁷⁰ SY v SY [1963] P37

²⁷¹ Dredge v Dredge [1947] 1 All ER 29

²⁷² Sexual Offences Act 2003 s79(2)

²⁷³ Sexual Offences Act 2003 s79(9)

²⁷⁴ The Marriage (Same Sex Couples) Act 2013 s1(1).

²⁷⁵ HM Govt, Equal marriage: The Governments Response. HMSO London @ para 9.10

²⁷⁶ Herring J ‘Why Marriage Needs to be Less Sexy’ in Miles J, Mody P and Probert R (eds), *Marriage Rites and Rights* (Hart Publishing 2015) p277

The Marriage (Same Sex Couples) Act 2013 states that adultery is ‘only conduct between the respondent and a person of the opposite sex’ thereby the courts can ‘coily look away’²⁷⁷ now that the Government has ‘de-sexed’ same sex marriage.²⁷⁸ The ‘de-sexing’ nature can also be seen in Chapter 3 where the ‘café culture’ resulted in a proliferation of lap dancing clubs and the Government’s reluctance to legalise brothels as shown in Chapter 4.

This second section has shown that the nature of sexual activities is constrained by the criminal law insofar as the level of harm caused and the person is either unwilling or unwitting. Consent and nature are interlinked because of the limits placed on consent by the very nature and purpose of the sexual activities. The criminal law recognises that consent can be vitiated with some levels of harm but when it comes to transmitting sexual diseases, consent to engage in the sexual activities is said to include consent to be open to the risk of a sexual disease despite the harm that a sexual disease can do.

The nature of sexual activities is influenced by civil and criminal law. Civil law provides grounds for annulment of marriage if consummation does not occur and criminal law provides the boundaries should harm occur. The nature of sexual activity in marriage is linked to the purpose of the activity whereas for sexual activity outside marriage the link between nature and purpose plays a different role. The next section will show how the influence of the civil law is reflected in the purpose of the sexual activities.

²⁷⁷ Herring J ‘Why Marriage Needs to be Less Sexy’ in Miles J, Mody P and Probert R (eds), *Marriage Rites and Rights* (Hart Publishing 2015) p277

²⁷⁸ *ibid*

Section 3 – The purpose of non-commercial sexual activity

The purpose of sexual activity is only mentioned once in s76 SOA where there is a conclusive presumption if the defendant has deceived the victim as to the nature and purpose of the act. There is however no definition and given the constraints put on the interpretation of s76 since the presumption is conclusive, the cases seen previously do not offer much help in offering a clear understanding of the purpose of sexual activity.

The purpose overlaps with the nature of sexual activity. Section 2 showed that the purpose of non-commercial sexual activity falls into two categories: procreation in section 3.1 and “pleasure” meaning non-procreational sexual activity in section 3.2 and as will be shown these two categories are not mutually exclusive. The following chapters will show that the purpose of commercial sexual activity include profit whereas the purpose of non-commercial sexual activity lays the foundations of the limits of “pleasure” (non-procreational sexual activity) for commercial sexual activity.

3.1 Procreation as the purpose of sexual activity

As noted earlier, the purpose of sexual activities within marriage per civil law was for the consummation of marriage and subsequently for the procreation of children. The church and canon law restricted sexual activity to marriage as a means of having control over sexual activity and carnal desire. Pleasure in sexual activity was to be avoided and the role of sexual activity ‘required forethought, deliberation, and conscious reflection’²⁷⁹ in order for procreation.

The purpose of consummation in the 21st Century simply symbolic: it ‘seals the deal’ in heterosexual marriage and the symbolism draws a clear demarcation between heterosexual marriage and same sex marriages. The Civil Partnership Act 2004 was drawn up to give same-sex couple equality in terms of legal protection for property and financial security and the Marriage (Same Sex Couples) Act 2013 amended the Marriage Act 1949 to include same

²⁷⁹ Brundage, James A. *Law, Sex, and Christian Society in Medieval Europe*. (The University of Chicago Press, 1987) p 450

sex couples. S1(1) clearly states that ‘marriage of same sex couples is lawful’ but makes no provision for the legal requirement of consummation.

Procreation can be said to be a purpose that is exclusive to heterosexual non-commercial sexual activity although adoption and surrogacy are available to same sex couples. In commercial sexual activity procreation is invariably an accidental by-product because the primary purpose is profit.

3.2 Pleasure as the purpose of sexual activity

It can be shown that the purpose of sexual activity within marriage is also for pleasure. The insistence on the use of condoms, as shown in *Baxter v Baxter* [1948]²⁸⁰ was not sufficient to classify as a refusal to consummate but *coitus interruptus* (the withdrawal of the penis from the vagina prior to ejaculation) met with conflicting decisions by the courts: In *Grimes v Grimes* [1948]²⁸¹ it was held that consummation required ‘emission’ within one's wife whereas two days later in *White v White* [1948]²⁸² the courts held that ejaculation was not to be a prerequisite of consummation and again in *Cackett v Cackett*,²⁸³ *coitus interruptus* was sufficient to consider consummation had taken place. The purpose of non-commercial sexual activities is therefore two-fold. It is to procreate and it is for pleasure.

When the purpose of sexual activities includes pleasure, the nature and the purpose overlap. However, if the purpose is to indulge in sado-masochistic practices then such activities are restricted by the level of harm caused in the name of public interest. The public interest argument may be distinguished when looking at boxing because boxing follows a strict set of rules whereupon a boxer may be criminally liable if it can be shown that the harm caused was due to the offending punch being thrown in such a way it breached the rules of boxing. This is in contrast to the rules for sado-masochistic sex or an orgy, which are ‘subjugated to the passions’²⁸⁴ and therefore are more fluid and would change from sex party to party and also between participants. Yet as Nussbaum commented, boxing is an activity ‘in which working-class people try to survive and flourish by subjecting their bodies to some risk of harm ... [and there] is a stronger case for ...regulation of boxing [because of] the glorification of

²⁸⁰ *Baxter v Baxter* [1948] AC 274

²⁸¹ *Grimes v Grimes* [1948] P 323,

²⁸² *White v White* [1948] P 330 deemed ejaculation not to be a prerequisite of consummation.

²⁸³ *Cackett v Cackett* [1950] 1 All ER 677

²⁸⁴ Wilson W *Criminal Law* 4th ed, Palgrave MacMillan (2011) p308

violence as [an] example to the young]²⁸⁵ but it is in the public interest to criminalise consensual sexual activities that may cause an equal or lower level of harm (and by this I do not mean breaking noses!).

In some instances, the purpose of the sexual activities is to give sexual pleasure to voyeurs or to gain sexual pleasure from having sexual activities with random people or group sex. The sexual activity that includes voyeurism is often in the form of ‘dogging’ where groups of people congregate in their vehicles and perform sexual activities whilst others look on. Another activity which is purely for pleasure and not for procreation is masturbation. This comes in many forms and may include the use of sex toys or other objects.

In all of these instances the purpose of the activity is pleasure and not procreation. This is also part of the purpose of commercial sexual activities. And similarly to commercial sexual activities the actual activity must be private.

²⁸⁵ Nussbaum C, ‘Whether from Reason or Prejudice: taking money for bodily services’ *Journal of Legal Studies* (1998), vol. XXVII 693-723, 711

Section 4 - Visibility

Having discussed the criminal law constraints regarding consent, nature and purpose of non-commercial sexual activities this section will show that consensual sexual activities also carry further restraints in the form of an expectation of privacy. In this instance privacy carries a different interpretation than in civil law. In civil law privacy equates to ownership, i.e. private property for instance, and as Tony Doyle notes, we have a ‘distinct interest in privacy’ given that most of us would choose *not* to have ‘certain types of information’ made public²⁸⁶ but the criminal law equates privacy to visibility and more importantly the acts that are visible. The criminal law only interferes with visible sexual activities if it interferes with the comfort of other members of public.

Historically, the Vagrancy Act 1824²⁸⁷ criminalised ‘every Person wilfully, openly, lewdly, and obscenely exposing his Person in any Street, Road, or public Highway, or in the View thereof, or in any Place of public Resort, with Intent to insult any Female’; and *Evans v Ewels* (1972)²⁸⁸ held that ‘his person’ meant penis.

Today the law still prohibits ‘public’ lewdness and the definition of ‘public’ changes depending on the situation. Technically there is no law against nudity or having sexual intercourse outside, but there are three areas of legislation that could be relied upon if the activity is morally repugnant. The SOA 2003 legislates against exposure (s66) voyeurism (s67) and sexual activities in a public toilet (s71). Other acts of indecency that outrage public decency are caught by the Criminal Justice Act 2003.

Exhibitionism would most likely be caught under the Public Order Act 1986 as it prohibits any activity which is intentionally ‘threatening, abusive or insulting within the hearing or sight of a person likely to be caused harassment, alarm or distress’. Another method of limiting the visibility of sexual activities is the Public Space Protection Order, as implemented in Birmingham. This order lasts for three years and outlaws public sexual

²⁸⁶ Doyle T ‘Privacy and perfect voyeurism’ (2009) *Ethics, Information and Technology* Volume 11 pp181-189

²⁸⁷ 50 George II, IV. Cap.83.

²⁸⁸ *Evans v Ewels* (1972) 136 JP 394

activities.²⁸⁹ The sexual activities proscribed are defined in s78 of the SOA 2003²⁹⁰ where any activity is sexual if a reasonable person²⁹¹ would consider that ... its nature is sexual²⁹² or because of its circumstances or purpose is sexual.²⁹³ The required level of alarm or distress suffered by an unwitting witness is not mentioned though in the SOA 2003. The purpose of such constraints is, as stated in *R v Stanley* (1965) that society is entitled to a modicum of decorum.²⁹⁴ But the decorum is a public decorum. The same sexual activities can occur without criminal intervention if it is in private. The problem is, as Lord Coleridge noted,²⁹⁵ it is difficult to define affirmatively what a public place is. In *R v Reakes* (1974)²⁹⁶ it was held that 'you look at all the surrounding circumstances, the time of night, the nature of the place including such matters as lighting and you consider further the likelihood of a third person coming upon the scene'.

Thus, the private space becomes a public space if and when it can be viewed by a third party. And the activity within the locus, as noted in *R v Crunden* (1809),²⁹⁷ depends on being in the presence of people. McDonald CB held that '...the law will not tolerate such an exhibition... to corrupt the public morals'. The common law established that an open but private space becomes a public space, and therefore a private space frequented or within the sight of the public, becomes public if the nature of the act is sexual; there is an unwilling audience; and the threshold of public decency is crossed by the onlookers becoming morally outraged.²⁹⁸

An example of the locus and constraints of public decency was considered in *Rose's Case* (2006)²⁹⁹ where the facts of the case were such that a girl performed oral sex on her boyfriend during the early hours of the morning in the foyer of a bank. It was possible for passers-by to see in and the foyer was monitored by CCTV. The bank manager saw the act the following day when she reviewed the overnight CCTV footage. Although it was a public place, there was no evidence that there had been any passers-by. Stanley Burnton J held that the offence of outraging public decency had not been committed as it had not been seen by anyone who

²⁸⁹Birmingham Community Safety Partnership, 'Public Space Protection Orders in the East of the City' <http://birminghamcsp.org.uk/our-work/anti-social-behaviour/public-space-protection-orders.php> (Accessed 09 June 2016)

²⁹⁰ Sexual Offences Act 2003 c42 s78

²⁹¹ Sexual Offences Act 2003 c42 s78

²⁹² Sexual Offences Act 2003 c42 s78(a)

²⁹³ Sexual Offences Act 2003 c42 s78(b)

²⁹⁴ *R v Stanley* (1965) 2 QB 327

²⁹⁵ *R v Ivens* (1835) 7 C & P 213

²⁹⁶ *R v Reakes* [1974] Crim LR 614 @ 615

²⁹⁷ *R v Crunden* (1809) 2 Camp 89, 170 ER 1091 para 90

²⁹⁸ *R v Wellard* (1884) 14 QBD 63, [1881-5] All ER Rep 1018

²⁹⁹ *Rose's Case* [2006] 1 WLR 2626

was not participating in it and there was no evidence of there being any passers-by. The sexual act made visible does not necessarily need to involve more than one person. It is a criminal offence under the SOA 2003 s66 if the person exposes their genitals with the intention of causing alarm or distress.

Section 66 of the SOA 2003 prohibits any person to *intentionally* expose their genitals to the public (commonly known as ‘flashing’) as opposed to someone who has accidentally exposed themselves. It is interesting to see that the police and courts find nudist Stephen Gough otherwise known as the ‘Naked Rambler’ as an exhibitionist (or flasher perhaps) when he has no intention to shock the public. But for people such as Gough it is also possible that it could be a triable offence under common law of creating a public nuisance by ‘outraging public decency’³⁰⁰ if the act is considered to be lewd, obscene or disgusting. The level of indecent behaviour must go ‘beyond the susceptibilities of, or even shocking, reasonable people’ as per Lord Simon in *Knüller (Publishing, Printing and Promotions) Ltd v DPP*³⁰¹ and the act must occur in public, as in *Wellard*³⁰² where the offence occurred in a field where others sometimes walked by, but if it is out of sight from the general public as in *Walker*,³⁰³ where the defendant exposed himself to his daughter and another girl in his own home, this would not be ‘in public’ as the general public do not have access and the occurrence happened out of view. Deliberate sexual congress or lewd behaviour inside a property but in front of a window or other viewable space from the outside also constitutes a public space.³⁰⁴

In such circumstances the publicity requirement is that there must be two or more persons present. In *Rose* no offence was committed because there were not two or more people present to witness it. However, an ambiguity was created because in *R v Hamilton* it was held that although there were numerous people present, nobody observed Hamilton’s activities and therefore were not offended. The court held that the two-person requirement was that the action was *capable* of two or more persons seeing it. *R v F* [2010]³⁰⁵ has since resolved the ambiguity by making the decision that at least two people must be present and were capable of seeing the nature of the act and being affected by it. This does not affect the *Rose* case because there were no people present or capable of seeing the nature of the act at the time the

³⁰⁰ Triable either way as per s320 Criminal Justice Act 2003

³⁰¹ *Knüller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435

³⁰² *R v Wellard* (1884) 14 QBD 63.

³⁰³ *R v Walker* [1996] 1 Cr App R 111

³⁰⁴ *Rouvierard* (unreported) 1830; *Thallman* (1863) Le & Ca 326, 169 ER 1416

³⁰⁵ *R v F* [2010] EWCA Crim 2243 at [15] referring to the ‘so called two person rule’ as set out in [12]

act happened. The result would most likely have been different if the sexual activities had happened during the day instead of night.

The voyeur participating in non-consensual voyeurism is subject to s67(1)(b) of the SOA 2003 where the voyeur 'knows that the other person does not consent to being observed for his sexual gratification' This section in the Act effectively deals with 'peeping Toms' but could also be applicable if couples choose to go beyond the realms of privacy and deliberately perform sexual acts outside, in spaces where they are likely to be seen by passers-by. Arguably acts, such as 'dogging', are performed in cars, a private space, and usually on private car parks. However, because the spaces are viewable by the public, the sexual activities then become prohibited. If the acts are not witnessed by a member of public who is morally outraged, then the sexual activity, as with a couple rather than a group, offends no-one and is not prohibited. The act of 'dogging' clearly shows that it is a mixture of location combined with witnesses that causes the tension. Yet s67 of the SOA 2003 requires that consent to be viewed is absent and s66 requires that the participant *intentionally* shows their genitals to shock. The difficulty is that 'doggers' do neither. Sexual acts that do not include groups or viewers are similarly limited by location. Although there is no statute law against enjoying sex 'al fresco', both cottaging and cruising are prohibited.

As with heterosexual activities, it is the nature of the act, within the location, that creates the prohibition. The nature of the male homosexual act in private is no longer prohibited, and homosexuals are treated equal to heterosexuals for the purpose of defining the term public, therefore gender is merely irrelevant. It is the behaviour surrounding the act, much like in prostitution, that is prohibited. 'Cruising', the term used for male homosexuals when looking for a sexual partner, happens in open spaces such as parks or heaths, and can be likened to 'kerb crawling' where men look for prostitutes. Both cruising and kerb crawling are prohibited by the SOA 2003 s51A as amended by the Policing and Crime Act 2009 s19 where a person is guilty of the offence of soliciting in a public place, which includes a vehicle. Section 16 of the Policing and Crime Act 2009 replaced the term 'prostitute' with 'person'. Therefore, within s16 and 19 of the Policing and Crime Act, a *person* may not persistently, meaning taking place on two or more occasions in any period of three months, loiter in any public place for the purposes of obtaining any sexual activities.

A second area of homosexual acts prohibited by location is 'cottaging'. The Crown Prosecution Service states that the offence was introduced to give adults and children the

freedom to use public lavatories for the purpose for which they are designed without the fear of being an unwilling witness to overtly sexual behaviour of a kind that most people would not expect to be conducted in public.³⁰⁶

To ‘cottage’ per the Dictionary of Slang is ‘to frequent public lavatories for [homosexual] sex’.³⁰⁷ Although the SOA 2003 s71 is written in gender neutral form, it is used to prevent homosexuals from cottaging. Cottaging is a different category to cruising; the SOA 2003 s71 creates the offence for someone to engage in sexual activities in a public toilet. This includes within a closed cubicle where a public toilet is considered to be public whether the door of the cubicle is open or closed. Closed doors create no expectation of privacy within s71(1)(a) as it defines a public lavatory as: ‘to which the public or a section of the public has or is permitted to have access, whether in payment or otherwise’. The homosexual sexual activities are defined within s71 as ‘sexual if a reasonable person would ...consider it to be sexual’.

By comparison, the regulation of lesbians has followed a different legislative route. Lesbianism has never been prohibited and there are no criminal offences against lesbian relationships. When lesbianism *per se* becomes public knowledge the state has no grounds to prosecute. This can be seen in *Gardner v Gardner* (1947)³⁰⁸ where the relationship Mrs Gardner had with another woman constituted cruelty as grounds for divorce. This case brought into the open the lesbian relationship of Mrs Gardner but did not go as far as using the relationship as grounds for divorce because there was no prohibition to enforce. Nevertheless, any sexual act between two women, as with two men or a heterosexual couple, if, when espied by the general public cause’s distress, then that act would fall within the purpose for prohibiting public sex. The expectation of privacy, as shown, is reliant on the location: ‘al fresco’ sexual activity is not in itself prohibited, but the criminal law puts constraints on the activity so that the general public would not see it and be harmed by what they see.

The criminal law also puts constraints on private sexual activities within internal spaces for sex clubs and commercial sexual activities. Although I expand further in the relevant chapters, a few words, at this stage, are necessary. Comparably ‘swinging’ - the modern term for ‘wife swapping’ because the sexual activity is not limited to married couples or indeed to

³⁰⁶ http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/s71_sexual_activity_in_a_public_lavatory/ (accessed 27 September 2014)(Link no longer available 09 June 2016)

³⁰⁷ Jonathon Green, *Cassell's Dictionary of Slang*, (Cassell & Co 2000) p277

³⁰⁸ *Gardner v Gardner* [1947] 1 All ER 630

heterosexual couples - was originally a private action. However, swinging is now organised in the form of swingers' clubs that although not considered as part of the sex industry per se, are considered to be sex establishments and are licenced by the Local Authority³⁰⁹ under the Local Government (Miscellaneous Provisions) Act 1982, and by the Licencing Act 2003 because alcohol is served in the clubs. The sexual activity in swingers' clubs therefore consists of quasi-commercial sexual activities. There is usually a club membership fee, which could, but does not, put swinger's clubs on par with lap dancing clubs. Nonetheless, swinging parties are regulated by the Local Authority and held within a private space which is not open to the public, unlike lap dancing venues which are open to the public but because of the signage outside the premises the public are aware of what is happening inside. Therefore, as with lap dancing venues, there is no risk of accidental viewing by non-consensual viewers. This is the thrust of the argument: the sexual activity 'behind closed doors' is not viewable by others who are not invited, and thus it is permitted. Nevertheless, neither of the two regulations protects the swingers from prosecution for being a brothel.³¹⁰ The distinction is made if it is a brothel where the sexual activity would be for payment even though it would be 'behind closed doors.' This begs the question whether there really is a difference; after all, swingers often have to pay club fees to belong to the club. Is this not the same as paying for a prostitute within a brothel?

Conclusion

Although the boundaries have shifted over the years, the criminal law approach to sexual activities remains structured with regards to the four interconnected criteria present in the SOA 2003.

Consent is the central requirement for permitted sex, and it may be difficult to establish in certain instances because the wording of s74 does not define freedom and choice. Circumstances may amount to deception; others may be recognised as forming conditional consent to the sexual activities. However, the law pertaining to s74, by leaving to the jury much to decide as to what is freedom and what is choice, leaves the door open to subjective criteria underlying the understanding of consent or lack of consent. Even if established though, consent is not sufficient to render sex permissible.

³⁰⁹ Local Government (Miscellaneous Provisions) Act 1992 c30

³¹⁰ Sexual Offences Act 2003 c 42 ss 53& 55

The nature of the sexual act also influences where the boundary must be set, as the act must involve living human beings but not animals, and must not harm the participants, although what constitutes harm is not as straightforward as it may seem, transmitting a sexual disease for example not vitiating consent.

Furthermore, criminal law differs from the civil law of marriage, as the purpose of the sexual activity is irrelevant, unless the purpose is associated with an intent to do the prohibited act such as voyeurism. It is the intent that triggers the criminality. Finally, sexual activities are permitted when they are not visible to the outsider. Like all of the three requirements, this last condition carries important consequences as to how criminal law approaches the regulation of commercial sexual activities. I start by examining the regulation of pornography.

Chapter 2 – Pornography

In this chapter I start the analysis of the three main areas of the sex industry, in light of the framework established in Chapter 1. Pornography is the most distant form of sexual encounter because the performers and film crew who make pornography have no contact with the viewer who watches the materials. Pornography is not illegal, but it is regulated. To outline how criminal law approaches pornography, I will apply the four concepts of the previous chapter, namely consent, nature, purpose and visibility, and discuss how they apply to pornography and compare to non-commercial sexual activities.

The first element to be discussed is consent. In pornography, whilst appreciating that much of what is performed in pornographic literature and film can also be performed in non-commercial relationships, the test is whether the issue of consent goes beyond that of non-commercial sexual activities. Unlike non-commercial sexual activities that can include wife swapping and dogging, pornography cannot exist without an audience; because of the commercial aspect, it also needs a management team. Therefore, in this section, consent from the viewer as well as from the performers and other members of the pornographic industry will be discussed.

The second element is the nature of pornography. It is here where the meaning of the term ‘pornography’ and the subsequent test for obscenity is discussed. The nature of the sexual activities within pornography, although contained within the same criminal laws as any sexual activities, also has statutes devoted to what may and what may not be produced or possessed. Therefore, the question to be answered is what is different, with respect to the criminal law, between the nature of non-commercial and commercial sexual activity and why does the criminal law treat it as such?

Following on from the nature is the purpose of pornography. Unlike non-commercial sexual activities, where arousal may promote pleasure and/or procreation, this section looks at the purpose of the sexual activities to ascertain whether it has an entirely different *raison d’être* and how criminal law acknowledges the commercial purpose of pornography.

Regarding visibility, this chapter considers the definitions and relationships of privacy applied to pornography. In pornographic pictures and films, all sexual activities physically exclude the viewer, although it could be argued that the activity is strictly for the delectation of the viewer. By its very nature, this form of commercial sexual activity carries no expectation of privacy; yet visibility is restricted by law to protect the public. As with non-commercial sex, it is the viewer whom legislation seeks to protect. Using the foundations set within the previous chapter, I demonstrate that the protection has developed in terms of content and vulnerability.

Section 1 - Consent and pornography

In order to determine whether the issue of consent goes beyond what is required for non-commercial sexual activities, I must consider first what it is that the persons involved in pornography are consenting to and, second, whether the constraints regarding consent are the same as those in non-commercial sexual activities.

Consent within the pornography industry, like for any sexual activities, falls under the auspices of the SOA 2003 s74. Consent must be given where a person 'agrees by choice, and has the freedom and capacity to make that choice'. Capacity and age restrictions apply as well. Thus, when it comes to age restrictions, the threshold is higher for the performer in pornography. The age of consent for non-commercial sexual activities is set at sixteen as per s9 SOA 2003 however, the age of consent for commercial sexual activities is set at eighteen years of age. Section 48(1)(i) SOA 2003 states that a child is a person who is under the age of eighteen, and s47 criminalises any person from paying for the sexual services of a child or for causing, inciting or controlling a child involved in pornography. Furthermore, the Criminal Justice and Public Order Act 1994 s84 amended the Protection of Children Act 1978 s1 to include making pornographic photographs as well as distributing or showing them and this also includes pseudo-photographs as referenced in s7 Protection of Children Act 1978 meaning an image, whether made by computer-graphics or otherwise. The pseudo-photograph (or copy) would be treated as showing a child, notwithstanding that some of the physical characteristics are those of an adult. The sentencing may reflect the difference.³¹¹ Nevertheless, an offence would be committed as long as the child is under eighteen. Therefore, the age of consent is raised from sixteen to eighteen for anyone participating in pornography. Any sexual activities involving a child under thirteen, whatever the purpose, carries the irrebuttable presumption of lack of consent. Therefore, all participants must be adults, that is, over the age of eighteen.

³¹¹ R v. Thompson (CA) [2004] EWCA (Crim) 669; R v Oliver [2002] EWCA Crim 2766, (2003) 2 Cr.App.R.(S.) 15. See also the guidelines of the CPS that state that 'pseudo-photographs generally should be treated less seriously than real photographs'. CPS, Indecent Photographs of children http://www.cps.gov.uk/legal/h_to_k/indecent_photographs_of_children/ (accessed 03 June 2016)

The participants in pornography consist of two groups: first, those within the sex industry who either perform or produce the pornographic film (or pornographic literature that contains no pictures) and secondly, those who look at pornography (the viewers). For the benefit of this thesis, the issues surrounding consent are therefore divided into three sections: the performers, the producers and the viewer.

1.2 Consent of the performer(s)

The performer, who must be eighteen or older, must have the freedom and capacity to be able to agree to consent to a) performing the sexual act with other actors, b) being filmed or photographed (thus consent must be between performers and film crew) and c) the resultant film being watched by the viewer. Differing from prostitution, the parties to the contract are at a remove because the customer pays for the depiction of sexual activities and not the physical exchange of sexual activities as in prostitution. Consent does not extend to permitting the stage director or crew to indulge in any form of sexual activities with the performers. Should this be required then the performers must be free to consent as per s74 of the SOA 2003 in the same manner as they would with co-performers.

Regarding consent with the viewer, the performer has a tacit consensual relationship with the viewer. The consent, as with that of the stage crew, is only that the viewer may view. The viewer may look at the film or picture, but the performer gives no consent for any physical connection. In this instance, unlike the film crew, there is a physical distance between the viewer and performer; the viewer only gets to see the celluloid version of the performer.

With regards to consent for performing and being filmed, the consent of the performers is a mix of contractual and non-contractual consent. As part of the contract, they agree to participate in sexual activities with the other performer(s) and they consent to being filmed. The contract should specify, if necessary, the sexual activities the performer does not want to engage in. Hence, any conditional consent would be within the remit of the contract. For example, the performer may state that they would not perform intercourse without the use of condoms. Violations of those contractual obligations could fall either within the ambit of civil law for breach of contract or criminal law for rape as per *R v Assange* [2011]³¹² and applied

³¹² *Assange v Swedish Judicial Authority* [2011] EWHC 2849 (Admin)

in *R (on the application of F) v DPP* [2013]³¹³. In *R(F) v DPP* Judge CJ noted that ‘What *Assange* underlines is that “choice” is crucial to the issue of “consent”.’³¹⁴

Pressure to consent for the performer, because of financial considerations, also relate to the fact that most studios do not insist on condoms being worn by the performers. The financial pressure for studios to continue working is surely passed on to the performer which may lead to sexual risks taken by the performers as happened in 2010 when a performer tested positive for HIV and two pornographic film studios had to be temporarily closed down.³¹⁵ Today many studios insist on the performers being tested for STDs (and of course AIDS) once a month³¹⁶ to prevent the loss of studio time.

Pornographic film studios may also fall within the scope of criminal law if consent has not been obtained in compliance with the rules established by criminal law. The performers must be free to consent as per s74 of the SOA 2003 to all legally permissible sexual acts performed on and off screen and agreed in contract. In that sense, the commercial purpose of pornography does not modify the criminal law restrictions imposed on consent for sexual activities as established in Chapter 1.

However, it should be considered to what extent consent in contract law matches consent in criminal law and whether it promotes compliance with the criminal law definition of consent.

In civil law, if the payment for services are made by freely consenting adults, within the remit of the SOA 2003, then, in law the contract is valid and the contract should not be overturned because the commodity is sex. Freedom to contract implies that morality is not a valid reason for preventing such a contract to be entered into. Many people agree to work in various industries because of the financial incentive even if the work is dangerous or unpleasant. Provided participation is voluntary by all parties, even if the consent is fiscally driven, s74 SOA 2003 provides no valid objection to a contract in pornography.

³¹³ *R (on the application of F) v DPP* [2013] [2013] EWHC 945 (Admin)

³¹⁴ *R (on the application of F) v DPP* [2013] [2013] EWHC 945 (Admin) at [26]

³¹⁵ ‘One HIV Positive Porn Star Shuts Down Industry’ Fox News (Entertainment) (13th October 2010) <http://www.foxnews.com/entertainment/2010/10/13/hiv-positive-porn-star-shuts-industry.html> (accessed 14th March 2017)

³¹⁶ Mowlabocus S, ‘Pornography laid bare: Gay men, pornography and bareback sex’ *Sexualities* (2013)16(5/6) 523-547

However, it is the element of voluntariness that creates concerns. Edlund and Korn may make a parallel between women engaging in sex within marriage and those in the sex industry,³¹⁷ but this parallel does not highlight the fact that some choices are not made as freely as others. As Easton argues ‘women’s choices may be condition[ed] by fundamental structural inequalities which affect ... life chances and earning capacity’.³¹⁸ The social inequalities form an oppressive social context in which a woman creates an ‘internalised oppression’³¹⁹ which frame the decisions based on ‘mistakenly adopted beliefs ... that reinforce a position of lesser power.’³²⁰

This is not to ignore the fact that marriage is not exempt from structural inequalities, but as Easton notes it is the very life choices causing the women who belong to the weakest groups of society, through poverty or racism, that the pornographic sex industry exploits.³²¹ When arguing that women have a ‘free decision’,³²² the sex industry continues to perpetuate gender inequality and ‘institutionalising access to women’s bodies’³²³ and ignores the ‘subordinate position of women in the labour market’.³²⁴ Subordination also comes in the form of assumption, female performers rarely engage in robust conversations about what she would or would not do on camera³²⁵ which fits with the argument that all prostitution exploits women regardless whether the woman consents or not.³²⁶

Therefore, there is an issue of freedom to contract but does this issue at civil law translate in criminal law terms to an issue of freedom as per s74 SOA 2003? Section 74 states that a person, in order to consent, must have ‘the freedom’ to make that choice, but it does not define ‘freedom’. The issues raised in Chapter 1 about whether consent exists when outside pressure is exercised but does not take the form of physical violence is of particular salience for the performers of pornography. I have argued that the concept of freedom to consent in s74 is more likely to be interpreted narrowly than broadly even when there could be a

³¹⁷ Edlund L and Korn E, ‘A Theory of Prostitution’ *Journal of Political Economy* (2002) Vol 110 No 1

³¹⁸ Easton S *The Problem of Pornography: Regulation and the Right to Free Speech* (Routledge 2005) p7

³¹⁹ Lomelino P *Community, Autonomy and Informed Consent: Revisiting the Philosophical Foundation for Informed Consent in International Research* (Cambridge Scholars Publishing 2015) p4

³²⁰ Lomelino P *Community, Autonomy and Informed Consent: Revisiting the Philosophical Foundation for Informed Consent in International Research* Cambridge Scholars Publishing (2015) p4

³²¹ Easton S *The Problem of Pornography: Regulation and the Right to Free Speech* (Routledge 2005) p8

³²² *ibid*

³²³ *ibid*

³²⁴ *ibid*

³²⁵ Sullivan R and McKee A *Pornography: Structures, Agency and Performance* Polity (2015) p101 see also Cowling M *Making Sense of Sexual Consent* (Ashgate 2004) pp 20-21 for Antioch Policy and Guttman Scale

³²⁶ Spector J *Prostitution and Pornography: Philosophical Debate about the Sex Industry* (Stanford University Press 2006) p156

demonstrable lack of consent.³²⁷ The problem with commercial sexual activities like pornography is that it brings additional means of pressure specific to the industry that are not necessarily present where non-commercial sexual activities are considered and that s74 seems unlikely to accept those factors demonstrating lack of consent. Notably, performers may feel they have no choice than to accept certain forms of sexual activities or activities without a condom, for example, because the industry would refuse to employ them in the future. Thus, the SOA 2003 has its shortcomings. Whether this is because s74 may have been drafted with primarily non-commercial sexual activities in mind is difficult to assert conclusively yet it is an issue that runs throughout the sex industry, beyond pornography, and is particularly acute when it comes to prostitution, as shown in Chapter 4.

1.2 Consent of the pornographers (producers, distributors and film crew)

The pornographers must consent to viewing the sexual activities that they are in the process of filming. The consent could be included within a contract although most employment contracts do not need to be in writing to be legally valid. The Employment Act 2002 makes provision for a person in fixed-term employment (for instance the making of the film) should be treated no less favourably than employees in permanent employment. The contract, either verbally or written, would stipulate that the job requires viewing/filming sexual activities and the employee would be obliged to consent before working in the industry. A tacit consent would also arise between the distributors and the film studio because they too are likely to view the content of the film.

1.3 Consent of the viewer

Consent of the viewer is interlinked with visibility. The viewer must consent to viewing the pornographic work but is limited to viewing such works in private. The pornographic images are produced with the assumption that the viewer is a consenting adult.

The similarity between persons watching non-commercial sexual activity (i.e dogging) as described in Chapter 1 and the viewer of pornography is that both must consent to viewing. Thus, the adult viewer consents to view pornographic material of which the content is of a nature that, if viewed accidentally by another person, could corrupt that particular individual.

³²⁷ Easton S *The Problem of Pornography: Regulation and the Right to Free Speech* (Routledge 2005) p33

Interestingly there is no statutory age limit to consent for the viewing of ‘soft’ pornographic magazines such as ‘Mayfair’ or other ‘top shelf’ magazines that do not breach the Obscene Publications Act 1959, Criminal Justice and Immigration Act 2008 as amended by the Criminal Justice and Courts Act 2015, or Coroners and Justice Act 2009. However, by convention, the purchaser must be over eighteen and the ‘no sale to under 18s’ rule was applied before the SOA 2003. From this it can be deduced that although the law is silent regarding the age limit for viewing ‘soft’ pornography, such as the Mayfair magazine, the prohibitions set in Chapter 1 are applicable if the sexual image involves sexual activities³²⁸ or if the child is encouraged to view such material by a person, who is in a position of trust.³²⁹

A dissimilarity to non-commercial sexual activities is the likelihood that the viewer may not be entirely aware of what he is consenting to view, or that the viewing may have an untoward consequence such as in *R v Coutts* [2005]³³⁰ where it was suggested that the consumption of violent pornography had ‘fuelled’ Coutts’ desire to murder Jane Longhurst.

Nonetheless, the implicit consent by the viewer is given either by the purchase of the material or, for online pornography by either a consent button or an ‘over 18’ button which unless this is clicked the viewer may not progress. Once the consensual ‘over 18’ button is clicked, the nature of pornography becomes obvious to the viewer.

Section 63 of the Criminal Justice and Immigration Act 2003 as amended by the Criminal Justice and Courts Act 2015 criminalises the possession of extreme pornography and therefore a viewer cannot consent to viewing such because he/she is prohibited from downloading (or purchasing) extreme pornography. Extreme pornography will be discussed further in sections 2.2 (the range of prohibited sexual acts) and 4.4 (constraints on visibility)

In the following section to understand how the nature of the act equates to pornography, I look at the meaning of the word ‘pornography’ and how it relates to the judicial interpretation of obscenity.

³²⁸ Sexual Offences Act 2003 s12

³²⁹ Sexual Offences Act 2003 s19

³³⁰ *R v Coutts* [2005] EWCA Crim 52

Section 2 - The nature of sexual activities within pornography

Today the two primary statutes regulating pornography are the Obscene Publications Act 1959 and the Criminal Justice and Immigration Act 2008 as amended by the Criminal Justice and Courts Act 2015.³³¹ The Coroners and Justice Act 2009 created offences for possessing prohibited (sexual) images of children but is not looked at as this thesis does not cover offences involving children.

The Obscene Publications Act 1959 gives a definition of ‘obscenity’ but strictly speaking does not define ‘pornography’, the word being absent from the statute. Conversely, s63(3) Criminal Justice and Immigration Act 2008,³³² which concerns only extreme pornography, describes ‘pornography’ as: ‘an image ... of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal’. Therefore, to understand the nature of the sexual activities performed by adults within pornography, I first consider, in both the literal and legal sense, the meaning of the term ‘pornography’ and ‘obscenity’ (2.1). I then outline the key aspects of the nature of the sexual activities permitted by criminal law with regards to this section of the sex industry (2.2).

2.1 The meaning of ‘pornography’ and ‘obscene’

The word pornography is taken from ancient Greek meaning ‘that which writes about prostitutes’ and could usefully be translated as the depictions of prostitutes³³³ and a pornographer someone who specialises in obscene writings.³³⁴ In England the term pornography was not used until 1842 and then only to mean the ‘lower classes of art’.³³⁵ A modern variant can be recognised in the interview between Shannon Bell and Candida Royalle, the Canadian feminist pornographer, who said that ‘pornography [is] like looking at

³³¹ Criminal Justice and Immigration Act 2008 c4

³³² *Ibid*

³³³ See Oxford English Dictionary, v. Pornography.

³³⁴ *Restif de la Bretonne, Le Pornographe ou, Idées d'un honnête-homme sur un projet de règlement pour les prostituées* (Translation: The Pornographer: A plan by an Honest Man for Regulating Prostitutes) (Gay et Douce, Brussels 1879)

³³⁵ Schneider R, *The Explicit Body in Performance*, (Routledge 1997) p20

prostitutes. It [is] just another version of prostitution. Instead of being with a prostitute ... you look at a prostitute'.³³⁶

By contrast, statute law favoured the word obscene. The legal interpretation of obscenity is narrower than the ordinary meaning, which, according to Ormerod, is 'filthy, lewd or disgusting'.³³⁷ The Oxford English Dictionary, using the language of law, defines obscene as: 'offensively or grossly indecent, lewd; (Law) (of a publication) tending to deprave and corrupt those who are likely to read, see, or hear the contents'.³³⁸ The word obscene is of unknown origin but it is suggested that it stems from the Latin *ob* meaning 'in front of' and *caenum* meaning 'filth' in the sense that it is offensive to modesty or decency.³³⁹ The modern understanding of the word obscene is: *ob* meaning 'in front of' and '*scene*' referring to the theatre stage³⁴⁰ or a view.³⁴¹ Thereby defining something obscene as requiring an audience; the audience placed *ob*, in front of, a *scene*, the means of conveying the lewd or indecent depravity.

The Obscene Publications Act 1857³⁴² was the first Act of Parliament to directly legislate against obscenity but it gave no precise definition of obscenity and the test for obscenity was not laid out until *R v Hicklin* (1868)³⁴³ where Lord Cockburn commented: 'I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.'³⁴⁴ From this flows the test of obscenity. If the response to the question is 'yes' then the material would be declared to be obscene.

The Hicklin test is not without criticism. It fails to address intention; instead it undermines 'the doctrine of *mens rea*'³⁴⁵ which is essential in any criminal case in order to promote

³³⁶ Shannon Bell, *Reading, Writing and Rewriting the Prostitute Body*, (Indiana University Press 1984) p138

³³⁷ David Ormerod, *Smith and Hogan Criminal Law*, (14th ed, Oxford University Press 2015) p 11192

³³⁸ Oxford English Dictionary Online : obscene (1st definition) <http://0-www.oed.com.serlib0.essex.ac.uk/view/Entry/129823?redirectedFrom=obscene#eid> (accessed 27 September 2014)

³³⁹ <http://www.etymonline.com/index.php?term=obscene> (accessed 27 September 2014)

³⁴⁰ Oxford English Dictionary, 'Scene' <http://0-www.oed.com.serlib0.essex.ac.uk/view/Entry/172219?redirectedFrom=scene#eid> (accessed 27 September 2014)

³⁴¹ *Ibid*

³⁴² Obscene Publications Act 1857

³⁴³ *R v Hicklin* (1868) LR 3 QB 360

³⁴⁴ *R v Hicklin* (1868) LR 3 QB 360 @ 371

³⁴⁵ Hall Williams J 'Obscenity in Modern English Law' 20 *Law and Contemporary Problems* (Fall 1955)630-647 p634

fairness. The Hicklin test ‘was largely ignored at common law’³⁴⁶ and the ordinary meaning of the word obscene was applied and ‘the tendency to deprave and corrupt was presumed’.³⁴⁷

The Obscene Publications Act 1857, which *Hicklin* interpreted, was updated by the Obscene Publications Act 1959 in which s1(1) gives the test of obscenity as: ‘an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.’³⁴⁸

*DPP v Whyte*³⁴⁹ established that the test was not based on the individual; instead the obscenity must affect a significant number of people. Section 4 provided the defence for the defendant to show that the publication was for the ‘public good’ and was ‘in the interests of science, literature, art or learning.’ This, in effect, affected the mass-produced materials and not the private collection of pornography. As per the Latin translation of the word obscenity, the mass-produced material created the stage for the public to view, whereas the private collection had no ‘public’ to view and fell outside *Whyte* and within s4 defence because it could be classed as ‘art.’ Ultimately, the interpretation of what is pornographic, the same as what is private or public sexual activity, is reliant upon the jury.

To summarise, *Hicklin*³⁵⁰ provided the test for obscenity, which held that the purveyor must ensure that the content does not deprave or corrupt the viewer. It was the subsequent Obscene Publications Act 1959 that gave the *Hicklin* test a statutory footing. The Obscene Publications Act 1959 regulates the content in pornography, and the actions of the actors. The statute limited the pornographic performance by the test in s1 as to whether their actions would deprave and corrupt persons who are likely to view such content. A wide range of sexual activities could and can be covered under this definition. To understand what types of sexual acts the test captures and how the test fits within the new test implemented by the Criminal Justice and Immigration Act 2008 as amended by Criminal Justice and Courts Act 2015 solely for possessing extreme materials, the following section analyses the range of sexual acts prohibited.

³⁴⁶ Ormerod D, *Smith and Hogan Criminal Law*, (14th Ed, Oxford University Press 2015) p1192

³⁴⁷ *Ibid*

³⁴⁸ Obscene Publications Act 1959 s1(1)

³⁴⁹ *DPP v Whyte* [1972] AC 849

³⁵⁰ *R v Hicklin* (1868) LR 3 QB 360

2.2 The range of prohibited sexual acts

For ease, this thesis divides pornography into four variants: erotica, softcore, hardcore, and extreme. Only the latter two potentially meet the obscenity test. There is no legal definition of the variants of pornography: erotica, softcore or hardcore. Instead, as this thesis suggests, there is a dividing line based on social mores that delineates erotica as being tasteful, the relatively harmless (softcore), content that is depraved or perverted (hardcore) and extreme pornography contains material prohibited by the Criminal Justice and Immigration Act 2008 as amended by the Criminal Justice and Courts Act 2015.

It may be noted that the jury is given the definition of obscenity as found within the Obscene Publications Act 1959 and the extent of extreme pornography found within the Criminal Justice and Immigration Act 2008 as amended by the Criminal Justice and Courts Act 2015.

From this yard-stick and the jury's own moral code, pornography 'is defined by the efforts to regulate'.³⁵¹ As a result erotica does not expose genitalia in detail and an element of romance would be in the story-line. Therefore, it is suggested, erotica can be considered as artistic if it has an element of education and/or social awareness as per s4 of the Obscene Publications Act where if it can be shown that the publication of an article is justified in the interests of art or learning a person shall not be convicted of an offence.

The definition of soft pornography has altered over time. Prior to the *British Board of Film Classification v Video Appeals Committee* (2008)³⁵² nudity was permitted although genitalia was covered with pubic hair. Today soft pornography shows genitalia without any pubic hair. Soft pornography is the socially acceptable Penthouse or Mayfair magazine and this in itself is a huge industry. Merskin argues that softcore pornography 'typically presents women on their own with genitals covered'.³⁵³ This is accurate for the cover of the soft porn magazines but Mayfair and similar magazines use women with covered genitalia on the front cover, but inside show women exposing their (shaven) genitalia. The background lighting is usually 'soft and natural and attractive young women are romantically posed'.³⁵⁴

³⁵¹ Merskin D, *Media, Minorities and Meaning: A critical introduction*, (Peter Lang Publishing (New York) 2011) p196

³⁵² *British Board of Film Classification v Video Appeals Committee* [2008] EWHC 203 (Admin)

³⁵³ Merskin D, *Media, Minorities and Meaning: A critical introduction*, (Peter Lang Publishing (New York) 2011) p196

³⁵⁴ *Ibid*

Conversely, hard-core pornography is images of sexual activities that fall within the boundaries of Obscene Publications Act 1957 and/or Criminal Justice and Immigration Act 2008 as amended by the Criminal Justice and Courts Act 2015. The lighting ‘draws attention to the fact that there is a photographer present’,³⁵⁵ which also draws attention to the fact that these are public sexual activities. The nature of heterosexual pornography can contain images of sexual intercourse between a man and a woman but ‘in contemporary pornographic videos anal sex and multiple penetration are common and virtually every sex scene ends with a man ejaculating onto a woman’s body’.³⁵⁶ The popular ‘high class’ pornographic magazines, such as Playboy now portray activities that would have fallen into the hard-core category given that jokes and pictures contain elements such as bondage and other actions that would have been considered as perverted by the courts on behalf of the public, as was Lady Chatterley’s Lover, the first major prosecution under the Obscene Publications Act 1959 or Kirkups poem in the 1970s.³⁵⁷ The question for a jury would be whether those sexual acts can be considered as obscene.

The content of pornography is vetted by the British Board of Film Classification (herein BBFC) insofar as the Board sets a viewing age restriction or deems it only suitable for licenced adult shops. It decides on what is or is not allowed to remain in the film. If the film makers fail to comply with the decision of the BBFC, the film makers can be prosecuted under the Video Recordings Act 1984. The sexual acts are subject to the same constraints of consent. The activity must be consensual and the actors must have the freedom and capacity to be able to consent by choice;³⁵⁸ consent must be voluntary and the actors must not be submissive or coerced,³⁵⁹ nor must they be rendered unable to consent.³⁶⁰ As established in the previous chapter, consent is a vital ingredient for permissible sexual activities.

However, consent is not always sufficient. Hardcore materials may reach a threshold where the violence is prohibited and cannot be acted, recorded or possessed, even if the performers, pornographers and viewers consent.

³⁵⁵ Merskin D *Media, Minorities and Meaning: A critical introduction*, (Peter Lang Publishing New York) (2011) p197

³⁵⁶ Dines G, Jensen B and Russo A, *Pornography: The Production and Consumption of Inequality* (Routledge 2013) p63

³⁵⁷ See Kearns P ‘Sensational Art and Legal restraint’ *New Law Journal* (2000) 150 NLJ 1776 who suggests that ‘art is distinguished from pornography according to its own mode of operating – legal or a matter of taste.

³⁵⁸ Sexual Offences Act 2003 s74

³⁵⁹ R v Olugboja [1981] 73 Cr App R 344

³⁶⁰ Sexual Offences Act 2003 s75

For example, one could argue that multiple penetration (fists in both vagina and anus at the same time) cause harm and therefore would breach the Offences against the Person Act 1861, given that vaginal ‘bleeding and abrasion’³⁶¹ is an ‘inevitable’ harm. The performers could thus be liable under the Offences against the Person Act 1861, providing the victim complains and is in the UK. However, whether the pornographers would be liable under the test of deprivation or corruption of minds of the Obscene Publications Act 1959 may prove more difficult nowadays.

In 2012, in *R v Peacock*,³⁶² the Obscene Publications Act 1959 was used to test whether the distribution of DVDs containing homosexual activities that included fisting, BDSM and staged kidnapping and rape were violating the law. The jury were repeatedly warned not to convict on any homophobic disgust and subsequently took two hours to reach a not guilty verdict. Thus it was held that the content in *Peacock* was not capable of depraving or corrupting any viewer watching the DVD and referring back to *Peacock*, if fisting was not considered to be capable of depraving or corrupting any viewer, it is likely that the harm would be considered low enough to be consensual. That said, as pornography records actions performed by live human beings, some prohibitions mirror those established in the SOA 2003 as analysed in Chapter 1.

The same objective of mirroring the prohibition of harm between sexual partners for pornographic materials was adopted in 2008. Adults are protected subject to the level of harm caused by the activity. Sexual activities such as in *R v Brown*³⁶³ or *R v Emmett*³⁶⁴ are already prohibited by the Offences Against the Person Act 1861. The Criminal Justice and Immigration Act 2008 legislates against possessing materials where the recorded sexual activities threaten a person’s life,³⁶⁵ or results, or is likely to result, in serious injury to a person’s anus, breasts or genitals.³⁶⁶ The Criminal Justice and Immigration Act 2008, although primarily to prevent the above kind of injuries witnessed by a viewer, also gives additional protection to the performer.

Before the amendments introduced by the Criminal Justice and Courts Act 2015, the Criminal Justice and Immigration Act 2008 did not include images of rape and so performers could

³⁶¹ Sheila Jeffreys *The Industrial Vagina: The Political Economy of the Global Sex Trade* (Routledge 2008) p79

³⁶² *R v Peacock* Southwark Crown Court (unreported) 6th January 2012

³⁶³ *R v Brown* (1994) 1 AC 212

³⁶⁴ *R v Emmett* [1999] EWCA Crim 1710

³⁶⁵ Criminal Justice and Immigration Act 2008 s63(7)(a)

³⁶⁶ Criminal Justice and Immigration Act 2008 s63(7)(b)

perform ‘fake’ rape if the performers consent to such sexual activities. Of course, a pretend or staged rape scene fits perfectly within the definition of obscene and could fall within the test of the Obscene Publications Act 1959. However, if prevention of harm was the rationale for the ban on possessing extreme pornographic materials, then the exclusion of rape scenes, fake or not, was at odds with Parliament’s aim. Rape Crisis South London wrote ‘an open letter to the Prime Minister on 7th June 2013’ suggesting that s63 of the Criminal Justice and Immigration Act 2008 contained a loophole that failed to cover depictions of simulated rape.³⁶⁷ Professor Clare McGlynn argued in support of the open letter urging David Cameron, the Prime Minister, to close the loophole within the Criminal Justice and Immigration Act 2008, saying that: ‘extreme pornography legislation is in urgent need of reform. The current law excludes the vast majority of pornographic images of rape’.³⁶⁸ The Ministry of Justice responded to Professor McGlynn by saying that: ‘In setting the threshold at a high level of serious violence, I wanted to ensure that what might be called mainstream bondage and sado-masochist material would not be caught’.³⁶⁹ The Ministry of Justice made a clear delineation between ‘real i.e. non-staged, rape of women or men, and also “staged rape” depictions, which are clips or pictures where a rape is being “acted out” with the consent of all the participants’. The Ministry of Justice argued that to include ‘staged rape’ would require a redefinition of pornography or obscenity, something they wished to avoid. This argument was weak, because the onus is already placed on the viewer who downloads pornographic material containing child or extreme pornography that appears to be realistic and it would not have been such a stretch to include staged rape in the definition.

The Criminal Justice and Immigration Act 2008 was a ‘lost opportunity’³⁷⁰ to include within its provisions the criminalisation of images of realistic rape scenes. *R v Walsh*³⁷¹ highlighted the need to ‘shift [the] debate’³⁷² to focus on ‘pornographic images of rape which inexcusably remain[ed] beyond the law’.³⁷³ The Government, in response ‘based on work carried out ...

³⁶⁷ <http://www.parliament.uk/documents/impact-assessments/IA14-03E.pdf> (accessed 7th September 2014)

³⁶⁸ Durham University News ‘Durham Academics support Rape Crisis rape pornography campaign: Letter to Prime Minister’ (2013) <https://www.dur.ac.uk/glad/news/?itemno=18009> (accessed 14th March 2017)

³⁶⁹ McGlynn C, ‘Why Criminalise the Possession of Rape Pornography’ <https://claremcglynn.com/2016/>

³⁷⁰ McGlynn, C and Rackley, E, ‘Criminalising Extreme Pornography: A Lost Opportunity’ (2009). *Criminal Law Review* (4): 245-260.

³⁷¹ *R v Walsh* (unreported, Kingston Crown Court, 8 August 2012)

³⁷² McGlynn, C and Rackley, E, ‘Prosecuting the Possession of Extreme Pornography: A Misunderstood and Mis-used Law’ [2013] *Criminal Law Review* 400-405 @ 405

³⁷³ *ibid*

in particular by Professor[s] McGlynn and Rackley...³⁷⁴ proposed, by way of the Criminal Justice and Courts Act 2015, to amend s63 of the Criminal Justice and Immigration Act 2008 to include possession of pornographic pictures depicting rape and other non-consensual sexual penetration. The offence within the Criminal Justice and Courts Act 2015 is designed ‘to break the demand and supply cycle of rape pornography ... and to prevent [children and vulnerable adults] from becoming desensitized to such acts of violence.’³⁷⁵ However, how the prohibitions for possessing extreme pornography interplay with the prohibitions for creating or recording the materials is not clear. The test for prohibiting the possession of these extreme pornographic materials differs from that of the Obscene Publications Act 1959. Whereas in the Obscene Publications Act 1959, the effect of the obscene image created must ‘tend to deprave and corrupt persons who ... read, see or hear’ the obscenity, in the 2008 Act, the image possessed only needs to create ‘sexual arousal’. The 2008 definition appears morally neutral, focusing on the purpose of the sexual activities for the viewer, rather than on whether the image depraves the viewer as in the Obscene Publications Act 2009. Although the interplay between the two statutes was not the focus of the case of *R v Peacock* (2012), the decision in *Peacock* supports such interpretation of the test for pornography in the SOA 2008. In *Peacock*, BDSM and staged rape were not considered obscene as per s1 Obscene Publications Act 1959. Yet, under the Criminal Justice and Immigration Act 2008, it could be argued that the materials would be considered as arousing the viewer and thus pornographic and thus illegal. The 2008 test seems broader than the Obscene Publications Act 1959 and to catch more pornographic materials that were possibly not illegal under the 1959 Act. It also allows for catching pornographic materials not where it is produced—since it is often outside the jurisdiction of the UK—but where it is consumed. The focus is thus on the consumer, the buyer of commercial sex, who is criminalised. The focus remains within s37 of the Criminal Justice and Courts Act 2015 which criminalises the possession of pornography that includes images of rape that are realistic. This is an attempt to stop the demand for pornography but does nothing to protect the actors within the industry.

To summarise, although consent is essential to the creation and viewing of pornography, it is not sufficient to render all pornographic materials legal. The Obscene Publications Act 1959

³⁷⁴ Joint committee on Human Rights ‘Legislative Scrutiny:(1) Criminal Justice and Courts Bill and (2) Deregulation Bill’ 14th Report of Session 2013 -14 HL Paper 189; HC 1293 p15

³⁷⁵ Joint committee on Human Rights ‘Legislative Scrutiny:(1) Criminal Justice and Courts Bill and (2) Deregulation Bill’ 14th Report of Session 2013 -14 HL Paper 189; HC 1293 p15

was devised to protect the viewer by prohibiting pornographic works from becoming public and to prosecute the publisher. The two cases *Curll* and *Hicklin* also show that obscenity (or the modern day term pornography) needs an audience. *Curll* and *Hicklin* show that audiences need to be protected from becoming depraved and corrupted if their minds are open to such immoral influences. Nowadays the *Hicklin* test, based on cultural understanding of what can deprave, is inadequate as illustrated in the case of *Peacock* where scenes of staged rape and BDSM practices were found not to corrupt. Consent here takes precedence over the perceived impact of the sexual activities acted out. Paradoxically, the apparently neutral Criminal Justice and Immigration Act 2008, with its tests of pornography focusing on the purpose of the act (sexual arousal), would capture those materials of which possession is prohibited, when the materials possessed mirror a prohibition as to the sexual activities established in Chapter 1 (corpse, animal, realistically portrayed harm to a human being). Thus, the nature of the sexual activities is restricted by two means: the sexual behaviour within the material and the possession of it. The restrictions regarding viewing and possession is further discussed later in this chapter in the visibility section.

Section 3 - The purpose of pornography

The Criminal Justice and Immigration Act 2008 defines pornographic material as being ‘produced solely or principally for the purpose of sexual arousal’ but the purpose goes beyond that. The purpose of pornography also includes non-procreational sexual activities **i.e. for pleasure** and profit. This section solely covers the latter.

The pornographic industry may have become, according to the Independent newspaper, ‘shrivelled beneath the chill wind of online piracy’³⁷⁶ but it is still a profitable business. For instance, Richard Desmond is said to be worth £1.9billion ‘with money made from pornography’³⁷⁷ Pornography therefore is produced ‘solely or principally for the purpose of sexual arousal’ in order to make a profit. To maintain profit, the viewing format is altered to keep up with the technological changes. Stag films and videos have made way for ‘pay to view’ available on both the television and Internet.

Nevertheless, the financial objective behind pornography is hardly stated in the law. Only s47 SOA 2003 mentions it, albeit it is about paying for the sexual services of a child and thus beyond the scope of this thesis. Per s47(2) “‘payment’ means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount’. This definition is worth mentioning because the explanatory notes to s47(2) mentions situations reminiscent of our discussions on consent in section 1 of this chapter. Payment ‘includes the discharge of an obligation to pay (for example, B owes A a debt for a car but A agrees to waive the debt if B provides him with sexual services) and the provision of goods or services gratuitously or at a discount (for example, where A provides drugs to B at no or reduced cost on condition that B provides sexual services to A).’³⁷⁸ The situations described can easily be transferable to adults where performers, heavily in debt or in need of drugs, would consent to participate in pornography

³⁷⁶ Tim Walker, ‘The porn industry has been pounded by the rise of Internet tube sites - has it now gone limp?’ <http://www.independent.co.uk/life-style/love-sex/sex-industry/the-porn-industry-has-been-pounded-by-the-rise-of-internet-tube-sites--has-it-now-gone-limp-10085301.html> (6th March 2015) (accessed 31 August 2015)

³⁷⁷ Jeffreys S The Industrial Vagina: The Political Economy of the Global Sex Trade (Routledge 2008) p75

³⁷⁸ Sexual Offences Act 2003 ch 42 explanatory notes

in order to pay their debt or for drugs and to sexual acts to which they may not otherwise have participated (for example, unprotected sex). In other words, it is as if the law confronts the issue of profit and its impact on consent when a child is involved but remains silent when the same situation involves adults. It is not only the age of the performer that makes a difference in their ability to make a decision and to consent freely but as with drunken consent, it may be time for the law to recognise that certain situations call for the law to state what is not permitted.

Section 4 – the visibility of pornography

I have shown that pornography requires consent from both the performers and the viewer. The consent is for the performer or viewer to participate in, or look at, commercial sexual activities that is akin to non-commercial sexual activities in nature. The pornographers then make a profit and the viewer gains sexual satisfaction.

In this section I demonstrate that the previous sections of this chapter interplay with visibility as, by regulating the content, legislation arguably seeks to protect the vulnerable from becoming depraved and corrupted from such immoral influences.

The content, as previously mentioned is prohibited from containing extreme pornography as per the Criminal Justice and Immigration Act 2008 and regulating all other content falls under the auspices of whether the content is obscene, and as noted earlier, the test can be found in the Obscene Publications Act 1959, where s1 provides the test of obscenity: if the effect of the content, taken as a whole, would be capable of having the tendency to deprave and corrupt persons who are likely to read, see or hear the matter contained within. There are similarities and differences in regulating the viewing of commercial sexual activities and non-commercial sexual activities. Both require an audience (or an accidental viewer) but the threshold for commercial sexual activities is that the content only needs to *tend* to deprave and the witnesses simply need to be *likely* to read, see or hear it, whereas for non-commercial sexual activities, as noted previously, the level of indecent behaviour must not only go ‘beyond the susceptibilities of, or even shocking, reasonable people’ as per *Knulier*,³⁷⁹ it must also be intentional. The test for non-commercial sexual activities is whether the activity causes moral outrage that is greater than simply being shocked, whereas the test for pornography is whether it is likely to deprave and corrupt the public. Therefore, the question is, who is it that is likely to be depraved or corrupted?

³⁷⁹ *Knulier (Publishing, Printing and Promotions) Ltd and others v Director of Public Prosecutions* - [1972] 2 All ER 898 at 936 per Lord Simon

The interpretation of the obscenity test relies on the obscenity ‘corrupting’ the viewer and pornography, unlike the sexual activities in Chapter 1, relies on technology, books, magazines, photographs, film and Internet. It is the dissemination of these technological tools that **prompts** the government to implement legislation in order to protect the morals of the young and vulnerable.

In *R v Reiter* [1954] Cockburn CJ argued that: ‘everybody's mind goes to the depraving or corrupting of young people into whose hands they may fall. There may be dirty-minded elderly people, no doubt, but it is not to be expected that many elderly people would read this stuff. Younger people would, however...’

4.1 Children, pornography and vulnerability

Today, children under the age of eighteen are still considered to be particularly vulnerable. Legislation has been introduced to protect children from both being in a pornographic picture and from viewing pornography. The Protection of Children Act 1978 prevents ‘the exploitation of children by making indecent photographs of them; and to penalise the distribution, showing and advertisement of such indecent photographs’.³⁸⁰

The SOA 2003 s10 and s17 also protects children from taking part in pornographic films as it is an offence to cause or incite a child to engage in sexual activities and the SOA 2003 s12 and 19 prohibit anyone to cause a child under the age of sixteen to watch pornography. It is also an offence to show or distribute such indecent photographs,³⁸¹ or to possess with a view of distributing or showing such indecent photographs³⁸² or to publish or cause to be published any advertisement of indecent photographs of children.³⁸³ Section 7 interprets a photograph to include an indecent film, a copy of an indecent film and a photograph comprised in a film.³⁸⁴ A film includes any form of video recording.³⁸⁵

The Coroners and Justice Act 2009 s62 widened the scope by prohibiting possession of an image of a child that is grossly offensive, disgusting or otherwise of an obscene character.³⁸⁶

³⁸⁰ Protection of Children Act 1978 ch 37 Long title

³⁸¹ Protection of Children Act 1978 s1(b)

³⁸² Protection of Children Act 1978 s1(c)

³⁸³ Protection of Children Act 1978 s1(d)

³⁸⁴ Protection of Children Act 1978 s7(2)

³⁸⁵ Protection of Children Act 1978 s7(5)

³⁸⁶ Coroners and Justice Act 2009 s62(6)(c)

These images may include acts, which include intercourse,³⁸⁷ oral sex,³⁸⁸ masturbation,³⁸⁹ or penetration (digital or with something).³⁹⁰

4.2 Adults, pornography and vulnerability

The constraints regarding visibility are designed to protect the viewer. Lord Campbell once described the pornography trade in London as: ‘a sale of poison more deadly than prussic acid, strychnine or arsenic’³⁹¹ and the Obscene Publications Act 1857 was the first act to directly legislate against obscenity. As Juffer notes, it ‘established the legal precedent for protection of the private sphere’,³⁹² in this instance the ‘private sphere’ referred to young middle-class women where in reality the “pornography” consisted of the romantic novel’.³⁹³ Today the ‘deadly poison’ comes in the form of extreme and child pornography.

The vulnerability of adults was further defined in *Hicklin* as to being those with ‘minds open to such immoral influences’ and the attitude that the persons who were more likely to be corrupted by such material were young women and easily influenced young men. However, in *R v Clayton and Halsey* (1963)³⁹⁴ there was a distinct shift away from the harm only being directed at such a small selection of the populace and where an experienced police officer claimed he was ‘not susceptible to depravity or corruption...’³⁹⁵ the Court of Appeal disagreed saying: ‘that even a most experienced officer, despite his protestations, was susceptible to the influence’ of pornographic material. Due to the increase in use of the Internet, the Court of Appeal held in *R v Perrin* [2002]³⁹⁶ that the content of a web page is capable of being the subject of prosecution under the Obscene Publications Act 1959 and the test of obscenity is for the jury to determine whether the content is likely to corrupt and deprave the viewer. Although it remains unclear whether the law still requires obscenity to be assessed by reference to the ‘decently brought up young female of fourteen’³⁹⁷ although it is most certainly likely that Parliament and the courts consider vulnerability to have shifted to a wider audience as adjudged by the jury.

³⁸⁷ Coroners and Justice Act 2009 s62(7) (a)

³⁸⁸ Coroners and Justice Act 2009 s62(7) (a)

³⁸⁹ Coroners and Justice Act 2009 s62(7) (c)

³⁹⁰ Coroners and Justice Act 2009 s62(7) (d)

³⁹¹ Hansard, Vol 145 cc 120_4 HL Bed 11 May 1857

³⁹² Juffer J *At home with Pornography: Women, Sex and Everyday Life* NYU Press (1998) p36

³⁹³ *Ibid*

³⁹⁴ *R v Clayton and Halsey* [1963] 1 QB 163

³⁹⁵ David Ormerod, *Smith and Hogan Criminal Law*, (12th Ed, Oxford University Press 2008) p 1042

³⁹⁶ *R v Perrin* [2002] EWCA Crim 747

³⁹⁷ *R.v Martin Secker Warburg Ltd* [1954] 2 All E.R. 683

The vulnerability of the audience is indirectly protected by the SOA 2003 prohibiting sexual activities with a corpse or an animal and the vulnerability of the unwitting viewer, insofar as someone accidentally seeing a film or pictures that is actually being watched by someone else, is protected by the Criminal Justice and Immigration Act 2008 as amended by the Criminal Justice and Courts Act 2015 by criminalising the possession of extreme pornography as discussed in section 2.2 above and 4.4 below.

The paternal protectionism toward young men (and women) who, as per *Hicklin*, have ‘minds open to such immoral influences’ widened to include people such as experienced police officers, as in *Clayton and Halsey*. That protectionism is also encapsulated in the Criminal Justice and Immigration Act 2008 as amended by the Criminal Justice and Courts Act 2015. The two Acts do nothing to protect the workers in the sex industry, but by prohibiting the possession of the prohibited material it reduces the risk of men becoming influenced by such immorality. Socio-legal lawyer Anna Carline argues that the regulations regarding permitted and non-permitted visibility of pornography is based on morality and not on the levels of harm it allegedly protects. Much of the regulation, although promoted as being put there to protect women from harm, uses the feminist perspective as ‘a smoke screen to push an undebated moral agenda’.³⁹⁸

4.3 Permitted visibility

Permitted visibility includes ‘soft’ pornography and erotica. Although the Vagrancy Act 1824, prohibited every person who wilfully exposed to view in any public place any obscene print, picture or other indecent exhibition, the publication of the materials was subject to common law. In the 1800s the most common form of pornography was via published novels and pamphlets, and pamphlets were the forerunner to the ‘top shelf’ magazine. Such magazines are permitted to be on display, but many newsagents, such as WHSmith,³⁹⁹ wrap the magazines in ‘modesty bags’ with only the titles showing so as not to offend customers.

The criminal law is silent regarding private pornography, where pictures or other materials are not made available for public perusal, on condition the content is not within s63 to 67 of the Criminal Justice and Immigration Act 2008 which prohibits possession of extreme

³⁹⁸ Carline A, ‘Criminal Justice, extreme pornography and prostitution: Protecting women or promoting morality?’ *Sexualities* (2011)14(3) 312-333

³⁹⁹ <http://www.campaignlive.co.uk/article/12340/wh-smith-reintroduces-soft-porn-magazines-stores#>

pornography. It is when the materials are made for public viewing that the criminal law becomes engaged in both the content and the effects of the content on unwary viewers.

The private collection may contain fisting, BDSM, stage rape and kidnapping because these forms of sexual activities are outside the Criminal Justice and Immigration Act 2008 and, as per *R v Peacock* [2012],⁴⁰⁰ are deemed not capable of depraving or corrupting any consenting viewer.

Visibility is also permitted under s4 of the Obscene Publications Act 1959 if it is proved that the ‘article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern’. This means that lecturers can discuss the content of pornographic literature, if it is in context with the lecture. Pornographic material is also permitted under the Local Government (Miscellaneous Provisions) Act 1982 in a sex cinema regulated as a ‘Sexual Encounter Establishment’ and pornographic films are also permitted to be visible, for instance at home, if they comply with the BBFC and the viewers are within the viewing age restriction.

Under Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982, a sex cinema is: a sex establishment, or sexual encounter establishment, and can consist of any premises used ‘to a significant degree for the exhibition of moving pictures...which are ... intended to stimulate or encourage sexual activity’.⁴⁰¹ The pictures may include acts of force or restraint⁴⁰² that are associated with sexual activities (BDSM) and portray genital organs, urinary and/or excretory functions.⁴⁰³ The sex cinema, as with a Sexual Entertainment Venue as discussed in the next chapter, is regulated by the Local Authority.

The cinema, although permitted to show pornography has, as with a Sexual Entertainment Venue, limitations regarding visibility from outside. In other words, the public must not be able to see in from the outside, they can only see the film once they have entered the building. The Local Authority, by means of the Local Government (Miscellaneous Provisions) Act 1982 Schedule 3 s13 imposes the rules that the building must have compulsory warning notices on the outside of the building at each entrance to the premises clearly stating the following:

⁴⁰⁰ *R v Peacock* Southwark Crown Court (unreported) 6th January 2012

⁴⁰¹ Local Government (Miscellaneous Provisions) Act 1982 Schedule 3 s3(1)

⁴⁰² Local Government (Miscellaneous Provisions) Act 1982 Schedule 3 s3(1)(a)(ii)

⁴⁰³ Local Government (Miscellaneous Provisions) Act 1982 Schedule 3 s3(1)(b)

WARNING

Persons passing beyond this notice will find material on display which they may consider indecent.

No admittance to persons under 18 years of age.

The signage must be so that the word ‘WARNING’ must appear as a heading and the warning notice shall contain only the prescribed words as shown above. This regulation imposed by the Local Authority is the same for exotic dancing clubs as shown in the next chapter. Some Local Authorities, such as Southend,⁴⁰⁴ also operate a ‘challenge 25’ policy where anyone who *appears* to be under the age of 25 is required to provide proof of being at least 18 years of age by means of showing a drivers licence or passport.

Viewing pornographic films in private is also regulated. Although not prohibited, viewing is constrained by the BBFC who decides the viewing age restriction: either over eighteen for the sex cinema or subject to the content, will be given an age limit or R18 (restricted) certificate for private viewing. The Video Recordings Act 1984, amended by the Criminal Justice and Public Order Act 1994,⁴⁰⁵ also catches films containing sexual material⁴⁰⁶ but it is for the BBFC to determine the classification of the sexual content.

A further, but somewhat contentious area of permitted visibility is viewing pornography in the workplace. The criminal law is silent regarding watching pornography at work unless it is in breach of either the Criminal Justice and Immigration Act 2008 or the Coroners and Justice Act 2009. To date the only punishment for accessing pornography at work is dismissal, but in order to dismiss staff for accessing pornography at work, employers must make it clear within the staff handbook or contract what is a prohibited act and what sanctions would result. In *Thomas v Hillingdon London Borough Council*, [2002]⁴⁰⁷ the staff handbook said that accessing pornography would amount to misconduct. The Employment Appeal Tribunal held that the dismissal was unfair because it was misconduct and not ‘gross misconduct’ which is actually the behaviour that would be appropriate for dismissal.

⁴⁰⁴ Southend On Sea Licensing Conditions

file:///C:/Users/aworak/Downloads/Sex_Establishments_Operating_Conditions.pdf

⁴⁰⁵ Criminal Justice and Public Order Act 1994, s90

⁴⁰⁶ Video Recordings Act 1984 s4A(e)

⁴⁰⁷ *Thomas v Hillingdon London Borough Council*, [2002] EAT, *The Times* 4th October 2002

A second area of contention, which could be connected to viewing pornography in the workplace, is the Investigatory Powers Act 2016, which allows data on all personal Internet searches, either at home or at work, to be stored for a year by the Internet service provider who, along with the police and any security agency would be able to access it at any time. The information held would not give a full browsing history, but it would hold the basic domain address. It is possible that employers could use the Investigatory Powers Act 2016 to implement criminal proceedings against the employee and elevate the ‘misconduct’ to ‘gross misconduct’ and subsequently the employee could be faced with both termination of employment and criminal liability.

I have shown that there are certain limitations concerning permissible visibility of pornography and in the next section I show how visibility is further constrained regarding extreme pornography.

4.4 Constraints on visibility

Pornography is obscene material conveyed in a format that consists of the written word, pictures or actions⁴⁰⁸ and made available to the public. Today pornography is truly portable as it is also available through the Internet and can be downloaded onto a moveable device such as a laptop. Therefore, the portability of pornography creates the problem that the viewing may occur anywhere and there is a greater risk of it being viewed by someone who may be corrupted by the content. In Chapter 1 legislation aims to prevent sexual activities from being accidentally viewed. Similarly photographs and/or films of sexual activities are also prohibited from being shown in such a way.

The essential difference between the visibility of sexual activities in Chapter 1 and the visibility of pornography, is that non-commercial sexual activities must be seen by more than one non-consensual viewer who only needs to be morally outraged, whereas for pornographic content the test set out in s1 of the Obscene Publications Act 1959 relies on whether it is likely ‘to deprave and corrupt persons’ and *DPP v Whyte* [1972]⁴⁰⁹ established that it must be a significant number of people likely to observe it. The difference between the exposure of non-commercial sexual activities and commercial (pornographic) material starts with pornographic materials are mass produced for ‘gain’ and therefore are designed catch a wider

⁴⁰⁸ R v Dugdale (1853) 17 JP 182

⁴⁰⁹ DPP v Whyte [1972] AC 849

audience. The differing values between the visibility of non-commercial and commercial offences was set out in the ‘Human Earrings’ case⁴¹⁰ where it was held that there was a clear distinction between offences involving corruption of public morals and those involving outrage on public decency whether or not public morals are involved.⁴¹¹

The first legislation to constrain visibility in order to prevent the exposure of obscene articles was the Vagrancy Act 1824 and amended by the Vagrancy Act 1838 to include legislating against exposing the public to indecent prints either on the side of a street or within a shop or house. Thus, the exposure of obscene articles became illegal and the offence lay in the publishing of such materials. The offence exposing the public to indecent prints was therefore developed to protect the morals of society from being corrupted by lustful desires.⁴¹² Originally pornography was portrayed either by pictures which were viewed in private, or sculptures viewed either in private if small enough to be portable, or publicly and consequently legislation had to consider both methods of viewing as well as the content.

Visibility becomes an issue when, as found in the Indecent Displays (Control) Act 1981, ‘any indecent matter is publicly displayed.’ Chapter 1 showed us that in criminal law a ‘public’ place is where the public have or are permitted to have access, and with regards to pornography it is where members of the public cannot avoid seeing the offensive material. I have shown that there are exceptions, but within those exceptions, such as a sex cinema, the visibility is permitted by *consenting* adults in such a place where accidental viewing is prevented on two counts: one, because of the signage warning the public that offensive material can be viewed within the building and two, there are no means of viewing such material from the outside. A person must actually enter the building in order to view the pornography.

Today, visibility, or to be more precise, the ability to view, is constrained by the criminal law because s63 of the Criminal Justice and Immigration Act 2008 creates the offence of possessing extreme pornographic images that are grossly offensive, disgusting or otherwise

⁴¹⁰ R v Gibson (Richard Norman) [1990] 2 QB 619

⁴¹¹ Case Comment: Outraging public decency – whether prosecution for common law offence ousted by Obscene Publications Act 1959 – mens rea for common law offence *Criminal Law Review* (1990) *Crim L R* 738-740 at 738

⁴¹² John Philip Jenkins, ‘Obscenity’ <http://www.britannica.com/EBchecked/topic/424001/obscenity> (26th March 2013)

of an obscene character.⁴¹³ These may contain images where a person's life is threatened⁴¹⁴ or serious injury results to a person's anus, breasts or genitals,⁴¹⁵ or intercourse is performed with a human corpse⁴¹⁶ or an animal (alive or dead).⁴¹⁷ Section 160 of the Criminal Justice Act 1988 prohibits possession of indecent photographs of children. With the advent of the Internet and technology being able to 'freeze' and copy single frames from videos, the Criminal Justice and Public Order Act 1994 s84 amended the Criminal Justice Act 1988 to include pseudo-photographs.

One can see that the allowed and disallowed visibility of pornography is in direct correlation with the moral levels of the content. The more morally repugnant, the more 'deadly poisonous' the content of the pornography the greater the restrictions of the material not only being allowed to be disseminated and viewed but also possessed. Therefore, legislating and regulating pornography has taken an interesting if not critical journey that has moved from a public space: publishing obscene materials, to a more private sphere: possessing obscene materials. This is a result of an assessment conducted for the Home Office which concluded that there is an 'existence of some harmful effects from extreme pornography on some who access it'. These include the increased risk of developing pro-rape attitudes, beliefs and behaviours, and committing sexual offences'.⁴¹⁸ Although as McGlynn and Rackley⁴¹⁹ note '... there is no definitive evidence of a causal link between extreme pornography and carrying out acts of sexual violence ... the harm comes from the promotion of unlawful acts of sexual violence'.⁴²⁰

Prior to the Criminal Justice and Immigration Act 2008 the criminal law was silent regarding the possession of adult pornography, instead criminalising the production and distribution of any material that was likely to deprave and corrupt the viewer. According to the Government, the Criminal Justice and Immigration Act 2008 was needed because reform was required to protect those who participate and to protect society, 'particularly children' from exposure to

⁴¹³ Criminal Justice and Immigration Act 2008 s63(6)(b)

⁴¹⁴ Criminal Justice and Immigration Act 2008 s63(7)(a)

⁴¹⁵ Criminal Justice and Immigration Act 2008 s63(7)(b)

⁴¹⁶ Criminal Justice and Immigration Act 2008 s63(7)(c)

⁴¹⁷ Criminal Justice and Immigration Act 2008 s63(7)(d)

⁴¹⁸ C. Itzin, A. Taket and L. Kelly, *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment (REA)*, Ministry of Justice Research Series 11/07 (September 2007).

⁴¹⁹ Clare McGlynn & Erika Rackley 'The Politics of Porn' *New Law Journal* (2007) 157 NLJ 1142 at 1142

⁴²⁰ Clare McGlynn & Erika Rackley 'The Politics of Porn' *New Law Journal* (2007) 157 NLJ 1142 at 1142

such material. The fear being it ‘may encourage interest in violent or aberrant sexual activity’⁴²¹ following the murder of Jane Longhurst. The argument that the pornography viewed by Coutts prior to killing Jane Longhurst, was causative to the murder was a potent argument presented by Jane Longhurst’s mother. Carline argues that ‘to maintain that the websites had causal influence gives too much power to such material and also removes the agency and, arguably, the blameworthiness of *Coutts*⁴²²’. To censor pornography on the basis that watching pornography leads to violence ‘will do little to prevent the deaths of women’⁴²³ either in domestic settings or as with Longhurst where the violence is perpetrated by an acquaintance.

But the Government argued that both prostitution (discussed in Chapter 4) and ‘extreme’ pornography garner harm and exploit women; stating that ‘there are hundreds of Internet sites offering a wide range of material featuring the torture of (mostly female) victims’ who may or not notionally or genuinely consented to take part.⁴²⁴ Yet the issue was not about consent, it was about the harm to women caused by such depictions described as ‘nasty’⁴²⁵ or ‘abhorrent’.⁴²⁶ The Government was using a false logic to support the moral argument that exposure to violent pornography has a causal effect.

The Government argued that there was a need for a possession offence, and ‘in the absence of any convincing empirical evidence’⁴²⁷ other than that based ‘on outdated research’⁴²⁸ concluded that ‘extreme pornography’ may have a negative impact on *some* men when viewed and consequently implemented the Criminal Justice and Immigration Act 2008.

In truth what the Government was doing by creating the strict liability crime of the possession of ‘extreme’ pornographic material, was to shift the focus away from the fact that it was a moral reform. In doing this, the Government ostensibly rejected the morality based arguments for arguments about potential harm. However, the end result was the definition of

⁴²¹ Home Office Consultation: On the Possession of Extreme Pornography HMSO (2005)

⁴²² Carline A, ‘Criminal Justice, extreme pornography and prostitution: Protecting women or promoting morality?’ (2011) *Sexualities* 14(3) 312-333

⁴²³ Carline A, ‘Criminal Justice, extreme pornography and prostitution: Protecting women or promoting morality?’ *Sexualities* (2011)14(3) 312-333 at 318

⁴²⁴ *Ibid*

⁴²⁵ Charles Walker (Conservative) HC Deb 8th October 2007 Col 117

⁴²⁶ Lord Hunt (Conservative) HL Deb 3rd March 2008 col 908

⁴²⁷ Johnson P, ‘Law, Morality and Disgust: The Regulation of Extreme Pornography in England and Wales’ *Social & Legal Studies* (2010) 19(2) 147-163, 151

⁴²⁸ Carline A, ‘Criminal Justice, extreme pornography and prostitution: Protecting women or promoting morality?’ *Sexualities* (2011) 14(3) 312-333 , 321

extreme pornography as being ‘grossly offensive, disgusting or otherwise obscene’ and although being moralistic in tone belies the fact that although staged rape and kidnapping were debated during the passage of the Bill, and such content ‘should have no place in our society’⁴²⁹ nonetheless violent rape scenes were not included in the SOA 2008.

Johnson, when talking about s63 of the Criminal Justice and Immigration Act asks ‘how is it possible to determine where the limits of social toleration lie’.⁴³⁰ When one looks at the social mores and the acceptance of things that once would have given a feeling of ‘disgust’, such as Ann Summers shops flourishing in the high street, the question alongside Johnson’s question is ‘have I become more or less vulnerable’ since the invention of the Internet? Although prosecutions were rare, the Indecent Displays (Control) Act 1981 criminalised the exposure of obscene articles by prohibiting ‘any indecent matter [that] is publicly displayed’ and ‘the person making the display and any person causing or permitting the display to be made shall be guilty of an offence’. The Indecent Displays Act 1981 criminalised the person who *displays* the indecent matter. The advantage of the morally laden Criminal Justice and Immigration Act 2008 is that it criminalises the person who *possesses* the material—thus the crime remains within the jurisdiction whereas the person who *displayed* obscene material on the Internet may be outside the jurisdiction of the law. Thus, the two Acts of Parliament are put in place to deter demand and therefore stop supply. This method of preventing demand to stop supply can be seen in the way the government regulates prostitution. The government has implemented an abolitionist system similar to the Nordic model where the client is criminalised and is discussed in Chapter 4.

Conclusion

This section has shown that the criminal law applies to pornography but rather than attracting systematic prosecution it is regulated by the BBFC which has the power to ban the film from being released in cinema’s or in digital formats. The BBFC scrutinises all films and decides what is permissible within the boundaries set by the various means of legislation shown above. It also sets a viewing age restriction and for pornographic films issues an R18 certificate that only permits the film to be shown in special licensed cinemas or supplied to adults only in licenced sex shops.

⁴²⁹ Home Office Consultation: On the Possession of Extreme Pornography HMSO (2005) Page 1 (Foreword)

⁴³⁰ Johnson P, ‘Law, Morality and Disgust: The Regulation of Extreme Pornography in England and Wales’ (2010) *Social & Legal Studies* 19(2) 147-163, 152

With regard to children, legislation protects all children under the age of sixteen by prohibiting pornographic material of children in any format to be produced and the SOA 2003 s48 sets the age of maturity for a child at eighteen and consequently children are prohibited from working in the pornographic industry.

The Obscene Publications Act 1959 in conjunction with The Criminal Justice and Immigration Act 2008 protects adults from being deprived by the content. But who are the vulnerable adults? The *Hicklin* test stated that it was ‘those whose minds are open to such immoral influences’⁴³¹ and was prior to the Internet. In *R v Clayton and Halsey* [1963]⁴³² Lord Parker’s obiter shows that it is the jury who decides who is the vulnerable person, and whether the material is likely to deprave that person. The Court of Appeal in *Perrin* held that the Obscene Publications Act 1959 is capable of including the content of a web page, and the test of obscenity is to be determined by the fact of whether it is likely to corrupt and deprave the viewer. This thesis contends that the vulnerability has shifted to a wider audience as adjudged by the jury.

The vulnerability of the audience is further protected by the prohibition of possessing materials where actors perform sexual activities involving a corpse, an animal or which causes harm to each other as within the Criminal Justice and Immigration Act 2008. The nature of the sexual activities prohibited indirectly through the possessor of the materials rather than the pornographers or performers, mirrors prohibitions criminal law formulated in the SOA 2003 and seen in Chapter 1. The test introduced by the 2008 Act though is potentially wider than the *Hicklin* test in the Obscene Publications Act 1959. The case of *Peacock* (2012) shows that images of which possession would be prohibited by the 2008 Act are not considered to corrupt a person mind under the Obscene Publications Act 1959.

Lord Chief Justice Campbell⁴³³ speaking out against the trade in obscene publications argued that the purpose of pornography was to corrupt the minds of young people, especially young women. The statutory interpretation of the resultant Obscene Publications Act 1857, the *Hicklin* test, was broader and defined the purpose to be such that would deprave and corrupt those whose minds are open to such immoral influences.

The purpose of pornography creating sexual arousal belongs to the definition found in s63(3) of the Criminal Justice and Immigration Act 2008 where it states that ‘An image is

⁴³¹ *R v Hicklin* [1868] LR 3 QB 360 page 371

⁴³² *R v Clayton and Halsey* [1963] 1 QB 163, [1962] 3 All ER 500

⁴³³ Hansard Parliamentary Debates 3rd Series Vol 145 (11 May 1857) cc 102 - 103

“pornographic” if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.’

The financial purpose inherent to pornography is hardly stated by the law. Payment is only mentioned, inasmuch as the SOA 2003 criminalises payment for sexual services of a child and the potential use of children for pornography. Yet, payment is at the heart of a debate regarding whether consent can be free if fiscally driven.

Thus criminal law expresses concerns regarding payment for children but shies away from the issue for adults involved in pornography, despite some situations of outside pressure being very similar if not identical to that of children. The SOA 2003 s43 creates the offence of inciting a child to become a prostitute or to be involved in pornography. The law is silent with regards to an adult, this is someone over the age of eighteen, who can be incited to be involved in pornography. Not all women ‘choose’ to perform in pornography, some are vulnerable to being incited in the guise of an invitation to perform for money because of her social or economic position.

Chapter 3 – Adult Live Sex Entertainment

Following on from pornography, this chapter shows how the criminal law curtails certain aspects pertaining to the live sex industry concentrating on: telephone sex, burlesque, striptease, hostess bars, topless waitressing, exotic dancing, and peep shows. Within this section exotic dancing includes lap dancing, pole dancing and table dancing. There is little difference between the three genres of dancing other than a pole dancer uses a fixed pole and some clubs install the pole on a table and the dancer dances around the pole on the table whilst the customers sit at the table. Therefore, when discussing the purpose in conjunction with activity and space, the generic term exotic dancing will be used.

This list of adult entertainment is far from exhaustive but the ones chosen shed significant light on the key issues the sex industry raises and how criminal law underpins the regulatory elements that controls the industry and provides a legal framework for the adult entertainment industry. The following areas of regulation are at stake: the sexual activity itself and its purpose as shaped by the space existing between performer and viewer, and the physical location where the sexual activities takes place.

Therefore, drawing on Chapters 1 and 2, this chapter shows how criminal law underpins the regulatory elements that control the live adult entertainment industry both in relation to: consent, the nature of the activity performed, the purpose it aims for, as shaped by the level of participation allowed from the viewer, and the visibility both inside the location and the actual physical location of these forms. In particular, the concept of Sexual Entertainment Venue is looked at, as this 2009 framework constrains the visibility of three of the activities studied: burlesque/striptease, lap dancing and peep shows. Each section is sub-divided into the different forms of adult entertainment wherever necessary, as outlined in the previous paragraphs.

Section 1 - Consent

Like pornography, live adult entertainment is by its very nature public and needs an audience. Thus both the performer and the viewer are required to consent in accordance with the SOA 2003. The definition of consent is consistent with consent established in Chapter 1 where s74 of the SOA 2003 provides that in all instances consent must be given by both the performer and the viewer and each must also have the freedom and capacity to make the choice. Choice, as held in *R (on the application of F) v The DPP [2013]*⁴³⁴ must be approached in a ‘broad and common sense way’⁴³⁵ and therefore live adult entertainment may not be performed if either the performer or viewer either refuses or withdraws consent, and in the knowledge that consent may be withdrawn at any time. Therefore, consent must be freely given without coercion or deception. Consent cannot be assumed either. For instance, silence is not consent as held in *R v Olugboja, (1982)*.⁴³⁶ Nevertheless, as with pornography, there is a level of implied consent within the live adult entertainment industry. Furthermore, as per s45 of the SOA 2003, the participants who consent must be over eighteen years of age. However, this age of consent may rise according to the regulation of the venue where live adult entertainment takes place.

This section utilises the elements of the framework by applying them individually to the various areas of the Live Sexual Entertainment industry as mentioned above. One area of consent that does not need to be treated individually is consent and management. This can be treated as a whole. Sex workers in adult live sexual entertainment, as with pornographic performers, work with, and for, management. The management also must consent to viewing (or listening to telephone sex workers) the sex workers whilst either at work or rehearsing for work. The consent, as with pornography, is tacit consent because the consent also forms part of the working contract. Similar to the pornographic performer, the fiscal pressure of the management teams begs the question whether the consent is truly made with free choice. The same comments made as to the suitability of s74 in pornography to deal with freedom to consent when payment for sex is conditional, apply to live sexual entertainment. It is not to presume that the performer cannot consent freely, but to ascertain that the law may have to

⁴³⁴ *R (on the application of F) v The DPP and “A” [2013] EWHC 945 (Admin)*

⁴³⁵ *R (on the application of F) v The DPP and “A” [2013] EWHC 945 (Admin)* at para 26 per Fulford J

⁴³⁶ *R v Olugboja [1982] QB 321*

acknowledge the pressures linked with the environment of the sex industry. For the live entertainment industry, this issue links with the visibility of the venue, as managers of Sexual Entertainment Venues, are under a legal obligation to make the performers and clients comply with the ‘no touching’ rule often associated with the additional ‘one metre’ rule. I come back to this aspect in section 4.

1.1 Telephone sex chat lines

In the context of telephone sex, consent is assumed by the operator, given that her services are advertised in such a way as to encourage the caller to contact her specific services. The operator may revoke consent should the caller go outside the agreed parameters of the call and simply terminate the call. The caller likewise gives assumed consent because he is paying for the service and controls the range of conversation. Should the caller mis-dial, the conversation would not be a consensual conversation and would be in contravention of the Malicious Communications Act 1988, where it is an offence to convey to another person a message, which is indecent or grossly offensive. Sex chat calls are also subject to s127 of the Communications Act 2003. In *DPP v Collins* (2006)⁴³⁷ it was held that s127 requires proof of an intention to send a grossly offensive message and Nick Taylor suggests that someone who is making a sex chat line call would have the prerequisite *mens rea* given that those involved would indeed have an intention to exchange obscene or indecent material.⁴³⁸

Although theoretically for telephone sex, as there is no specific venue, age of consent is defined in the SOA 2003 only, and thus being sixteen years of age is sufficient to fall outside the realm of criminal law. However, most services require payment by credit card and add the proviso that all users must be aged over eighteen, given that credit cards are not issued to persons under the age of eighteen due to this being the minimum age in the law of contract.

Should the caller go beyond the agreed parameters of the call, the operator is free to disconnect the call. However, if the caller then makes further calls to the operator, either in his own name or in assumed names and/or disguised voices, in order to continue the sexually explicit conversation, the question is whether the caller would be liable for breach of the Malicious Communications Act 1988 as amended by the Criminal and Justice Act 2001. Section 1 prohibits any person from sending any communication that conveys ‘a message

⁴³⁷ *DPP v Collins* [2006] UKHL 40

⁴³⁸ Nick Taylor ‘House of Lords: Communications Act 2003: grossly offensive message’ *Journal of Criminal Law* (August 2007)JCL 71 (301)

which is indecent or grossly offensive.’ It would also be in breach of the s39 Criminal Justice Act 1988 given that in *R v Wilson* [1955]⁴³⁹ it was held that words could amount to assault and in *R v Constanza* [1997]⁴⁴⁰ it was established that words *can* amount to assault. The same is applied with a mis-dialled call where the caller does not reach a sex line operator, but another individual who did not consent to a sexual conversation.

It is contended that the SOA 2003 should be wide enough to protect the sex chat line operator with regards to deception or coercion. In *R v Jheeta*, [2007]⁴⁴¹ deception prevents free choice, and in *Olugboja* if coercion leads to acquiescence then consent is vitiated. But, in both cases a sexual physical assault occurred whereas for a sex line operator the problem is that no physical assault occurs. Section 76 is used as a conclusive presumption for consent as defined in s74. However, s76 is designed for breaches of sections 1 to 4 where a physical assault has occurred. The argument is that s76 should be made wide enough to encapsulate malicious calls to a sex line operator under s76(2)(a) where the caller has been intentionally deceived ...as to the nature ... of the relevant act. The hypothesis rests on the fact that although s76 is written in such a way that it pertains to shared physical activity, and although telephone sex is not a shared physical activity, it does consist of a consensual sexually explicit conversation between the caller and the sex line operator. Therefore, if the operator has refused consent and the defendant is aware of the consent being removed and then goes on to deceive the operator as to the nature and purpose of the call, it is suggested that it should fall within s76 of the SOA 2003.

1.2 Burlesque and strip-tease

Strippers and burlesque dancers offer an implied consent. The consent is shown by the dancer being on stage and by the customer purchasing the ticket. The stripper can demonstrate refusal of consent when she refuses to dance the striptease. The consent is limited to the viewer watching the show and it does not include touching. This form of consent is conditional consent. The performer does not agree to anything other than being viewed. This element of consent, as shown with lap dancers, is now imposed by the Local Authority rules under the Local Government (Miscellaneous Provisions) Act 1976. The dancer has no option, but to refuse any form of contact with the viewer.

⁴³⁹ *R v Wilson* [1955] 1 WLR 493

⁴⁴⁰ *R v Constanza* [1997] Crim LR 576

⁴⁴¹ *R v Jheeta* [2007] EWCA Crim 1699

1.3 Hostess bars

The law and circumstances relating to consent are exactly the same for both the hostess and the topless waitresses. Although hostesses work in a closer proximity to the viewer than telephone sex chat lines, and unlike telephone sex chat lines, the viewer and performer share the visual connection within the same physical space, there is no invitation for the viewer to have any physical contact. The hostess and topless waitress do not consent to any sexual activities other than mild flirting and, due to the nature of the advertising outside the venue, for as much of her breasts as on show to be looked at. Both hostesses and topless waitresses work in very close proximity to the customer and therefore touching and jostling are considered as part of the job. Nevertheless, the touching and jostling must not be sexual in nature, it may only be as described by Lord Justice Goff in *Collins v Wilcock* [1984]⁴⁴² ‘to allow for the exigencies of everyday life’.

Should the viewer inappropriately touch the hostess he would, at the very minimum, be liable for the common law offence of battery as shown in *Collins v Wilcock*, but he could also be liable for the offence of sexual assault under s3 of the SOA 2003. Section 3 states that a person commits an offence if he intentionally touches another person and the touching is sexual and the other person does not consent to the touching. It should be noted that inappropriate touching would not necessarily trigger s75 as the circumstances do not fit with the criteria unless s75(2)(a) or (b) could be used and, s75(2)(a) is not an unreasonable assumption to make. The hostess is scantily clad and the viewer has imbibed alcohol at the hostess’ behest and it would not be unreasonable for the hostess to fear violence.

1.4 Exotic dancing

As with striptease and burlesque, consent is implied and part of the exotic dancers’ contract. The performer is limited by the Local Authorities to providing a conditional consent where the ‘one metre rule’ is imposed so there is a minimum of one metre between dancer and viewer, and therefore lap/pole dancers give the same consent as strippers: a regulated form of consent where the audience may view but not touch, and where none gives consent for any physical interchange.

⁴⁴² *Collins v Wilcock* [1984] 3 All ER 374

Therefore, the issue of consent is complex. The dancer, as with actors in pornography, gives contractual consent to dance as part of her employment agreement. She is bound by her contract to the 'no touching' rule. Consequently, she has no freedom or choice to make the decision to consent to any further activity than being viewed by the customer. Many dancers breach the rule if giving a 'private' dance, but the dancer is then deemed by the Local Authority who put in place the 'no touching' rule to be acting as a prostitute. The viewer consents in one of two ways: either by the purchase of a ticket at the start of the show, the same as striptease and burlesque shows that are performed in a theatre, or by the viewer paying money incrementally during the performance. With each payment, consent is re-negotiated by both parties: the performer may refuse to dance and the viewer may forgo further payments if he has seen enough of the dance. Consent is given by exotic dancers on the tacit understanding that it is withdrawn the moment the client is unable or unwilling to pay for the dance and the consent is limited to the restrictions set by the Local Authority with 'the focus being on the body parts of the female'⁴⁴³ dancer. But there are several inherent problems with the issue of consent and exotic dancing. Sir Igor Judge P, in the context of voluntary consumption of alcohol and rape, stated that s74 SOA 2003 'provides a clear definition of consent'⁴⁴⁴ but as Rook and Ward argue, 'the concept of "free agreement" is capable of wide interpretation'⁴⁴⁵ and using their example of the 'penniless employee' it is argued that some exotic dancers do not have the 'freedom' to make the choice of giving or withdrawing consent. In Chapter 1 it was noted that s74 does not specifically deal with drunken consent, and in this instance, it is contended that s74 also does not specifically deal with the issue of economic pressure and consent. As Elvin notes 'the statute is silent about this issue...'⁴⁴⁶ The Local Authorities create a situation where consent is limited to conditional consent (the no touching rule) but when that condition is broken, either by the client groping the dancer or by management (or for financial reasons) insisting, the dancer has little or no option but to break the LA rules and give a dance that involves sexual touching, it is the dancer who is marginalised. Marginalisation can also happen when the Local Authority either places a complete ban on exotic dance clubs or only allows them in

⁴⁴³ Sanders T and Hardy K *Flexible Workers: Labour Regulation and the Political Economy of the Stripping Industry* (Routledge 2014) p150

⁴⁴⁴ R v Bree [2008] QB 131 at [36]

⁴⁴⁵ Rook P and Ward R *Rook and Ward on Sexual Offences: Law and Practice*, (3rd edn Sweet and Maxwell 2004) paras 1.84-1.85

⁴⁴⁶ Elvin J, 'The Concept of Consent under the Sexual Offences Act 2003' *Journal of Criminal Law JCL* 72 (519) p530

certain 'zoned' areas. Hubbard notes that 'rights to run businesses or work in sexual entertainment are being over-ruled by local decision-making processes'⁴⁴⁷ and this can result in the exotic dancer being put into a far less secure position of having the freedom to withdraw consent because exotic dancers are reliant on 'arm's length'⁴⁴⁸ regulation overseen by the managers and door staff.

1.5 Peep shows

Unlike exotic dancing, early peep shows did not have 'live' women; instead the customer looked at photographs of women in provocative poses revealed by coin operated mutoscopes.⁴⁴⁹ The mutoscopes were popular side-shows at the seaside and the content was titillating, but not obscene; otherwise they would have breached the Obscene Publications Act 1857 if, as per the *Hicklin* test discussed in Chapter Two, it had the capability to deprave and corrupt those whose minds are open to such immoral influences.

Progressively, peep shows developed into places where real women were employed. As described in *Lewstar Ltd and others v Secretary of State for the Environment (1985)*⁴⁵⁰ the venues are booths, often with a coin operated shutter, and the customer can look through an aperture into a room which is lined with mirrors. Today, as technology has advanced, peepshows are also available on television and the Internet. Consent of performers and of viewers is similar to lap dancing or striptease clubs.

To summarise the findings on consent: consent from the viewer or listener is implicit and stems from the person entering the premises or making the call. Consent of the performer in adult entertainment is part of a contract and from a viewer point of view, is implied by the venue where the activity takes place. For striptease, lap dancing and peep show, consent is conditional to not being touched, a rule enforced by the Local Authority under the Local Government (Miscellaneous Provisions) Act 1976. Only hostesses are to be touched, but in a non-sexual way. For telephone sex, the consent of the performer is implied by the advertisement and cannot involve touching by the nature of the phone call.

⁴⁴⁷ Hubbard P 'Law, sex and the city: regulating sexual entertainment venues in England and Wales' *International Journal of Law in the Built Environment* (2015) IJLBE 7(1), 5–20 at 6

⁴⁴⁸ *ibid* 8

⁴⁴⁹ For further examples see: <http://www.erbzine.com/mag12/peep/1.html> (accessed 1st October 2013)

⁴⁵⁰ *Lewstar Ltd and others v Secretary of State for the Environment and another* [1985] 1 EGLR 169 (CA)

Section 74 of the SOA 2003 does not make any reference to consent given whilst working in the sex industry. For women who work in the industry s74 needs to be more explicit as it lacks understanding of how sex workers can be fiscally coerced into consenting. The workers are limited to what they can actually consent to and the next section will show how the nature of the sexual activity in each area of adult live sex entertainment differs from each other.

Section 2 - The Nature of Sexual activities within the Live Sexual Entertainment Sphere

The nature or content of the sexual activities is also regulated. The peep show artiste is the most graphic, and the burlesque dancer the least. The allowable content of the sexual activities for entertainment is related to the expected level of sexual arousal, which is related to the level of privacy of the viewer. The viewer of a burlesque dance is not expected (or indeed permitted) to reach orgasm, whereas the sex chat line caller and the peepshow viewer are.

2.1 Telephone sex chat lines

Telephone sex consists of a consensual sexually explicit conversation between the caller and the sex line operator. The operator has a guideline script but the experienced operators' repertoire includes many elements of sexual preferences such as sado-masochism or fetishes such as a foot fetish. These preferences are not acted out by the sex line operator, and so do not fall within the scope of criminal law.

Flowers argues that modern society is well placed for telephone sex given the answering machine, Walkman and computer 'increase the social as well as physical distance between communicating individuals'.⁴⁵¹ She argues that this 'indirect quality of communication creates a disembodiment, a distance between communication and self'.⁴⁵² This disembodied connection between the operator and caller gives telephone sex its specificity in comparison with pornography. It is indeed dissimilar to pornography insofar as with pornography it is visual whereas in telephone sex lines the connection between the customer and the operator is only aural.

The service offered by a sex chat line operator is also distinct from a prostitute's services, despite adverts offering girls who 'will talk you through to orgasm in a special way' as

⁴⁵¹ Flowers A *The Fantasy Factory: An insider's view of the Phone Sex Industry* (University of Pennsylvania Press 1998) p1

⁴⁵² *Ibid* p1

argued in *Armhouse Lee v Chappel*(1996).⁴⁵³ In *Armhouse Lee v Chappel* the Court of Appeal (Civil) was faced with the question of whether the contract was unenforceable as a matter of public policy because of the illegal nature of the advertisement. Lord Justice Simon Brown argued that telephone sex operators were not prostitutes. He said:

“For my part I would roundly reject the invitation. Consider the implications. Its acceptance would brand as prostitutes not merely these particular telephone women but also, for example, strippers. It would also result in many people involved commercially in such activities being instantly open to prosecution for living on immoral earnings. I see no warrant for any such extension of the criminal law. Rather, in my judgment, a finding of prostitution requires at the very least both that the putative prostitute be at some stage in her client's presence and that her offer, whether intended to be fulfilled or not, is at any rate of some direct physical contact of a sexual nature between them.”⁴⁵⁴

However, the sexual content of the call could come under the scope of criminal law if the conversation can be heard by unwitting third parties. There is an interplay between the nature of the sexual content in the call and the fourth criterion of our framework, visibility. This aspect is analysed in section 4 pertaining to visibility.

2.2 Burlesque and strip-tease

The performer dances sensually to music whilst removing her clothes, choreographed in such a way that the ‘dance’ teases the viewer to want the dancer to take off even more garments; the difference between a striptease dancer and a burlesque dancer is that although both dances are performed for the titillation of the viewer, the burlesque dancer does not remove all her clothing. As the purpose of the activity is to sexually arouse the viewer, the activity is considered to be of a sexual nature.

2.3 Hostess bars and topless waitressing,

Legitimate hostess bars are largely unaffected by the Policing and Crime Act 2009 provisions which give further powers to the Local Government (Miscellaneous Provisions) Act 1982 to empower Local Authorities to impose stricter regulations on venues that provide any live performance which involves nudity, and nudity can consist of a woman exposing her nipples.

⁴⁵³ Magrath P, ‘Sex-line advertisements were not immoral’ Independent Newspaper Law Report 26 July 1996 <http://www.independent.co.uk/news/people/sexline-advertisements-were-not-immoral-1330516.html>

⁴⁵⁴ *Ibid*

Hostess bars, by their very nature, do not provide any form of nudity. However, if the bar employs topless waitresses, instead of hostesses, the premises would be regulated by s27 Policing and Crime Act 2009 providing that the bar employs the waitresses eleven times or more per year. This issue is considered in section 4.

2.4 Exotic dancing,

Lord Justice Ward in *Sutton v Hutchinson* (2005)⁴⁵⁵ said that one could only guess at what exactly lap-dancing involves but one could not faithfully describe it. His Honour Judge Purle noted in *Hindu Religious Association Leamington and Warwick v Warwick District Council* (2013)⁴⁵⁶ that ‘whatever else goes on in lap dancing establishments, it is not suggested that they could fairly be described as red light activities’. This distinction made between lap dancing shows and prostitution could be explained by the fact that there is in principle no touching between lap dancers and their clients. Indeed, the lap dancer has a restriction imposed by the Local Authorities, usually of one metre distance, that neither she nor the viewer may encroach. The viewer also has a restriction placed upon him: he must keep his hands by his side. Should the performer or viewer breach the one metre rule, then the licence holder would be taken to court for the criminal offence of breach of conditions. In some instances, if the performer should have intentional physical contact with the viewer, the licence holder may have his licence revoked and would also be liable to a fine.⁴⁵⁷ It is rare for the dancer to be charged with any criminal liability, as evidenced by *R v Bowman* where the manager was charged with allowing physical contact between the dancers and customers.⁴⁵⁸ One could argue that *Bowman* by breaching the regulations had implemented a form of illegal self-regulation where, as with the topless waitressed mentioned earlier, the lap dancers are also employed as prostitutes offering extra sexual services that involve touching for reward.

Despite the rules being clear, dancers and councillors both argue that the one metre rule is ‘virtually unenforceable’,⁴⁵⁹ which raises in turn the validity of the distinction made by Judge Purle in *Hindu Religious Association Leamington and Warwick v Warwick District Council*

⁴⁵⁵ *Sutton v Hutchinson* [2005] EWCA Civ 1773 per Ward LJ

⁴⁵⁶ *Hindu Religious Association Leamington and Warwick v Warwick District Council* [2013] EWCH 1600 (Admin) at 19

⁴⁵⁷ *R v Bowman* Plymouth Magistrates, not reported, 13th June 2013, <http://www.plymouthherald.co.uk/Plymouth-lap-dancing-club-boss-guilty-licence/story-19269661-detail/story.html> (accessed 27 September 2014)

⁴⁵⁸ *R v Bowman* Plymouth Magistrates, not reported, 13th June 2013

⁴⁵⁹ Paul Cassell ‘One metre limit on lapdances’ Getreading <http://www.getreading.co.uk/news/local-news/one-metre-limit-on-lapdances-4220017> (accessed 31st August 2014)

in 2013 between prostitution and lap dancing as shown in chapter 4. Hubbard notes that there is ‘an association made between prostitution and lap dancing’⁴⁶⁰ by the general public and lap dancing venues were considered as ‘little better than brothels.’⁴⁶¹ When taking a closer look at the nature of the sexual activity that occurs in a live sexual entertainment venue and the nature of the sexual activity of a prostitute (as discussed in Chapter 4) there is little difference and when the one metre rule is broken there is no difference. Hannah notes, the lap dance can consist of ‘standard bumps-grinds-shimmy’ moves⁴⁶² but as noted by Colosi, ‘lap-dancers are governed by the house rules created by managers and owners.’⁴⁶³ Following the argument set out in the previous section, the nature of the sexual activity is governed by (a self-regulated) management. There is a similarity between a prostitute being controlled by her (unregulated) pimp and a lap dancer being controlled by her self-regulated manager/door-staff.

2.5 Peep shows

The performance in a peepshow is more sexually explicit than lap dancing or strip-tease. In *Willowcell* (1995)⁴⁶⁴ the courts noted that the women were naked or semi-naked and ‘gyrating to loud music while caressing their breasts and vaginas with their hands’.⁴⁶⁵ The level of sexual activities within a dance can also be noted by *Smakowski and Another v Westminster City Council* (1990)⁴⁶⁶ where: women in various states of undress were seen to be performing acts which variously consisted of stroking the breasts, and vagina, raising and lowering wide open legs showing pubic hair, thrusting buttocks from side to side and visual display of breasts, vaginal area and anus. The acts were performed on top of a large bed⁴⁶⁷ and from the ‘surrounding circumstances revealed by the evidence’⁴⁶⁸ from the viewers’ booth, one would be able to infer that there is sexual stimulation. Furthermore, when considering the content of a digitised peep show, in *Smakowski* the courts held that although the purpose was to sexually stimulate the viewer, it was ‘unnecessary to call any viewer to

⁴⁶⁰ Hubbard P and Colosi R ‘Respectability, morality and disgust in the night-time economy: exploring reactions to ‘lap dance’ clubs in England and Wales *The Sociological Review* (2015) Vol. 63, 782–800 p794

⁴⁶¹ *ibid* 794

⁴⁶² Hannah J ‘Exotic Dance Adult Entertainment: A guide for Planners and Policy Makers’ *Journal of Planning Literature*, (November 2005) Vol.20,No.2p121

⁴⁶³ Colosi R ‘Just get pissed and enjoy yourself: Understanding Lap-dancing as “Anti-work”’ in Hardy K, Kingston S and Sanders T (eds) *New Sociologies of Sex Work* (Routledge 2016) p189

⁴⁶⁴ *Willowcell Ltd v Westminster City Council* (1995) 94 LGR 83,

⁴⁶⁵ *Willowcell Ltd v Westminster City Council* (1995) 94 LGR 83, per Roche LJ

⁴⁶⁶ *Smakowski and Another v Westminster City Council* - (1990) 154 JP 345 (1990) 154 JP 345

⁴⁶⁷ *Smakowski and Another v Westminster City Council* - (1990) 154 JP 345 per Tudor Evans J

⁴⁶⁸ *Smakowski and Another v Westminster City Council* - (1990) 154 JP 345

say that he had been stimulated ...' and the provisions set by parliament 'are plainly aimed at the performances and not the results of such performances'. Thus, the viewer is expected, as with telephone sex chat lines, to orgasm, and as with telephone sex chat lines, the performer is expected to keep the viewer stimulated to a level where he is prepared to pay more in order to reach orgasm.

To summarise, apart from telephone sex, the viewer and performer share the same physical space. This shared space however does not translate into sexual activity that involves touching between viewer and performer. If a hostess is touched, the touching is likely to be considered not sexual as per s78 SOA 2003. For burlesque/striptease, lap dancing and peepshows, as well as topless waitresses if employed more than eleven times a year, there is a no touching prohibition enforced by the Local Authority, as part of the regulations of Sexual Entertainment Venues as shown in section 4 on visibility.

The no touching prohibition is demonstrated by the space between the performer and viewer, and is interrelated with the purpose of the activity, as presented in the next section.

Section 3 - The purpose of the sexual activities in Live Sexual Entertainment

Live adult entertainment is a commercial enterprise and has a dual purpose. The primary purpose behind all live adult entertainment is money. Live adult entertainment has a price attached to it in order for the management and entertainers to make profit. Parliament does not shy away from this. Contrary to the situation for pornography, the Local Government (Miscellaneous Provisions) Act 1982 uses language such as ‘a significant degree of selling’ and twenty-seven years later Parliament is even more straightforward when it introduced the Policing and Crime Act 2009,⁴⁶⁹ which when talking about adult live entertainment in s27 states that it is for ‘*the financial gain* of the organiser or the entertainer’ (my emphasis).

The second purpose, and it is directly linked to the first purpose, is sexual arousal. However, the level of arousal and the subsequent forms of sexual activities expected or possible for the viewer depends on the level of participation allowed between the viewer and the performer.

3.1 Telephone sex chat lines

Telephone sex chat lines are designed to keep the viewer stimulated to a level where he is prepared to pay more in order to reach orgasm, but for the operator this must not happen too soon as the number dialled generates money for the phone sex business or the self-employed operator. Profit is achieved by calls being routed through a premium rate number that can cost ‘typically between 6 pence per minute and £1.53 per minute/call for calls from BT landlines (incl. VAT)’.⁴⁷⁰ Although still popular, it is argued that telephone sex lines are in decline because it is now in direct competition with the more modern varieties of telecommunication such as the premium rated Internet based ‘Niteflirt’⁴⁷¹ or ‘Sexy121’.⁴⁷²

⁴⁶⁹ Policing and Crime Act 2009 s27 amending the Local Government (Miscellaneous Provisions) Act 1982 to include s2A(1) where a sexual entertainment venue ‘means any premises at which relevant entertainment is provided before a live audience for the financial gain of the organiser or the entertainer.’

⁴⁷⁰ Ofcom Review of Premium Rate Services, 2nd July 2012

⁴⁷¹ <http://www.niteflirt.com/> an American premium rated Internet/telephone sex line charging up to \$3 per minute (approx. £1.85 per minute) (accessed 27 September 2014)

⁴⁷² http://www.sexy121chat.com/?gclid=Cj0KEQjw_42eBRDHqcG1psmtneEBEiQAWPL8WNla55ALC2GX7-5TSXvIdi4D4cFrO0LJl9tkv4veC-caAq658P8HAQ a British premium rated Internet/telephone sex line charging up to £1.53 from a land-line telephone, mobile phone charges are higher. (accessed 27 September 2014)

The question of the purpose of telephone chat lines was raised in *Armhouse Lee Ltd v Chappell and Another* (1996)⁴⁷³ where the Civil Court had to consider whether the telephone operators were acting as prostitutes. Simon Brown LJ distinguished telephone operators from prostitutes by noting that the putative prostitute must be, ‘at some stage in her clients presence’ and that her offer is of ‘some direct physical contact of a sexual nature between them.’ But what if the client has no need for direct physical contact and only wants the prostitute to “talk dirty”? It is likely that the courts would reject the claim based on the dicta in *Webb*⁴⁷⁴ where it was said it does not ‘matter whether the woman masturbates the man or vice versa’ the distinction between prostitution and other forms of sex work is that ‘the woman has participated bodily in lewd acts for the sexual gratification of men.’ It is the *bodily* participation that prevents other sex workers such as strippers from being ‘branded’,⁴⁷⁵ as prostitutes and the implication being that it would result in ‘many people involved commercially in such activities being instantly open to prosecution for living on immoral earnings.’

The dicta in *Armhouse Lee Ltd* and *Webb* show that although the purpose of the sex chat line operator is the same as a prostitute, to make a profit, the method of achieving that profit is different. The telephone operator has no opportunity of physical contact and to maximise profit, the operator of a telephone sex chat line, unlike a prostitute, must neither reject nor disappoint a caller.⁴⁷⁶ Instead the operator must interact with the caller and develop an, albeit disembodied, intimacy⁴⁷⁷ and ascertain the caller’s fantasies and desires and encourage the caller to talk about them.

3.2 Burlesque and strip-tease,

The purpose of striptease and burlesque dancing is sexual arousal, which is of the same level as the hostess viewer. The viewer is expected to watch the show with a certain amount of decorum. However, it is doubtful that anyone in the audience would be alarmed or distressed if a viewer exceeded the level of decorum, and therefore the criminality connected to

⁴⁷³ *Armhouse Lee Ltd v Chappell and another* [1996] (unreported) *The Times* 7th August 1996

⁴⁷⁴ *R v Webb* [1964] 1 QB 357 @ 361

⁴⁷⁵ *Armhouse Lee Ltd v Chappell and another* [1996] (unreported) *The Times* 7th August 1996 per Simon Brown LJ

⁴⁷⁶ Lane F, *Obscene Profits: Entrepreneurs of Pornography in the Cyber Age* (Routledge 2001) p167

⁴⁷⁷ Flowers A, *The Fantasy Factory: An insider’s view of the Phone Sex Industry* (University of Pennsylvania Press 1998) p83

disorderly behaviour with a public display of arousal or even masturbation that would breach the Public Order Act 1986 s4A(1)(a) is not likely to be reported.

3.3 Hostess bars and topless waitressing,

The purpose of a hostess is to encourage the prospective viewer to purchase expensive drinks prior to paying for the in-house adult entertainment such as a peepshow. Women who work in hostess bars are usually scantily dressed but would not reveal their breasts totally or their genitalia. Their activity consists of flirting and exuding the promise of sex, but they must not offer any encouragement for the viewer to be sexually aroused. Hostess bars are primarily situated in London and became popular due to prostitutes being driven off the streets as a result of the Street Offences Act 1959.⁴⁷⁸ However, unlike prostitutes, their role remains restricted to encouraging the viewer to pay for and use the other facilities on offer within the premises.

Another area of employment that benefitted from the Street Offences Act 1959 was topless waitressing. Topless waitresses are employed in bars and corporate venues. The purpose of a topless waitress is to encourage more customers to use the venue and purchase food and drinks at an inflated price. To achieve this, a topless waitress wears a short skirt or shorts, high heels and nothing else. Their activity is similar to a hostess insofar as she is there to provide ‘eye candy’⁴⁷⁹ by providing a meet and greet service or serving and waiting on guests.⁴⁸⁰

Within the boundaries as defined by traditional criminal law under the SOA 2003, hostesses and topless waitresses in bars can promote a sexual atmosphere that Parliament has acknowledged. Indeed, for the hostess bars in London regulated by Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982, as amended by s33 of the London Local Authorities Act 2007,⁴⁸¹ a hostess bar is defined as ‘any premises’ where customers are given the impression ‘*that a performance, entertainment, service, exhibition or other experience of sexual nature is available*’.⁴⁸² Outside the London Borough, they are defined as premises that provide, either for a fee or not, companions for customers on the premises,⁴⁸³ or give the

⁴⁷⁸ Ruth Simpson (ed) *Dirty Work: Concepts and Identities*, (Palgrave Macmillan 2012) p71

⁴⁷⁹ <http://www.cheeky-events.co.uk/topless-waitresses.html> (accessed 6th August 2014)

⁴⁸⁰ As advertised by ‘Cheeky Events’ <http://www.cheeky-events.co.uk/topless-waitresses.html>

⁴⁸¹ London Local Authorities Act 2007 s33(1)(a)

⁴⁸² Sched 3 LG(MP)S 1982

⁴⁸³ Sched 3 LG(MP)S 1982

impression that a service of a sexual nature is available. They are regulated as a sex establishment by the Local Government (Miscellaneous Provisions) Act 1982 Schedule 3 in the same way as sex cinemas and sex shops. Lord Bridge of Harwich defined sex shops and sex cinemas as:

‘Put shortly sex cinemas are those where sexually stimulating films are shown and sex shops those which sell articles in connection with the stimulation of sexual activities’.⁴⁸⁴

Therefore, a sex shop is a premises that, as a significant degree of its business, consists of selling sex articles for sexual arousal. A sex cinema is a cinema that is ‘*used to a significant degree for showing of films which are concerned primarily with, or relate to, or are intended to stimulate sexual activity*’.⁴⁸⁵ Similarly, there is an expectation of an ‘*experience of sexual nature*’ within an organised swingers club, as mentioned in Chapter 1. Swingers clubs are also considered as sex establishments, but the level of regulated sexual activities within a swingers club and a hostess bar are vastly different. In swingers clubs touching is permitted, indeed sexual intercourse is often the ‘*experience of a sexual nature*’, whereas within a hostess bar touching is prohibited other than in an accidental manner.

Bars are not the only venues where topless waitresses work. Other adult live entertainment venues use topless waitresses in the same way as hostesses. The women are expected to serve (expensive) drinks and flirt with the customer in order to get him sexually stimulated enough to want to partake in the in-house entertainment, which can be a strip show, lap dancing or peepshow.

3.4 Exotic dancing

Exotic dancing clubs are identified through the Policing and Crime Act 2009 as ‘a distinct form of night life’⁴⁸⁶ whose purpose is to make a profit by creating sexual arousal. The purpose of sexual arousal must be viewed considering the nature of the sexual activities. The no touching prohibition is demonstrated by the space between the performer and viewer, but may not always be easily enforceable within some Sexual Entertainment Venues where no

⁴⁸⁶ Hubbard P and Colosi R, ‘Taking back the night? Gender and the contestation of sexual entertainment in England and Wales’ *Urban Studies* (2015) 52(3) 589–605, p590

physical separation exists. By means of CCTV management can control the dancers ‘which in turn affect both dancers and customers within this space.’⁴⁸⁷

In order to fulfil the purpose of making a financial profit, exotic dance clubs ‘have different organizational cultures based on distinctions made by the perceived social class of customers’ and to be able to ‘construct sexuality to be consistent with client class norms’ ‘the stripper seduces the customer by manufacturing a believable relationship.’⁴⁸⁸ The purpose of the manufactured relationship is to ensure the customer will pay for more dances because they ‘feel like they are somehow special or unique.’⁴⁸⁹ However, as Hubbard notes, there was a ‘widespread anxiety’ about exotic dancing clubs and the clubs were identified as ‘needing to be controlled differently from other licensed premises.’⁴⁹⁰

3.5 Peep shows.

The purpose of the peepshow, as for exotic dancing, is interlinked with the nature of the sexual activity. Thus, the purpose is twofold: to sexually arouse the viewer and get him to pay for further arousal to financially profit management. The viewer pays for the privilege of being sexually aroused, but the level of arousal in peepshows is different in nature to striptease or lap dancing because the nature of the sexual activities is far more graphic than that of the striptease or lap dance. The viewer, watching the peepshow performer using both aural and visual stimulation, masturbates to orgasm. But is the purpose of profit obtained at the cost of the human dignity of the dancer? In Germany it was held peepshows ‘violate the dignity of women who voluntarily expose themselves’ but O’Mahony offers an alternative view that the peep-show has ‘nothing to do with dignity properly so-called; all that is happening is that the right to personal autonomy and self-determination is being restricted, and this restriction is being dressed up as a protection for human dignity so as to justify what in reality is a decision reached on moral or paternalistic grounds.’⁴⁹¹

⁴⁸⁷ Egan D ‘Eyeing the Scene: The Uses and (RE)uses of Surveillance Cameras in an Exotic Dance Club’ *Critical Sociology*, (2006) (Volume 30, issue 2: 299 - 319 pp301, 302

⁴⁸⁸ Murphy A, ‘The Dialectical Gaze Exploring the Subject-Object Tension in the Performances of Women Who Strip’ *Journal of Contemporary Ethnography*, (2003) Vol. 32 No. 3, 305-335 p317

⁴⁸⁹ Murphy A, ‘The Dialectical Gaze Exploring the Subject-Object Tension in the Performances of Women Who Strip’ *Journal of Contemporary Ethnography*, (2003) Vol. 32 No. 3, 305-335 p317

⁴⁹⁰ Hubbard P and Colosi R, ‘Taking back the night? Gender and the contestation of sexual entertainment in England and Wales’ *Urban Studies* (2015) 52(3) 589–605, p590

⁴⁹¹ O’Mahony C ‘There is no such thing as a right to dignity’ *International Journal of Constitutional Law* (2012) Int J Constitutional Law 10 (2): 551 p570

Section 4 - Visibility

In the live adult entertainment industry, the law chooses to regulate this participation which can vary hugely, from an audience distantly engaged as with pornography, to a viewer sharing the same physical and visual space as the performer. Breaching these regulations, as shown, constitute criminal offences.

Furthermore, to avoid the accidental onlooker of sexual activities performed in a public space, something criminal law forbids as I have shown in Chapter 1, the law regulates the physical location of live adult entertainment so that the entertainment is not viewable from outside the property where the performance takes place. Should there be a breach of these regulations, then criminal law steps in again, although its role differs according to the set of regulations at stake.

The sexual activities within Sexual Entertainment Venues and the space between the performer and viewer change in accordance to the purpose of the different types of Sexual Entertainment Venue. For instance: telephone sex chat lines operators, similarly to prostitutes, do not operate from a venue that is open to the public whereas other venues are.

Consent put aside, the issue behind live adult entertainment is how legislation permits sexual activities within a public space. I have shown in Chapter 1 that criminal law as such does not prohibit private sexual activities in a public space, but is concerned with protecting the accidental viewer. However, with live adult entertainment, as much as with pornography studied in Chapter 2, viewing is rarely an accident, but rather the very objective of the activity. Should there thus be any restriction imposed by criminal law? There is no criminality in this; indeed, the very act of selling is acknowledged by the law as the purpose and considered legal, as I have shown in the previous section. Strictly speaking, criminal law does not prohibit anything directly. Live adult entertainment is mainly subjected to regulatory requirements and criminal law reappears only if there is a breach of these regulations. There are however some significant differences as to the visibility or invisibility requirements, according to the activity considered. Telephone sex activities are not regulated as hostess/topless waitressing are, and in turn, they both differ from burlesque/striptease, lap

dancing and peepshows, the last three being classified as a Sexual Entertainment Venue. Therefore, I consider them each individually, before looking at the concept of Sexual Entertainment Venue.

4.1 Telephone sex chat lines

For telephone sex the restrictions regarding visibility are aimed at the caller and less at the operator. Although the caller, with modern technology, is able to make the call from anywhere, the operator is confined to working within a building where no eavesdroppers can overhear the conversation. The operator is invariably out of sight—either in a call centre or at home. Moreover, the operator rarely performs any sexual activities (although it would not be prudent to say they never do). Therefore, visibility is not the issue but the likelihood that the conversation (as with the caller) would be overheard is.

Though it is a commercial sexual activity, the caller and the operator agree to a private conversation. Telephone sex thus has an expectation of privacy. Therefore, should the sexual content of the call be overheard in the middle of a busy street or restaurant, the caller would fail the *Crunden*⁴⁹² test, as shown in Chapter 1, where the public/private locus depended on the presence of people. If in addition, it could be shown that the overheard conversation caused alarm or distress, then the caller would be in breach of the Public Order Act 1986 s5(1)(a), which states that a person is guilty of the offence if he ‘uses threatening, abusive or insulting words or behaviour, or disorderly behaviour within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby’.

4.2 Hostess bars and topless waitressing

The essential difference between a hostess bar and a swingers club is that a swingers club is a member’s only club and is not open to the general public; therefore there is a much reduced risk of any nudity being viewed by a non-consensual viewer as discussed in Chapter 1. Whereas the very nature of a hostess bar is public, it relies on the fact that it is not a club—all customers are free to enter during opening hours, and the regulations are set to prevent any accidental viewing of nudity or sexual activities.

The key difference between hostess bars and topless waitress bars are that topless waitressing is considered as an activity of an adult sexual nature. The topless waitress must remain within

⁴⁹² R v Crunden (1809) 2 Camp 89, 170 ER 1091

the building and not be in such a position as to be seen from outside so there is no risk that the unsuspecting passer-by is likely to be alarmed or distressed, whereas the hostess is often 'front of house' standing just outside the building. This is ironic given the Street Offences Act 1959 was implemented precisely to eradicate commercial sexuality from view. However, a scantily clad woman would not cause enough alarm or distress to either breach the Street Offences Act 1959 or the Public Order Act 1986. Therefore, it is permissible for the hostess to stand outside in order to encourage the customer to enter the bar and after spending money with her to watch a live adult entertainment such as a strip show.

Topless waitresses, because they show their breasts, are considered to provide a live display of nudity and thus fall within the parameters of s27(2A) (2)(b) of the Policing and Crime Act 2009 and the concept of Sexual Entertainment Venue. However, s27(2A)(3)(b)(i) states that if the relevant entertainment, in this instance topless waitressing, is provided for less than eleven occasions within a period of twelve months, then the venue would not require regulating by the Policing and Crime Act 2009. Because of the clause within s27, bars often limit the use of topless waitresses to less than eleven times a year in order to circumvent the stricter regulations set by the Policing and Crime Act 2009. The venue is then regulated by the Licensing Act 2003. The Licensing Act 2003 simply delegates the power to Local Authorities to issue licences to venues where alcohol is sold or provided. Consequently, it would be an offence not to possess a licence to provide or sell alcohol. However, the Licensing Act 2003 does not delegate control or regulation to the Local Authority by means of the Local Government (Miscellaneous Provisions) Act 1982; thus the bar on the occasions that it offers topless waitressing is only licensed through the Licensing Act 2003 and would be self-regulating. This is open to abuse and as Sanders and Hardy note, although referring to strip clubs: ' [there] is already a detectable unregulated strip scene occurring in London ... which could lead to the development of a two-tiered system: one which is regulated and the other left to self-regulation'.⁴⁹³ Self-regulation, when abused, not only ignores the 'no touching' rule, but often invites further sexual activities such as prostitution to occur. This issue is also considered in Chapter 4.

⁴⁹³ Teela Sanders and Kate Hardy, *Flexible Workers* (Routledge 2014) p66

4.3 Burlesque and strip-tease

A striptease show requires an audience, although this can be an audience of one as per the Policing and Crime Act 2009;⁴⁹⁴ but unlike the hostess, the proximity between the performer and the viewer is further distanced. The audience is seated in a public space, which is not capable of being viewed from outside, whilst the performer is live on stage. There is thus no issue of visibility, apart from the rules that govern any visible space within a Sexual Entertainment Venue.

4.4 Exotic dancing

The performer and viewer share the same physical space, like the strip tease dancer who works in bars. The regulation of visibility is through the venue, i.e. the Sexual Entertainment Venue.

4.5 Peep shows

Unlike other forms of live adult entertainment other than telephone sex chat lines, the viewer can communicate with the performer but is physically disconnected from the performer by means of a window, or in the case of television and Internet peepshows, a screen. The sexual activities within a peepshow are the most sexually explicit of the forms of live adult entertainment in this thesis. It is parallel to pornography. And, as with pornography, the barrier of either the glass window or physical distance for electronic peepshows prevents any further interaction. The more modern version of peep shows is where the performance is viewed on a computer screen or television set, which is akin to pornography although the viewer is also the director.

Although performed in a private space, with the viewer also in a private space, the sexual activity is open to an audience, which must pay, and is thus public. This is the opposite of swingers' parties as discussed in Chapter 1. Swingers meet in a private space, usually a house, and create a public environment. The sexual activities are consensually performed and viewed by each other. As with the sexual activities of swingers being seen by an accidental viewer, if the kind of entertainment in peep shows be witnessed by any sensitive member of the community it would be deemed as lewd and subject to criminal liability either under the

⁴⁹⁴ Policing and Crime Act 2009 s27(14): 'In this paragraph – 'audience' includes an audience of one'

common law of outraging public decency or by causing alarm or distress as per the Public Order Act 1986.

4.6 Sexual Entertainment Venues

From this analysis, it is clear that the three forms of adult live entertainment: striptease, lap dancing (including peepshows), and bars employing topless waitresses more than eleven times a year, are sexually explicit and aim at sexually arousing the viewer.

Until 1982, the commercial sex industry in the form of strip shows, lap dancing and peepshows, were unlicensed venues and subject to regulation only with regards to traditional criminal law and to the selling of alcohol. As noted by the House of Lords in *McMonagle v Westminster City Council (1990)*,⁴⁹⁵ the Local Government (Miscellaneous Provisions) Act 1982 intended to introduce other forms of control than that of criminal law: ‘para 3A of Sch 3 [of the Local Government (Miscellaneous Provisions) Act 1982] is to require any premises ... where live nude entertainment is provided to be licenced ...’. The venues, initially referred to as Sex Encounter Establishments, operated under a Public Entertainment Licence, with a Special Nudity Provision issued by the Local Authority. If alcohol was served a separate liquor licence issued by the local magistrate was also required. The venues were a precursor to the Sexual Entertainment Venues introduced by the Local Government (Miscellaneous Provisions) Act 1986 which replaced the Local Government (Miscellaneous Provisions) Act 1982.

In 2003 the government introduced the Licensing Act 2003 in order to simplify and improve the licensing process by replacing the complicated system of regimes for different forms of licence, governed by different licensing authorities to a single licensing authority.⁴⁹⁶ This regime effectively devolved licensing decisions away from the courts to local councillors.

The Licensing Act 2003 was intended to promote a ‘café bar’ culture and to encourage more diversity in the high street by facilitating the opening of new ‘family friendly’ cafés and café bars, thus acting as a means of stopping lager louts brawling.⁴⁹⁷ The Licensing Act 2003 was

⁴⁹⁵ *McMonagle v Westminster City Council* [1990] 1 All ER 993

⁴⁹⁶ Schedule 12 to the London Government Act 1963; Licensing Act 1964; Private Places of Entertainment Act 1967; Theatres Act 1968; Late Night Refreshment Act 1969; Schedule 1 to the Local Government (Miscellaneous Provisions) Act 1982; Cinemas Act 1985 and Part 2 of the London Local Authorities Act 1990.

⁴⁹⁷ Department for Culture, Media and Sport Press Release, ‘Major Reform of the Licensing Laws Completed’, 9 July 2003.

supposed to be a bold, impressive and modern regime,⁴⁹⁸ stemming from the fact that professionals and academics suggested that attitudes were more liberated with regard to nudity, so the café culture could also include ‘entertainment’ in the form of venues offering lap dancing. What happened was instead of a family friendly café culture, there was a proliferation in pole dancing venues in certain towns which, licensed under the Licensing Act 2003, ‘colonised the British High Street’.⁴⁹⁹ The level of opposition encountered in its implementation demonstrated that the sex industry was **not** considered the same as other types of industry. There was a rising concern among the public and residents began to object to clubs. Groups such as ‘Object’ argued that a more rigorous form of regulation of such venues should be implemented. Notably lap dancing and pole dancing prompted ‘significant policy debate’⁵⁰⁰ because of the sexual content involved within. The government, and the liberal academics, had misjudged the reaction of civil society when lap/pole dancing was categorised the same as cafés and bars. Residents started to object to clubs opening using the four grounds for objection within the Licensing Act 2003: that it is a proven nuisance, causes harm to children, public safety and causes crime and/or disorder. But the Licensing Act 2003 had no specific provisions to give Local Authorities extra powers to control the live adult entertainment clubs.

Jacqui Smith, the then Home Secretary admitting that the law had been ‘left behind’ said "I don't believe lap-dancing clubs fall into the category of mainstream entertainment and therefore they shouldn't be regulated in that way either." She then went on to say ‘We will give communities a stronger say in stopping lap-dancing clubs opening in their areas’,⁵⁰¹ but it was not until 2008 that Dr Roberta Blackman-Woods MP, in response to concerns voiced by the media and pressure groups such as ‘Object,’ introduced a Private Members Bill. The Bill, entitled ‘The Sex Encounter Establishments (Licensing) Bill’ was put before Parliament on the basis that ‘at present the law is simply inadequate to deal with lap-dancing club issues’⁵⁰² and it ‘appears that too many lap-dancing clubs [were] gaining licences where local residents, the police and others deem them to be totally inappropriate’.⁵⁰³ There was no criminality involved regarding the sexual activities within the venues. The sexual activities

⁴⁹⁸ Leo Charalambides, ‘Sexual Entertainment Venues’ *Westlaw Insight* 17 June 2014

⁴⁹⁹ Jon Kelly, ‘The rise and fall of lap dancing’ *BBC News Magazine* (8th February 2012) <http://www.bbc.co.uk/news/magazine-16869029> (accessed 7th September 2013)

⁵⁰⁰ Hubbard P and Colosi R, ‘Sex, crime and the city: Municipal law and the regulation of sexual entertainment’ *Social & Legal Studies* (October 2012) 22(1) 67–86 p68

⁵⁰¹ http://news.bbc.co.uk/1/hi/uk_politics/7753456.stm (accessed 27 September 2014)

⁵⁰² Hansard, HC Deb 18 Jun 2008 : Column 947

⁵⁰³ *Ibid*

could not be seen by the unsuspecting passer-by and the viewers, by means of purchasing the ticket or paying the dancer had tacitly consented to view. Should any of the activity be generally viewable then the dancers would be liable for public indecency and obscenity and the managers would be liable for permitting indecent displays. The test of decency would depend on the viewers and whether or not the exposure was intended as per the SOA 2003 but the argument was not so much as what could be seen as the proliferation of lap dancing clubs, and the seemingly impossibility to prevent further clubs from opening within the vicinity. What was needed, according to Blackman-Woods' supporters were for the venues to be considered as sexual activities venues⁵⁰⁴ and not, as the narrative suggested by the media, on moralistic grounds of social 'pornification'.⁵⁰⁵

The Sex Encounter Establishments Bill failed for lack of time, despite it being publicly supported in the Houses of Parliament. However, the Policing and Crime Act 2009, supported by Dr Blackman-Woods MP, addressed some of the concerns. The Policing and Crime Act 2009 introduced a new definition: the Sexual Entertainment Venue. A Sexual Entertainment Venue is any premises in which any live performance or live display of nudity which is provided solely or principally for the purpose of sexually stimulating any member of the audience. Section 27 of the Policing and Crime Act 2009 includes peep shows within the definition of a Sexual Entertainment Venue.⁵⁰⁶

The Policing and Crime Act 2009 extends the powers of Local Authorities to regulate Sexual Entertainment Venues by way of the Local Government (Miscellaneous Provisions) Act 1982. The consolidation of powers to control all forms of sexual entertainment by Local Authorities offers an approach that is more suitable to the needs of each locale. This approach however, creates inconsistencies in decisions made by each Local Authority. For instance, one Local Authority might permit a club to stay open until the early hours of the morning whereas another might insist on a midnight curfew.

Another issue arises as to the enforcement of the 'no touching' rule and the 'one metre' rule set by the Local Authority. Officially, all those involved: performer, client and manager of the venue, must comply with the rule. The question is whether the existing mechanisms at

⁵⁰⁴ Hansard, HC Deb 18 Jun 2008 : Column 947

⁵⁰⁵ See Paasonen S, 'Pornification and the mainstreaming of sex' *Criminology and Criminal Justice* p1 <http://criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-159> for further discussion re the term: 'pornification'

⁵⁰⁶ Home Office, Sexual Entertainment Venues: Guidance for England and Wales, Parliamentary Office 2009 p7 para 2.3

law allow for complaints to be formulated, investigated and upheld. The client may not be the one complaining, but the performer may have grounds for concerns. At stake is her ability to say ‘no’ to a manager asking for her to take part in sexual activities that would involve touching with a client. If the performer cannot complain, in a system similar to that of whistle-blowers, she is unlikely to be able to say ‘no’, especially if the threat is to lose her job. Her freedom to consent would be diminished, whilst it may be difficult for her to prove where the coercion lies. As noted in Chapter 1, it is easier to prove lack of freedom to consent when physical violence is exerted than when other forms of implicit threats and violence take place.

Another issue regarding live adult entertainment venues is location: the positioning of the venue within any given district, i.e. its impact on the vicinity and integration within its environment. The issue is interrelated with that of the advertising of Sexual Entertainment Venues. Prior to the implementation of the Local Government (Miscellaneous Provisions) Act 1982, live adult entertainment often went largely unadvertised and was held in workingmen’s clubs thus bringing little attention to either the police or the public. With the introduction of licensing in 1982, the practice of advertising clubs either within the vicinity of the club or beyond arose. The adverts had to comply with the Indecent Displays (Control) Act 1981. Although the wording was originally intended specifically for a sex shop, it now applies to all sexual entertainment venues and each venue must carry a warning notice, as enforced by the Local Authority, that contains the following words, and no others:

“WARNING Persons passing beyond this notice will find material on display which they may consider indecent. No admittance to persons under 18 years of age.”⁵⁰⁷

Section 1(6)(d) of the Indecent Displays (Control) Act 1981 states that the notice must be situated so that no one could reasonably gain access to the venue without being aware of the notice. Should the person who advertised not comply with the legislation, s4 of the Indecent Displays (Control) Act 1981 states they may be liable to a summary conviction, although they are not likely to have the licence revoked as the Indecent Displays (Control) Act 1981 does not provide for such a penalty, but the Local Authority does have the power to revoke a licence under para 17 using the grounds in paragraph 12(3)(a) in Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982. By restricting advertisement and displays, criminal law introduced indirect control on live adult entertainment. The warning notice is in

⁵⁰⁷ Indecent Displays Act 1981 s6(a)

compliance with the minimum age set by the Local Government (Miscellaneous Provisions) Act 1982 para 23 Schedule 3, which states a licence holder would be guilty of an offence if they permit a person under eighteen years of age to enter the establishment or employs a person under the age of eighteen in the business of the establishment. This is not to say that the only permitted sign is the warning notice as each venue may advertise the entertainment.

Adverts in the media such as ‘Learn how to pole dance, step-by-step’⁵⁰⁸ do not fall within the realm of the Indecent Displays (Control) Act 1981. This is because the advert is aimed at adults (persons over eighteen) and the dancing has been de-sexualised by rebranding it as a form of fitness.⁵⁰⁹ Home videos of children ‘twerking’⁵¹⁰ posted on public platforms such as Facebook or Youtube are also outside the realm of the Indecent Displays (Control) Act 1981 because they fall below the obscene threshold.

Although such activities do not cause offence and therefore are not considered as obscene, they add fuel to the moral complaints⁵¹¹ against the ‘pornification’ created by the Sexual Entertainment Venues. Nonetheless, Liza Tsaliki notes that schools ‘found it imperative to regulate against’ twerking. But these objections are not applicable for the rejection or foreclosure of a Sexual Entertainments Venue licence. The objections must be within strict objective criteria set within the Local Government (Miscellaneous Provisions) Act 1982.

Arguably, to control the vicinity of the venue on the only grounds of performing sexual activities as defined above is at law difficult. Performing sexual activities in striptease clubs, lap dancing venues and peepshows is not *per se* illegal let alone criminal. They would be if they were linked with prostitution emanating from the venue, as per the Street Offences Act 1959, but the statute would not apply if the complaint is just about noise issues such as when the viewer leaves the premises late at night and the slamming of car doors. This could constitute a statutory nuisance under s79 and 80 of the Environmental Protection Act 1990 which defines noise nuisance as noise emitted from or caused by a vehicle so as to be prejudicial to health or a nuisance. In this instance the Local Authority would be under a duty to inspect the area and should the authority find that the nuisance is or is likely to be taking

⁵⁰⁸ <http://www.learn-pole-dancing.com/how-to-lap-dance.html> (accessed 27 September 2014)

⁵⁰⁹ <https://www.facebook.com/UniofEssex.Pole.dancing.society> (accessed August 2013: Facebook page live on 09 June 2016)

⁵¹⁰ See ‘ https://www.youtube.com/results?search_query=twerking+child

⁵¹¹ Hubbard P and Colosi R ‘Respectability, morality and disgust in the night-time economy: exploring reactions to ‘lap dance’ clubs in England and Wales *The Sociological Review* Vol. 63, 782–800 (2015) although not directly referring to ‘twerking’ note the moral repugnance of venues opening near schools or nurseries.

place, it must serve an abatement notice. With regard to noise emanating from the venue between the hours of 11pm and 7am, s3(b) of the Noise Act 1996 gives additional powers to the Local Authority to issue a warning notice to any person who is responsible for the noise which is emitted from the dwelling. Section 4 creates the offence where noise exceeds the permitted level after service of notice and under s4(3) would be liable to a fine. But it is more likely that a certain amount of tolerance would be expected given the venue is in a business area.

Thus, the law does not allow objecting to Sexual Entertainment Venues solely on the grounds of the sexual content of the activities. So, when residents or various bodies such as ‘Object’⁵¹² complain on the basis that they do not approve of the activities performed in the Sexual Entertainment Venue for the sole reason that the activities are sexual, their objection falls outside the scope of reasons to refuse a licence. With regard to the objections petitioned by ‘Object’ the reasons are considered as an expression of morals and in the key case *R v Newcastle upon Tyne City Council [2001]*,⁵¹³ which was concerned directly with paras 12(3)(c) and (d) of Schedule 3 (as applied, in that case, to ‘sex establishments’ as defined at the time) confirmed that although objections could not be based on moral grounds, it would also be unlawful for a Local Authority to refuse a licence to a Sexual Entertainments Venue based on its own view that such venues should not be allowed at all. Indeed, the Home Office ‘Sexual Entertainment Venue’ guide for England and Wales incorporates the *Newcastle* case and states: ‘objections should not be based on moral grounds/values and Local Authorities should not consider objections that are not relevant to the grounds set out in the Local Government (Miscellaneous Provisions) Act 1982.’⁵¹⁴ Surely the very fact that a lap-dancing club can be refused a licence because it is within the vicinity of a church is in itself based on a moral foundation?

Therefore a way to restrict the Sexual Entertainment Venue is if the objections can be based on the following two grounds within Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1986: the uses to which nearby premises are put *and* the character of the local area.⁵¹⁵ This may seem very constraining, but the Local Government (Miscellaneous Provisions) Act 1986 does not make a definition of how nearby the premises must be or what constitutes as local. Nonetheless, the objection must show how the venue affects ‘the use to

⁵¹² <http://www.object.org.uk/beinvolved> (accessed 3rd August 2014)

⁵¹³ *R v Newcastle upon Tyne City Council Ex parte The Christian Institute [2001]* B.L.G.R. 165

⁵¹⁴ Home Office, ‘Sexual Entertainment Venues: Guidance for England and Wales’ HMSO (2010) p18 [3.23]

⁵¹⁵ Local Government (Miscellaneous Provisions) Act 1986 Schedule 3, Paragraph 12

which any premises in the vicinity are put' or how it can relate to layout, character or condition of the premises. There is no explicit provision in Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1986 for objectors to be heard but a Local Authority is under a duty to consider any objections as was held in *Quietlynn* [1988]⁵¹⁶ when *Quietlynn* were held to be operating without a licence.

Furthermore, licences can be refused without an objection being lodged. The Local Authorities can refuse further licences if: '... the number of sex establishments in the relevant locality at the time the application is made is equal to or exceeds the number which the authority considers is appropriate for that locality.'⁵¹⁷ Many Local Authorities make use of this proviso and set the new application limit to nil, which in effect can reduce the number of venues to nil should any of the existing ones close. Thus Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1986 provides the legitimate solution to the objections based on moral grounds by the local residents and the Local Authorities can also support the moral compass by refusing to grant licences. Another way their objections can be taken into account would be if they can prove the licensee violated the conditions of their licence, such as the no touch rule imposed by most Local Authorities. But as seen earlier, it is very unlikely this would happen, and even if they succeed, and the rule of no touching is enforced, the sexual content of the activities would remain.

Conclusion

The performers and viewers in live adult entertainment, give tacit consent: the performer by her/his very presence and the viewer by paying. The consent given by the performer is conditional to the nature of the sexual activities, insofar as it only permits someone to view and not to touch. A 'no touching' rule is set out by the Local Authority and should be enforced in the premises of the Sexual Entertainment Venue.

The level of arousal for viewers at lap dancing clubs and the space between the performer and viewer is restricted by the Local Authorities as per the Local Government (Miscellaneous Provisions) Act 1982. The type of dance is also restricted by the Local Authorities and acts of intercourse (or simulated intercourse) are not permitted. This contrasts with Chapter 1

⁵¹⁶ *Quietlynn Ltd v Plymouth City Council* [1988] Q.B. 114

⁵¹⁷ Local Government (Miscellaneous Provisions) Act 1986 Schedule 3, Paragraph 12 (3) (c)

where sexual activities can include consensual touching and intercourse, and partially in contrast to Chapter 2 where the commercial sexual activities of pornography can and indeed does include touching and intercourse between the performers. However, as in pornography, *there is no physical contact* between the performer and viewer but unlike pornography the viewer does share the same space.

Should physical sexual activities occur then the performer is considered to be a prostitute instead. Consent may be refused at any time by the performers. Of course, if the performer does not consent to being viewed, then the likelihood is that the performer would not receive any payment from the employer. How the purpose of the sexual activities to make a profit influences the freedom to consent for the performer is hardly explored in law; yet, the question arises again when it comes to the enforcement of the ‘no touching’ rule in Sexual Entertainment Venue.

The nature is linked to the purpose: to create sexual arousal for money. The nature, although varies in the different types of entertainment, is concomitant to the level of arousal. However, the arousal is not intended as a precursor for sexual activities, it is simply a means of making a profit by getting the viewer to spend more and more money. Regarding visibility, live adult entertainment is public but the space within is quasi-private, insofar as it is a private space shielded from unintentional viewers and shared with intentional viewers. Regulation of visibility takes place by regulating where the venue can take place and by the warnings a venue must comply with to avoid the unwitting viewer.

In line with protecting the unwitting ‘partner’ as per Chapter 1, each venue must comply with the Local Authority to clearly warn the prospective viewer by virtue of the provisions of Section 1(6) of the Indecent Displays (Control) Act 1981 that the viewer must be over eighteen. The Local Government (Miscellaneous Provisions) Act 1982 also prohibits people under eighteen to be admitted to any Sexual Entertainment Venue. Thus, the regulatory warning and minimum age requirements must be complied with by the management of each venue. The warning must also inform any prospective viewer if they pass the warning sign they may find the content indecent. The constraints on visibility are clearly set because of the nature of the sexual activities, which, if seen by an unintentional viewer, would certainly be deemed as indecent if, as per s66 of the SOA 2003 the performer intended for the viewer to see. If the activity is unintentional, then it would fail the common law test as outlined in *R v Hamilton* [2007] where Lord Justice Thomas stated that the act not only had to be lewd,

obscene or disgusting but capable of outraging the minimum standards of public decency as judged by contemporary society.

Those constraints on the venue once the venue has been authorised are of lesser importance than the constraints put on obtaining the authorisation for a venue. The Local Government (Miscellaneous Provisions) Act 1982 by virtue of the Policing and Crime Act 2009 offers a more localised approach as to which venue to allow or not. It has effectively decentralised regulating sexual entertainment venues. The Policing and Crime Act 2009 also reflects a less liberated view than the government had anticipated when it created the special spaces that are the Sexual Entertainment Venues. Many Local Authorities now limit the amount of venues to be licenced and in some instances are reducing the number to nil. In effect, the moralistic 'not in my back yard' attitude was legitimised by Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 by virtue of the Policing and Crime Act 2009. It gave a legal voice to complainants against Sexual Entertainment Venues applying to open in areas that were once considered by the residents as family areas and therefore free of any sexual overtones. The complaint could now be legitimately posited as the venue would be situated amidst nearby premises and would not be in character with the local area.

These influences exercised by the local community in relation to the location, that they perceive should be acceptable for legal commercial sex to take place, apply only to Sexual Entertainment Venues. Bars that provide strippers or topless waitresses less than eleven times a year would not be regulated by the Policing and Crime Act 2009 or the Local Government (Miscellaneous Provisions) Act 1982; instead they would be subject to the Licencing Act 2003 which does not provide for the Local Government (Miscellaneous Provisions) Act 1982 to regulate the bars. This creates a reliance on self-regulation. The concern with self-regulation is, as shown in Chapter 4, that if the no touching rule is flouted and these venues can become a breeding ground for prostitution.

Chapter Four – Prostitution

Governments in the 20th and 21st centuries all refer to prostitution as a ‘problem’, whereas other forms of sex work, such as pornography (Chapter 2) and the live entertainment industry (Chapter 3), are not presented and regulated as being an issue that needs to be eradicated. Thus, the question is by what means is prostitution a problem when compared with other parts of the sex industry?

At this juncture, it is important to remember that partaking in sexual activities for money is of itself not a criminal action whichever type of sex work is considered. Furthermore, each area within the sex industry, pornography, live sexual entertainment and prostitution, have some form of management team to ensure the safety of the sex worker and in return to benefit from the money the sex worker generates from the clients. Albeit in prostitution the management is unofficial since it is illegal as per s53 of the Sexual Offences Act 2003 to control prostitution for gain.

Commercial sexual activities discussed in Chapters 2 and 3 contain lewdness but such lewdness is not considered as a problem to the government on the understanding it stops short of sexual intercourse with the paying customer. *De Munck*⁵¹⁸ defines acts of lewdness as being any acts that promote sexual gratification.

The issue of prostitution is the very fact that the sexual activities paid for are not only lewd but there is a likelihood of sexual intercourse. To determine whether prostitution is indeed different from the other forms of sex for payment as seen in Chapters 2 and 3, I use the same criteria as the previous chapters, namely consent, nature, purpose and visibility.

With regards to consent I consider whether the definition of consent and rebuttals in the SOA 2003 apply to prostitutes. The nature of prostitution, the actual sexual activities a prostitute engages in, is discussed and compared to both other forms of commercial sexual activities and non-commercial activities to demonstrate that there are strong overlaps between them all.

⁵¹⁸ R v De Munck [1918-19] All ER Rep 499

Payment also plays a major part in the purpose of prostitution. Lastly, I demonstrate that where criminal law intervenes most and sets apart prostitution from other forms of sex work is with regards to the visibility, not of the sexual activity itself, but of the behaviours that precede the sexual activities and that constitute the act of selling and buying sex.

Section 1 - Consent

The first aspect of consent to consider pertains to the individuals involved in the sexual activities. The client and the prostitute must consent to the sexual activities in compliance with the SOA 2003 s74, where the person 'agrees by choice, and has the freedom and capacity to make that choice'. Capacity and age restrictions apply as well. However, when it comes to age restrictions, the threshold is higher for the prostitute and her client. As for pornography, instead of the age of consent being set at sixteen, in line with the minimum age of marriage, the threshold is eighteen-years old. Section 47 SOA 2003 expressly criminalises any person from paying for sexual services of a child who is defined in s48 as being under eighteen. Thus the prostitute cannot be under eighteen. Furthermore, any sexual activity, whatever the purpose, involving a child under thirteen is an irrebuttable presumption of lack of consent. Therefore, all participants must be over the age of eighteen. These age restrictions established, there remains to be understood whether consent is provided according to s74 SOA 2003. Section 1.1 will therefore address consent with regards to an adult prostitute.

Moreover, as within pornography and the live entertainment industry, prostitution rarely involves just the two persons engaged in the sexual activities: the client and the prostitute. Often, there is a third party in the shadows referred to commonly as the 'pimp' or 'madam'. A client can engage in sexual activity with a child; nor the pimp can cause or incite a child under eighteen 'to become a prostitute' according to s48 SOA 2003. However, the prohibition goes further than causing a child to enter prostitution. Criminal law also prohibits any person to work as a 'pimp' and is therefore indifferent as to whether the third party (pimp or madam) consented or not to making a profit out of the sexual activities of the prostitute. This prohibition sets the manager (pimp or madam) of a prostitute apart from the management team present in pornography and in the live entertainment industry. In addition, the basis of the prohibition is that the pimp controls the activities of the prostitute and consequently criminal law presupposes that the prostitute cannot consent freely if the pimp runs the prostitute's sexual services. In section 1.1.5 as part of the issue of consent for the prostitute, I will consider how pimping may influence the prostitutes' consent.

1.1 The prostitute and consent

The legal presumption was that consent was permanent because a prostitute ‘offered her body commonly for lewdness for payment in return’⁵¹⁹ and so she could not be raped. This specific position, established at common law, was removed in 2004 but despite the disappearance of this presumption to consent for the future, difficulties remain as to how a prostitute can consent freely.

1.1.1 The presumption of permanent consent for all future sexual acts until 2004

Sir William Blackstone⁵²⁰ suggested in the ‘Commentaries on the Laws of England’ that prostitutes have, in theory, the same legal protection as any other woman with regards to non-consensual sexual activities. However, criminal law in practice did not reflect Blackstone’s commentary.

Evidence of ‘loose character’⁵²¹ or prostitution was admissible in court to show the ‘general character’ of the prosecutrix and again in *R v Bashir and Manzur* (1969)⁵²² where it was held that ‘there is a difference between the woman who has acts of sexual intercourse with men and a prostitute who regularly sells her body’.⁵²³ As Barbara Sullivan⁵²⁴ suggested, prostitutes were seen at law as ‘commonly available to men, as always consenting to sexual activity and thus, as *not able to be raped*’.⁵²⁵

The bias extended to assessing whether prostitutes could suffer trauma, and again a clear distinction was made. In *R v Shaw* (1997)⁵²⁶ the trial judge said that ‘intercourse was not as traumatic to the [prostitute] as to most victims raped by strangers’. The argument that prostitutes are not like other women or not like any other sex worker, still resonates.

⁵¹⁹ *R v De Munck* (1918) 82 JP 160 CCA

⁵²⁰ Sir William Blackstone *Commentaries on the Laws of England* (1765 – 1769)

<http://www.lonang.com/exlibris/blackstone/bla-415.htm> , Book 4 Chapter 15 (accessed 30th August 2014)

⁵²¹ *R v Greatbanks* [1959] Crim LR 450 at 78

⁵²² *R v Bashir and Manzure* [1969] 2 All ER 692

⁵²³ *R v Greatbanks* [1959] Crim LR 450 p78

⁵²⁴ Sullivan, B, ‘Rape, Prostitution and Consent,’ *Australian and New Zealand Journal of Criminology*, (2007) Vol 40 Issue 2 pp 127 - 142

⁵²⁵ *Ibid*

⁵²⁶ *R v Shaw* (Grenville) [1997] 2 Cr. App. R. (S.) 206 p 207

Professor Wertheimer uses similar language to that of *Shaw* when he argues ‘... the rape of a prostitute is less likely to cause PTSD than the rape of a non-prostitute ...’⁵²⁷

The *dicta* in *White*⁵²⁸ by removing the presumption that a prostitute could not withdraw consent offers a welcome change of attitude by noting that ‘It should today be a simple commonplace that a prostitute is as much entitled to say no as any other woman... [and a woman who] is or was a prostitute is no reason on its own to suppose that she might have been any more ready than the next woman to say yes’.⁵²⁹ Criminal law at last is applied without introducing an additional criterion. Consent by a prostitute must be given by the prostitute for each transaction; it cannot be presumed to have been given prior to the transaction on the sole basis that a prostitute has regular encounters with various men in exchange for payment.

1.1.2 Consent beyond the now abolished presumption

A prostitutes’ consent, as for other forms of commercial sex, is contractual. Theoretically, she has the opportunity prior to any sexual activities to simply walk away from the job should it contain any element that she does not want included. The difference between a performer or dancer and a prostitute is that it can be argued that contract law partially protects the performers; whereas, because pimping is criminalised, there is no civil law protection. The similarity here is of course that should the actress or prostitute deny consent then they would not get paid. But the performer is free to deny or withdraw consent given that she is in a ‘safe’ working environment. In that sense, the prostitute can be said to be in a far more precarious position when refusing consent.

Section 74 of the SOA 2003 is supposed to protect *all* persons engaging in any form of sexual activities. The definitions of rape and sexual assault in the SOA 2003 are dependent on the lack of consent by the victim and do not incorporate any reference, implied or explicit, to the context of prostitution. Rape is about a woman not consenting to sexual intercourse, and assault is about a woman not consenting to be touched. Whether she is a prostitute or not is, in black letter law, irrelevant. However, difficulties of interpretation of s74, notably freedom and capacity of a prostitute to consent, remain. The debate focuses on whether payment vitiates the prostitutes’ consent and the next section (1.1.3) will further elaborate on the

⁵²⁷ Wertheimer A, *Consent to Sexual Relations*, (University Press, Cambridge 2003) p111

⁵²⁸ R v White [2004] EWCA Crim 946

⁵²⁹ R v White [2004] EWCA Crim 946 at [12]

following issue: whether a prostitute can consent against payment noting that the argument is hardly made with regards to other sex workers, and **some** academics consider that the *prostitute* cannot consent against payment.

1.1.3 The academic discourse on prostitutes' capacity and freedom to consent

The academic discourse regarding consent and prostitution is complex and ranges from those who take the view that prostitutes cannot consent⁵³⁰ to an approach⁵³¹ in which consent means the same whether it is for commercial or non-commercial sexual activity.⁵³² The question of whether 'liberated western whores who are free to choose their profession'⁵³³ are also free to choose whether to consent depends on the political position of the author.

Radical feminists Dworkin⁵³⁴ and MacKinnon⁵³⁵, argue that prostitutes cannot consent because sex is equated with male power. Through patriarchal oppression female sexuality becomes both objectified and commodified, thus, no woman can give consent because the consent itself is nothing more than a product of a patriarchal society. The government does not quite echo this argument but MP Fiona MacTaggart relates to it, in a Parliamentary debate, by making the comment that prostitution would 'destroy human relations and create a grossly unequal society'.⁵³⁶ Dworkin, MacKinnon and MacTaggart see the social contexts in which prostitution takes place as 'reducing the degree to which women ... may be seen [to be]freely consenting.'⁵³⁷ But Sutherland argues that 'changing ideas about sex can change sex itself and with it the balance of power in society'.⁵³⁸ This position eschews the arguments supported by government which argues that prostitution 'is not a matter of career choice'⁵³⁹ and that being paid for sexual services dehumanises women. The debates in government have

⁵³⁰ Dworkin *A Life and Death* (The Free Press 1997); MacKinnon C, 'Prostitution and Civil rights' *Michigan Journal of Gender and Law* (1993) Vol 1 pp13-32

⁵³¹ See Sanders T 'Mixing up the Subject: Methodological Nuances in Researching the Female Sex Industry' *Sexualities* (2006) Vol 9(4): 449 – 468

⁵³² A McClintock "Sex workers and sex work: Introduction" *Social Text* (1993) 37: 1 – 10 p7

Jeffries S *The Idea of Prostitution* Spinifex Press (1997) p 137 Jeffries argues that consent is 'not a very effective way to distinguish between abusive and non-abusive sex and because consent is established in the market exchange the prostitute is made to be the 'other.'

⁵³³ Kempadoo K and Doezema J, *Global sex workers: Rights, resistance, and redefinition* Routledge (1998)

⁵³⁴ Dworkin *A Life and Death* The Free Press (1997) p141

⁵³⁵ MacKinnon C, 'Prostitution and Civil rights' *Michigan Journal of Gender and Law* (1993) Vol 1 pp13-32 at p14

⁵³⁶ Fiona MacTaggart (Labour) HC Deb, 19 May 2009, col 1431

⁵³⁷ Monto MA, 'Female Prostitution, Customers, and Violence' *Violence Against Women*, Vol. 10 No. 2, February 2004 160-188

⁵³⁸ K Sutherland, 'Work, Sex and Sex-work: Competing feminist discourses on the international sex trade' *Osgoode Hall Law Journal* (2004) 42: 139-167 p 144

⁵³⁹ Nadine Dorries (Conservative) HC Deb, 19 January 2009, col 571

resulted in casting prostitutes as *victims* who have ‘been “re-made” in law as women vulnerable to rape.’⁵⁴⁰ However, this thesis argues that the sex industry should be legitimised and prostitutes are equal to all other women insofar as their moral and legal *right* to be able to withdraw or refuse consent.⁵⁴¹ This right should not be censured for being irresponsible and prostitutes should be recognised as ‘individuals able to give and withhold sexual consent.’⁵⁴²

The question then centres on what level of control a prostitute has if she is subjected to pressure by the client or by the pimp to be able to freely consent. This argument becomes obfuscated when both Parliament and academics link prostitution with trafficking. There is a clear distinction between a trafficked prostitute who has no freedom of choice and a prostitute who is not trafficked. One can argue that the Parliamentary debates and subsequent legislation were set up to protect the prostitute who aside from all others participating in sexual activities is more vulnerable. But this argument fails when one considers situations such as the very drunk young woman in the *Evans* case;⁵⁴³ her vulnerability equates to that of any prostitute when with a client and in the *Evans* retrial the young woman’s intimate details about her sexual preferences and the language she used during sex were questioned in open court. This precedent gives little confidence for a ‘fair hearing’ for a prostitute who has been raped.

In Chapter 1 the issue of stereotypes and myths was touched upon, and again needs to be addressed regarding women who work in the sex industry. One myth is that sex workers are viewed as an appropriate object for violence against them because they are the ‘quintessential "bad" woman.’ This furthers the argument that all sex-workers, whether in the pornographic industry or prostitutes, are subject to ideas regarding sex and although Sutherland argued the balance of power in society needs change, it is the power behind negative stereotyping that needs to end.

⁵⁴⁰ Sullivan B, ‘Rape, Prostitution and Consent’ *Australian & New Zealand Journal of Criminology* (August 2007) vol. 40 no. 2127 p142

⁵⁴¹ A McClintock “Sex workers and sex work: Introduction” *Social Text*(1993) 37: 1 – 10 p7

⁵⁴² Sullivan B, ‘Rape, Prostitution and Consent’ *Australian & New Zealand Journal of Criminology* (August 2007) vol. 40 no. 2127 p142

⁵⁴³ Although *Evans* was initially convicted, his case was later quashed because the Court of Appeal allowed the testimony of two men as witnesses before a new jury.

Following on from an academic discourse regarding whether prostitutes can consent to paid sexual activity, the problem of freedom to consent at law emerges: when the prostitute has not been paid, despite payment being conditional to sex.

1.1.4. Consent conditional upon payment

I have shown in Chapter 1 that recently consent could be subject to conditions expressed by the person as to the use of condoms or the lack of ejaculation inside the woman's body. Conditions could also be set as to the taking of a photograph or video and to its (non) distribution to third parties. Consent by the prostitute, like for performers in pornography and live sex industry, is conditional upon payment by the client. The issue arises if the client does not pay the prostitute but has engaged in sexual activity with her. Two modern cases, *R v Linekar (1995)*⁵⁴⁴ and *Attorney General's Reference (no 107 of 2007) re Bouguenoune*⁵⁴⁵ distinguish between fraud and rape.

In *R v Linekar (1995)* a young woman had sex with a man who afterwards ran away without paying. The question for the jury to consider, as directed by the judge, was if he had forced himself upon her or if he had tricked her and obtained her consent by fraud. In both instances, this would amount to rape, but if he had intended to pay but simply changed his mind afterward, then he should be acquitted of rape. *Linekar* was, from the outset charged with rape as per s1 of the SOA 1956 on the basis of the statement of the complainant. The Court of Appeal noted that s3 of the SOA 1956, which makes it an offence to procure a woman by false pretences, was the appropriate part of the SOA 1956 to charge him with but then the question remained whether the fraud of not paying is enough to vitiate consent. In *Linekar*, this was avoided by the courts concentrating on the issue of when the intention not to pay arose: before or after the sexual activities.

In the *Attorney General's Reference (no 107 of 2007) re Bouguenoune*, the defendant agreed to pay £25 for sexual intercourse and oral sex. He took her to a secluded spot and 'stood squarely in front of her, refused her request for cash payment immediately and instead said: "Am I scaring you?" He told her that she was going to die'.⁵⁴⁶ He beat her and then proceeded to have full intercourse with her on two occasions and she performed oral sex once on him. In *Bouguenoune*, the SOA 2003 was in force and although s76 offers a conclusive

⁵⁴⁴ *R v Linekar* [1995] 3 All ER 69

⁵⁴⁵ *Attorney General's Reference (no 107 of 2007)*; *R v Bouguenoune* [2008] EWCA Crim 198,

⁵⁴⁶ *Attorney General's Reference (no 107 of 2007)*; *R v Bouguenoune* [2008] EWCA Crim 198 at [2]

presumption where deception is involved, s76 of the SOA 2003 does not offer any scope if the client has no intention to pay the prostitute: he can be guilty of rape only if he had the intention of not paying prior to negotiating payment with the prostitute.. Section 75 offers a rebuttable presumption that consent has not been given when violence is used⁵⁴⁷ or there is a fear of violence being used.⁵⁴⁸ Whether the intention was formed before or after the sexual activities is for the jury to decide

In both cases the prostitute was not paid by the client. The two cases had apparently different approaches because of two issues: *Linekar* pleaded not guilty to rape whereas *Bouguenoune* pleaded guilty; and *Linekar* was pre SOA 2003 and therefore prosecution did not have the conclusive presumption of fraud to rely on. Thus, the Court of Appeal upheld the appeal that *Linekar* was *not* guilty of rape, whereas *Bouguenoune* had pleaded guilty to rape.

In *Linekar* the Court of Appeal held that just because the woman had consented to intercourse in return for a promise that she would be paid, it did not mean that there was a lack of consent. The essential element was the intention of the client: should he have decided not to pay from the start, then it would have been rape, but the courts held that he had simply changed his mind. Whereas in *Bouguenoune* the intention not to pay was clear. His intention not to pay, and moreover, his violence toward the prostitute clearly indicated rape.

Both cases relied on the absence of consent to establish rape and not the existence of fraud. This is because, as in *R v Clarence* (1866)⁵⁴⁹ it was held that the general proposition that ‘...consent obtained by fraud is no consent at all is not true ... either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent.’⁵⁵⁰

As per Stephen J. in the same case, to argue that fraud would negate consent within the meaning of consenting to sexual activities would mean that ‘many seductions would be rapes, and so might acts of prostitution procured by fraud’.⁵⁵¹ Therefore, modern courts have moved the responsibility by establishing the point of intention and this in effect has the capability of removing the fraud element, to become a rape issue and thereby keep the matter within the

⁵⁴⁷ Sexual Offences Act 2003 s75 (2)(a)

⁵⁴⁸ Sexual Offences Act 2003 s75 (2)(b)

⁵⁴⁹ *R v Clarence* (1866) [1886–90] All ER Rep 133

⁵⁵⁰ *R v Clarence* (1866) [1886–90] All ER Rep 133 at 135

⁵⁵¹ *R v Clarence* (1866) [1886–90] All ER Rep 133 at 144 per Stephen J

criminal courts. Payment thus can influence how a prostitute is considered to consent. Conditional consent to sexual activities by a prostitute can be recognised by the courts at criminal law when the client's intention has been never to pay, as part of what is now s74 SOA 2003. It obviously begs the question as to how to prove the client's intention not to pay if no outside violence is manifested, but at least the elements of the transaction are recognised.

The question that remains, since *Bouguenoune* pleaded guilty, is whether s76 as to fraud applies. Section 76 establishes a conclusive presumption when the defendant deceives the victim 'as to the nature or purpose of the relevant act'. The sexual act by the prostitute has been agreed to, so it would be difficult to argue that the prostitute has been deceived as to the nature of the act. As stated by Ormerod, 'it might be argued that the deception as to payment alters the 'purpose' of the act for the prostitute'.⁵⁵² However, s76 is a conclusive presumption. As I have shown in Chapter 1, in two important cases of deception, (*Jheeta*⁵⁵³ where the defendant sent a message to the victim as though it was from a police officer saying she needed to have sexual intercourse so that the defendant does not commit suicide, and *McNally*, where the victim was said to be deceived as to the gender)⁵⁵⁴ the courts refused to apply s76, and considered the fraud under s74. Thus, I come back to our starting point about s74 and the timing of the intention to deceive. When the client has the intention to pay before or at the time the sexual activities takes place, but does not do so afterwards, criminal law would consider that the prostitute has not been raped or assaulted. Effectively, it would become a civil law matter in order for her to enforce the contract unless violence, or the threat of violence, is involved and then s75 of the SOA 2003 can be used.

Violence, or the threat of violence, can also come from another quarter. The next section will consider consent with regards to the behaviour of the pimp.

1.1.5 The effects of a pimp regarding consent

A pimp does not actively engage in the sexual activities and therefore consent to the sexual activities does not apply. However, there is a tacit contractual consent between the prostitute and the pimp. A pimp is usually a man who 'manages' the prostitute. It is the pimp's responsibility to ensure the prostitutes safety and provide the clients. Women who work in

⁵⁵² Ormerod D, *Smith & Hogan Criminal Law*, (14th ed, Oxford University Press 2015) p840

⁵⁵³ R v Jheeta [2007] EWCA Crim 1699 at [28]

⁵⁵⁴ R v McNally [2013] EWCA Crim 1051 at [27]

collectives also use the same system and when using a woman as the manager she is known as a ‘madam’. Like the manager of a Sexual Entertainment Venue, or the publisher of pornography, the pimp benefits from the money the prostitute makes out of the sexual activities. The pimp can be paid either by the client or by the prostitute once she has received the money from the client. In any case, the pimp plays a role in the prostitution of the woman and profits from her engaging in commercial sex.

However, the criminal law treats the pimp very differently from the manager in a Sexual Entertainment Venue or the publisher of pornography. The publisher would be criminally liable only if the pornographic materials fall within the definition of obscenity and ‘deprave and corrupt’ the audience, a test now hardly satisfied in light of *Peacock* where even sadomasochistic acts were not considered obscene. The manager of a Sexual Entertainment Venue has even less constraints than the publisher of pornography as they simply have to apply for a licence to open the venue. By contrast, the simple fact of living, even partially, off the payments made to the prostitute, and to have control over ‘any of the activities of’ the prostitute is a criminal offence.

Indeed, the SOA 2003 created the gender neutral offence⁵⁵⁵ for a person to ‘intentionally control any of the activities of another person relating to that person’s prostitution in any part of the world⁵⁵⁶ for or in the expectation of gain for himself or a third person,⁵⁵⁷ and thus removed two gender specific offences in the 1956 Act: s30 prohibited men from living, partly or wholly on the immoral earnings of a prostitute and s31 prohibited women from exercising control over prostitutes.

The interpretation of the term ‘control’ within the meaning of the SOA 2003 s53 was considered in *R v Massey* [2008].⁵⁵⁸ The Court of Appeal, held that the word ‘control’ should be given its ordinary dictionary meaning. ‘Control’ was not restricted to ‘one who forces another to carry out the relevant activity’ and force and coercion are ‘not necessarily required in order for a sex worker to be controlled for the purposes of gain’.⁵⁵⁹ The complainant just had to prove that they had been directed to do so. Therefore, s53 is wide enough to

⁵⁵⁵ Sexual Offences Act 2003 s53(1)

⁵⁵⁶ Sexual Offences Act 2003 s53(1)(a)

⁵⁵⁷ Sexual Offences Act 2003 s53(1)(b)

⁵⁵⁸ *R v Massey* [2008] 1 WLR 937

⁵⁵⁹ Anna Carline ‘Criminal justice, extreme pornography and prostitution: Protecting women or promoting morality?’ *Sexualities* (2011) 14(3) 312 – 333 p327

encapsulate both pimps who traffic by means of coercion and pimps who use voluntary prostitutes.

The problem is precisely that *Massey* makes no distinction as to managers of prostitution who are violent or exercise pressures and those who do not use the proceeds of prostitution to coerce the prostitute or threaten the prostitute in any way. If managers are presumed to exercise some form of violence or coercion in one-way or another, when looking at the whole of the sex industry, the decision appears controversial as it really casts aside management of prostitution by third parties, compared to management of venues and pornography.

The decision is nonetheless in line with the government's intention to include not only trafficked prostitutes, but other prostitutes who are subject to exploitation. The portrayal of the pimp in the government review *Paying the Price*,⁵⁶⁰ makes a distinction between different types of pimp; including men described as 'classic pimps'. The political discourse regarding the classic pimp echoes the Wolfenden report which commented that pimping is 'usually brought about at the instance of the woman, and it seems to stem from a need on the part of the prostitute for some element of stability in the background of her life'⁵⁶¹ and that the association 'operates to a mutual advantage...'⁵⁶² However, *Paying the Price* makes a connection between drugs and prostitution and moves away from the 'mutual advantage' theory put forward by Wolfenden. Instead the official discourse introduces the 'new style pimp/partners' and in *Paying the Price* noted that the boyfriend pimp with a drug habit is increasingly common. This links pimping to terms such as 'coercion' and 'control' by making several references such as '...crack use means increased violence ...'⁵⁶³ to show how drug dealers and pimps use violence and drugs to control prostitutes. In practice, this association may well be true, but it does not mean that pimping is solely about a drug dealer profiting from a prostitute, who often would be a drug addict herself. If the law acknowledges the team management aspect of commercial sex for pornography and adult entertainment venues, why can't it acknowledge it for prostitution? In pornography and venues, managers 'control' the sex workers by a contract, and yet the law considers they exercise a legitimate activity, whilst they remain criminally liable if they were dealing with drugs or exercise other

⁵⁶⁰ Home Office 'Paying the Price: A consultation document' The Stationary Office, London (2004)

⁵⁶¹ Home Office, 'The Wolfenden Committee's Report on Homosexual Offences and Prostitution' HMSO (1957) p99

⁵⁶² Home Office, 'The Wolfenden Committee's Report on Homosexual Offences and Prostitution' HMSO (1957) p100

⁵⁶³ Home Office 'Paying the Price: A consultation document' The Stationary Office, London (2004) p 44

forms of coercion so as to break for example the ‘no touching’ rule. Arguably it may be a fine line between the two types of pimps; but it does not mean the law cannot draw a line. It is argued that the visibility of prostitution through regulated brothels may be the essential difference between forced prostitution and consensual voluntary prostitution.

Thus, part of the answer lies within Dworkin and MacKinnon’s⁵⁶⁴ argument that penetrative sex is, by its nature, violent but not *all* sex is rape. Reciprocal sexual activities where the woman is not in the subordinate position is not an act of violence or rape. Moreover, when one considers the subordinate position of the prostitute, then surely the argument here is that the unfettered prostitute is in a reciprocal position because she sets the boundaries and the price, but those who are trafficked are in a subordinate position to both the client and the pimp.

1.2 The client and consent

Consent is intrinsically linked to the nature of the sexual activities and its purpose. The client consents to both paying for the sexual activity, and the sexual activity itself, but nothing else. As I have shown in Chapter 1, section 2.3, criminal law sets the prohibition that the nature of the sexual activities cannot include activity that harms the person. This means the client cannot consent or consider he has consented to harming the prostitute when he consents to the sexual activities. I come back to this issue of harm in section 2 on the nature of the sexual activities.

The client is the one who invariably sets the arrangement with the prostitute—he would ask for certain types of sexual activities, thereby offering tacit consent. It is then for the prostitute to either agree, giving consent, or disagree, denying consent to the sexual activities and/or to the amount offered for payment. The criminal law does not regulate payment directly. However, the question arises indirectly, through the concept of conditional consent, as I have shown with the prostitute. In effect, failure to pay the prostitute, if it cannot be established that the client had no intention to pay before the sexual act, belongs to the realm of the civil law of contract, except that I see, in the purpose of the activity, that the civil law is reluctant to uphold ‘immoral’ contracts.

⁵⁶⁴ See for instance: MacKinnon C and Dworkin A, *The Reasons Why: Essays on the New Civil Rights Law recognising Pornography as Sex Discrimination Women Against Pornography* (1985)

Another aspect of the consent of the client relates to the strict liability offence of making or promising payment for sexual services of an exploited prostitute as set out in the SOA 2003 s53 amended by s14 of the Policing and Crime Act 2009. The original draft was overly broad making the offence ‘paying for sexual services of a prostitute controlled for the purposes of gain’. The broadness of s14 in its original form combined with the *Massey* judgment could also capture women who worked together as a collective and those who worked in brothels with a ‘madam’ leading to the question whether the initial wording intended to be used against all prostitutes thus using a ‘back-door’ ban on prostitution. Vernon Coaker argued that this was certainly not the aim of the offence, but s21 of the Policing and Crime Act 2009 makes provision for a closure order for ‘premises used for activities related to certain sex offences’ which include pornographic offences where a child is involved, but the crux of s21 is that it provides, under s136B (2) of the SOA 2003, powers for a police officer ‘who has reasonable grounds for believing’ that either the premises are used for prostitution or pornographic offences, to apply to an ‘authorising officer,’ a police officer ‘not below the rank of superintendent’ to authorise a closure notice. The Policing and Crime Act 2009 certainly does contain a possibility for a ‘back door ban’ and could thereby force prostitutes back onto the streets.

Nonetheless, the amended version of s14 is narrower than the original. It defines ‘exploitative conduct’ as a third party to the client and the prostitute ‘us[ing] force, threats (whether or not relating to violence) or any other form of coercion, or practis[ing] any form of deception’. However, *Massey* raises issues as the wide definition of ‘control’ might still capture the client paying for services of a prostitute working for a pimp. Thus there is no difference in consent between a prostitute and a non-commercial woman consenting and the criteria explained in Chapter 1 should apply equally to the prostitute and to her client, with no distinction to be made according to the financial context in which sexual activities takes place. However, when a woman chooses to engage in prostitution, the question remains whether she consents to sexual activities and how this consent should be defined. The terms of the various statutes defining sexual assault and rape never distinguished between a prostitute and a woman engaging in sexual activities without reward.

In addition to the difficulties of treating a prostitute as an ‘ordinary’ woman who should not be presumed to consent to all sexual encounters; there are other factors that the prostitute may need to consider before consenting, such as the type of activity she is consenting to and the

payment for that specific type of sexual activity. The question remains whether a prostitute's consent is made within the confines of s74 of the SOA 2003 insofar as she actually has the freedom (and capacity) to make that choice. It can be argued here that any prostitute who has a pimp or is part of a collective still falls within the range of being exploited by a third person who would gain from her payment.

The criminalisation of the client was introduced in Sweden. In England, the government, having raised the issue of harm to the prostitute in its series of reports, had two options; follow Sweden and the abolitionist 'Nordic model'; or New Zealand and its liberal toleration of prostitution. English law fails to recognise the intrinsic and extrinsic value of prostitution, instead relying on the abolitionist argument, put forward by radical feminists which in turn appeals to politicians who already have a moral opposition to prostitution. Such abolitionist policies for further criminalisation of the client were suggested by Harriet Harman MP, whilst referring to the Swedish model. She said to the BBC '...we don't want this sort of organised crime in this country'.⁵⁶⁵ She argued that the Swedish model would 'protect' the prostitutes, at a time when the government was 'dragging its feet over legislation ...to legalise small brothels'.⁵⁶⁶ The government ultimately failed to legalise small brothels or indeed any brothels but gave the green light to lap dancing clubs and peep shows. Another suggestion that removed the focus from the client was the introduction of licenced red-light zones but this was rejected because they 'could send out the wrong message'.⁵⁶⁷ The policies are based on, as Nussbaum argues, 'prejudices and misunderstandings [that] mask where the true problems lie in sexual exchanges for money'.⁵⁶⁸ The issues surrounding demand will be discussed further in section 4 (4.2.3.5).

⁵⁶⁵ 'Target prostitute users – Harman' http://news.bbc.co.uk/1/hi/uk_politics/6188203.stm (17th December 2006) (Accessed 10 June 2015)

⁵⁶⁶ *Ibid*

⁵⁶⁷ *Ibid*

⁵⁶⁸ Nussbaum M 'Whether from reason or Prejudice: taking Money for Bodily Services', *Journal of Legal Studies* (1998) 27:2 pp 693 - 724

Section 2 - Nature of the sexual activities within prostitution

The founding definition of a prostitute was first given by Justice Darling in *R v De Munck* (1918).⁵⁶⁹ The facts of *De Munck* are that a fourteen-year-old girl went to a room with a man for money at the behest of her mother. It was also recorded that over five months, the mother and her daughter had been seen accosting men in the street in the West End of London, and the daughter had taken men to the house where the appellant was living. The mother was found guilty of two offences: that of the Criminal Law Amendment Act 1885 s2(2) criminalising any person who procured or attempted to procure any girl or woman under the age of twenty-one to become a common prostitute; and that of aiding and abetting prostitution, contrary to the provisions of the Vagrancy Act, 1898, as amended by s7 of the Criminal Law Amendment Act, 1912. On appeal, the counsel for the defence contended that the appellant, the mother, could not be found guilty because the girl was a virgin, implying that a 'common prostitute' has to engage into full intercourse in order to be considered so. Consequently, the question for the courts was to decide what exactly a common prostitute was and did the child's activity equate to that of a common prostitute. Until that point there was no statutory definition, and Justice Darling set the precedent: a common prostitute is a '...woman who offers her body commonly for lewdness for payment in return.'⁵⁷⁰ The definition in *De Munck* was intended to clearly delineate prostitutes from other women.

The following two cases show how the courts, following the *De Munck* principle, relied on the issue of *lewdness* and not sexual congress to define prostitution.

In *Webb*(1964)⁵⁷¹ the issue was whether the women who worked in a massage parlour were prostitutes if they only masturbated the male clients. The question then was did the definition depend upon whether the female was physically active or passive? Lord Parker C.J. said:

'From a purely practical point of view, it would be artificial, to say the least, to draw a distinction between the case of a woman who takes a passive role and one in which she takes an active role. Indeed, it can be said with some force that some activity on her part is of the very essence of prostitution. It cannot matter whether she whips the man or the man whips

⁵⁶⁹ *R v De Munck* [1918] 1 KB 635 at 637 per Darling J

⁵⁷⁰ *R v De Munck* (1918) 1 KB 635

⁵⁷¹ *R v Webb* [1964] 1 QB 357

her; it cannot matter whether he masturbates himself on her or she masturbates him. In our judgment, the expression used by Darling J., a woman offers her body commonly for lewdness,' means no more and was intended to mean no more than 'offers herself,' and it includes, at any rate, such a case as this where a woman offers herself as a participant in physical acts of indecency for the sexual gratification of men.⁵⁷²

The courts again distinguished the need for intercourse in *McFarlane* (1994).⁵⁷³ Indeed, no physicality was evident where the husband lived off the earnings of his wife who offered sexual services with no intention of performing them. Such women are known as 'clippers'. The Court of Appeal agreed with the judge in the Crown Court who directed the jury by saying: 'There are prostitutes who are honest and prostitutes who are dishonest. Miss Josephs tells you that she is a dishonest prostitute. But she is a prostitute, members of the jury'.

And dismissing the appeal added 'For a man to live off the earnings of a woman who offers sexual services, takes the money and then reneges on the offer, if she does, is in our view to live off the earnings of prostitution, or, as it used to be termed, immoral earnings. Indeed, most people would consider such earnings doubly immoral'.

The two cases mentioned, each important in their own right, show that the need for sexual congress or indeed any physicality, is not a necessary ingredient in prostitution. The essential ingredient that defines the sexual activities of a prostitute is twofold: she must offer her body 'commonly [and] for lewdness'. In *R v Morris-Lowe* (1985)⁵⁷⁴ the term 'commonly' was defined in order to ascertain whether the defendant had indeed procured women based on the material facts that he had placed an advertisement for young women to train as masseuses for excellent pay. Each girl was told that she would be expected to perform 'relief massage,' a euphemism for masturbation, on male clients and at one interview he invited the girl in question to masturbate him then and there in the hotel room. The offence of procurement as per s22(1) of the SOA 1956 is for a person to procure a woman to become, in any part of the world, a common prostitute. Lord Lane was of the opinion that the answer turned on what constituted a 'common' prostitute and held that: '[T]he performance by a woman of a single act of lewdness with a man on one occasion... does not make her a woman who offers herself

⁵⁷² *R v Webb* [1964] 1 QB 357 at 366 per Lord Parker

⁵⁷³ *R v McFarlane* [1994] 2 WLR 494; [1994] QB 419

⁵⁷⁴ *R v Morris-Lowe* [1985] 1 WLR 29

commonly for lewdness. That must be someone who is prepared for reward to engage in acts of lewdness with all and sundry, or with anyone who may hire her for that purpose.⁵⁷⁵

Hence, a woman who engaged in sexual activities with one man for reward would not be considered as a common prostitute. Similarly, a woman who participates in regular sexual activities *for reward* with one client to the *exclusion* of all other clients would not be considered as a prostitute, as per the *De Munck* definition.

When considering sexual activities in Chapter 1 it was established that sexual intercourse was associated with marriage, where one woman ‘gives’ herself to one man, to the exclusion of all others, in matrimony. Any and all sexual activities were to remain in the province of marriage. Prostitution is the antitheses of marriage, when one considers the edicts of the church, the civil law definition of consummation, and the Wolfenden Report. Indeed, prostitution involves sexual activities with more than one man, and this is similar to the requirements of adultery where sexual activities occur with more than the husband. In addition, prostitution is the repetition of the sexual activities with various men for the purpose of payment, as shown *infra* section 3.

What this repeated sexual activity entails is referred to by the expression ‘for lewdness’ and ‘lewdness’ does not have a legal definition, but the *ratio decidendi* in *De Munck* is that any act of lewdness would suffice. The literal interpretation of ‘lewdness’ would mean as little as being lascivious or unchaste.⁵⁷⁶ Indeed, in *De Munck*, although the sexual activities that happened between the girl and the man were not recorded, it was held to be a fact that the girl remained a virgin. In other words, there was no vaginal intercourse, and yet the court considered the facts fulfilled the definition of a ‘common prostitute’. Consequently, the sexual activities a prostitute performs do not need to be sexual intercourse; she can also perform any other form of sexual activities that does not necessarily involve touching.

This echoes the definition of ‘obscene’ as seen in Chapter 2 given that ‘obscene’ includes reference to lewdness. It could be argued that pornography falls, in that respect, within the definition of prostitution as per *De Munck*, and actors in pornographic films could be called prostitutes. Candida Royalle made a very similar comment, as discussed in Chapter 2, when

⁵⁷⁵ R v Morris-Lowe [1985] 1 All ER 400 at 402

⁵⁷⁶ Oxford English Dictionary Online: ‘lewd’, <http://0-www.oed.com.serlib0.essex.ac.uk/view/Entry/107735?redirectedFrom=lewd&> (accessed 31st August 2014)

she noted that that ‘pornography [is] like looking at prostitutes. It [is] just another version of prostitution. Instead of being with a prostitute ... you look at a prostitute’.⁵⁷⁷

Furthermore, in light of the *De Munck* definition, the prostitute can perform the same sexual activities as in a Sexual Entertainment Venue. Of course, the sexual activities of a prostitute go beyond that of someone who works in a Sexual Entertainment Venue, because touching is forbidden in a Sexual Entertainment Venue. Each Local Authority imposes set regulations with regards to the distance between the performer and the viewer with the most common distance being one metre. Nevertheless, a prostitute may also act in a similar way to a peep show worker insofar as she may be required to perform a sexual display, such as self-masturbation, and as within a peep show there would be no touching. As in these venues, the expectation of the client is that he would be sexually aroused to a certain degree – depending on the type of entertainment and the regulations set by the Local Authority. It could be argued that the client in *De Munck* wanted to be sexually aroused, but there is nothing in the facts to confirm this other than the girl remained a virgin. This also means that women who work in Sexual Entertainment Venues fulfil the *De Munck* criteria of prostitution in that they offer their body commonly for lewdness, as would a prostitute who does not engage in touching, and with both doing it for ‘payment in return’.

The elements of the previous chapter, such as striptease, pole dancing and certainly peepshows all fall within the category of lewdness. Therefore, when considering the definition of ‘lewd’ the sex workers equate to the same level of lewdness as prostitutes and should therefore be considered as ‘common prostitutes’. The *De Munck* definition of the sexual activities a prostitute engages into contradicts Judge Purle’s assertion, as seen in chapter Three, that ‘whatever else goes on in lap dancing establishments, it is not suggested that they could fairly be described as red light activities’.⁵⁷⁸ The cautious approach taken by the courts to separate prostitution from other aspects of the sex industry, can be seen in *Webb* and *McFarlane* as previously mentioned, where the courts defined prostitution as something beyond adult sexual entertainment.

The courts, when considering the *de Munck* facts, applied the law from a literal interpretation and when following this reasoning I see the sex industry as a whole with prostitution being no

⁵⁷⁷ Shannon Bell, *Reading, Writing and Rewriting the Prostitute Body*, (Indiana University Press 1984) p138

⁵⁷⁸ *Hindu Religious Association Leamington and Warwick v Warwick District Council* [2013] EWCH 1600 (Admin) at 19

different to pornography and live adult entertainment sexual activities. In that regard, logic would dictate that the prostitute should be treated in the same way as the people working in a Sexual Entertainment Venue or on a pornographic set. Yet, the regulatory regime of prostitution is fundamentally different, as shown. The question remains whether it is the possibility of actual touching and intercourse in prostitution that justifies the difference in regulations and whether this difference is an objective criterion to establish different regulatory regimes. To answer this question, I need to look at the purpose of prostitution.

Section 3 - The Purpose of Prostitution

3.1 Payment

Payment, outside the element of consent, is a civil law matter, not a criminal law issue and as such, should be excluded from this thesis. Yet, the civil law on payment informs the debate on criminal law as soon as I start to compare how civil law treats payment for sexual activities in Sexual Entertainment Venues and within the framework of prostitution (section 4.3.1). Payment can also be considered as expressing the prostitute's control over her body. Given that prostitution is not illegal, we might surmise that the prostitute has in that sense bodily integrity, a right that criminal law does protect (section 4.3.2).

3.2 The ambiguous position of the civil law regarding payment in prostitution

A prostitute by the *De Munck* definition is not only one who offers her body commonly for lewdness, but also for 'payment in return'. Considering this element of prostitution, some have argued that it would not be possible to differentiate wives from prostitutes as both prostitute and wife offer economic 'goods' in the form of sexual activity. This argument stands, unless I take into consideration another factor, i.e. the additional purpose of the sexual activities. For example, Edlund and Korn⁵⁷⁹ suggested the main difference between a wife and a prostitute is reproductive sex and not payment; wives both offer and expect it whereas prostitutes do not. This explanation holds some elements of truth for the past, as indeed sexual activity in marriage was expected to be for the purpose of procreation; however, today, with the availability of contraception, sexual activities within or outside marriage are not confined to procreation only, and what distinguishes a woman engaging in successive relationships (casual sex) or sexual encounters from a 'prostitute' is the payment. Those who engage in consensual casual sex and the prostitute allow sexual touching. But those engaging in consensual casual sex are not prohibited by law on the basis that they allow sexual touching but the *nature* of the sexual behaviour, if it takes place in a public space, is criminalised, whereas prostitution seems to attract prohibition on the basis of payment for sexual touching.

⁵⁷⁹ Lena Edlund and Evelyn Korn 'A Theory of Prostitution' *Journal of Political Economy*, (2002) vol. 110 no 1 p183

In *Lloyd v Johnson* (1798),⁵⁸⁰ the connection between prostitution and an immoral contract was considered by the courts, as it was held that the contract must be directly related to the activity of prostitution to be unenforceable. In this instance the maid employed to wash the prostitute's clothes could show by means of the unpaid bill that the articles washed consisted principally of expensive dresses, and that there were also some gentlemen's night-caps. The witness swore that the former were for the purpose of enabling the Defendant to appear at public places, and that the latter were worn by those persons who slept with her mistress. Justice Buller commented 'what do you mean by the expression of clothes used for the purposes of prostitution? This unfortunate woman must have clean linen, and it is impossible for the Court to take into consideration which of these articles were used by the Defendant to an improper purpose, and which were not.'⁵⁸¹ And so Lloyd won her petition on the grounds that no such immorality in the contract had been proved, as ought to defeat the action.

A second case that had similar difficulties as to whether the contract was immoral was *Appleton v Campbell* (1826)⁵⁸² where the defendant, who was in rent arrears, used her lodgings to receive male visitors to the knowledge of her landlord. Justice Abbot explained how the contract depended on whether the prostitution occurred within or outside the property:

'If a person lets a lodging to a woman, to enable her to consort with the other sex, and for the purposes of prostitution, he cannot recover for the lodging so supplied. But if the defendant had her lodgings there, and received her visitors elsewhere, the plaintiff may recover, although she be a woman of the town, because persons of that description must have a place to lay their heads; but if this place was used for immoral purposes, the plaintiff cannot recover.'

In *Pearce & another v Brookes* (1866),⁵⁸³ a prostitute hired a brougham, (a horse-drawn carriage) but failed to pay the hire fee. The case was a contract issue and so came before the civil court where the connection between immoral contract and prostitution was again made. The court noted the jury's 'intelligent appreciation'⁵⁸⁴ that the woman was a prostitute and both repeated and applied Justice Piggots comment that 'the principle of law is contained in

⁵⁸⁰ *Lloyd v Johnson* (1798) 1 B&P 340

⁵⁸¹ *Lloyd v Johnson* (1798) 1 B&P 340 p341

⁵⁸² *Appleton v. Campbell*, (1826) 2 C. & P. 347 p157

⁵⁸³ *Pearce and another v Brooks* - [1861-73] All ER Rep 102

⁵⁸⁴ *Pearce and another v Brooks* - (1866) L.R. 1 Exch. 213 at 215

the legal maxim *ex turpi causa non oritur actio*⁵⁸⁵, and consequently the owner of the brougham⁵⁸⁶ could not enforce the prostitute to pay the hire purchase or damage caused to the brougham. Per Branwell B: ‘There is no doubt this woman was a prostitute, and that the plaintiffs knew it ... and of which the jury shewed their intelligent appreciation ...’ Justice Piggot added to the moral argument by applying the legal maxim ‘*ex turpi causa non oritur actio*’⁵⁸⁷ saying: ‘... there is no doubt that where persons engage to be parties to immoral contracts, they must not come to Courts of Justice and seek to enforce them’. In effect the courts said that the fact that the owner had lost out financially was his loss and not the problem of the courts because the contract was immoral.

Therefore, within civil law, morality plays a role. For an immoral contract to be voided two factors must occur: there must be knowledge that the other party was a prostitute as per *Pearce v Brooks*⁵⁸⁸ and the knowledge that what was supplied under contract would be used for prostitution as shown in *Appleton v Campbell* (1826)⁵⁸⁹ where it was held that it was unlawful to provide accommodation to a known prostitute to be used to conduct her commercial sexual activities.

Consequently, a contract or agreement between a client and an escort would clearly be caught within the rule if sexual services were included. In today’s modern technological era, contracts occur between prostitutes and website hosts. The prostitutes, by paying the website hosts by credit card, or clients who make payments by credit card, become part of contract law that is outside the remit of this thesis but show how the implications of contract law and morality within prostitution pervades all areas.

By contrast, payment for a dancer in a Sexual Entertainment Venue is part of the definition of a venue in the Local Government (Miscellaneous Provisions) Act 1982 as amended by the Policing and Crime Act 2009. Dancers are considered to be in a legitimate employment, and are entitled to protection under the Employment Rights Act 1996⁵⁹⁰ as held in *Quashie v Stringfellows Restaurants Ltd* [2012].⁵⁹¹ Both the management and dancer make a legitimate profit from the client and unlike for a prostitute, the contract would be honoured in court.

⁵⁸⁵ from a dishonorable cause an action does not arise

⁵⁸⁶ Brougham: a 19th century horse-drawn carriage with a roof, four wheels, and an open driver's seat in front.

⁵⁸⁷ Translation: from a dishonourable cause an action does not arise

⁵⁸⁸ *Pearce v Brooks* (1866) LR 1 Ex 213

⁵⁸⁹ *Appleton v. Campbell*, (1826) 2 C. & P. 347

⁵⁹⁰ Employment Rights Act 1996: ss.4, 212

⁵⁹¹ *Quashie v Stringfellows Restaurants Ltd* [2012] IRLR 536.

The principle of *ex turpi causa non oritur actio* with regards to prostitutes and contracts still stands today and extends to company law. In *R v Registrar of Companies ex parte Attorney General* [1991],⁵⁹² Miss Whiplash, who had by then changed her name to Lindi St Clair, registered her company as Lindi St Clair (Personal Services Ltd). The Court quashed the decision to allow the registration. Relying on Section 1 of the Companies Act 1948, which allowed any two or more persons associated for any lawful purpose to form a company, Lord Justice Akner said:

‘It is well settled that a contract which is made upon a sexually immoral consideration or for a sexually immoral purpose is against public policy and is illegal and unenforceable... the purpose is a sexually immoral purpose and ... if that is the position, as indeed it clearly is on the authorities, then the association of the two or more persons cannot be for ‘any lawful purpose.’⁵⁹³

Conversely, all owners of Sexual Encounter Venues are at liberty to register their club as a company, despite the sexual activities being identical in all but touching, and being within the definition of Sexual Entertainment Venues. Ironically a year prior to the decision to quash Lindi St Clair’s registration of her business the Inland Revenue demanded any unpaid taxes due from her in *Inland Revenue Commissioners v Aken* [1990]⁵⁹⁴. As Professor Graham Scambler⁵⁹⁵ notes: ‘the paradox...persists: earnings from prostitution are taxable but the British Government will not condone prostitution as a lawful trade for the purposes of registration’.

Civil law thus differentiates between sections of the sex industry, casting prostitution aside from the rest of the industry. The problem with this line of reasoning is that it supposes an inherent difference between prostitution and the rest of industry. However, I have demonstrated that payment is the same across the industry and that the only possible—but not constant—variation is the sexual activities. Once this variant disappears, when the prostitute engages in the same sexual activities, for example as a woman in a peep show, there is no objective difference between prostitution and other parts of the sex industry. In this case, prostitution and peep shows are an identical activity that should be regulated in exactly the same terms. This means there are two options: either all sexual activities, in a SEV or outside

⁵⁹² *R v Registrar of Companies ex parte Attorney General* [1991] BCLC 476

⁵⁹³ *R v Registrar of Companies ex parte Attorney General* [1991] BCLC 476 at 479 per Akner LJ

⁵⁹⁴ *Inland Revenue Commissioners v Aken* [1990] 1 WLR 1347

⁵⁹⁵ Scambler G, *Rethinking Prostitution: Purchasing Sex in the 1990s*, (Routledge 2003) p74

(i.e. prostitution) should be banned. Alternatively, sexual activity inside and outside a SEV can be accepted equally. If a difference is maintained between activity within a SEV and activity outside a SEV, when the sexual activities are the same, then the difference can only be framed in moral terms, which is exactly what the regulation of Sexual Entertainment Venues tries to avoid by prohibiting morality as a ground for Local Authorities to refuse licensing. Civil law is not consistent and coherent. It is little wonder that criminal law, which often reflects what a civil society considers to be important, also struggles to be coherent.

Would the argument work however when the variation between the sexual activities in Sexual Entertainment Venues and that of prostitution is reinstated? In other words, when the sexual activities involve touching—prohibited in Sexual Entertainment Venues, expected in prostitution, should the law set the two apart? Is it objectively justifiable to separate prostitution on the basis of touching? It is difficult to answer the question positively without relying on moral grounds, especially prior to the sexual liberation of the 1960s. Indeed, in the past, it was not morally acceptable for sexual touching to take place outside the sacred contract of marriage. Prostitution runs counter to the idea of marriage and sexuality admissible within marriage. Again this harks back to the definition within *De Munck* whereupon the wife only chooses one partner to engage in sexual activities whereas the prostitute is common to all. But today, in light of social changes and the regulation of Sexual Entertainment Venues implemented in the Policing and Crime Act 2009, should prostitution still be considered as inherently and constantly different? The Offences against the Person Act 1861 protects the person (body) from harm but there remains an unjust prejudice stigmatizing prostitution.⁵⁹⁶ The question leads whether social change could bring about a right to sexual autonomy. There are limits to bodily autonomy as the selling of body parts is criminalised, but if there was a right to sexual autonomy or sexual integrity⁵⁹⁷ rather than autonomy, the prostitute would not be considered as a sexual commodity and therefore not ‘different’ or ‘other.’

⁵⁹⁶ See Nussbaum M *Sex and Social Justice* (Oxford University Press 1999) p276 and p283

⁵⁹⁷ Lacey N “Unspeakable subjects, impossible rights: sexuality, integrity and criminal law”, in N Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*, (Hart Publishing 1998) p 118.

Section 4 - Visibility

So far this chapter has established that prostitution is legal, consent is required and the prostitute's bodily integrity does not prohibit her to sell her services. So what is the 'problem' with prostitution? As with non-commercial sexual activities, there is an expectation of privacy. A Sexual Entertainments Venue is regulated in order to contain the sexual activities performed by several 'dancers' within the venue. In contrast, two or more prostitutes are not permitted to perform any type of sexual activity within a building and so often practice their trade on the streets or in client's cars, which makes them liable to various criminal offences as discussed in section 4.1 while section 4.3 considers the fact that specific venues for prostitution, such as brothels or massage parlours are prohibited.

Prior to the SOA 1985, with regard to men who approach street prostitutes, the criminal law was restricted to the public nuisance offence of soliciting. However, the SOA 1985 introduced the summary offence of 'kerb crawling' which in effect was two new offences within s1: where a man persistently⁵⁹⁸ 'solicits a woman for the purpose of prostitution',⁵⁹⁹ either 'from a motor vehicle while it is in a street or public place'⁶⁰⁰ and 'in a street or public place while in the immediate vicinity of a motor vehicle he has just got out of or off.'⁶⁰¹

Kerb crawling under the 1985 Act was not an arrestable offence; instead the client would receive a letter ordering him to attend the Magistrates' Court. He was given an option of paying the fine immediately thus avoiding the court appearance. A second Act, the Powers of the Criminal Courts (Sentencing) Act 2000 gave the Magistrates further power under s146(1) to 'order him to be disqualified' from driving 'for any offence'.

During the 1980s and 1990s, in conjunction with the offence of soliciting, a 'name and shame' campaign was launched. The local newspapers were provided with the names of all men convicted of soliciting. This campaign also coincided with the SOA 1985. The anti-client momentum continued to increase when the Criminal Justice and Police Act 2001 made kerb crawling an arrestable offence if the kerb-crawler causes annoyance or disturbances to people in the neighbourhood or if the soliciting is persistent behaviour.

⁵⁹⁸ Sexual Offences Act 1985 s1(1)(b)

⁵⁹⁹ Sexual Offences Act 1985 s1(1)

⁶⁰⁰ Sexual Offences Act 1985 s1(1)(a)

⁶⁰¹ Sexual Offences Act 1985 s1(1)(b)

The police and local media used the ‘visibility’ of the client and inverted it to ‘name and shame’ the client, and the criminal law implemented to eradicate kerb-crawling was a move from criminalising prostitutes to criminalising men as well. By making it a ‘male issue’, it highlighted the *supply and demand* aspects of prostitution and the criminal law in place was a move to break the ‘vicious cycle of prostitution’.⁶⁰² By attempting to cut off the demand, it created an abolitionist configuration of reducing prostitution with a view to putting an end to prostitution altogether. This particular abolitionist approach fails on two fronts: it ‘understates the vital role in the law in structuring the marginal position of [prostitutes]’⁶⁰³ and does not take into account that the increasing criminalisation of men ‘may not lead to a corresponding reduction in [the prostitutes] punishment’.⁶⁰⁴ Indeed, the anti kerb-crawler legislation served as a two-pronged attack on street prostitution. Although there was a strong focus on the kerb crawling offences, it also created a ‘zero tolerance’ abolitionist reaction to prostitution by means of applying an Anti-Social Behavior Order (ASBO) on the prostitutes who were also arrested and found to be persistently soliciting.⁶⁰⁵ A prostitute with an ASBO would then be expected to exit from prostitution. Ironically to work in a Sexual Entertainments Venue is legitimate work, therefore would it be possible for a prostitute to gain employment in a Sexual Entertainments Venue and ‘exit’ prostitution? A sauna or massage parlour is classified as a Sexual Entertainments Venue and the County Council of The City and County of Cardiff noted in their report, ‘A Review of Multi-Agency Approaches to Tackling SexWork/Prostitution in 2012’,⁶⁰⁶ that ‘saunas and massage parlours... are often used as off-street sex work/prostitution establishments’. It is argued that the whole exercise in producing the ‘Review of Multi-Agency Approaches to Tackling Sex Work/Prostitution in 2012’ report ‘was largely symbolic; it was designed to send a normative message about right and wrong types of sex’⁶⁰⁷ which can be shown by the disparity in the large number of prostitutes arrested and punished against the ‘small numbers’⁶⁰⁸ of men arrested.

⁶⁰² Home Office ‘Tackling the Demand for Prostitution: A Review’ HMSO 2007

⁶⁰³ Guista D & Munro V (eds) *Demanding Sex: Critical Reflection on the Regulation of Prostitution*, (Ashgate 2008) p20

⁶⁰⁴ *ibid* at p21

⁶⁰⁵ Sagar T ‘Tackling on-street sex work: Anti-social behaviour orders, sex workers and inclusive inter-agency initiatives’ *Criminology and Criminal Justice* (2007) CCJ Vol 7(2) 153 – 168 at p154

⁶⁰⁶ County Council of The City and County of Cardiff ‘A Review of Multi-Agency Approaches to Tackling Sex Work/ Prostitution’ (2012) para KF34

<file:///C:/Users/Audz/Downloads/Sex%20Work%20Prostitution%20report%20FINAL.pdf> (accessed 6th September 2014)

⁶⁰⁷ Guista & Munro (eds) *Demanding Sex: Critical Reflection on the Regulation of Prostitution*, (Ashgate 2008) p170

⁶⁰⁸ *Ibid* at p171

4.1 The streets and public spaces

4.1.1 Soliciting

Unlike the client who approaches the prostitute, prostitutes are said to solicit in many ways, from the direct approach to advertising. The essential ingredient was that for soliciting to occur the prostitute must be present. The public element is also present because the prostitute must publicly solicit with other members of society.

The difference between advertising and soliciting blurs, but it was enough in *Behrendt v Burridge* [1976]⁶⁰⁹ for the prostitute to be ‘sat silent and motionless behind a bay window, illuminated by a red light’⁶¹⁰ to be found guilty of soliciting. The standard definition of soliciting⁶¹¹ is different to advertising;⁶¹² soliciting uses direct contact whereas advertising has an element of space between the client and the seller. Soliciting is a form of physical advertising and is prohibited by means of the Policing and Crime Act 2009 which amends the Street Offences Act 1959.

Sexual Entertainment Venues use advertising regulated by the Local Government (Miscellaneous Provisions) Act 1982 and the Obscene Publications Act 1959. The London Local Authorities Act 2007 make it an offence under s72 to solicit for a hostess bar in London, but there are no provisions other than the Local Government (Miscellaneous Provisions) Act 1982 for other provincial towns or villages. However, hostess bars outside London employ hostesses to stand outside the bar to attract customers and it could be argued it is soliciting clients to enter the premises and view lewd acts. This shows a dichotomy between urban and provincial Sexual Entertainment Venues.

For prostitutes, soliciting is criminalised by the Street Offences Act 1959 as amended by the SOA 2003 and the Policing and Crime Act 2009. Section 1 of the Street Offences Act 1959 makes it an offence for common prostitutes to either loiter or solicit in a street or public place for the purposes of prostitution. The Street Offences Act 1959 does not define loitering or

⁶⁰⁹ *Behrendt v Burridge* [1976] 3 All ER 285

⁶¹⁰ *Behrendt v Burridge* [1976] 3 All ER 285

⁶¹¹ Oxford English Dictionary, ‘solicit’ reference 2a: ‘To entreat or petition (a person)... to ask earnestly or persistently’. <http://0-www.oed.com.serlib0.essex.ac.uk/view/Entry/184207#eid22022728> (accessed 26 September 2014)

⁶¹² Oxford English Dictionary, ‘advertising’ reference 2a: ‘publication of an announcement in a public medium’ <http://0-www.oed.com.serlib0.essex.ac.uk/view/Entry/2981?rkey=pfXRCC&result=1&isAdvanced=false#eid>

soliciting for the purposes of prostitution but does not define 'street'. The result of the Street Offences Act 1959 was that prostitutes had to find a new way of contacting the client.

In *Smith v Hughes* (1960)⁶¹³ the prostitute sat tapping inside her window to attract the attention of men in the street below. Lord Parker noted that the Street Offences Act 1959 was introduced to 'clean up the streets' by prohibiting female prostitutes from soliciting and applied the Mischief Rule to s1(1) and (4) of the Street Offences Act to include the inside of windows as forming part of the street.

Although to date only female prostitutes have been discussed, men were not liable for soliciting because prior to the SOA 1967, the act of homosexuality was illegal. Either as a commercial enterprise or as private sexual activities, the defendant would be subject to the Criminal Law Amendment Act 1885. In 1962 the question was again raised with regard to s32 of the SOA 1956 which created the offence '... for a man persistently to solicit or importune in a public place for immoral purposes'. In *Burge v DPP*,⁶¹⁴ it was held that a man does not solicit within the meaning of s32 of the SOA 1956 unless he is physically present. Although a man is capable of soliciting, in *DPP v Bull*⁶¹⁵ it was held that the term 'common prostitute' in s1(1) of the Street Offences Act 1959 applied exclusively to female prostitutes. The term 'common prostitute' was introduced by way of s3 of the Vagrancy Act 1824 which stated 'every common prostitute wandering in the public streets ... shall be deemed an idle and disorderly person.' The Vagrancy Act 1824 and the subsequent Contagious Diseases Acts of 1864, 1866 and 1869 did nothing to define 'common prostitute' but enabled 'the authorities to retain broad discretionary powers about what could constitute a common prostitute.'⁶¹⁶ The ratio in *De Munck* (1918) said that the definition of 'common prostitute is not limited so as to mean only one who permits acts of lewdness with all and sundry ... prostitution is proved [when] a woman offers her body commonly for lewdness for payment in return.'⁶¹⁷

The label 'common prostitute' was applied to any woman if she received a police caution for loitering. The police officer needed no other evidence to issue the caution. Once labelled the "common prostitute" becomes liable under Section 1(1) of the Street Offences Act 1959

⁶¹³ *Smith v Hughes* [1960] 1 WLR 830;

⁶¹⁴ *Burge v DPP* [1962] 1 W.L.R. 265

⁶¹⁵ *DPP v Bull* [1995] Q.B. 88

⁶¹⁶ Baker K, 'The Contagious Diseases Acts and the prostitute: how disease and the law controlled the female body' *UCL Journal of Law and Jurisprudence* (2012) UCL J.L. 88-118 at 93

⁶¹⁷ *R v De Munck* [1918] 1 K.B. 635 Page 638

which echoed the Vagrancy Act 1824 stating ‘it shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution.’ Sagar and Wright note that ‘any woman appearing before the Bench does so already stigmatized by that label.’⁶¹⁸ The stigmatizing label was not removed from statute until s16 of the Policing and Crime Act 2009 amended s1(1) of the Street Offences Act 1959 and replaced the term ‘common prostitute’ with ‘person’.

The Policing and Crime Act 2009 introduced the Anti-Social Behaviour Order (ASBO), as a ‘tool of zero tolerance’⁶¹⁹. ASBOs were initially intended to ‘tackle nuisance neighbours [and]street thugs’⁶²⁰ in conjunction with local interagency ‘holistic initiatives.’⁶²¹ Instead sex workers were almost immediately targeted with ASBOs seen as ‘*the* effective deterrent to on-street sex work’⁶²² to exclude prostitutes from residential areas. An example of such ‘urban cleansing’⁶²³ is London’s Kings Cross where prostitutes were driven out prior to re-development. However, as Sagar notes, implementing an ASBO to drive prostitutes out of an area does nothing to tackle the causes of on-street sex work; it simply relocates the problem and as a strategy it ‘lacks longevity.’⁶²⁴ The reason the use of ASBOs are an ‘inappropriate response’ is because although an ASBO is supposed to work in tandem with joint agencies, in practice poor relationships can exist between the police and social services⁶²⁵ to the point where reactive policing works against longer-term problem-solving.⁶²⁶ This leads to two problems: if a prostitute breaches her ASBO then she faces up to five years in prison and the lack of incorporating an inclusive inter-agency exit strategy incurs hidden costs to the State: the cost of incarcerating the prostitute and if she has children, state child care whilst she is in prison.

This section has shown the criminality attached to soliciting by the prostitute and the client. A prostitute soliciting consists of the prostitute being visible and by her visibility she can directly offer her services to a prospective client but her very visibility is again threatened by

⁶¹⁸ Sagar T and Wright H ‘Out of Sight, Out of Mind’ *New Law Journal* (2000) 150 JLJ 1792 at 1792

⁶¹⁹ Sagar T, ‘Tackling on-street sex work: Anti-Social Behaviour Orders, sex workers and inclusive inter-agency initiatives’ *Criminology and Criminal Justice* CCJ 7(2) 153-168 p154

⁶²⁰ *ibid* 153

⁶²¹ *ibid* 154

⁶²² *ibid* 155

⁶²³ See Hubbard P, ‘Maintaining family values? Cleansing the streets of sex advertising’ *Geographical Society* (2002) 34.4, 353–360 and Hubbard, P. ‘Cleansing the Metropolis: Sex Work and the Politics of Zero Tolerance’, Hubbard, P. *Urban Studies* (2004) 41(9): 1687—702.

⁶²⁴ Sagar T, ‘Tackling on-street sex work: Anti-Social Behaviour Orders, sex workers and inclusive inter-agency initiatives’ *Criminology and Criminal Justice* CCJ 7(2) 153-168 p157

⁶²⁵ Sagar T, ‘*ibid* 159

⁶²⁶ Sagar T, ‘*ibid* 160

the criminalisation of the client soliciting. By criminalising soliciting, the law criminalises the actions necessary to conduct a commercial activity such as prostitution. The criminalisation is not based on the obscenity of the conduct as no sexual act has yet taken place.

4.1.2 Advertising

During the medieval period Richard II, using the same reasoning as Edward II that ‘many men have been slain and murdered, by reason of the frequent resort of, and consorting with, common harlots, at taverns, brewhouses ... and other places of ill-fame’ made the proclamation that: ‘... any such women shall go about or lodge in the said city, or in the suburbs thereof, by night or by day; but they are to keep themselves to the places thereunto assigned, that is to say, the Stews... and Cokkeslane; on pain of losing and forfeiting the upper garment that she shall be wearing, together with her hood....’ The proclamation gave ‘every officer and serjeant of the said city [the] power to take such garments and hoods, in manner and form aforesaid...’⁶²⁷ The result of the proclamation was twofold: one that prostitution was regulated insofar as it was restricted to certain areas and second that as a consequence of the punishment the woman was made to wear a striped hood and have her upper garments removed, thereby creating an advertisement. The removal of the upper garment and hood for a woman moved prostitution to a public entity, similarly to the Romans and Greeks where the prostitutes, although not legislated against, were set aside from the community by their garb.

During the Victorian era many prostitutes had no need to directly solicit; instead they wore cheap silk and would walk out bonnet-less and without a shawl,⁶²⁸ creating a ‘uniform’ that advertised in much the same way as the prostitutes of Richard II’s era. Some became more discrete in London areas such as the West End and handed out business cards to passing gentlemen who milled about the theatres.

A modern form of advertisement, originating during the 1960s, was by means of ‘tart cards’ whereby prostitutes advertise by means of a card placed in a telephone box. This is not dissimilar to the business cards distributed by Victorian prostitutes outside theatres or the discrete advertisements in newsagent’s windows offering ‘private tuition’ or ‘French

⁶²⁷ Regulation as to Street-Walkers by Night, and Women of Bad Repute. Proclamation of Richard II 17 Richard II. A.D. 1393. Letter-Book H. fol. cclxxxvii.

⁶²⁸ Judith Walkowitz, *Prostitution and Victorian Society: Women, Class and the State* (Cambridge University Press 1999) p26

lessons'. Tart cards or vice cards as they are also known, were once a common sight in London.

In *Felix v DPP* (1998),⁶²⁹ Felix affixed a prostitute's card inside an enclosed telephone box. The telephone box was designed with a six-inch gap at the bottom to allow the circulation of air. The legal issue was whether this constituted littering a 'public open space' as per s87(4) of the Environmental Protection Act 1990 which defined a public open space as: 'any place in the open air to which the public are entitled or permitted to have access without payment; and any covered place open to the air on at least one side and available for public use'. On appeal, Justice Blofeld criticised the wording of the summons and opined that the summons should have used the generic term 'public open space' to satisfy either definition, whereas the summons actually said 'from a place in the open air' which only satisfied part of the definition. The court held that the phone box did not satisfy the first part of the definition of s87(4) as it was not a place 'in the open air' although it was a place to which the public were entitled to enter and leave without payment. The Court also held that it did not come within the second part of the definition because it was not open on at least one side, it had a door that was normally closed, and the six-inch gap at the bottom did not satisfy the definition of a 'public open place'. The result of this case was that a lacuna appeared within the law and prostitutes within London (and Brighton and Hove) began the practice of putting cards in telephone boxes. The number of cards placed in a telephone booth is estimated to be approximately fourteen million per year⁶³⁰ and subsequently the Criminal Justice and Police Act 2001 s46 criminalised 'tart cards' in public telephone boxes. Section 46(3) defines the tart card as an advertisement which a reasonable person would consider to be an advertisement relating to prostitution and a public telephone is defined in s46(5) as any telephone located in a public place and made available for use by the public. It is not only the iconic red telephone box which is restricted as advertisements in or around any telephone made available to the public would breach s46 (5). The Criminal Justice and Police Act 2001 does not include advertisements by swingers or doggers as described in Chapter 1.

Swingers congregate within buildings for the purpose of sexual activities and can advertise their parties, subject to the Obscene Publications Act 1959 and the Criminal Law Act 1977. Doggers can also advertise subject to the same restrictions set within the Obscene

⁶²⁹ *Felix v. Director of Public Prosecutions* [1998] Crim LR 657

⁶³⁰ David Hirshel et al, *Criminal Justice in England and the United States* (Jones and Bartlett Publishers, USA, 2008) p49

Publications Act 1959 and the Criminal Law Act 1977. Conversely, the Criminal Justice and Police Act 2001 criminalised the placing of advertisements (tart cards) in or in the vicinity of telephone boxes and any other form of advertisement is subject to the Obscene Publications Act 1959 and the Criminal Law Act 1977.

The prohibition of soliciting and other forms of advertising is at odds with the permitted advertising of Sexual Entertainment Venues and the pornographic industry. The legislation that surrounds soliciting and advertising prevents the prostitute from plying her trade and therefore creates an abolitionist means of dealing with the ‘problem’ of prostitution. A Sexual Entertainments Venue is allowed to advertise as noted in Chapter Three. The advertisements are regulated by the Obscene Publications Act 1959 and the venue has a statutory obligation to have a warning sign outside the premises. A prostitute must carry out her business in a clandestine manner.

With the rise in modern technology, prostitutes other than street prostitutes advertise via the Internet and this part of the section will discuss the advertisements of off-street prostitutes.

The Wolfenden report, which gave rise to the Street Offences Act 1959, suggested that prostitution should be kept ‘off the streets’: an ‘out of sight out of mind’ answer to the ‘problem’. Many women chose to work alone from their accommodation; this in itself is not illegal. They relied on telephone calls from their clients in order to arrange times for the client to visit the prostitute. These women became known as ‘call girls’. The modern variant of a call girl is an ‘escort’. Escorts and call girls use a loop-hole within the law because they argue that they are not advertising sexual activities for reward. The sexual activities are simply a bonus. However when one looks at Eve Escorts Agency⁶³¹, ‘Katy’ whose photo depicts her bikini clad, charges £99 for the first hour for services that include GFE (Girl-Friend Experience), domination, overnight stays and euphemistically ‘extra’ services.⁶³² Erin, photographed in leather bondage, charges £120 per hour but offers: striptease/lap-dance, erotic massage, couples, foot fetish, domination, overnight stays and ‘extra’ services.⁶³³ Katy and Erin’s services are at complete variance with the ideology of an escort—one who accompanies someone to somewhere. They are prepared to offer their body ‘commonly for lewdness for payment in return’⁶³⁴ and are prostitutes in accordance with the *de Munck*

⁶³¹ <http://cityofeve.com/> (accessed 27th January 2014)

⁶³² <http://cityofeve.com/escort/katy/> (accessed 27th January 2014)

⁶³³ <http://cityofeve.com/escort/erin/> (accessed 27th January 2014)

⁶³⁴ *R v De Munck* (1918) 1 KB 635

definition, therefore one could argue that not only both women work for a third party as prostitutes, but advertise as prostitutes.

A second area of prostitution that uses the Internet for advertising are brothels that pose as massage parlours. Sandy's Superstars Massage Parlour in Manchester⁶³⁵ similarly to Eve Escorts, gives the body measurements of the prostitutes and a list of sexual activities that each girl offers. For example: 'Claire' offers 'Girlfriend Experience, OWO, CIM, Kissing, A Levels, Reverse O, Reverse A, Facials, Fantasies, Mild Domination, 2 Girl Scene, 2 Guys, Couples, Foot Worship, Face Sitting and is a non-smoker'.⁶³⁶ The charge is £50 per 30 minutes.⁶³⁷ Given the *de Munck* argument, every girl who works for either Eve Escorts or Sandy's Superstars fulfil the criteria of being a prostitute, which means that Katy or Erin and the management are also liable for advertising. The management within Eve Escorts and Sandy's Superstars are also liable for controlling for gain prostitutes as per s53 of the SOA 2003.

The (Internet) advertisements of the off-street prostitute are far more descriptive than the ambiguous 'I like my job' tart card⁶³⁸ of the street prostitution and yet neither Eve Escorts nor Sandy's Superstars have been prosecuted for prostitution or obscene advertisements as per the Obscene Publications Act 1959 or the Indecent Displays (Control) Act 1981. It is the street prostitute that, because she is most visible, criminal law prohibits soliciting and advertising. Without soliciting or advertising, the street prostitute becomes more dependent on third party involvement.

4.2 Visibility and the nature of prostitution

Prostitutes often practice their trade in cars and it could be argued that the prostitute and client believe that a vehicle would fulfil the expectation of privacy, but it is not the private ownership of the vehicle, as explained in Chapter 3, that defines privacy when it comes to sexual activities. Indeed, the elements of what is private or public depend on what can be seen. Thus, if the sexual activities inside a car can be seen by a passer-by, it becomes a public activity and is an offence under the SOA 2003.

⁶³⁵ <http://www.sandyssuperstars.com/> (accessed 14th August 2014)

⁶³⁶ <http://www.sandyssuperstars.com/viewgirl.asp?GirlName=Claire> (accessed 14th August 2014)

⁶³⁷ <http://www.sandyssuperstars.com/Rates.asp> (accessed 14th August 2014)

⁶³⁸ Audrey Woraker: I witnessed this card in a telephone box in 2010

Nevertheless, it is not only sexual activities, but any public activity such as begging, being drunk or riotous that is criminalised in order to prevent a public nuisance. The legislation that surrounds street prostitution effectively seeks to control and punish acts that are associated with prostitution in order to protect the moral interests of the public; yet prostitutes were not recognised in statutory legislation. Until the Vagrancy Act 1824, prostitutes were collectively caught under the Vagabonds Act 1609 and the Vagrancy Acts of 1713 and 1744 with any other citizen who fell into the 'idle and disorderly' class of persons. Section 3 of the Vagrancy Act 1824 introduced the term 'common prostitute' and prohibited prostitutes as well as vagabonds from 'wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner.' It added the element of indecency to distinguish morally upright women who were simply out for a walk from prostitutes who were accosting men as shown in *R v Duke* (1909),⁶³⁹ that unless there is evidence of indecency in her words or gestures, she is not within the meaning of s3 of the Vagrancy Act 1824. The Act, by creating a stricter element of public nuisance effectively prevents street prostitutes from soliciting. In *Duval v Denman* (1901)⁶⁴⁰ it can be shown how the Vagrancy Act 1824 was used to prevent soliciting. The prostitute, having approached several men and 'taking hold of them by the arm and walking a short distance with them' was convicted for behaving in a riotous and indecent manner within the meaning of the Vagrancy Act 1824 s3 after one of the men complained to a police constable.

Furthermore the Town Police Clauses Act 1847 created the offence for common prostitutes to *assemble* in any 'place of public resort'. The Vagrancy Act 1824 in conjunction with the Disorderly Houses Act 1751 prohibited both the keeper of the premises and the prostitute, and therefore abolished prostitution within public spaces. Regulating location was reviewed in the Wolfenden Report and consequently in the subsequent Street Offences Act 1959 created the offence for prostitutes to 'loiter *or* solicit' (my emphasis) in a street or public place for the purpose of prostitution. The intention of this Act was to abolish street prostitution.

The 'problem' of prostitution was at this point seen as the prostitutes being a public nuisance in public spaces. The Acts narrowed the space where prostitutes could go: from being riotous in public to simply loitering as per the Street Offences Act 1959. Although there is no offence for having sex for money the above Acts restricted the movement of a prostitute in public

⁶³⁹ *R v Duke* (1909) 73 JP 88

⁶⁴⁰ *Duval v Denman* (Metropolitan Police Magistrate) (1901) 65 JP 297 at 297

spaces. The prostitute is now restricted from working on the street and any other public space, thus no longer being visible.

In addition, the location can be inside a building if the prostitute is a nuisance to the public. As noted above, in *Smith v Hughes*⁶⁴¹ the prostitute was advertising her profession from inside a closed building by tapping on a closed window. Lord Parker said ‘it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window, or whether the window is shut or open or half open’.⁶⁴² He was clearly responding to the ideology purported by the Wolfenden Report of clearing the streets of prostitution.

Having restricted the whereabouts of a prostitute, the second ‘problem’ of prostitution was the public nuisance caused by clients. The SOA 1956 and the Street Offences Act 1959 were implemented with the intention of prohibiting street prostitution. Section 32 of the SOA 1956 provided: ‘it is an offence for a man persistently to solicit or importune in a public place for immoral purposes.’ The purpose was to reduce the nuisance of men who directly approached the prostitutes. In *Crook v Edmonson* [1966]⁶⁴³ the court of first instance dismissed the case but on appeal from the Crown the central question was whether the defendant had solicited for immoral purposes. The Divisional Court held that although he had solicited, it was not for ‘immoral purposes’ based on the fact that a request for consensual sexual intercourse is not a crime in itself.⁶⁴⁴ The difficulties of s32 were again reviewed in *Goddard* [1991]⁶⁴⁵ where the defendant had approached a 28-year-old woman and a 14-year-old girl. It was held that the incident with the 28-year-old did not fall within s32 as it was no more than a request for intercourse, but the incident with the 14-year-old did fall within s32 as it amounted to importuning for immoral purposes. The Court of Appeal held that it was for the jury to decide on the evidence, by applying contemporary standards of morality, whether the act involved an immoral purpose.

The unsatisfactory position of s32 in the SOA 1956 where importuning could occur in a single incident was amended in s2 of the SOA 1985 which created the offence of persistent solicitation of a woman (or different women) for the purpose of prostitution by a man. The

⁶⁴¹ *Smith v Hughes* [1960] 1 WLR 830;

⁶⁴² *Smith v Hughes* [1960] 2 All ER 859 at 861

⁶⁴³ *Crook v Edmonson* [1966] 2QB 81

⁶⁴⁴ *Crook v Edmonson* [1966] 2QB 81 at 83

⁶⁴⁵ *Goddard* [1991] Crim LR 299

SOA 1985 also introduced the new offence of kerb crawling: whereby it became an offence under s1(1)(a) for a man to solicit a woman for the purpose of prostitution ‘from a motor vehicle while it is in a street or public place’ or if he has ‘just got out, or off, of the vehicle ... in such manner or ... circumstances ...[as] to cause ... nuisance to other persons in the neighbourhood’.⁶⁴⁶

The common law public nuisance offence was therefore encapsulated within the SOA 1985 and removed the opportunity for prostitutes to supply a service. Men could not approach on foot because of the SOA 1956 and now could not drive by and slow down or indeed leave the vehicle, to ascertain whether the prostitute was willing to have consensual sex for money. The Acts circumnavigated the fact that requesting consensual sexual intercourse was, and is, not a crime by creating a statutory nuisance of blocking the streets and roadways in order to do so.

The definition of soliciting as per the SOA 1985 was central in *Ollerenshaw v Director of Public Prosecutions* [1991].⁶⁴⁷ The crux of the issue was that although Mr Ollerenshaw was in the vicinity of prostitutes he did not approach them. Instead one approached him by calling to him from the pavement to ask if he ‘wanted to do business’. He replied ‘yes’ and invited her into his car. The Court held that ‘the mere acceptance of an offer, no matter how well the man knew the district and no matter how anxious he was to have sexual intercourse with a prostitute, did not amount to soliciting’.⁶⁴⁸ Justice Owen stated: ‘there has been no soliciting here by the appellant because there was a prior agreement. Once there was a prior continuing agreement, there was no need to beg a favour, to ask or to importune. Accordingly, I would find that there was no soliciting’.⁶⁴⁹ However, Justice Owen made the proviso that ‘it is necessary to say that that conclusion does not mean for one moment that if a woman does make the first approach a man cannot be guilty of soliciting thereafter. That would be a false conclusion as I have endeavoured to indicate’.⁶⁵⁰ The most modern legislation, the Policing and Crime Act 2009, repaired the mischief in *Ollerenshaw*. It created an offence ‘for a *person*

⁶⁴⁶ Sexual Offences Act 1985 s1(1)(b)

⁶⁴⁷ *Ollerenshaw v Director of Public Prosecutions* (1991) (Crown Office List) CO/2197/90 per Owen J (Lexis transcript)

⁶⁴⁸ *Ollerenshaw v Director of Public Prosecutions* (1991) (Crown Office List) CO/2197/90 per Owen J (Lexis transcript)

⁶⁴⁹ *Ollerenshaw v Director of Public Prosecutions* (1991) (Crown Office List) CO/2197/90 per Owen J (Lexis transcript)

⁶⁵⁰ *Ollerenshaw v Director of Public Prosecutions* (1991) (Crown Office List) CO/2197/90 per Owen J (Lexis transcript)

in a street or public place to *solicit another*' (my italics), including a person in a vehicle in the street or public place, for the purpose of obtaining sexual services. This is distinguished from the Nordic Model, which will be discussed in Chapter 5, which only criminalises the client.

The above Acts are mostly designed to prohibit street prostitution by prosecuting the client as well as the prostitute. The above shows that criminal law treats prostitution differently by its external presence. The criminality considering the visual element above has consisted of how prostitution is perceived on the streets or thoroughfares, either pedestrian or in cars by concentrating on the soliciting of prostitutes and clients. A second element is when prostitution is criminalised but not so visual: toilets, brothels and massage parlours.

4.2.3 Specific enclosed spaces

The expectation of privacy does not include toilets, brothels or massage parlours. Sexual activities are prohibited within brothels and massage parlours, although they are enclosed spaces but for different reasons to toilets.

Toilets are considered to be *public* spaces and, as shown, the concept of privacy does not include toilet cubicles. It is understandable, from a moral viewpoint, for sexual activities to be prohibited in a public toilet if it is frequented by members of the public who do not wish to participate directly or indirectly in sexual activities. But the question is why is there a need to prohibit sexual activities within brothels and massage parlours?

4.2.4 Public toilets

The first enclosed space, where a minimum of privacy could be expected, is the public toilet. The SOA 2003 s71 prohibits sexual activities in a public lavatory. However it was never intended to specifically target prostitutes. Prior to 1967 homosexuality was illegal and homosexuals have traditionally met for sexual activities in public toilets in order to be: a) not aligned with prostitutes and b) unnoticed by the general public and police. Under s13 of the SOA 1956 it was an offence 'for a man to commit an act of gross indecency with another man whether in public or private'. The SOA 1967 removed the private element of homosexual sexual activities by stating in s1 that 'a homosexual act in private shall not be an offence ...' and although the 1967 Act gave homosexuals new legal rights s1(2) states that any sexual activities would not be a private act 'when more than two persons take part or are present ... in a lavatory'. This legislation, although written in neutral language, and therefore

applicable to all, was intended to be a continuation of s13 of the SOA 1956. It remains in the wording of s71 of the SOA 2003: A person commits an offence if he is in a lavatory to which the public ... have access ... and he intentionally engages in sexual activities as a reasonable person would consider it to be sexual. Section 71 of the SOA 2003 is distinct from other public nuisances as no one else needs be present or is likely to be present.

As prostitutes have ever decreasing areas in which to ply their trade they are, as a result, now starting to use public toilets as a venue for sexual activities as noted in the Bath Chronicle where it reported that ‘police and council chiefs are investigating reports that public toilets in Bath are being used for drug taking and prostitution’.⁶⁵¹ The prostitutes, if arrested, would be liable under s71 of the 2003 Act. Section 71 of the SOA 2003, ostensibly a device to prohibit homosexual sexual activities, also criminalises prostitution in quasi-private areas such as toilets. Section 71 of the Act is a public order offence and not a sexual offence; it is purportedly to protect the public so they can have the freedom ‘to use public lavatories for the purpose for which they are designed...’⁶⁵² ASBOs, as discussed earlier, are also used as a means of preventing drug use, prostitution and ‘cottaging’ in public toilets. The criminal law here is treating two ‘marginalised’ groups of people differently to others by creating a law that affects them more than it is likely to affect non-prostitutes or men who do not ‘cottage’.

Brothels are also visual but any sexual activity is internal. Brothels are prohibited by the SOA 2003 s55 which causes it to be an offence for ‘a person to keep ... manage ... or assist in the management of a brothel ...’ However, brothels are on a par with Sexual Entertainment Venues that are regulated by Local Authorities. Therefore, why does the criminal law want to treat brothels differently from Sexual Entertainment Venues? It cannot be payment because as stated earlier women who work in Sexual Entertainment Venues are paid. It cannot be the activity because the activity is similar except that in a Sexual Entertainment Venue touching is prohibited whereas the activity of a prostitute permits touching. Is this difference so great that prostitutes should be treated differently?

⁶⁵¹ <http://www.bathchronicle.co.uk/Drugs-prostitution-fear-Monmouth-Street-toilets/story-19975231-detail/story.html> (23rd October 2013) (accessed 2nd September 2014)

⁶⁵² http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/s71_sexual_activity_in_a_public_lavatory/ (accessed 2nd September 2014)

4.2.5 Massage parlours

A massage parlour is simply an acceptable name for a brothel. In certain towns the police do not close down parlours although the police are aware that the masseuses offer ‘extras’ and the parlour is no more than a brothel. The police treat them in much the same way as Sexual Entertainments Venues, making infrequent checks to ensure that the women working within the massage parlour are not trafficked. In Manchester a Mr Richard Carvath⁶⁵³ sent several emails to the Greater Manchester Police regarding the previously mentioned massage parlour known as ‘Sandy’s Superstars Massage Parlour,’ to which he received a reply that stated that the premises had been visited in February 2014, not by the police but by Manchester Action on Street Health and ‘during this visit there were no concerns raised’ and subsequently the police were not going to investigate or close the massage parlour. Conversely, the Guardian newspaper⁶⁵⁴ reported in February 2014 that eighteen brothels were closed during ‘Operation Companion’ in Soho. As noted earlier, Sandy’s Superstars advertise on the Internet—one could argue that Sandy of Sandy’s Superstars is in breach of s52(1) of the SOA 2003 because Sandy is ‘causing, inciting and controlling prostitution for gain’. Sandy’s defence could be that no illegality has happened because the sex worker is not involved in management or control of the brothel. But this a poor defence, given that the name of the massage parlour and the advertising implies that Sandy of Sandy’s Superstars controls the prostitutes for gain. There is no specific offence for placing advertisements in newspapers and this includes adverts on the Internet; however the newspaper or ISP may be liable to prosecution ‘for money laundering offences under the Proceeds of Crime Act 2002’.⁶⁵⁵ Yet if Sandys Superstars massage parlour was a Sexual Entertainments Venue, it would be allowed to advertise and so long as the massage parlour did not offer ‘extras’ as it is euphemistically known, then the women would be permitted to touch the customer but not indulge in any sexual activities.

Having established that criminal law treats prostitution differently by its external presence, this section has shown that criminal law for a specific enclosed space is not only limited by the expectation of privacy but it is also dependent on the activity within. The criminal law

⁶⁵³ <http://carvath.wordpress.com/2014/03/21/a-chief-inspector-spills-the-beans/> (accessed 14th August 2014)

⁶⁵⁴ Mark Townsend, ‘Closure of Soho brothels raises risks for women, says local priest’
<http://www.theguardian.com/society/2014/feb/23/soho-brothel-sex-worker-raids-priest> (accessed 14th August 2014)

⁶⁵⁵ Crown Prosecution Service, Legal Guidance: Prostitution and Exploitation of Prostitution
http://www.cps.gov.uk/legal/p_to_r/prostitution_and_exploitation_of_prostitution/

contains a variety of different regulations and prohibitions with regard to specific enclosed spaces. Although not intended to target prostitutes, sexual activities within a public lavatory is prohibited. The prohibition set within s71 of the SOA 2003 is gender neutral and is therefore applicable to everybody.

It is the distinction between brothels and Sexual Entertainment Venues that raises the question of why one is prohibited and yet the other is licenced and therefore regulated by the State. The argument in *Smith v Hughes* (1960)⁶⁵⁶ gives a clear indication of how it is the possibility of visibility as well as the activity within an enclosed space that creates the grounds for prohibition of prostitution. However, Sexual Entertainment Venues can be located in retail areas that are on the streets. Yet, the Local Authorities have a very strict criteria set out in Paragraph 12 of Schedule 3 Local Government (Miscellaneous Provisions) Act 1982 for refusing a licence, and cannot refuse a licence on moral grounds.

The Street Offences Act 1959 made it an offence to solicit in a public place, In *Smith v Hughes* the judicial ‘mischief rule’ was applied and it was held that a window or balcony were within the definition of “street”. Following the logic in *Smith and Hughes* a legal difference was created between a brothel and a Sexual Entertainments Venue based on visibility. Lap dancers may be seen outside the venue so long as they are not being lewd or obscene and yet a prostitute may not be seen at all. The argument regarding *Smith v Hughes* is that the prostitute was not engaging in sexual activity in the window. It is the level of sexual activity that separates prostitutes from women who work in Sexual Entertainment Venues: the prostitute can on occasion engage in touching and intercourse although this is not always necessary.

4.2.6 Brothels

The Government has remained steadfastly resolute in criminalising brothels. The Wolfenden Report,⁶⁵⁷ as part of its remit, considered whether brothels should be licensed but concluded that due to fundamental objections the suggestion could not be countered. The Government, although in haste to rid the visibility of street prostitution, agreed with the Wolfenden conclusion and failed to introduce licenced brothels.

⁶⁵⁶ *Smith v Hughes* [1960] 1 WLR 830

⁶⁵⁷ Report of the Committee on Homosexual Offences and Prostitution, Cmnd 247, p 97

Brothels remained illegal and it was for the courts to decide what constituted a brothel. The courts defined a brothel as a place where two or more prostitutes participated in physical acts of indecency for the sexual gratification of men. It was ‘not essential to show that the premises are in fact used for the purpose of ... payment for services rendered’.⁶⁵⁸ Nor was it essential to show that ‘normal sexual intercourse’ was provided in the premises as it was sufficient to prove that more than one woman offered herself ‘as a participant in physical acts of indecency for the sexual gratification of men’.⁶⁵⁹

Despite calls to legalise brothels by the Green Party⁶⁶⁰ in 2002, the Home Office report ‘A Coordinated Prostitution Strategy’,⁶⁶¹ relying on the ideology that prostitutes are victims, said ‘[t]his can encourage women to work in isolation and inhibit their ability to protect themselves.’⁶⁶² It was also stated that ‘off street prostitution may seem safer than operating on the street but respondents to the review have provided significant evidence of violent crime (and robbery) taking place in brothels.’⁶⁶³ Conversely Egan⁶⁶⁴ notes that in lap dancing venues management use CCTV as a means of controlling both the dancers and clients, and for brothels, as Sanders outlines, management can implement precautions to avoid robbery and violence, such as the use of CCTV, peepholes, banning men in groups and alcohol and drugs.⁶⁶⁵

The Home Office Coordinated Prostitution Strategy noted that some felt decriminalising prostitution and permitting brothels sent ‘the wrong message to young people, and the wider public, about the acceptability of prostitution’ and yet that very body of respectability, the Women’s Institute passed a resolution in 2007 calling for ‘local authorities to provide safe working spaces for the operation of brothels.’⁶⁶⁶ However, the British Government

⁶⁵⁸ Kelly v. Purvis [1983] Q.B. 663 at 665 *per curiam*

⁶⁵⁹ Kelly v. Purvis [1983] Q.B. 663 at 671 per Ackner LJ

⁶⁶⁰ Green Party, ‘Prostitution and the sex industry’ RR557 <https://policy.greenparty.org.uk/rr.html>

⁶⁶¹ Home Office ‘A Coordinated Prostitution Strategy and a summary of responses to Paying the Price’ (2006) HMSO

⁶⁶² Home Office ‘A Coordinated Prostitution Strategy and a summary of responses to Paying the Price’ (2006) HMSO p10

⁶⁶³ Home Office ‘A Coordinated Prostitution Strategy and a summary of responses to Paying the Price’ (2006) HMSO p56 para 4.19

⁶⁶⁴ Egan D ‘Eyeing the Scene: The Uses and (RE)uses of Surveillance Cameras in an Exotic Dance Club’ *Critical Sociology*, (2006) (Volume 30, issue 2: 299 - 319 pp301, 302)

⁶⁶⁵ Sanders T *Sex Work: A Risky Business* (Willan Publishing 2005) p64; see also Sanders T ‘Evaluation of the Leeds Street Sex Working Managed Area’ Executive Summary, University of Leeds (2015) p3 <http://www.nswp.org/sites/nswp.org/files/Executive%20Summary%20Leeds.%20U%20of%20Leeds%20-%20Sept%202015.pdf>

⁶⁶⁶ Women’s Institute (Hampshire), Resolution ‘local authorities to provide save working spaces for the operation of brothels’ <https://hampshirewi.org.uk/current-issues/> (accessed 11th March 2017)

continued to promote the abolitionist ideology similar to that of Norway and Sweden. The Government promoted criminalising the client and any suggestions to create managed areas, licensed and regulated brothels, or enable two prostitutes to work from the same residence were quietly abandoned. Instead, to further reduce the visibility of prostitution the Government implemented the Policing and Crime Act 2009 which increased police powers to arrest and detain sex workers. By means of issuing an ASBO the sex worker was obliged to enter a 'rehabilitation' programme or go to prison. This thesis suggests that the drive to abolish prostitution and the implementation of the ASBO drives prostitution further underground and puts prostitutes at a greater risk of violence and exploitation.

The Policing and Crime Act 2009 in conjunction with the Sexual Offences Act 2003 remain the two primary sets of legislation criminalising most aspects of prostitution and the Modern Slavery Act 2015 s3 criminalises trafficking for sexual exploitation. However, because of further calls to decriminalise prostitution, the House of Commons Home Affairs Committee provided their first inquiry into prostitution.⁶⁶⁷ The Committee produced a report recommending that 'at the earliest opportunity, the Home Office change existing legislation so that soliciting is no longer an offence and so that brothel-keeping provisions allow sex workers to share premises,'⁶⁶⁸ with the proviso that the ability to prosecute those who use brothels to control or exploit sex workers is not lost and that there must be zero tolerance of the organised criminal exploitation of sex workers.⁶⁶⁹ The committee made the recommendation on the basis that it would help make the industry safer for those who operate within it.

The Government yet again stalled against making a decision to legalise brothels because of a lack of 'robust evidence regarding the scale and nature of prostitution'⁶⁷⁰ which would require a particularly careful consideration of the link between brothels, trafficking and organised criminal gangs⁶⁷¹ before the merits and demerits of any policy changes and their potential implications were to be considered.⁶⁷² The Government's reluctance to legalise

⁶⁶⁷ Home Affairs Committee 'Prostitution: Third Report of Session 2016-2017' (2016) HMSO p7 para 10

⁶⁶⁸ Home Affairs Committee 'Prostitution: Third Report of Session 2016-2017' (2016) HMSO p21 para 59

⁶⁶⁹ Home Affairs Committee 'Prostitution: Third Report of Session 2016-2017' (2016) HMSO p21 para 59

⁶⁷⁰ Secretary of State for the Home Department 'Government Response to the Third Report from the Home Select Committee Session 2016 – 1017 HC 26: Prostitution' HMSO p5 [4]

⁶⁷¹ Secretary of State for the Home Department 'Government Response to the Third Report from the Home Select Committee Session 2016 – 1017 HC 26: Prostitution' HMSO p5 [4]

⁶⁷² Secretary of State for the Home Department 'Government Response to the Third Report from the Home Select Committee Session 2016 – 1017 HC 26: Prostitution' HMSO p5 [4]

brothels may also fit with James Morton's comment that 'there is something inherently unattractive about the concept of the State as pimp.'⁶⁷³

There are other elements that also give rise to arguing against legalising brothels. Nina Lopez-Jones argues that calls to legalise/decriminalise brothels are 'usually aimed at protecting men's right to sex without risk to their health, reputation or career prospects, rather than at protecting women's right not to be criminalised for earning a living.'⁶⁷⁴ Other arguments include the complaint that the police do not take attacks against sex workers seriously,⁶⁷⁵ the stigma remaining attached to prostitution,⁶⁷⁶ and the licencing and profiting from brothels still equating to 'the degradation of women.'⁶⁷⁷

The arguments against legalising brothels are legitimate when looking at the problems in Nevada or Australia. Nevada is the only state that permits brothels and in Australia legislation differs from state to state with brothels remaining illegal in the Northern Territory and South Australia. This thesis contends that because there are differing legislative systems that reflect the political and moral compass of each area, the areas where brothels are legal take on a different perspective where the outside influences appeal to the commercial aspect but lack in promoting tolerance toward the prostitutes. Another aspect is that the outside influences cause prostitutes to be considered as nothing more than sexual commodities and this in turn creates poor working conditions with little support from external agencies such as the police.

Thus, the conditions prostitutes work in can vary from collaborative to abusive and exploitative and to understand this further the relationship between the prostitute and the client needs to be explored.

The client plays an important role in this discussion because as Janice Raymond notes 'a [heterosexual] prostitution market without male consumers would go broke.'⁶⁷⁸ Nonetheless the reduction of demand by criminalisation is not the answer. The issue of demand with regards to heterosexual prostitution is, as Swedish law suggests, gendered. Sullivan and Jeffreys argue

⁶⁷³ Morton J 'Opinion – Legalising Brothels' *Journal of Criminal Law* (2004) JCL 68(87) 87

⁶⁷⁴ Lopez-Jones N, 'Legalising brothels' *New Law Journal* (1992) 142 NLJ 594 p594

⁶⁷⁵ Lopez-Jones N, 'Legalising brothels' *New Law Journal* (1992) 142 NLJ 594 p594

⁶⁷⁶ Lopez-Jones N, 'Legalising brothels' *New Law Journal* (1992) 142 NLJ 594 p594

⁶⁷⁷ Editorial, 'A licence for brothels?' *New Law Journal* (1996) 146 NLJ 1177 p1177

⁶⁷⁸ Raymond J, 'Prostitution on Demand: Legalising the Buyers as Sexual Consumers' *Violence Against Women* (2004) Vol 10 No 10 pp1156 – 1186 p1160

that ‘women in prostitution are suitable objects for... unwanted remarks, ... whilst their female workmates in factories and offices are not.’⁶⁷⁹ Sexism, in the form of ‘unwanted remarks’ is not restricted to the sex industry and men grab and harass women whether they have ‘paid for it’ or not. It is because demand is gendered that legalising brothels makes prostitutes available to more men⁶⁸⁰ and this negative aspect can be shown by the Australian super brothels. Sullivan and Jeffreys noted that in 2001 the population of Victoria consisted of 3.5 million people of whom 60,000 men visited the bigger brothels each week.⁶⁸¹ This does not provide a reason to stop legalising brothels but it is an example of how the *novelty* of a legal brothel has an impact on the local society. If prostitution was legal country wide in Australia (with the benefit of brothels) then the novelty value would diminish and prostitution would be treated with greater respect as it is in New Zealand.

If the ‘novelty’ of prostitution is destroyed by legalising brothels, then the next step would be to change the language of the ‘thousands of men who use women in the sex industry’⁶⁸² to a more understanding concept. Men will pay for sex but not *use* prostitutes for sex.

The UK version of the Swedish/Nordic model has been implemented primarily to abolish street prostitution and multi-use brothels, however the law is silent if a prostitute works from home on the condition that she works alone, without the protection of a manager/pimp or fellow prostitute. The criminal law does restrict advertising for the prostitute who works at home but if Lord McColl’s Advertising of Prostitution (Prohibition) Bill had not failed due to lack of time, the law would have criminalised any advertising of prostitution online or in newspapers. This would have caused prostitutes to either risk prosecution for advertising or be driven onto the streets and risk prosecution for soliciting.

⁶⁷⁹ Sullivan, M., & Jeffreys, S. ‘Legalizing prostitution is not the answer: The example of Victoria, Australia.’ *Coalition Against Trafficking in Women*. (2001) p9

<http://www.catwinternational.org/Content/Images/Article/95/attachment.pdf> (accessed 12th March 2017)

⁶⁸⁰ Raymond J, ‘Prostitution on Demand: Legalising the Buyers as Sexual Consumers’ *Violence Against Women* (2004) Vol 10 No 10 pp1156 – 1186 p1163

⁶⁸¹ Sullivan, M., & Jeffreys, S. ‘Legalizing prostitution is not the answer: The example of Victoria, Australia.’ *Coalition Against Trafficking in Women*. (2001) p3

<http://www.catwinternational.org/Content/Images/Article/95/attachment.pdf> (accessed 12th March 2017)

⁶⁸² Sullivan, M., & Jeffreys, S. ‘Legalizing prostitution is not the answer: The example of Victoria, Australia.’ *Coalition Against Trafficking in Women*. (2001) p8

<http://www.catwinternational.org/Content/Images/Article/95/attachment.pdf> (accessed 12th March 2017)

Chapter 5 - The proposal: improving all performers' working conditions by better regulating the commercial sex industry

1.1 Introduction

This thesis suggests that when looking at the nature of the sexual activities, prostitution is treated differently to other sex work by social attitudes and the law. Social attitudes perceive a prostitute to be 'other' because she can engage in sexual intercourse with a client, whereas the performer in pornography does not have contact with the viewer/audience, and a performer in the adult entertainment industry is bound by a 'no touching' rule.

However, in law, an individual just needs to behave in a manner that outrages the minimum standards of decency and creates a public nuisance towards various persons for payment to be considered a prostitute. The *De Munck* definition was established on facts that leave no doubt as to the need for lewdness but not sexual intercourse, since a young girl of 14 years of age who was still a virgin was considered a prostitute. Therefore, in contradiction to the ruling in *Hindu Religious Association Leamington and Warwick v Warwick District Council* (2013), and following the logic of the *DeMunck* definition in the literal sense, surely the prostitute is the same as performers in pornography and the adult entertainment industry and should be treated no differently to other sex workers and vice-versa.

The main issue that cuts across the three areas of sex work are the repeated difficulties to ensure at law that all sex workers consent freely, without physical coercion, fiscal pressure, deception as to payment and sexually transmitted diseases. The difficulties are most obvious with prostitution, but they are not absent in other areas, even if less acute. Criminal law is ill-equipped to protect effectively individuals, and in particular sex workers, from sexually transmitted diseases. Sex workers in adult entertainment venues should not be concerned as the 'no touching' rule applies, but for the prostitute and the performer in pornography, the issue is present. At criminal law, not informing a sexual partner of a risk of infection does not vitiate consent to the sexual activities under s74 SOA 2003. It may only lead to a charge under s18 or s20 Offences against the Persons Act 1861. Paradoxically, to require the use of a

condom—that protects against the transmission of diseases—is recognised as part of the newly developed concept of conditional consent, where should the condition (of a condom) be breached, the criminal law would consider that the consent was vitiated and rape can occur. In practice, the sex worker in the worst position is the prostitute who is in a vulnerable position if her client does not want to wear a condom or informed her (without lying) as to his risk of infection. For the performer of pornography, if a sexually transmitted disease is discovered, the constraints established on the set lead to the closure of the studio until everybody has been tested. By contrast, the prostitute, being on her own, and often on the streets without protection, is unlikely to have any recourse, and is also less likely to be shielded from physical coercion if the client does not agree with her request regarding sexual health.

Furthermore, consent interplays with the purpose of the activity, i.e. making a profit. For each area of the sex industry, the effect of payment, or lack of payment, on consent arises in different situations. For the prostitute, payment by the client is integral to her consent to the sexual activities. Yet, for the client's lack of payment to vitiate her consent under s74, one must prove that the client intended never to pay her, which would be particularly difficult unless physical violence occurred. Lack of consent is not considered under the new concept of conditional consent with the condition being payment, despite the use of condoms or information about gender being accepted. For performers in pornography, and the adult entertainment industry, any lack of payment or threat of withdrawal of payment by their managers/employers remains solely within the realm of the civil law of contract. The irrefutable presumption at criminal law—as there is no offence if a manager of a venue applies a fine- is that the sex worker has consented and the consent is not vitiated by lack of payment. For the prostitute, the criminal law deals with this issue by taking the exact opposite stance, and criminalises pimping or management of prostitutes, as well as brothels, on the implicit understanding that if the pimp 'controls' the prostitute, she cannot consent freely to the sexual activities.

These difficulties as to consent show that the location and surroundings of the sex work – linked to the visibility of the activity—can also play an important role in safeguarding the sex worker. Pornography locations and adult entertainment venues are all legal and regulated, with advertising possible even if strictly constrained. Conversely, the prostitute, who cannot join a brothel, is on the street at the mercy of the violence from her clients, and faces in

addition the risk of arrest for soliciting and so is unable to advertise her services. The criminal law blurs the distinction between the voluntary prostitute and the trafficked prostitute—and although the focus is put on the client, it continually refers to the links between prostitution and crime.⁶⁸³ Her client is also at risk of arrest for soliciting with the criminal law having adopted a ‘steady trajectory towards arresting men’ and the ‘subsequent naming and shaming in the local media’.⁶⁸⁴ By contrast, the client of pornography (for instance a cinema licenced to show sex films) or of a Sexual Entertainment Venue can approach the premises without fear of committing a criminal offence. For the client of pornography who views at home, the only offence would be that of possessing extreme pornography, which would be committed *after* having purchased the pornographic material, not *before* the purchase.

Therefore, the key questions are how to protect all sex workers equally with regards to consent, the nature of the activity to which they consent, and the purpose (payment); as well as to establish regulated advertising for *all* areas of sex work. To do so, I argue that prostitution needs to be decriminalised entirely along the NZ model and that the model needs to be extended to include all other sex workers who are not ‘prostitutes’.

In stark contrast to England implementing the Nordic model, this proposal offers a different strategy that is in line with the NZ model; a model which already paved the way for a proposal presented in Scotland by Jean Urquhart MSP in 2015⁶⁸⁵.

This Chapter will move away from the four contextual connectors: consent, nature of the sexual activities, purpose and visibility as shown in the previous chapters and will instead outline the NZ model followed by criticisms and rebuttals before leading into the proposal for legislation to legalise brothels and solicitation in the United Kingdom. The proposal will then be criticized and the criticisms will be rebutted.

⁶⁸³ Kantola and Squires, ‘Discourses Surrounding Prostitution Policies in the UK’ *European Journal of Women’s Studies* (2004) Vol 11 No 1 pp77-101

⁶⁸⁴ Teela Sanders, ‘The policing of pleasure: what kind of police service do I want?’ *Police Journal* (2011) Pol. J. 110

⁶⁸⁵ Jean Urquhart MSP Prostitution Law Reform (Scotland) Bill consultation (8th September 2015) http://www.scottish.parliament.uk/S4_MembersBills/2015-09-3_Prostitution_Law_Reform_Bill_consultation_-_final.pdf

1.2 The New Zealand model

The Prostitution Reform Act 2003, supported by the New Zealand Prostitutes Collective, decriminalised prostitution and is referred to as the New Zealand model. Promoting the opposite approach to the Nordic model, it provides all sex workers with a legal framework that upholds safety and rights including labour rights. The Prostitution Reform Act 2003 is for nationals of New Zealand only and non-citizens may not apply for a visa to work for the purposes of sex work—either as a prostitute or as an operator. Any non-citizen of New Zealand working as a prostitute or operator are liable to have their visa revoked and be deported under s157 of the (New Zealand) Immigration Act 2009.⁶⁸⁶ Prior to the Prostitution Reform Act 2003, the law, much like that of England, prevented soliciting for the purposes of prostitution, keeping a brothel, living on the earnings of prostitution and procuring persons for the purposes of prostitution.

The purpose of the Prostitution Reform Act 2003 was to legalise prostitution so as to: safeguard the human rights of sex workers and protect them from exploitation;⁶⁸⁷ promote the welfare, health and safety of sex workers⁶⁸⁸ and prohibits the use in prostitution of persons under eighteen years of age.⁶⁸⁹ Sections 20 and 21 specifically prohibit persons under the age of 18 from being employed by a operator or hired by a client.

Brothels in the NZ model are defined in two different ways: small owner-operated and operator run brothels. Local Authorities can make bylaws controlling both the location⁶⁹⁰ and signage⁶⁹¹ of the brothel. The advertising of the brothel is prohibited on radio, television and cinema⁶⁹² but classified advertisements are allowed in a newspaper or periodical.⁶⁹³

Small owner-operated brothels are where not more than four sex workers work and each sex worker retains control over earnings from prostitution carried out at the brothel.⁶⁹⁴ For more than four prostitutes, it is any premises kept or habitually used for the purposes of prostitution⁶⁹⁵ that is run by an operator who owns, operates, controls or manages the

⁶⁸⁶ Prostitution Reform Act 2003 s19(1) and s19(3)

⁶⁸⁷ Prostitution Reform Act 2003 s3(a)

⁶⁸⁸ Prostitution Reform Act 2003 s3(b)

⁶⁸⁹ Prostitution Reform Act 2003 s3(d)

⁶⁹⁰ Prostitution Reform Act 2003 s14

⁶⁹¹ Prostitution Reform Act 2003 s12

⁶⁹² Prostitution Reform Act 2003 s11

⁶⁹³ Prostitution Reform Act 2003 s11(1)(b)

⁶⁹⁴ Prostitution Reform Act 2003 s4(1)

⁶⁹⁵ Prostitution Reform Act 2003 s4(1)

business.⁶⁹⁶ The operators are required to have an ‘operators certificate’⁶⁹⁷ issued by the Registrar of the District Court.⁶⁹⁸ Sex workers in small owner-operator brothels are exempt.

Once registered, all operators of the brothels, small or large, must promote safe sex practices and the workers and clients must adopt the safe sex practices. Prophylactic sheaths and/or other appropriate barriers must be provided and safer sex health information must be prominently displayed.⁶⁹⁹ It is the responsibility of both the sex worker and the client to ensure that the sheath or other barrier is used and both the sex worker and client must not imply that they are not infected with a sexually transmitted disease when in fact they are.⁷⁰⁰ However, all sex workers have the right to refuse consent⁷⁰¹ for whatever reason. They are protected from any coercion to consent by the operators, either by violence or by a form of fine and the client even if he has already paid. Such refusal does not affect the right for the client to recover damages,⁷⁰² nor does it affect the sex workers entitlements under the (New Zealand) Social Security Act 1964.⁷⁰³ Should the sex worker decide to leave work, their exit strategy is not impeded by having their entitlements affected because they now refuse to do, or continue to do, sex work.⁷⁰⁴ In effect, the reform establishes legal boundaries so as to avoid deception as to sexual health, fiscal pressure by managers or by client, and physical violence.

1.2.1 Criticisms and rebuttals to the criticisms of the New Zealand Model

The principle behind the PRA was to safeguard prostitutes by decriminalising prostitution. This section will show that since 2003 there have been criticisms of the model including the level of violence against sex-workers; little or no reduction in street prostitution; and the stigma against prostitution remaining.

⁶⁹⁶ Prostitution Reform Act 2003 s5

⁶⁹⁷ Prostitution Reform Act 2003 s34

⁶⁹⁸ Prostitution Reform Act 2003 s35

⁶⁹⁹ Prostitution Reform Act 2003 s8

⁷⁰⁰ Prostitution Reform Act 2003 s9

⁷⁰¹ Prostitution Reform Act 2003 s17(1)

⁷⁰² Prostitution Reform Act 2003 ss17(3)

⁷⁰³ Prostitution Reform Act 2003 s18(1)

⁷⁰⁴ Prostitution Reform Act 2003 s18(2)

1.2.2 Violence toward prostitutes did not reduce

Alex Penk, researching for the Maxim Institute,⁷⁰⁵ states that the PRA fails because there is ‘no recognition of the abuse that purchasers of sex are subjecting prostitutes to’⁷⁰⁶ and Melissa Farley agrees that the violence against prostitutes has continued despite prostitution being decriminalised. She believes that the PRA does not offer ‘any specific protection from the violence that is intrinsic to prostitution’⁷⁰⁷ and that ‘the NZ law keeps the names of brothel owners secret, thus making public health inspections of brothels an impossibility.’⁷⁰⁸ Instead of the PRA protecting prostitutes from violence she argues that ‘in fact, the law protects the privacy of pimps and generally represents the interests of johns.’⁷⁰⁹ She also suggests that some brothel owners are refusing to allow the prostitutes to reject customers⁷¹⁰ and consequently the women prefer to work as street prostitutes because they feel safer than when working in brothels. She noted that prostitutes when working on the streets could ‘refuse dangerous appearing or intoxicated customers’ and their friends could ‘make a show of writing down the john’s car license plate number, which they considered a deterrent to customer violence.’⁷¹¹ This was also an added protection against the client because a ‘john could be easily traced using such methods, whereas a brothel customer’s identity would likely be protected by the brothel owners, making it difficult to prosecute him for violent behaviour.’⁷¹²

1.2.2.1 Rebuttal re: Violence toward prostitutes did not reduce

Contreras and Farley state that ‘legalising prostitution does not decrease violence against women in prostitution’⁷¹³ and if taken literally this is true. No statute in written form can protect a person but the change in law does help toward the change in attitude and gives the victim redress. This can be shown when a prostitute was awarded substantial damages for sexual harassment by a brothel owner in a Human Rights Review Tribunal. The New Zealand Prostitutes Collective told Fairfax News that ‘it could never have happened when sex

⁷⁰⁵ Maxim Institute is an independent research and public policy think tank, incorporated as a charitable trust, www.maxim.org.nz.

⁷⁰⁶ Scoop press release 23rd May 2008 <http://www.scoop.co.nz/stories/PO0805/S00385/report-shows-prostitution-reform-act-is-failing.htm>

⁷⁰⁷ Farley M, “‘Bad for the Body, Bad for the Heart’: Prostitution Harms Women Even if Legalized or Decriminalized’ *Violence Against Women* Vol 10 No 10 (2004) pp 1087-1125 at p 1116

⁷⁰⁸ *ibid* 1090

⁷⁰⁹ *ibid* 1090

⁷¹⁰ *ibid* 1101

⁷¹¹ *ibid* 1101

⁷¹² *ibid* 1101

⁷¹³ *ibid* 1116

work was illegal. It indicates the massive change (the industry) has gone through.’⁷¹⁴ The change in legislation empowered the prostitute to be able to seek compensation and the result sends a message to brothel owners and clients alike that the women who work in brothels are not there to be abused.

1.2.3 Little or no reduction in street prostitution

Street prostitution has an inherent problem of ‘under-employment’⁷¹⁵ which creates low incomes for the sex worker. However, because they ‘desire autonomy from brothel owners’ they work without security or protection by ‘frequenting the docks and truck stops.’⁷¹⁶ These prostitutes are at risk of violence due to the very nature of them having either very limited or no security from friends or police. Violent behaviour toward prostitutes has been recorded as happening in Christchurch (NZ) where members of the public ‘regularly drove to the area ... to shout and harass sex workers as well as throwing eggs at them’ and in Manukau residents held campaigns to remove street prostitution from the area.⁷¹⁷

1.2.3.1 Rebuttal re: Little or no reduction in street prostitution

Alex Penk suggests that the Committee’s⁷¹⁸ research shows that the PRA 2003 has failed. In the “Scoop”⁷¹⁹ media release he states that ‘worryingly there are still significant numbers working on the streets ...’ and that ‘the numbers of street prostitutes have failed to drop.’ He criticises the PRA by saying that the PRA fails to provide alternatives for those caught up in prostitution. It offers no pathways to help sex workers to change their lives.

This is to suggest that ‘exit’ strategies as with the Nordic system, are put in place to abolish prostitution but in New Zealand any exit strategies would need to eradicate ‘the barriers to women exiting prostitution.’⁷²⁰ As there is a lack of reliable data about the scale and

⁷¹⁴ Catherine Healy talking to Fairfax News (2014) <http://www.abc.net.au/news/2014-03-01/an-nz-prostitute-harassment-case/5292738> (accessed 19th March 2017)

⁷¹⁵ Newbold G *Crime Law and Justice in New Zealand* (Routledge 2016) p73

⁷¹⁶ *ibid*

⁷¹⁷ Kingston S *Prostitution in the community: Attitudes, Action and Resistance* Routledge (2014) p102 relying on article in New Zealand Herald news paper www.nzherald.co.nz/prostitution/news/article.cfm?c_id=612&objectid=10567403&pnum=1 (accessed 11th Feb 2017)

⁷¹⁸ Ministry of Justice ‘Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003’ (2008) New Zealand Government

⁷¹⁹ Scoop press release 23rd May 2008 <http://www.scoop.co.nz/stories/PO0805/S00385/report-shows-prostitution-reform-act-is-failing.htm>

⁷²⁰ Munro V and Giusta M (eds) *Demanding Sex: Critical Reflections on the Regulation of Prostitution* Routledge (2008) p2

operation of prostitution in New Zealand⁷²¹ it is difficult for critics such as Penk to assert whether the PRA has indeed failed. The Report of the Prostitution Law Review Committee makes no mention of an intention to reduce the numbers of prostitution but it does state that although numbers are difficult to assess, there is a ‘perception that there has been an increase ...[which] may be due to sex workers working more visibly in some areas.’⁷²²

1.2.4 Stigma against prostitution remains

Contreras and Farley suggest that the ‘social stigma of prostitution persisted five years after decriminalisation in New Zealand’⁷²³ implying that social prejudice remains and prostitution is shameful. Contreras and Farley say that the inequality can be shown by the fact that although ‘johns are legally and socially protected’ as per s4 of the PRA 2003, no one ‘wants the business of prostitution operating in his or her community’⁷²⁴ and therefore prostitution still carries a stigma. Because of the stigma prostitutes are socially ‘invisible as full human beings’⁷²⁵ and subsequently ‘those in prostitution often internalize toxic public and private contempt directed against them.’⁷²⁶ Social prejudice can also be seen by the attitudes regarding the belief that it is prostitutes who are responsible for the spread of sexually transmitted diseases. Kingston notes that ‘members of the Papatoetoe Community Patrol group’ believed that the prostitutes ‘posed a risk to their clients and client’s partners.’⁷²⁷

Another form of stigmatisation can be shown by brothels having their own hierarchy and thus charge different rates. High-end brothels can charge a half-hourly fee of approx. \$350 whereas ‘lower-end walk-in brothels’ ‘charge considerably less... between \$160 and 220 per hour.’⁷²⁸ This suggests that the hierarchy causes the ‘lower end’ prostitutes to be considered of less personal value.

⁷²¹ Ministry of Justice ‘Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003’ (2008) New Zealand Government

⁷²² Ministry of Justice ‘Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003’ (2008) New Zealand Government p118

⁷²³ Farley M and Contreras M ‘Human Trafficking: Not an Isolated Issue’ in Bryant-Davis T (ed), *Surviving Sexual Violence: A Guide to Recovery and Empowerment* (Rowman & Littlefield Publishers 2011) p31

⁷²⁴ Farley M, “‘Bad for the Body, Bad for the Heart’: Prostitution Harms Women Even if Legalized or Decriminalized’ *Violence Against Women* (2004) Vol 10 No 10 pp 1087-1125 at 1092

⁷²⁵ *ibid* 1092

⁷²⁶ *ibid* 1092

⁷²⁷ Kingston S *Prostitution in the community: Attitudes, Action and Resistance* (Routledge 2014) p65

⁷²⁸ Newbold G *Crime Law and Justice in New Zealand* (Routledge 2016) p74

1.2.4.1 Rebuttal re: Stigma against prostitution remains

The Report⁷²⁹ accepts that stigma ‘plays a key role in the non-reporting of incidences’⁷³⁰ but notes that ‘it will take time before it dissipates’⁷³¹ however there ‘has been a change of attitude’ ... by some members of the Police [toward] sex-workers.⁷³²

Scouler, when discussing prostitution and health says ‘Rights continue to be an important vehicle through which to challenge criminal regimes that threaten health.’⁷³³ This comment can be equally applied when discussing the overall stigma of prostitution given that part of the basis of stigma lies in the belief echoing from the Contagious Diseases Acts of 1862, 1866 and 1869 that a prostitute is ‘dirty’ because she carries and spreads disease. Giusta notes that stigma can be understood as a ‘loss of reputation which affects social standing for both clients and sex workers’⁷³⁴ however, ‘decriminalisation is framed by the assumption that the stigma of prostitution will cease if it is not treated as though it needs special criminal justice or civil regulations.’⁷³⁵ Instead prostitution takes ‘its place alongside any other profession’⁷³⁶ and like any other form of employment prostitution is regulated by health and safety provisions. Phoenix notes that ‘decriminalisation has had a marked effect on safeguarding and protecting the rights and safety of those selling sex.’⁷³⁷

Taking note of the criticisms of the NZ model, the next section will now put forward the proposal.

1.3 The proposal

Katherine Raymond, advisor to the then Home Secretary David Blunkett, argued that ‘sex workers lead difficult and dangerous lives and the truth is that most people, including

⁷²⁹ Ministry of Justice ‘Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003’

⁷³⁰ Ministry of Justice ‘Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003’ p58

⁷³¹ Ministry of Justice ‘Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003’ p58

⁷³² Ministry of Justice ‘Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003’ (2008) New Zealand Government p58

⁷³³ Scouler J *The Subject of Prostitution: Sex Work, Law and Social Theory* Routledge (2015) p96

⁷³⁴ Munro V and Giusta M (eds) *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Routledge 2008) p124

⁷³⁵ Phoenix J (ed) *Regulating Sex for Sale: Prostitution, Policy Reform and the UK* (The Policy Press 2009) p18

⁷³⁶ *ibid* 19

⁷³⁷ *ibid* 19

politicians, don't care what happens to them'.⁷³⁸ My proposal is to suggest the repeal of certain laws and offer a model much in line with the NZ model, similar to that of Jean Urquhart, the independent MSP, who brought forward a 'radical policy for change'⁷³⁹ in Scotland. The purpose of the proposal is to bring better cohesion to the law regarding the sex industry and to ensure less risk to the prostitute given that, as Raymond notes 'possibly more'⁷⁴⁰ than an average of six prostitutes are murdered each year.

I suggest that the criminality of prostitution could be solved from a criminal law perspective by including brothels within the Policing and Crime Act 2009 that gives Local Authorities powers to regulate Sexual Entertainment Venues and Sexual Encounter Establishments. Alternatively, and probably a better solution, would be to be introduce new legislation, as suggested by the 2014 'Shifting the Burden'⁷⁴¹ report but this proposal recommends that within the drafting it encapsulates the whole sex industry under one title. The new Commercial Sexual Activity Act (for the want of a title) would work alongside the SOA 2003 and the Offences against the Person Act 1861. This would remove the plethora of statutes that were once described as a 'patchwork quilt of provisions ancient and modern'⁷⁴² and it would work, not because 'people make it do so'⁷⁴³ but because there is 'a coherence and structure'.⁷⁴⁴

To begin with, the issue of consent must be addressed. Section 17 of the (New Zealand) Prostitution Reform Act 2003 protects the human rights of prostitutes by providing them with the right by law to withdraw consent and clarifies that the exchange of money does not constitute consent to sexual activity for the purposes of criminal law. Section 74 of the SOA 2003, as discussed in previous chapters, although offering a definition of consent does not explain clearly enough how a person can be 'free' to make a 'choice' to consent. It also fails

⁷³⁸ Katherine Raymond, 'Brothels and Safe Red Light Areas are the Only Way Forward' *Observer*, December 17 2006 <http://www.theguardian.com/commentisfree/2006/dec/17/comment.politics3> (accessed 24th May 2016)

⁷³⁹ Jean Urquhart MSP Prostitution Law Reform (Scotland) Bill consultation (8th September 2015) http://www.scottish.parliament.uk/S4_MembersBills/2015-09-3_Prostitution_Law_Reform_Bill_consultation_-_final.pdf

⁷⁴⁰ Katherine Raymond, 'Brothels and Safe Red Light Areas are the Only Way Forward' *Observer*, December 17 2006 notes that 'Home Office figures show that 60 prostitutes, possibly more, have been murdered in the past 10 years.' <http://www.theguardian.com/commentisfree/2006/dec/17/comment.politics3> (accessed 24th May 2016)

⁷⁴¹ All-Party Parliamentary Group on Prostitution and the Global Sex Trade, 'Shifting the Burden: Inquiry to assess the operation of the current legal settlement on prostitution in England and Wales' (March 2014) <https://appgprostitution.files.wordpress.com/2014/04/shifting-the-burden.pdf> (accessed April 2016)

⁷⁴² Home Office, 'Setting the Boundaries' (2000) HMSO at 0.2

⁷⁴³ Home Office, 'Setting the Boundaries' (2000) HMSO at 0.2

⁷⁴⁴ Home Office, 'Setting the Boundaries' (2000) HMSO at 0.2

to define that consent can be conditional thus leaving the courts to interpret conditional consent. The wording of s74 is neutral insofar as it applies to either sex but does not make any special provision for sex workers. This proposal will include provisions for *all* sex-workers for all forms of consent and not just for prostitutes, as with the NZ model.

Conditional consent is paramount for a sex worker. The condition of a protective device such as a condom helps to prevent unwanted pregnancies and the spread of sexually transmitted disease. Public Health England commented in their Press Release that ‘Individuals can significantly reduce their risk of catching or passing on an STI by consistently and correctly using condoms.’⁷⁴⁵ The proposed Act will, in the spirit of the NZ model include the right for a sex worker (or client) to insist on the use of a prophylactic. Section 9 of the PRA 2003 makes it compulsory for the prostitute and client to take ‘all reasonable steps’ to ensure a sheath or other appropriate barrier is used for any sexual activity that has a risk of acquiring or transmitting sexually transmissible infections.

The nature of the sexual activities, as with non-commercial sexual activities, should remain outside of the criminal law’s remit unless harm occurs that falls within the boundaries already established at law. The purpose of the sexual activities as with all commercial sexual activities is to make a living which in turn raises issues as to the visibility of the venues with regards to unwitting viewers. This proposal suggests that for prostitutes working in groups of four or less within a building, the premises would constitute a ‘small owner-occupied brothel’ and at least one of the prostitutes must live in the premises as either the owner or occupier (tenant). The prostitutes must be part of a collective and the use of external pimps is not permitted. Groups of five or more prostitutes, all working within the same purpose built premises, would be designated as a Sexual Encounter Venue and would be regulated by the Local Authority. The revenue required for the extra resources for each Local Authority could be met through the cost of the licence for each brothel and Council/business Tax payments.

The brothel, as with lap dancing and peep show clubs, would be regulated by the Local Authority under the remit of the Local Government (Miscellaneous Provisions) Act 1982.

⁷⁴⁵ Public Health England, Press Release: Sexually transmitted infection risk in England is greatest in gay men and young adults’ <https://www.gov.uk/government/news/sexually-transmitted-infection-risk-in-england-is-greatest-in-gay-men-and-young-adults> (17th June 2014)

This would reduce the risk of the prostitute being a victim to her pimp as the prostitute would be protected by the same employment laws that affect all workers, as are women who work in other Sexual Entertainment Venues and the pornographic industry. An additional proviso would be added that the Local Authority must ensure that the premises are inspected (to ensure the safety of the sex workers) on a minimum of four pre-announced visits per year and four unannounced visits. The prostitute would then have the opportunity to tell the inspector if she has been coerced or if an external pimp is controlling her. Admittedly this would depend on the prostitutes and inspectors developing a good relationship but it is not unfeasible that such a relationship could exist. The Local Authority in Leeds set up a managed zone where the prostitutes were free from the risk of arrest during certain hours and consequently developed a better relationship with the police.⁷⁴⁶

The removal of external third parties (pimps) would allow prostitutes to be able to work together from the same venue and have the choice of either working for themselves or using the services of a manager who is solely responsible for that one brothel, alleviating the need for an illegal pimp who offers the prostitute no protection from him, instead forcing her to work under threats of violence. On the face of it there would be no difference between pimp and manager but with managed brothels a prostitute would be 'freelance' and therefore free to leave and work elsewhere. A prostitute working for a pimp is far less likely to be able to leave for fear of reprisals due to the complex relationship with the pimp.⁷⁴⁷ The prostitute would also be protected from the client who would no longer be able to take her to a remote place. If brothels were permitted, the criminal law would be able to protect the prostitutes by instigating a drive to ensure that no offences found within the Offences against the Persons Act 1861 or the Criminal Justice Act 1988 s40 were caused against the prostitute. This means that neither the client nor the pimp would be able to physically harm the prostitute.

The brothel could advertise under the Indecent Displays (Control) Act 1981 in the same way as a Sexual Entertainments Venue does and display the signage that states:

⁷⁴⁶ Leeds City Council , Report of Director of Environment and Housing (January 2016)
<http://democracy.leeds.gov.uk/documents/s140685/item%209%20-%20Scrutiny%20Report%20-%20Update%20Dec%202015.pdf>

⁷⁴⁷ Home Office 'Paying the Price: A Consultation Paper on Prostitution' HMSO (2004) p16

‘WARNING Persons passing beyond this notice will find material on display which they may consider indecent. No admittance to persons under 18 years of age’.⁷⁴⁸

The notice would prevent unintentional passers-by and underage youth from entering. At the moment prostitutes are prohibited from advertising or soliciting, and there is a degree of difference between the two: soliciting involves direct interaction between the prostitute and the client, or the client and the prostitute. Sexual Entertainment Venues are prohibited from soliciting but as already mentioned are permitted to advertise. It would therefore be criminally responsible to continue the anti-soliciting nuisance law with regards to prostitution.

This proposal departs from the NZ model because it includes all sex workers under the same umbrella statute. In this way sex workers in the pornographic industry are further protected because they will have the same legal rights to insist on a prophylactic sheath or other appropriate barrier being used whilst engaging in sexual activity for the benefit of the pornographic film or pictures. Another departure from the NZ model is with regards to the signage outside a brothel. The NZ model makes the provision that the Territorial Authorities may make bylaws that prohibit or regulate signage that advertises commercial sexual services. The proposal for the new Act provides that there is one standard sign for all types of commercial sexual activity. This includes pornographic film and photo studios and Live Sexual Entertainment venues with Local Authorities being given the power to ensure that the sign complies with the legislation. As with the NZ model, prostitutes who do not work in a brothel containing 5 or more sex workers, will be restricted to advertising in the classified advertisements section of the newspaper or periodical, however, soliciting will not be criminalised by either the sex worker or the potential client.

This proposal also departs from the NZ model which rejected legalising prostitution because it would contain a need for a licensing regime which would need extensive administration and enforcement resources whereas this proposal would contain a prerequisite that all brothels will be subject to inspections. Unlike Farley’s comments regarding the names of NZ brothel owners being kept secret, the licence holder and names of those working in a managerial capacity would be registered with the Local Authority. Within the proposed Act to run in conjunction with the Licensing Act 2003, a requirement would be imposed for each

⁷⁴⁸ Indecent Displays Act 1981 s6(a)

Local Authority to keep a register⁷⁴⁹ of all brothel owners and management; any security activity to be included within the licence⁷⁵⁰ and a legal duty for the owner/manager to publicly display, keep and produce the licence for examination by a constable or authorised person.⁷⁵¹

This proposal builds on the concept of consent and conditional consent which not only protects prostitutes but also those who work in the Live Sexual Entertainment industry. The proposal makes a distinction between working in a brothel and a Live Sexual Entertainment venue where the one metre rule will still apply.

By implementing the proposal the term 'prostitute' would then become superfluous: a 'prostitute' would be a sex worker with identical rights as a lap dancer or any other sex worker. The generic term 'sex worker' would then be able to rightly address all people who work within the sex industry and the term prostitute could be removed from statute.

1.4 Arguments against legalising prostitution and rebuttals.

The proposal recommends introducing an overarching Act of Parliament, which whilst focusing on prostitution, would unify the regulation of the sex industry as a whole. Of course there are arguments against such a suggestion and this section will deal with some of the critiques.

The Government considered the policy issue regarding legalised brothels and the opportunity for sex workers to work together in small groups. Such a suggestion was raised in the Wolfenden Committee Report, and again in 2006 in the 'Coordinated Prostitution Strategy and a Summary of responses to Paying the Price' but insisted that managed prostitution was 'not an activity that we can tolerate in our towns and cities'.⁷⁵² This policy issue is in line with academic arguments that suggest legalising brothels is 'pie in the sky',⁷⁵³ on the basis that 'prostitution is fundamentally immoral.'⁷⁵⁴ These arguments detract from the main issues, namely: the right of prostitutes and other sex workers to retract or refuse consent safely, the right for the prostitute and other sex workers to choose the nature of their sexual

⁷⁴⁹ Licensing Act 2003 s8

⁷⁵⁰ Licensing Act 2003 s21

⁷⁵¹ Licensing Act 2003 s94

⁷⁵² HMSO 'A Coordinated Prostitution Strategy and a Summary of responses to Paying the Price' COI on behalf of the Home Office (2006)

⁷⁵³ James Morton 'Legalising Brothels' *Journal of Criminal Law* (2004) Volume 68(2) pp87-89 at 88

⁷⁵⁴ See Susan Edwards, 'In praise of "licensed" brothels?' (1999) *The New Law Journal* Volume 149:6880 pp403-407 at 404

activity, which in turn relates to consent, the right for prostitutes and other sex workers to *make a living* from their chosen profession and lastly the right for prostitutes and other sex workers not to be cast aside as ‘other’ whilst respecting the need for their activities to be kept discrete. Thus, this section will look at the following issues: harm; health; regulation; and whether brothels have an effect on the surrounding location.

1.4.1 The issue of harm

We have seen in previous chapters, for both pornography (Chapter 2) and prostitution (Chapter 4) that recent legislation⁷⁵⁵ was introduced following the government’s narrative regarding physical and psychological harm. This is not to be confused with safety.

The proposal suggests that brothels are made legal and subject to regular inspection but as Susan Edward notes ‘even with inspection and regulation ... [the] women’s personal safety can never be adequately addressed’.⁷⁵⁶ Not only will prostitutes remain at risk, personal safety for trafficked women will increase. The law at present criminalises all forms of trafficking: the Nationality, Immigration and Asylum Act 2002 criminalises trafficking for reasons of prostitution, the Sexual Offences Act 2003 criminalises trafficking for all forms of sexual exploitation and the Coroners and Justice Act 2009 criminalises forced labour. More recently the Government has introduced the Modern Slavery Act 2015 s(2) with a broader remit that criminalises a person who ‘arranges or facilitates the travel of another person’ with the view to exploit that person for any purpose irrespective as to whether that person consents to travel.

Amnesty International claim that the legislation is ‘not fit for purpose’ and that ‘officials are overly concerned with immigration issues rather than assisting the victims of traumatic crimes, including sexual exploitation...’⁷⁵⁷ The Modern Slavery Act 2015 introduced after Amnesty International’s claim but it could be argued that the claim still stands.

⁷⁵⁵ For instance: the Sexual Offences Act 2003 protects women from being forcibly prostituted and the Criminal Justice and Immigration Act 2008 defined and criminalised the possession of extreme pornography

⁷⁵⁶ Edwards S, ‘In praise of “licensed” brothels?’ (1999) *The New Law Journal Volume* 149:6880 pp403-407 at 404

⁷⁵⁷ Amnesty International ‘UK anti-trafficking measures 'not fit for purpose' and breach international law - new report’ Press Release, ‘<https://www.amnesty.org.uk/press-releases/uk-anti-trafficking-measures-not-fit-purpose-and-breach-international-law-new-report>

It could be argued that exploitation will continue in licensed brothels because they ‘can end up being controlled by criminal cartels’⁷⁵⁸ and ‘without proper and regular inspection of commercial and private brothels, commercial crime is inevitable,’⁷⁵⁹ leaving the prostitute with even less safety.

1.4.1.1 Rebuttal re: the issue of harm

The Sexual Offences Act 2003 s55 criminalises keeping a brothel for the use of prostitution and any property occupied by more than one woman for prostitution is a brothel.⁷⁶⁰ Therefore legislation at present makes it ‘impossible for a prostitute to inform police that he or she is being "trafficked" or knows of a person who is "trafficked" without risking arrest.’⁷⁶¹ If criminalisation, both of the prostitute and the client, is continued then ‘the government makes it less likely abuse will be reported, increasing the vulnerability of those they wish to help. Traffick[ed] victims will pay the price.’⁷⁶² Whereas ‘brothel and agency owners ... are the most likely to see and report victims of trafficking,’⁷⁶³ it is the prostitutes who are in the best position to identify victims of sex trafficking and have the most motivation to bring such victims to safety.⁷⁶⁴

By regulating the brothels so that either in a small brothel the owner/occupier or in larger brothels the manager is in control, the argument that ‘licensed brothels can end up being controlled by criminal cartels’⁷⁶⁵ would be negated because the management would be regulated. The suggestion that ‘without proper and regular inspection of commercial and private brothels, commercial crime is inevitable,’⁷⁶⁶ given that it is often the criminal cartels who use trafficked women and children for prostitution would be redundant.

⁷⁵⁸ Andrew Keogh ‘The oldest profession or an age old injustice?’ (2004) *The New Law Journal* Volume 154:7144, pp1350-1351 at 1351

⁷⁵⁹ Edwards S, ‘In praise of "licensed" brothels?’ (1999) *The New Law Journal* Volume 149:6880 pp403-407 at 404

⁷⁶⁰ *Gorman v Standen, Palace Clarke v Standen* (1964) 48 Cr App R 30

⁷⁶¹ Deady G, ‘The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification Within the Prostitution Industry’ (2011) *Washington and Lee Journal of Civil Rights and Social Justice* Vol 17:2 pp515-555 at 533

⁷⁶² *Ibid* at p534

⁷⁶³ *Ibid* at p534

⁷⁶⁴ *Ibid* fn 854

⁷⁶⁵ Andrew Keogh ‘The oldest profession or an age old injustice?’ (2004) *The New Law Journal* Volume 154:7144, pp1350-1351 at 1351

⁷⁶⁶ Edwards S, ‘In praise of "licensed" brothels?’ (1999) *The New Law Journal* Volume 149:6880 pp403-407 at 404

The proposal within this thesis will include *all* trafficked sex workers – for instance, those who work in lap dancing clubs (and are forced to give “special” dances) as well as those who are forced to work as prostitutes. The offence will remain as a strict liability offence with proof of *mens rea* not being required if it can be shown that the person was "forced, threatened, coerced or deceived" by a third party who was aware, or ought to know, that the person was trafficked.

Decriminalising brothels and at the same time more effectively applying sanctions regarding controlling and/or purchasing sexual activity from a trafficked prostitute, gives the trafficked prostitute (or indeed any worker within the sex industry) the ability to either report the fact she is trafficked either directly to the police or to her manager without indirect repercussions. This in turn puts her, and non-trafficked sex workers in general, on equal terms with people who are not involved in the commercial sex industry with regards to having the freedom to make the choice whether to consent, to refuse consent or to withdraw consent. The Nordic model has an adverse effect to all prostitutes because it forces them to work in more dangerous ways than those who are protected by the NZ model. The proposal takes its lead from the NZ model, which although silent on the matters of trafficking, provides inspectors with the powers to enter brothels.⁷⁶⁷ Mishra argues that decriminalisation is ‘a necessary step to securing sex workers rights’ and although decriminalisation does not ‘fix’ the situation it creates a better environment in which to prevent and curtail trafficking.⁷⁶⁸

1.4.2 The issue of health and hygiene

Keogh argues that in many cases health advantages (screening, for example) are not delivered and uses as his example Australia, where prostitution is regulated⁷⁶⁹ and Morton notes that unregulated brothels ‘operate on all levels of quality and hygiene⁷⁷⁰ meaning that if a brothel is not regularly inspected the levels of hygiene can be so low as to be dangerous for the prostitutes as well as the clients. Mayhew and Mossman note that ‘there are many barriers to exiting sex work: not least of the reasons are economic and the difficulty to ease back into

⁷⁶⁷ Prostitution Reform Act 2003 s26

⁷⁶⁸ Panchal T ‘Immoral Women or Victims? Prostitution in India’ in Mishra V (ed) *Human Trafficking: The Stakeholders’ Perspective* (Sage Publications 2013) p95

⁷⁶⁹ Keogh A ‘The oldest profession or an age old injustice?’ *The New Law Journal* (2004) Volume 154:7144, 1350

⁷⁷⁰ Morton J ‘Legalising Brothels’ *Journal of Criminal Law* (2004) Volume 68(2) pp87-89

‘normal’ society.⁷⁷¹ The barriers to exiting sex work force prostitutes to ‘end up back on the streets’⁷⁷² and Morton suggests that as the prostitute gets older her position is further downgraded⁷⁷³ until she has no protection or autonomy whatsoever.

1.4.2.1 Rebuttal to the issues of health and hygiene

When discussing health and hygiene, and the avoidance of spreading sexually transmitted diseases, one must be careful to avoid the suggestion that prostitutes are ‘dirty’ and that it is the prostitute that spreads disease. The proposal does not suggest that legislation should force all prostitutes to be screened. This would return to the Contagious Diseases Acts of 1864, 1866 and 1869 where women were harassed by police and subjected to ‘instrumental rape’⁷⁷⁴ in the form of an internal medical examination. To implement legislation that orders sex workers to have regular medical check-ups would have to be monitored by the police or other official, thus creating an ‘us and them’ relationship and consequently creating a chasm that would hinder any sex worker who needs to report any trafficking or other problem.

The NZ model makes it an offence to practice sex without prophylactics and as a matter of formality ‘each client should be examined by the sex worker to detect any visible signs of sexually transmitted disease’⁷⁷⁵ thus protecting both the sex worker and the client without laying any moral blame on either party. My proposal suggests the same; that it is the responsibility of both the prostitute and client to practice safe sex and to inform each other if they have a transmissible disease then, the client/prostitute will have the freedom to decide whether to consent to sexual activity, and what form of sexual activity. As discussed in the proposal above, the same should apply to women who work in the pornographic industry. All workers in the sex industry would have the legal right to insist on the use of prophylactics and pornography studios would be subject to regular inspection to ensure, among other things, that prophylactics are available. Susan Edwards notes that in Australia sex workers are provided guidance by the Code of Practice as per the Australian Occupational Health and Safety Act 1998, with regards to ‘linen, food preparation, sex toys, accidental spills of body fluids, disposals of sharps, amenities, and education and training for sex workers.’ There is

⁷⁷¹ Mayhew P and Mossman E , ‘Exiting Prostitution: Models of Best Practice’ *Crime and Justice Research Centre* (2007) Ministry of Justice, New Zealand

⁷⁷² Morton J, ‘Legalising brothels’ *Journal of Criminal Law*(2004) Volume 68(2) pp87-89 at 88

⁷⁷³ *ibid* 88

⁷⁷⁴ Walkowitz J *City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian London* (Virago Press 1992) p100

⁷⁷⁵ Prostitution Reform Act 2003 s9 (New Zealand)

‘no mechanism for monitoring or enforcement of the Code of Practice’ which means it is not the responsibility of the police or other agency, but in the interests of safety, the prostitute, manager and client can implement their own form of checks and balances by reporting the person who is breaching the law: thus, each regulates the other. The Ministry of Justice Report notes that the ‘PRA brought the sex industry under the (New Zealand) Health and Safety in Employment Act 1992’⁷⁷⁶ and that ‘there is a high level of awareness of Occupational Safety and Health requirements’⁷⁷⁷ however, they also noted that, as with the Australian system, ‘there is no system of regular inspections of brothels by Medical Officers of Health, and the Department of Labour.’⁷⁷⁸ The move toward ‘written, best practice employment contracts becoming standard for sex workers in brothels strengthen the human rights, employment conditions, health and safety, and well-being of sex workers’⁷⁷⁹

The proposal suggests that sex work is work. There are arguments that create a ‘contest between pro- and anti-sex sex work’⁷⁸⁰ and these arguments often direct ‘attention away from understanding sex work as work.’⁷⁸¹ Jean Urquhart MSP in her proposal for the Prostitution Law Reform (Scotland) Bill said that ‘Policy- makers frequently reduce sex workers to a single homogenous group arguing that they all share the same characteristics’⁷⁸² but this thesis argues that there is no standard sex worker, although each follow a set of rules, rituals and routines⁷⁸³ and they pass their skills on to new workers. This is not to say that sex work is “good” work, no more than any other low ability work is “good,” it is commercial sexual labour offered as a service.⁷⁸⁴

By proposing that sex work is work, it offers the sex worker autonomy, with equal rights to all other workers and therefore provides the worker with the option to opt into a pension scheme, and for the management to provide, by law, a pension scheme.

⁷⁷⁶ Ministry of Justice ‘Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003’ (2008) New Zealand Government p14

⁷⁷⁷ Ministry of Justice ‘Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003’ (2008) New Zealand Government p14

⁷⁷⁸ Ministry of Justice ‘Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003’ (2008) New Zealand Government p14

⁷⁷⁹ Ministry of Justice ‘Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003’ (2008) New Zealand Government p17

⁷⁸⁰ Maher J, Pickering S and Gerard A *Sex work: Labour, Mobility and Sexual Services* (Routledge 2013) p1

⁷⁸¹ *ibid*

⁷⁸² Jean Urquhart MSP ‘Prostitution Law Reform (Scotland) Bill (2015) p8

<https://jeanurquharthighlandsandislandsmsp.files.wordpress.com/2015/09/prostitution-law-reform-bill-consultation.pdf>

⁷⁸³ Sanders T *Sex Work: a risky business* (Willan Publishing 2005) p159

⁷⁸⁴ Wolkowitz C, Cohen R, Sanders T and Hardy K *Body/Sex/Work: Intimate, Embodied and Sexualised Labour* (Palgrave MacMillan 2013) p 44

Therefore, as a sex worker ages, she can either move to becoming a ‘maid’ working for a prostitute working as receptionist and/or housekeeper or retire from the sex industry. As the system stands today, with prostitutes given criminal convictions ranging from breach of ASBO to soliciting or keeping a brothel, it makes gaining employment outside of the sex industry far more difficult and therefore if soliciting and brothel keeping were legal, exit strategies would have a far better success rate because of the lack of criminal convictions.

Prostitutes are not a homogenous group⁷⁸⁵ and ‘exiting’ will have a different meaning to each prostitute depending on her circumstances. It is because of the different needs for each woman that Hester and Westmarland strongly suggest that a ‘holistic support, which includes a range of mechanisms of support services ...geared to the individual needs of women involved in prostitution ... should be central to any [exiting] approach.’⁷⁸⁶

This thesis recommends that providers of exit strategies in place today would remain to give advice and assistance to sex workers who wish to leave the industry. This would be interlinked with organizing suitable accommodation in order to start a new life ‘away from the temptations of the street culture, life, and networks.’⁷⁸⁷

Women who wish to retire (either because of age or for other reasons) from the sex industry would continue to be supported by outreach⁷⁸⁸ agencies such as ‘Safe Exit’ in Hackney who provide practical support for those who wish to leave the sex industry. The issue of whether the women will ‘end up back on the streets’⁷⁸⁹ is in part a realistic issue, not least because as Matthews et al note, women involved in prostitution tend to have low level skill-sets and consequently available employment opportunities are often low paid menial or temporary jobs. Criminal records through prostitution become a ‘trapping factor’ that causes women to ‘yo-yo’ in and out of any exit strategy support but if soliciting and brothel keeping were legal, exit strategies would have a far better success rate because of the lack of criminal convictions.

⁷⁸⁵ See Sanders T ‘Becoming an Ex-Sex Worker: Making Transitions Out of a Deviant Career’ *Feminist Criminology* (2007) Vol 2 No 1: 74 – 95 p79

⁷⁸⁶ Hester M and Westmarland *Tackling Street Prostitution: Towards a Holistic Approach* Home Office Research Study 279 (2004) HMSO p40

⁷⁸⁷ Sanders T ‘Becoming an Ex-Sex Worker: Making Transitions Out of a Deviant Career’ *Feminist Criminology* (2007) Vol 2 No 1: 74 – 95 p84

⁷⁸⁸ Outreach groups are non-profit Non-Government Organisations that provide services to groups who might not otherwise have access to those services. Outreach groups are, by their very nature, mobile in delivering services such as condoms to prostitutes or clean needles to addicts *in situ*.

⁷⁸⁹ Morton J, ‘Legalising brothels’ (2004) *Journal of Criminal Law* Volume 68(2) pp87-89 at 88

1.4.3 The issue of regulating prostitution

Regulating prostitution comes with an array of problems, not least of all who will regulate and who will pay for the regulation and as Morton notes: 'It is one thing to turn a blind eye to the running of a sauna and a wholly different thing if the situation is legalised'⁷⁹⁰

1.4.3.1 Rebuttal to the issue of regulating prostitution

The question of who is going to be in day-to-day supervision of these premises is easily answered: the proposal suggests that it will be the management of SEV's and large brothels and the owner/occupier of the smaller brothel. The proposal answers the comparison between unregulated saunas and legalized prostitution by regulating all forms of commercial sexual activity under the same Act so there will be no opportunity to turn a 'blind eye.'

The proposal suggests that regulating prostitution should be no different to regulating the live sexual entertainment industry. Brothels can be classed as either Sexual Entertainment Venues as Jean Urquhart suggests, or renamed as Sexual Encounter Venues, distinguishing brothels from 'no touching' lap dancing clubs.

The responsibility of the venue, whether it be a lap dancing club, brothel or pornographic film set, sits squarely with the management. They are obliged, as with all other forms of industry, to abide by the law and ensure the safety of the workers at all times.

The police, instead of concentrating on prostitutes and clients who solicit, can concentrate on dealing with tracing the perpetrators of trafficked prostitutes and the safety of the non-trafficked prostitutes. The experiment in Leeds frees up police time because it allows sex workers to work in a 'managed zone' between 7pm and 7am, where they are not told to 'move on' or arrested by the police unless they are working outside the 'managed zone'. This system cannot work by itself and would need the support of other agencies such as the local council providing extra bins put in place to collect the waste products generated. The Leeds system has its advantages insofar as the anti-social behaviour orders and fines issued to prostitutes along with complaints from residents have dropped remarkably. Prostitutes feel

⁷⁹⁰ *ibid* 89

safer, and a better relationship between the prostitutes and police has the added advantage that prostitutes are more likely to report crimes to the police.⁷⁹¹

This is a system that is attempting to work within the confines of the legal process in place in England. It is not without difficulties but it does show that by providing prostitutes with an area where they can work does lead to a drop in the level of complaints and a reduction in the visibility of street prostitution. It also shows that prostitutes do not need to be treated as ‘others’ and can be legitimately classed as sex workers.

1.4.4 The issue of stigma and property

James Morton argues that the ‘effect a brothel will have on [a] neighbourhood’⁷⁹² is ‘a consideration of some import to people living nearby.’⁷⁹³

1.4.4.1 Rebuttals to the argument of stigma and property

Morton makes a spurious argument with regards to brothels and locality. The proposed smaller brothels containing not more than four prostitutes would have no greater impact than what is already in place with women advertising ‘massage’ instead of ‘sex.’ It is not the value of the property that is at stake but the collective attitude toward prostitution that needs to be addressed. The perception of the prostitute is clouded by arguments that stigmatises a prostitute because she is indiscriminate with whom she has (paid) sexual activity.⁷⁹⁴ And yet, as Bell⁷⁹⁵ notes whilst referring to Freud, ‘the difference between [a] mother and a whore is ... not so very great, since at the bottom they both do the same thing.’⁷⁹⁶ The stigma attached to prostitution is not because of the nature of the sexual activity but because she is seen as a threat to monogamy by her sexual indiscrimination. Penny Crofts notes that in Australia since prostitution has become imported into an existing legal framework with ‘associated accountabilities, rights and responsibilities,’ there has been a shift resulting ‘in people viewing sex services premises differently.’⁷⁹⁷

⁷⁹¹ Leeds City Council, Report of Director of Environment and Housing (January 2016) <http://democracy.leeds.gov.uk/documents/s140685/item%209%20-%20Scrutiny%20Report%20-%20Update%20Dec%202015.pdf>

⁷⁹² Ibid page 89

⁷⁹³ Ibid page 89

⁷⁹⁴ This thesis recognises that not all prostitutes are female.

⁷⁹⁵ Bell S, Reading, Writing and Rewriting the Prostitute Body (Indiana University Press 1994) p71

⁷⁹⁶ Freud S, ‘A special type object choice made by men’ (1910) in Philip Reiff (ed), Sexuality and the Psychology of Love (Collier Books 1972)

⁷⁹⁷ Crofts P, ‘Brothels: outlaws or citizens?’ (2010) *International Journal of Law in Context* Vol6:2 pp 151 - 166

For the larger brothels, Local Authorities have the responsibility through the planning and development departments to look at how an area will develop in the future. We have already discussed how Local Authorities have refused further exotic dancing clubs to open in an area where it is deemed unsuitable (because of the surroundings). In Leeds, the prostitution ‘managed area’ is on the edge of a business area. Further consideration in other towns could be put forward and suggest that an area devoted to the sex industry, this means both exotic dance clubs *and* brothels, could be earmarked where it has no impact on residential dwellings, and minimum impact on the town centre. Women who work in the sex industry should not be positioned on the outskirts of an industrial area otherwise it will continue the ‘contradictory images of the prostitute body’,⁷⁹⁸ as someone who is *other*. Situating the larger brothels near the commercial area instead of residential areas would lessen the impact of the nuisance of noise and detritus. In New Zealand, the issue of nuisance caused by parked cars is removed by some of the larger brothels offering a service where either the client can be taken to the brothel or the prostitute can be taken to the client to work in private.⁷⁹⁹ Brothels in New Zealand are not restricted to the outskirts of a town or city and although this has helped to reduce the stigma⁸⁰⁰ legalising prostitution did not eradicate the stigma overnight and it does create disputes when a property is rented out to multiple businesses.⁸⁰¹

⁷⁹⁸ Bell S, Reading, Writing and Rewriting the Prostitute Body (Indiana University Press 1994) p72

⁷⁹⁹ Newbold G Crime, Law and Justice in New Zealand (Routledge 2016) p73

⁸⁰⁰ cf Bryant-Davis who argues that the social stigma persisted for five years after criminalisation in *Surviving Sexual Violence: A Guide to Recovery and Empowerment* (Rowman & Littlefield Publishers 2011) p31

⁸⁰¹ For instance: <http://www.stuff.co.nz/business/75368723/Building-owners-fail-in-bid-to-kick-out-alleged-brothel-from-rented-apartment>

Conclusion

This thesis has shown, that with regard to consent there should be no difference whether the woman is a sex worker or not but the interpretation of s74 does not straightforwardly lend itself to application to commercial sexual activity with regards to the lack of consent. Also there is no difference in the nature of commercial and non-commercial sexual activities except where legislation imposes constraints. It is the constraints that create a distinction between commercial and non-commercial sexual activities and within the different spheres of commercial sexual activities. The purpose of non-commercial sexual activities differs to commercial sexual activities. In non-commercial sexual activities, the purpose is largely for procreation and pleasure whereas in commercial sexual activities the primary purpose is financial profit. The visibility of sexual activities carries similar constraints for non-commercial as for commercial sexual activities—to remain out of sight. The difference here is that for the prostitute it is not only the sexual activities that must be kept out of sight; the prostitute herself must also remain hidden.

The comment that the laws on commercial and non-commercial sex are ‘a patchwork quilt of provisions ancient and modern that works because people make it do so [and] not because there is a coherence and structure’ still applies.⁸⁰² The legislative patchwork quilt has yet to be reduced to a coherent single Act of Parliament with the current regulatory framework now consisting of approximately thirty statutes including: the Sexual Offences Acts of 1956, 1985 and 2003; the Street Offences Act 1959, the Licensing Acts 1964 and 2003; the Criminal Justice and Police Act 2001 and the Police and Crime Act 2009. The multiplicity of these statutes contributes to the lack of coherence with regards to regulating the sex industry. Pornography and adult live entertainment are permitted with certain restrictions but prostitution is marginalised and cast as different from the rest of the sex industry. In addition, Sexual Entertainment Venues are regulated by the Local Authority and each Local Authority can impose their own rules; this creates a system with a potential for disparity when regulating Sexual Entertainment Venues, although all possess a common feature: the ‘no touching’ rule, between the viewer (the client) and the performer. These grey areas

⁸⁰² Home Office, ‘Setting the Boundaries: Reforming the Law on Sex Offences’ HMSO (July 2000) para 0.2

subsequently create a bigger gap than necessary when applying the criminal law to prostitution.

To establish some coherence in how criminal law can approach the sex industry, as much as to understand how criminal law has so far approached the matter, it was necessary for this thesis to investigate permissible sex in a non-commercial relationship. An understanding of the different criteria used to distinguish between permitted and not-permitted sexual relationships was analysed, before assessing the way in which they had been applied to commercial and non-commercial sexual relationships. The two types of relationships share some fundamental elements: the need for consent, the nature of the sexual activities, an indifference regarding the purpose of the sexual activities, except for prostitution, and an expectation of privacy.

By utilising the four conceptual connectors this conclusion demonstrates the reasoning behind the proposal and then shows how the proposal benefits not only prostitutes but also the agencies engaged in either supporting prostitutes to exit prostitution and the police who have the task of moving on or arresting prostitutes.

Consent

It is when consent is withheld or withdrawn that the criminal law plays a role and although the SOA 2003 gives a definition of consent; it is the absence of consent that creates the criminality. Drawing from the constraints shown in Chapter 1 it was established that consent is the central requirement for all sexual activities and this applies for both non-commercial and commercial sexual activities. It is the consensual sexual activities that binds non-commercial to commercial sexual activities and the wording of the legislation makes no obvious distinction between them, yet, as applied, the law introduces subtle (and sometimes more apparent) distinctions between consent in non-commercial and commercial sexual activities.

Consent was defined for the first time in s74 of the SOA 2003 as follows: ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice’ with evidential and conclusive presumptions in s75 to 76 to assist the jury. The constraints within s74 regarding capacity apply to persons under the age of sixteen and also those with mental health issues. Neither constraint is straightforward with the constraint of age carrying its own ‘grey area’ within the criminal law. Consent may not be given by a child under the age of

sixteen and yet s9 states that if a person over the age of eighteen sexually touches a child who is under sixteen they must ‘reasonably believe that [the *child*] is sixteen or over’.⁸⁰³ This, means that the adult can rely on reasonable belief that the child is over 16 without actually ascertaining the child’s real age. It is not until the child is under thirteen years of age⁸⁰⁴ that the reasonable belief defence is withdrawn.

The second statutory constraint regarding consent is mental capacity which prohibits someone who intentionally⁸⁰⁵ sexually⁸⁰⁶ touches a person who is unable to refuse because of a reason related to a mental disorder⁸⁰⁷ or is unable to refuse⁸⁰⁸ because that person lacks the mental capacity,⁸⁰⁹ but offers little protection for a person with physical disabilities. The law is silent regarding persons with disabilities that do not prevent communication, indeed they are treated in the same way as a person who does *not* have any physical disabilities. It is the type of disability that affects communication that creates a distinction: the issue for the courts then becomes whether that person was able to give or refuse consent.

These constraints aside, the SOA 2003 fails to give further direction with regards to having the ‘freedom and capacity’ to consent whilst under the influence of drink or drugs, and it is this issue that is crucial to women working in the sex industry. The terms within the SOA 2003 are too narrow; the provisions in s75 are limited either to the complainant being asleep or otherwise unconscious at the time of the relevant act or that the drugs were administered to the complainant by the defendant. This is not wide enough to encapsulate self-administered drink/drugs as shown in the leading case of *Bree* where drunken consent was interpreted in its narrowest term, since the woman although obviously drunk, though not to the point of unconsciousness, was assumed to have consented. The dicta in *Bree* despite its lack of delicacy, is that drunken consent is still consent. The courts widened the scope in *Evans*⁸¹⁰ where in the first instance Judge Merfyn Hughes QC held that although the girl was not unconscious she was ‘*in no condition to have sexual intercourse*’ thus applying the law where the girl was ‘incapable’ of giving consent and applying s74, holding that her freedom to make a choice had been removed. The defendant in *Evans* had assumed consent from the girl and

⁸⁰³ Sexual Offences Act 2003 s9(1)(i)

⁸⁰⁴ Sexual Offences Act 2003 s9(1)(ii)

⁸⁰⁵ Sexual Offences Act 2003 s30 (1)(a)

⁸⁰⁶ Sexual Offences Act 2003 s30(b)

⁸⁰⁷ Sexual Offences Act 2003 s30(c)

⁸⁰⁸ Sexual Offences Act 2003 s30 (2)

⁸⁰⁹ Sexual Offences Act 2003 s30(2)(a)

⁸¹⁰ *R v Evans and McDonald*, Caernarvon Crown Court, unreported, (24th April 2012)
<http://www.bbc.co.uk/news/uk-wales-17781842> (accessed 16 September 2014)

by the time he had intercourse with her she was in no condition to retract or refuse consent. However, because she was possibly sober enough to consent to his colleague, it did not mean that she had consented to all. The issue in *Evans* is not an open door for all regrettable but consensual drunken sex. In *Evans* the courts held that the victim failed to have the required *capacity* to consent; the *Evans* case clearly widened the scope for evaluating the capacity to consent whilst drunk but the Criminal Case Review Commission referred the case back to the Court of Appeal based on new, and as yet undisclosed, material which was not considered by the jury at trial and subsequently the Court of Appeal⁸¹¹ in 2016 quashed *Evans*' conviction and ordered a retrial. Nonetheless, the principle of capacity in *Evans* opens up an opportunity for other cases, should they come before the courts, to re-address the issue of capacity under s74 because s75 is too narrow. If a wider scope, such as in *Evans*, is taken by the courts it would certainly benefit women who are not in the sex industry but it is not likely to benefit sex workers because they do not reach that point of intoxication from either alcohol or drugs, for if they did they would not be able to continue with their work.

Moreover, in commercial sexual activities, there are further criticisms of the SOA 2003 regarding the issues of submission and coercion. Although ss 74, 75 and s76 indirectly relates to women who work in the sex industry one could argue that the women are submissive due to fiscal pressures; women who work in the sex industry are also beholden to their manager or pimp and lap dancers et al run the risk of losing their job. Prostitutes can also lose money but because of the dark nature of pimping, face the real threat of violence from the pimp. The 2003 Act is written in such neutral terms it can only be applied to non-commercial submission situations unless the courts are prepared to utilise judicial linguistic gymnastics.

In the sex industry consent is often implied. With regards to pornography, the issue of consent is similar to that of other workers in the sex industry. The sex industry is fiscally driven and for pornography consent is contractually given between the cast and the crew and implied between the performer and viewer. The viewers' consent is constrained by the BBFC who can limit the pornography seen by the viewer, and by the Criminal Justice and Immigration Act 2008 which prohibits films that contain 'extreme' pornography.

⁸¹¹ R v Evans [2016] EWCA Crim 31

In Sexual Entertainment Venues, both parties again imply consent: the performer by her presence on stage and the viewer by his purchase upon entering the venue. The performer may withdraw consent by refusing to perform, but this again could lead to fiscal pressure because a lack of performance would not generate any pay. The ‘no touching’ rule imposed by Local Authorities puts a further constraint on consent for the lap-dancer (or any other worker in a Sexual Entertainment Venue) so that the dancer/performer can only consent to being viewed. If she consents to sexual touching, she is then considered to be engaging in prostitution and the Local Authority would consider the Sexual Entertainment Venue to be a brothel, with all the criminality that entails.

Regarding prostitutes, it is questionable whether consent can be implied; any sexual congress is not agreed until the exchange of money has also been agreed. Regarding cases of fraud vitiating consent, the courts focussed on the intention of the client, and whether he was going to pay or not, rather than whether the prostitute was consenting to sex or sex for payment. The principle of fraud can apply to prostitutes as opposed to other sex industry workers because the prostitute is paid directly whereas the client pays a third party for pornography or a lap-dance. Any money given direct to a lap-dancer is considered to be a ‘tip’ albeit a tip that is often shared with management. This leaves the prostitute in an invidious position: her consent, or lack of it, is dependent on the intention of the client (to pay or not to pay). This is after she has made a hurried decision because, by simply negotiating, she may be liable for solicitation.

The main issue with regards to consent is that when consent by a prostitute is denied or withdrawn, then as with any other person, the sexual activities constitute a statutory offence(s), as per sections 1 to 4 of the SOA 2003. The argument, as shown in the proposal, is that the performer in commercial sexual activities, as well as the prostitute, ought to be able to withdraw consent, implicitly or directly, and be treated in the same way as anyone embarking in non-commercial sexual activities, given that black-letter law does not distinguish. Sir William Blackstone⁸¹² in the eighteenth century recognised that prostitutes should be treated no differently in law to non-prostitutes with regards to rape (and other sexual offences). Yet, the law is not applied in the same way to the prostitute, as it is to a woman in a non-commercial sexual relationship.

⁸¹² Sir William Blackstone *Commentaries on the Laws of England* (1765 – 1769) <http://www.lonang.com/exlibris/blackstone/bla-415.htm> , Book 4 Chapter 15 (accessed 10 June 2016)

There was a perception⁸¹³ that prostitutes did not suffer from rape in the same way as non-prostitutes as shown in *R v Bashir and Manzur* (1969)⁸¹⁴ and also, as Sir Matthew Hale⁸¹⁵ noted ‘in a rape case it is the victim, not the defendant, who is on trial’. In practice, the opinion of Sir Matthew Hale still presides where the commercial sex-worker has her credibility challenged more than other victims. This can be shown by the prosecutor having a duty to assess the credibility and reliability of the victim’s evidence. The fact that many prostitutes have drink or drug addictions arguably make it more likely that the Crown Prosecution Service would evaluate the credibility of the prostitute as unfit for trial. If the prostitute convinces the Crown Prosecution Service that she is a reliable witness in court the second hurdle she must face is that evidence of her prostitution can be admissible in court with permission of the judge. This rule of evidence effectively discriminates between prostitutes and non-prostitutes, in violation of the SOA 2003 which does not state that proof of lack of consent depends on the person’s employment or that it should be different when it comes to prostitutes being the victims. The final hurdle to face is the fact that it is incumbent upon the jury to decide in matters of rape, but there is an implicitness that sex-workers, especially prostitutes, carry some responsibility.⁸¹⁶

A further issue touched on is the myths and stereotypes that surround the issue of rape. Fairchild noted that victims who wear short skirts are still more likely to have blame attributed to them because they were dressed irresponsibly.⁸¹⁷ This sort of stereotype affects all women, but it is an added burden for those who are working in the sex industry, for they are expected to dress provocatively.

Thus, there are problems with the issue of consent: the SOA 2003 makes no distinction regarding gender or employment, but it is shown that s74 does not fit with people who work in the sex industry and/or who are drink/drug dependent. In instances of rape or other sexual offences, prostitutes, as I have shown, are treated differently to non-prostitutes, so that lack of consent is more difficult to prove than for a victim in a non-commercial relationship.

⁸¹³ See Kingston S, *Prostitution in the Community: Attitudes, action and resistance* (Routledge 2014) who suggests that there is an attitude that rape claims by prostitutes will not be awarded sympathy because of the widespread belief that prostitutes place themselves in situations where they are open to sexual attack.

⁸¹⁴ *R v Bashir and Manzure* [1969] 2 All ER 692

⁸¹⁵ Sir Matthew Hale, *History of the Pleas of the Crown*, (E. and R. Nutt, The Savoy, London 1736)

⁸¹⁶ Ellison and Munroe ‘Reacting to Rape’ *British Journal of Criminology* (2009) BR J Criminol 49(2): 202-219; Finch E & Munro V, ‘Breaking Boundaries? Sexual Consent in the Jury Room’ *Legal Studies* (2006) vol 26, pp303-318

⁸¹⁷ Fairchild K ‘But Look at What she was Wearing!: Victim Blaming and Street Harassment’ in Tarrant S (Ed), *Gender, Sex, and Politics* (Routledge 2016) page 23

Government reports mentioned within the thesis do not concentrate on the issue of commercial sexual consent in a general way, but instead concentrate on those who either lack the capacity to consent or are being forced to prostitute by third parties. Stemming from this the narrative sets the prostitute out to be the ‘victim.’ It avoids, and yet at the same time alludes to, the issue of whether prostitution ‘entails a violation of personhood that no woman can ever genuinely consent to ...’⁸¹⁸ whereas as Davidson notes, if the ‘vulnerability’ of female prostitutes and the references to sex trafficking were removed from policy documents, ‘the approach ... would actually look like a fairly traditional policy of prohibition’ finding favour with those who consider prostitution as ‘a form of sexual and social deviance that causes public nuisance’.⁸¹⁹

This is the very narrative that the proposal seeks to redress. The intention of the proposal is that legislation should not be silent at worst, and implicit at best, when legislating about consent. Section 74 should make it clear that it encompasses commercial sexual activities, and whilst s75(2)(f) provides the evidential presumption regarding substances (including alcohol) that have been administered without the complainant’s consent, capacity should be widened to include self-administered intoxication.

The nature of the sexual activities

Aside from the constraints on consent, the nature of the sexual activities is also restricted by criminal law. The criminal law makes no distinction between commercial and non-commercial sexual activities when it prohibits certain forms of sexual activities such as intercourse with an animal⁸²⁰ or sexual penetration of a corpse.⁸²¹ The regulation of pornography reflects these offences as not only are the acts forbidden but the possession of such images is also forbidden.⁸²² Harm is also prohibited in both commercial and private sexual relationships. Indeed, in *R v Brown* (1993)⁸²³ it was held that, as a matter of public policy, in private relationships consent is not a defence if the level of harm caused by the sexual activities is comparable to an assault as per the Offences against the Person Act 1861. Pornography reflects this because the nature is defined by the prohibition of the content. The

⁸¹⁸ Julia O’Connell Davidson, ‘A Question of Consent? Sexual Slavery and Sex Work in the UK’ *Identity, Citizenship and Migration Centre Working Paper No 5 WP-09-05* University of Nottingham 2009 p3

⁸¹⁹ *Ibid* p5

⁸²⁰ Sexual Offences Act 2003 c42 s69

⁸²¹ Sexual Offences Act 2003 c42 s70

⁸²² Criminal Justice and Immigration Act 2008 s63 (7)(c)

⁸²³ *R v Brown* [1993] 2 All ER 75

BBFC constrains the nature of pornography by vetting the content and imposing certificates of viewing age and has the authority to enforce that certain parts of the film be cut. Film companies must comply with the censorship otherwise the film would not be permitted for general release. The Criminal Justice and Immigration Act 2008⁸²⁴ also controls the nature of the content by prohibiting extreme pornography, defined as being: an act that threatens a person's life,⁸²⁵ or is likely to cause serious injury to a person's breast, anus or genitals.⁸²⁶

The Criminal Justice and Immigration Act 2008 fell short of criminalising rape scenes and it was not until the Criminal Justice and Courts Act 2015 that the possession of rape scenes was criminalised. Although there is argument that 'stage rape' scenes should fall within the SOA 2003, the Ministry of Justice argue that it would also catch mainstream bondage and sado-masochistic material and this was not the design of the 2008 Act. The Ministry of Justice further argued that to include rape that was 'acted out' would require a redefinition of pornography and obscenity. And yet it is difficult to see the logic behind the Ministry of Justice's argument regarding redefining pornography given that pornography has been redefined by the very creation of 'extreme' pornography. Not only is there a redefinition of pornography but the Criminal Justice and Immigration Act 2008 and the Criminal Justice and Courts Act 2015 place the onus upon the viewer by creating the offence for a person to be in possession of the prohibited material.

Like pornography, the content within live adult entertainment is also regulated but by different legislation and not in the same way. Live adult entertainment must be performed within Sexual Entertainment Venues and are regulated by Local Authorities empowered by the Local Government (Miscellaneous Provisions) Act 1982 as amended by the Policing and Crime Act 2009. It is important to note that there is a disparity of the level of content depending on the type of entertainment. For instance, strippers and lap dancers may not imitate sexual intercourse or publicly masturbate, whereas a peep show artiste is permitted to do both. The type of content depends on the audience: in striptease and lap dancing venues the audience may consist of a group and the level of arousal must therefore maintain a degree of moderation, while the peepshow booth normally contains only one person, and sometimes, but rarely, two people, and so the level of arousal does not depend on decorum. The decorum is required because to masturbate in public would outrage public decency and would also be

⁸²⁴ Criminal Justice and Immigration Act 2008 s63 (7)

⁸²⁵ Criminal Justice and Immigration Act 2008 s63(7)(a)

⁸²⁶ Criminal Justice and Immigration Act 2008 s63(7)(b)

in breach of the SOA 2003 s66(1) which prohibits indecent exposure insofar as s66 prohibits the intentional exposure of genitals. However, the test of decency in both instances depends on the surrounding audience and relies on the activity to not only be seen but also cause alarm or distress; in a Sexual Entertainments Venue causing distress is highly unlikely.

There is no legislation defining the nature of the sexual activities of prostitutes other than that which applies to non-prostitutes. Prostitutes are thus constrained in the same way as non-prostitutes. The nature of the sexual activities involved in prostitution is redolent of the worker in either a pornographic film set or a Sexual Entertainments Venue: it can range from no-touching to touching and full intercourse. The 'actress' in a pornographic film *can* perform the same actions as a prostitute: oral or anal sex, vaginal penetration with objects, more than one sexual partner at a time, masturbation and a plethora of other activities, commonly for money to be viewed by all. The peepshow artist also gives performances akin to those of the prostitute and pornographic actress: she too performs sexual acts for the delectation of the viewer. In these instances, the difference between the pornographic actress or peepshow artist to the prostitute is that of distance. The viewer has no contact with the artiste. This could also be said of the pole/lap/table-top dancer except in certain circumstances where the viewer puts money into the knickers or bra of the dancer, but this is not considered to be touching of a sexual nature. Consequently, in pornography and in the Sexual Entertainment Venues, there is no touching between the sex worker and the viewer; it is even a regulatory offence giving rise to criminal liability should touching occur in a Sexual Entertainment Venue. However, this is not always true for prostitution. A prostitute can also engage in touching and full sexual intercourse. Although criminal law does not forbid touching and intercourse between a prostitute and her clients, it is the touching and especially intercourse with the client that sets her apart from the rest of the sex industry by the regulations set by the Local Authorities under the Local Government (Miscellaneous Provisions) Act 1982. However, neither the *de Munck* definition of a prostitute as: '...a woman who offers her body commonly for lewdness for payment in return' nor the SOA 2003 s51 which defines a prostitute as 'a person who, on at least one occasion offers or provides sexual services to another person in return for payment...' include having sexual intercourse, or indeed the need to touch as the *exclusive* sexual act that defines prostitution. The woman simply needs to be lewd for reward. Yet it is the idea of a woman having sexual intercourse that sets her apart from the rest of the sex industry. It is also intercourse that casts her apart from other women involved in non-commercial relationships, in a subtle and

indirect manner, through the boundaries established at civil law. The civil law, with its emphasis on vaginal intercourse as the only form of sexual activity's validating a marriage between heterosexuals through consummation, closely associates intercourse with the sanctity of marriage, as if intercourse was the preserve for married women. When intercourse and marriage were also linked to the purpose of the sexual activities, i.e. procreation, the association of the two meant that the civil law projected an image of women who, when engaging in intercourse outside marriage, were 'fallen' and were thus prostitutes, not worthy of the protection of the law. Although the civil law is indifferent to the purpose of procreation it can still be seen that the stigma attached to the prostitute as a 'fallen' woman exists within the criminal law by how it approaches prostitution. The proposal endeavours to eradicate the stigma by treating prostitutes and other sex workers equally and acknowledging in law that all sex workers are entitled to the same rights as any other worker.

The purpose of the sexual activities

Criminal law has always been indifferent to procreation as the purpose of the sexual activities but until 1950 civil law required that sexual activities within marriage had to be full and complete intercourse, suggesting that procreation was the purpose, although this requirement never translated into a criminal offence. Criminal law is also indifferent to whether people engage in sexual activities for the purpose of pleasure or for payment, as long as there is no harm committed as defined by the SOA 2003. Therefore, it can be said that criminal law does not interfere with the purpose of non-commercial sexual activities, unless the purpose is a prohibited act such as voyeurism where there is a lack of consent.

Commercial sexual activities have two purposes: to create sexual arousal, in order to generate money. Criminal law does not interfere with sexual arousal as a purpose as long as there is consent and protection of the accidental viewer through the expectation of privacy.

The level of sexual arousal in order to generate profit ranges from high to low and is dependent on the different types of entertainment within the sex industry.

Pornography provides material that creates high arousal so the viewer may reach orgasm in private. Chat lines and peep shows create a medium level of arousal because it is in their interest to keep the viewer sexually aroused for as long as possible because once orgasm has occurred the customer loses interest and no longer wishes to continue payment for more. The level of arousal within a Sexual Entertainments Venue, including burlesque, striptease and

lap dancing, is intentionally low due to the viewer being part of a large audience but also to keep the customer's interest so they continue to pay. The purpose of the prostitute is also for profit but the method is opposite to other sex workers: the prostitute wants the customer's orgasm to occur speedily, partly because she is at risk of criminal arrest and partly because she, like the escort, is on a time limit.

The purpose is linked to the business aspect of commercial sex, i.e. to generate money and criminal law does not interfere with payment as a purpose for the sexual activities. The commercial purpose of pornography is the same as it is for Live Adult Entertainment as can be shown by the fact that the issue of payment is only referred to with regard to child pornography. Profit is the primary function and there is no distinction made to any other commercial business. Indeed, it is shown how the fiscal purpose is supported by looking at the language in the Local Government (Miscellaneous Provisions) Act 1982 and in the Policing and Crime Act 2009 with regards to Live Adult Entertainment. The Local Government (Miscellaneous Provisions) Act 1982 uses language such as 'a significant degree of selling' and in the Policing and Crime Act 2009 the language is even more direct by stating that the purpose is for financial gain.

The primary purpose for prostitution is also for gain but the criminal law is far more ambiguous. There is no offence for a prostitute to receive money from her client; however, a prostitute cannot work with a pimp nor have an employee-employer type of relationship with the pimp who would pay her, as a sex worker in a Sexual Entertainment Venue would have with her employer. Indeed, pimping is a criminal offence; by contrast, being the director of a Sexual Entertainment Venue is not. This prohibition partially extends to civil law as a prostitute cannot set up her own company, as shown when Lindi St Clair was refused registration of her business in *Inland Revenue Commissioners v Aken* [1990]⁸²⁷ and subsequently the Inland Revenue demanded any unpaid tax due. This highlights the fact that the civil law is fraught with contradiction as the prostitute's revenues are nonetheless taxed. Although there is no upfront prohibition of a client paying a prostitute, the business aspect of prostitution is prohibited, in contradiction with the acceptance the law demonstrates when it comes to the business aspects of working in Sexual Entertainment Venues.

It is how the criminal (and civil) law establish the differences between the three categories within the commercial nature of the sex industry, and in particular prostitution, that forms the

⁸²⁷ *Inland Revenue Commissioners v Aken* [1990] 1 WLR 1347

absolute crux of the argument when comparing the sex industry. The external view of pornography is permitted in several ways and shows that the purpose and visibility are interconnected. A sex cinema is regulated by the Local Government (Miscellaneous Provisions) Act 1982 and shops are permitted to place pornographic magazines within view of customers. Sexual activities such as lap dancing are permitted within Sexual Entertainment Venues and such venues can only be refused within the grounds set in the Local Government (Miscellaneous Provisions) Act 1982. Live adult entertainment is permitted as long as it takes place in specific locations that have to be licensed: the Sexual Entertainment Venues. Conversely, prostitution cannot occur in specific locations that are licensed because the Sexual Entertainment Venues have a no-touching rule, effectively banning prostitution from their premises; and brothels where prostitutes could congregate are prohibited with a criminal offence attached to running a brothel (but not to running a Sexual Entertainment Venue). Consequently, prostitutes are forced onto the street, but then become criminally liable if their business activities include advertisement or soliciting. Hostesses are similar in that they may not solicit but the bar may openly advertise the fact that topless waitresses or strippers are within. The problem for prostitutes is that despite the purpose being profit, street prostitutes are at risk of not being paid as shown in *Bouguenoune*⁸²⁸ but if brothels are permitted and protected in law then cases such as *Bouguenoune* and *Linekar*⁸²⁹ will hinge on consent of the sexual activity and not on the intention to pay.

Privacy/visibility

Once valid consent is obtained, criminal law would still constrain sexual activities according to where it takes place with regards to the required expectation of privacy. This thesis has shown that the criminal law looks upon privacy from a different perspective to that of the civil law. Although there is no statutory law against enjoying sex ‘al fresco’, the criminal law places an expectation of privacy on all sexual activities whether it be heterosexual, homosexual, commercial or non-commercial, which is reliant on the visibility of the sexual activities. As shown in *Crunden* (1809)⁸³⁰ the locus relies on being in the presence of people. Thus, no matter if the land is privately or publicly owned, it is the presence of people that causes the activity to become public, and in *Hamilton* [2007]⁸³¹ it depends whether those people are capable of seeing it, although they do not have to actually observe the activity in

⁸²⁸ R v Bouguenoune [2008] EWCA Crim 198

⁸²⁹ R v Linekar [1995] 3 All ER 69

⁸³⁰ R v Crunden (1809) 2 Camp 89, 170 ER 1091

⁸³¹ R v Hamilton [2007] EWCA Crim 2026, [2007] All ER (D) 99 (Aug)

order to create a public location. Criminal law, through the expectation of privacy, protects the accidental viewer, the one who did not consent. It also protects the parties from voyeurism as per s67 of the SOA 2003. However, if both parties agree and give consent, the criminal law does not prohibit *per se* the sexual activities, but merely articulates the expectation of privacy and s66 of the SOA criminalises any intentional showing of genitalia to a non-consenting viewer.

The unwitting or vulnerable observer must be protected from viewing the content of commercial (and non-commercial) sexual activities in order to prevent corrupting the mind of those who are open to such influences. The restrictions regarding visibility of pornography are not dissimilar to non-commercial sexual activities as the primary function is to protect the viewer. With regards to pornography the test is different. In non-commercial sexual activity the test is focussed on the activity being witnessed by an accidental viewer but in pornography the test focuses on the material, and the possession of extreme or child pornography is criminalised.

Sexual Entertainment Venues are regulated so that all sexual activities take place inside the venue. Passers-by, the accidental viewers who do not enter the venue, must not be capable of seeing the sexual activities within from outside the venue.

However, as Philip Hubbard notes, ‘without spaces to flourish, marginal sexualities dwindle’⁸³² and with the introduction of the Licensing Act 2003, lap dancing clubs increased to an estimated 350 by 2005, but since lap dancing clubs have been considered as Sexual Entertainment Venues and are regulated by the same criteria as a Sexual Encounter Establishment (sex cinemas and sex shops), the number of clubs have dwindled because of licence applications being refused, with many clubs not applying for a licence or a renewal of a licence, given the likelihood of refusal.⁸³³

The Local Authority have two purposes: planning and licensing. The Local Authority must consider planning with future events in mind and licensing from a teleological perspective. Thus the planning application must fit in with what purpose the space would serve in years to come, whereas the licence is granted subject to the immediate impact. Even though planning and licensing are distinct in principle, as Hubbard notes, both planning and licensing

⁸³² Philip Hubbard ‘Law, sex and the city: regulating sexual entertainment venues in England and Wales’ *International Journal of Law in the Built Environment* (2015) IJLBE 7(1), 5-20 p6

⁸³³ *Ibid* p7

‘sidestep questions of decency, obscenity or manners to focus instead on ... the reduction of nuisance’.⁸³⁴ The nuisance created by SEVs is not noise, fumes or vibrations, given the noise is unlikely to be any worse than that from a night club or bar. The nuisance complained of by NIMBYs⁸³⁵ is ‘stigma nuisance’ where the opening of a lap dancing club would *lower the tone* of an area and lower the value of the surrounding properties. Although there is little redress for such complaints, if there is a change of usage within the nearby area, the new licence or renewal licence would be refused if the SEV is no longer appropriate because of the increased usage of young or vulnerable persons.

Planning ‘zones’ classify areas as either commercial, industrial or residential. The Licensing Act 2003 allowed lap dance club owners to open the clubs in the High Street as cafes – commercial buildings, but the planning department would want to put such a type of commercial activity on the outskirts of the commercial zones and not too near the residential areas, perhaps as a buffer between the commercial zone and the industrial zone. This pushes the sex industry away from the High Street into the hinterland of the town, in the same way as prostitutes are moved away from ‘society’. The difference is that it is not the intention to abolish lap dancing altogether, whereas it is the intention to abolish prostitution.

Prostitutes are also subjected to the same legislative requirements as those who work in SEVs whereby should they engage in any sexual activities in a location where accidental viewing is likely to happen, like in a car, they would become criminally liable for the offence of outraging public decency as per the SOA 2003 and the Public Order Act 1986. In practice this situation is likely to occur as prostitutes are forbidden to congregate behind closed doors in brothels and so are forced onto the streets or in cars. Furthermore, prostitutes are subjected to additional requirements in that criminal law prohibitions are extended beyond the visibility of the sexual activities themselves and catch the visibility of the non-sexual activities the prostitute engages in by soliciting or by advertising her commerce. Effectively, criminal law encompasses the commercial aspects of prostitution rather than concentrating solely on protecting the accidental viewer.

Advertising commercial sexual activities is not free of constraints with the criminal law establishing such constraints because there is a perception that the public consists of vulnerable persons who would be either outraged or influenced. Hence, pornography is

⁸³⁴ *Ibid* p10

⁸³⁵ NIMBY – Not In My Back Yard

permitted to advertise but within the constraints set in the Obscene Publications Act 1959. Advertising Sexual Entertainment Venues is also permitted, again under the aegis of the Obscene Publications Act 1959. By contrast, prostitutes are not permitted to advertise. It is an outright ban on their business. Yet, with the enactment of the Street Offences Act 1959, prostitutes found that the only way to attract customers was by advertising. They used telephone boxes as a convenient means of advertising as the customer could find the prostitute of his choice and phone immediately. However, the Criminal Justice and Police Act 2001 s46 prohibits advertisements in telephone boxes by prostitutes but does not include advertisements by swingers' clubs. In other words, the criminal law approach is to allow advertising for pornography and live adult entertainment within set boundaries, whereas for prostitution it is to ban advertisement outright.

Many prostitutes, by their very nature, are visible because they work from the street. It is this element of visibility, and not the sexual activities, that the criminal law, by means of public nuisance, demarcates prostitution from the other forms of the commercial sex industry. The sexual activities are regulated in the same way as non-commercial sexual activities and so it can be seen that morality overshadows prostitution and is disguised as originally a public nuisance and then within statute law.

The Wolfenden Report was the impetus for subsequent governments to implement new laws in order to abolish the visibility of prostitution as a business. The Street Offences Act 1959 strengthened existing laws in order to prohibit prostitutes from 'loitering' in public places for the purpose of prostitution. Loitering was already prohibited by the Vagrancy Act 1824, and it included prostitutes among the 'idle and disorderly persons' but the Obscene Publications Act 1959, as amended by the Criminal Justice and Immigration Act 2008 specifically prohibits prostitutes to loiter or solicit in a street or public place. The Obscene Publications Act 1959 prohibited the prostitute from either standing still in a public place *or* approaching a prospective client. The client was also targeted; the SOA 1985, by creating the offence of kerb crawling, prohibited men from asking their price from either the car or the immediate vicinity of the car. The Criminal Justice and Police Act 2001 increased the powers of the police by making kerb-crawling an arrestable offence if it could be shown that the kerb-crawler was causing a public nuisance.

The prostitute (or the worker within a Sexual Entertainments Venue) is prohibited from approaching any member of the public directly in order to encourage them to participate in

commercial sexual activities. For the prostitute, the constraints set are to the point of absurdity. She may not loiter, solicit or advertise. Compelled to work the streets, because venues such as brothels are prohibited, she is then considered to be committing an offence of public nuisance just for going about her business. The interests of the prostitute are ignored and instead, the government introduces yet more harsh penalties for prostitutes by means of anti-social behaviour orders that prohibit the prostitute from entering the area she normally works. The government also enacted the Crime and Disorder Act 1998 where the 1998 Act gave a statutory footing for multi-agencies to implement exit strategies. None of this applies to the accepted forms of sexual activities within the rest of the sex industry but, as Roger Matthews expressed, the multi-agency initiatives are neither cheap nor fast and not all prostitutes welcome them. He argued that most of the women ‘pointed out that there was nothing which could give the level of remuneration which they earned as prostitutes.’⁸³⁶ A problem with such initiatives as used by the agencies is that they are ‘implemented in an uneven manner with different elements combining with different degrees of intensity at different times’.⁸³⁷ As a consequence of the initiatives, prostitutes move to the periphery of the area.⁸³⁸ Leeds has taken this into consideration and understanding the pressures the police are under due to funding cuts has implemented a managed area where the police do not arrest the prostitutes for soliciting.

The law, criminal and civil, refuses to consider prostitution as a commercial activity that is an integral part of the sex industry. The commercial aspects of pornography and live adult entertainment venues are permitted within certain boundaries. Prostitution as a commercial enterprise is prohibited in all its external signs, making the situation of a prostitute intolerable, for what can a prostitute do if she cannot be in brothels, cannot solicit, and cannot advertise? How are people going to know about her business? The difference with the Sexual Entertainment Venue is particularly striking as the local community cannot object to the licensing of a Sexual Entertainment Venue on moral grounds, i.e. its disapproval of the sexual element in the industry. Yet, the local community can effectively drive prostitution underground. The law is inconsistent. For pornography and live adult entertainment, it recognises a fifth element in a sexual relationship: its commercial purpose and the visibility

⁸³⁶ Roger Matthews, ‘Kerb Crawling, Prostitution and Multi-agency Policing’ Crime Prevention Unit Series Paper No 43, Home Office Police Department (1993) p11

⁸³⁷ Roger Matthews, ‘Kerb Crawling, Prostitution and Multi-agency Policing’ Crime Prevention Unit Series Paper No 43, Home Office Police Department (1993) p27

⁸³⁸ *Ibid* p27

of a business, but when it comes to prostitution, it prohibits the commercial purpose and visibility outright.

In applying the four criteria⁸³⁹ established for non-commercial relationships to the sex industry, this thesis has demonstrated that those criteria remain applicable to commercial relationships, but not consistently to prostitution. It has also established that the visibility of a commerce/enterprise is accepted, within some limits, for all commercial sexual relationships except prostitution. Therefore, the question remains how this lack of coherence in criminal law should be remedied and is approached in the proposal of this thesis where it argues that the government is ostensibly following the abolitionist route to eradicate prostitution by adopting the Nordic model that criminalises the purchaser and not the seller. However, the British law criminalises both the purchaser and the seller. If one takes, for example, recreational hard drug usage the government has prohibited the sale, purchase and possession of hard drugs such as heroin. But heroin is still a common drug used by many; it has simply gone ‘underground’ and is available on the black market. The same can be said for the sale of sexual activities in the form of prostitution. By criminalising the purchase of the sexual activities, the result is twofold: some women would exit prostitution, but many would continue, and because of the illegality of purchasing the sexual activities it would become increasingly dangerous for the prostitute because the sex may take place in more isolated locations, leaving the prostitute vulnerable to attack. The argument that legalising brothels could create an underground market for other illegal services fails because a legal brothel would be a more secure area to work in, as shown by the NZ model. Although ‘very little research has been conducted regarding drug use amongst sex workers’⁸⁴⁰ it is argued that if a brothel is run as a legitimate business the risk of it becoming an outlet for illicit drugs or other illegal services would be not greater than that of any other business outlet.

The Proposal

By utilising the NZ model, and the example set by Leeds City Council in the Holbeck area, the proposal suggests that brothels are to be regulated by the Local Authority as with Sexual Entertainment Venues. By doing so the problems with regards to fiscally driven consent created for the prostitute by having an unregulated pimp would then be alleviated. It was also noted in the proposal that there would be a need for the ‘no touching’ rule within a

⁸³⁹ The four criteria being: consent, nature, purpose and visibility

⁸⁴⁰ Jordan J, ‘The Sex Industry in New Zealand: A literature Review’ (2005) Ministry of Justice p3

Sexual Entertainment Venue. The 'no touching rule' in lap dancing clubs would protect the lap dancer from any fiscally driven pressure of having to consent to prohibited sexual activities with a client by her manager. The brothel would be in a purpose built Sexual Entertainment Venue, the same as the lap dancing and peep show clubs, and regulated under the remit of the Local Government (Miscellaneous Provisions) Act 1982. This would reduce the risk of the prostitute being a victim of the pimp as the prostitute would be protected by the same employment laws that affect all workers and tax payers, as are women who work in other Sexual Entertainment Venues and the pornographic industry.

The removal of the prohibition of third parties would allow prostitutes to be able to work together from the same venue and have the choice of either working for themselves or using the services of a manager, thereby removing the need for an illegal pimp who affords the prostitute no protection, and the prostitute would also be protected from potential danger from the client. If brothels were permitted, the criminal law would be able to protect the prostitutes by instigating a drive to ensure that no offences were caused against the prostitute as found within the Offences against the Persons Act 1861 or the Criminal Justice Act 1988 s40. This means that neither the client nor an illegal pimp would be able to physically harm the prostitute. The proposal makes a distinction between a 'pimp' and a manager. The manager would be scrutinised by the Local Authority and would be responsible to the Local Authority for the prostitutes' welfare. This would also apply to the pre-existing Sexual Entertainment Venues. This is not to suggest that houses containing not more than four prostitutes should be unprotected. The cooperative of four or less sex workers within a residence, the same as those in New Zealand, would also have to be licenced and regulated by the Local Authority.

This suggestion does not force prostitutes to work in brothels but the proposal will put in place the ability for a street prostitute to either be self-employed or work for a registered manager and not under the control of an unregulated pimp. She would be further protected by the criminal law with regards to issues such as consent. By its very nature the proposal would offer a solution to the 'patchwork quilt' of legislation and in addition to the inclusion of prostitution, the new statute would also include pornography and any other area of the sex industry. This would give *all* sex workers equal rights and equal protection.

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