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Is the criminalisation of the purchase of sex (the Swedish model) consistent with the European Convention on Human Rights?

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An analysis of the Swedish legislative approach to sex work and its consistency with the European Convention on Human Rights

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Preface

On 3 July 2015, Ms Laura Lee commenced proceedings[1] for a judicial review of Northern Ireland's Human Trafficking and Exploitation [Criminal Justice and Support for Victims] Act (Northern Ireland) 2015 (**2015 Act**) on the basis that its provisions are inconsistent with the European Convention on Human Rights (**ECHR**).[2] The 2015 Act came into force in Northern Ireland on 1 June 2015, and included the purchase of sex as an offence under the Sexual Offences (Northern Ireland) Order 2008.[3] The review is sought on the grounds that the law interferes with rights guaranteed to sex workers under the ECHR: namely articles two, three and eight.[4]

Northern Ireland is the latest country to adopt a legislative framework that treats sex work as a form of violence against women, and so accordingly penalises the purchase of sex, but not the sale itself (**Swedish model**). This model is unique to standard European and Commonwealth approaches of decriminalisation, regulation, criminalisation of the sale of sex (prohibition) and the criminalisation of activities associated with sex work (abolition).[5]

The Swedish model originated in Sweden and then spread to Norway, with similar laws subsequently adopted by Finland, Iceland and Canada. Comparable legislative measures are currently proposed for France and the Republic of Ireland. There is extensive debate as to whether they should be imposed throughout the remainder of the United Kingdom (**UK**).[6]

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[1] Ms Lee served pre-protocol correspondence outlining the basis of her claim in accordance with the United Kingdom Civil Procedure Rules. A hearing date has yet to be set: Interview with Laura Lee, Sex Worker and Activist, (The Author, Wellington, 3 October 2015).

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, entered into force 3 September 1953 (**ECHR**).

[3] The 2015 Act inserted Article 64A into the Sexual Offences (Northern Ireland) Order 2008, which reads: "A person (A) commits an offence if – (a) A makes or promises payment for the sexual services of a prostitute (B); a third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and (c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B)."

[4] Henry McDonald, "Sex worker to launch legal challenge against NI prostitution ban", *The Guardian* (online ed, United Kingdom, 22 March 2015); Interview with Laura Lee, Sex Worker and Activist, (The Author, Wellington, 3 October 2015).

[5] See for example sections 51A to 54 Sexual Offences Act 2003 (UK), which prohibit soliciting and causing, inciting or controlling prostitution for gain.

[6] Alexandra Topping, "UK urged to follow Nordic model of criminalising prostitution clients", *The Guardian* (online ed., 11 December 2013).

The Swedish model cannot be viewed as consistent with the rights guaranteed by the ECHR. There are similar contradictions with other conventions to which Sweden, Norway, Iceland and Northern Ireland are party to such as the International Convention on Economic, Social and Cultural Rights 1966 (**ICESCR**)[7] and the International Covenant on Civil and Political Rights (**ICCPR**)[8]. The extent to which the legislatures of Nordic countries would need to adapt their laws to be ECHR compliant would depend on the margin of appreciation that the European Court of Human Rights (**ECtHR**) would be prepared to allow those legislatures. It would also depend on the weight that the ECtHR would be prepared to give to other constitutional decisions that deal with the criminalisation of commercial sex[9] and that address proportionality in human rights litigation.[10]

Other European countries, such as Germany, Austria and the Netherlands, apply a legalisation model that imposes regulations without penalties on worker or client, while New Zealand and some parts of Australia[11] have adopted a completely decriminalised model. International human rights organisation Amnesty International has recently confirmed that a decriminalised approach is the framework most consistent with rights of sex workers:[12] for both the privileged class of workers who willingly enter the industry, as well as those less socially advantaged workers who may not have made their 'choice' freely.[13]

[7] International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).
[8] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).
[9] Such as *Canada (AG) v Bedford* 2013 SCC 72; *Jordan v. S.* 2002 (6) SA 642 (CC) also reported as 2002 (11) BCLR 1117 (CC) and Interpretation of Article 80, Social Order Maintenance Act, Constitutional Court of Taiwan, 6 November 2009.
[10] *Lochner v New York* 198 U.S 45 (1905); *Tennessee v Garner* 471 U.S. 1 (1985); *Tison v Arizona* 481 U.S 137 (1987); *R v Oakes* [1986] 1.S.C.R. 103; *Vriend v Alberta* [1998] 1.S.C.R. 493; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6.
[11] New South Wales is the only Australian state where sex work is completely decriminalised, but decriminalisation is currently proposed in South Australia by the Statutes Amendment (Decriminalisation of Sex Work) Bill 2015 (SA).
[12] Catherine Murphy, *Sex Worker Rights are Human Rights*, (Amnesty International website, 14 August 2015): https://www.amnesty.org.
[13] Or as feminist Margot St James termed it in 1989: "A blow job is better than no job" (J William Spencer *Contexts of Deviances: Statuses, Institutions and Interactions*, Oxford University Press 2014 at p43).

I. Introduction

A. Prostitution v. Sex Work

For much of the twentieth century, and still to this day in most Western states where prostitution is illegal, a distinction has been made between indirect sex work (adult shops, strip clubs, adult film theatres, escort agencies, phone sex workers and massage parlours) and the direct exchange of physical sexual services for consideration (i.e. prostitution). The distinction was considered by the United States (**US**) Supreme Court in *California v Freeman*.[14] Harold Freeman was convicted of procuring "another person for the purpose of prostitution" under s266(i) of the Californian Penal Code after hiring and paying pornography actors to perform a variety of sexual acts for an erotic film. The relevant law in *Freeman* defined prostitution as "any lewd act…for money or other consideration"[15] and a lewd act that amounted to prostitution was defined as one where the purpose of the act was "sexual arousal or gratification".[16]

The Californian Supreme Court (**CSC**) overturned Mr Freeman's convictions on the basis that the monies paid to the pornography actors were acting fees, not 'consideration' for 'sexual arousal or gratification'.[17] The CSC also concluded that any other interpretation would improperly impinge on the right to freedom of expression protected by the First Amendment of the US Constitution.[18] The CSC's decision was upheld by O'Connor J in the US Supreme Court.[19]

Those who identify as sex workers for the purposes of rights activism do not perceive that a distinction between the two forms of sex work exists, and prefer the terms 'sex work' and 'sex workers' to 'prostitution' and 'prostitutes'. The latter terms are considered derogatory[20] and, for those who promote the Swedish model, imply coercion and abuse.[21] Accordingly the term 'sex

[14] *California v Freeman* 488 U.S. 1311 (1989).
[15] Section 647(b) Penal Code (California, United States of America).
[16] *Pryor v. Municipal Court* (1979) 25 Cal.3d 238 [158 Cal.Rptr.330, 599].
[17] *People v Freeman* 46 Cal. 3d 419 (1988).
[18] US Const, amend I: "Congress shall make no law…abridging the freedom of speech".
[19] *California v Freeman*, above n14.
[20] John Godwin, *Sex Work and the Law in Asia and the Pacific: Laws, HIV and human rights in the context of sex work* (United Nations Development Programme, Bangkok, 2012) p.ix.
[21] Commission for Gender Equality (SA), *Decriminalising Sex Work in South Africa: Official Position of the Commission for Gender Equality 2013*:

work' and 'sex workers' instead of 'prostitution' and 'prostitutes' have been used below, unless the context requires otherwise.

B. The ECHR and the ECtHR

After the horrors of the Second World War and the positivist Nazi regime, global commitments to a natural law promotion of fundamental human rights were entered into, aiming to prevent such unspeakable crimes from occurring on a large scale again. These commitments revolved around "recognition … of the equal and inalienable rights of all members of the human family".[22] The United Nations (**UN**) was formed in 1945, and a Universal Declaration on Human Rights (**UDHR**) was drafted and steadily endorsed around the world.

In addition to forming a global community within the UN, the Council of Europe was formed to "achieve greater unity between its members".[23] The Council began drafting a convention which reflected the UDHR in 1950, and on 3 September 1953 the ECHR entered into force. Section II[24] established the ECtHR, whose jurisdiction extends "to all matters concerning the interpretation and application of the Convention".[25] The ECtHR itself is responsible for determining whether or not it has jurisdiction.[26] Any person who has suffered a "significant disadvantage" may bring a claim against a member state,[27] and the ECtHR can remedy the disadvantage by awarding "just satisfaction" to an injured party.[28] Today nearly all European states, including Sweden, Norway, Iceland, Finland and Northern Ireland, are parties to the ECHR and are bound by the jurisprudence of the ECtHR.[29]

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http://www.gov.za/sites/www.gov.za/files/Commission%20for%20gender%20equality%20on%20sex%20work_a.pdf.

[22] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Preamble (**UDHR**).

[23] General Agreement on Privileges and Immunities of the Council of Europe, 250 UNTS 12, entered into force 10 September 1952, article 1(a)

[24] Articles 19 to 51 ECHR, above n2.

[25] Article 32 ECHR, above n2.

[26] Above.

[27] Article 35 ECHR, above n2.

[28] Article 50 ECHR, above n2.

[29] The only European countries which have not yet ratified the ECHR are those which are yet to join the Council of Europe: Belarus, Kazakhstan, Vatican City and Kosovo (a state of limited recognition). Article 9 General Assembly Resolution 1031 (1994) requires Council of Europe member states to ratify the ECHR within one year of joining the Council.

C. How has the Law Historically Dealt with Sex Work?

Laws relating to sex work in Europe have traditionally been issues of public health and morality, and in many ways still are. Prostitution was tolerated and even encouraged during medieval times[30] as it enabled noble women to maintain their virtue while allowing men to succumb to inevitable sexual appetites.[31] A municipal degree of Amsterdam in 1413 sums up the attitude of European society at the time:[32]

> Because whores are necessary in big cities and especially in cities of commerce such as ours – indeed it is far better to have these women than not to have them – and also because the holy church tolerates whores on good grounds, for these reasons the court and sheriff of Amsterdam shall not entirely forbid the keeping of brothels.

After the Reformation reintroduced a religious zeal against sexual relations outside of marriage[33] and New World explorers brought syphilis and gonorrhoea back to Europe, European countries attempted to abolish or regulate prostitution, but such measures simply drove the practice underground.[34]

At the start of the 19th century the European legislative approach was primarily regulatory,[35] but towards the end of it prostitution came to be viewed as a moral plague for which abolition was the only appropriate answer.[36] Although Sweden continued to regulate prostitution under vagrancy laws and health regulations,[37] it was a criminal offence throughout the rest of Scandinavia[38] and Victorian England (and, accordingly, throughout the Commonwealth).[39] The

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[30] George Ryley Scott, *The History of Prostitution*, Random House, London, 1996 at p125: "Prostitution flourished gaily in profligate Europe for a matter of five hundred years at the most modest of estimates".
[31] At p126.
[32] Chrisje Brants, "The Fine Art of Regulated Tolerance: Prostitution in Amsterdam", (1998) 25 *Journal of Law and Society* 25, issue number 4 621–635 at p621.
[33] Yvonne Svanström, *Policing Public Women: The Regulation of Prostitution in Stockholm 1812-1880*, Stockholm University, Stockholm, 2000 at p71.
[34] George Ryley Scott, above n30 at p127.
[35] Katria Hiersche, *Prostitution and the Contagious Diseases Acts in 19th Century British Colonies*, Western Oregon University, 2014. Regulation was known as the French or Napoleonic approach after Napoleon introduced a licensing system in France in 1851 (George Ryley Scott, above n30 at p 65).
[36] Nils Ringdal, *Love for Sale: A Global History of Prostitution*, Atlantic Books, New York, 2004 at p272.
[37] See for example the Swedish Regulation of Loose Women 1847 (discussed in Sanstrom, n33, at p142).
[38] See for example the Norwegian Penal Code 1842 (discussed in Sunniva Schultze-Florey, *The Sale of Sexual Services in Norway: legal, but still illegal?*, Nordic Prostitution Policy Reform, 7 July 2011); and Irene Berg Peterson, *Police forced Prostitutes into Brothels*, Science Nordic 18 February 2013.

colonisation of ideas meant that prostitution and associated activities were at the very least frowned upon,[40] if not illegal, on a global scale by the beginning of the twentieth century.

As morality has relaxed and as independent statehood (as opposed to imperialism) has allowed more variety as to how states legislate, there are now a great variety of political approaches to how sex work is controlled. Approaches can be classified into one of five categories, namely:

- Prohibition: all commercial sex and associated activities are illegal.
- Legalisation: commercial sex and associated activities are legal but heavily regulated.
- Decriminalisation: commercial sex and associated activities are legal, and sex work is treated as a legitimate commercial enterprise and occupation (**New Zealand model**).
- Abolition: the commercial sex transaction itself is legal, but soliciting and/or other associated activities such as brothel-keeping are illegal.
- Criminalisation of the purchase of sex: the purchase of sex and third parties profiting from the sale of sex are illegal (Swedish model).[41]

These various approaches are somewhat juxtaposed in Europe. The laws in developing Eastern European countries usually reflect an abolitionist approach, even though prostitution can be rife in practice.[42] Western European countries with a reputation for being sexually liberal such as Germany, Austria and the Netherlands tend to follow a legalisation model. The UK and France do not penalise the commercial sex transaction but prohibit associated activities, while Sweden, Norway, Iceland and Northern Ireland have all endorsed the Swedish model.

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[39] The Criminal Amendment Act 1885 (UK) 48 & 49 Vict. c.69 provided that was a serious misdemeanour for any woman to "leave her usual place of abode…for the purpose of…prostituting herself". The law also outlawed soliciting, brothel-keeping and living on the proceeds of prostitution.

[40] For example see Edwin Sims, *Fighting the Traffic in Young Girls (or War on the White Slave Trade)*, Illinois Vigilance Association, 1910 at p18: "Men and women who make a living and fatten off the shame, the disgrace and the ruin of innocent young girls are a menace to the community , to whom no quarter should be given".

[41] Commission for Gender Equality (SA), above n21.

[42] For example Belarus, Russia, the Ukraine and, until 2014, Romania.

II. **The Swedish model**

A. History of the Swedish Model

Although frequently lauded as the brainchild of abolitionist radical feminists and Swedish social pioneers, the first state to criminalise the purchase of sex was the Union of Soviet Socialist Republics (**USSR**) in 1922.[43] The Soviets saw sex work as a by-product of capitalism and sought to provide alternative education, training and employment opportunities to prostitutes, while penalising those who exploited prostitutes and 'naming and shaming' those who purchased sex.[44]

The history of the asymmetric model in Sweden has its roots in two Swedish ideologies: *Kvinnofrid* – or 'women's peace'[45] and *folkhemmet* – or 'the people's home'. The former extends to a prohibition on assaults against women (and dates back to at least 1280[46]) while the latter describes the social welfare state the Social Democrat-led government aspired to during their political tenure from 1932 to 1976.[47] Prioritising the state's interest over those of individuals has been so paramount that Sweden embraced eugenic policies up until 1975, and only overturned compulsory sterilisation laws in 2013.[48] Even today, Sweden still has legislation which provides for 'indefinite compulsory isolation' or detention of people who have the HIV/AIDs virus if such persons are suspected to be deviating from medical instructions.[49]

During this ideological socialist period, sex work continued to be viewed as a social threat in need of eradication rather than a 'necessary evil' requiring monitoring and regulation. Yet it was accepted that criminalising the sale of sex had not worked. Sex work was still rife globally

[43] Dorothy Atkinson, Alexander Dallin and Gail Warshofsky Lapidus, *Women in Russia*, Stanford University Press 1977 at p250.
[44] George Ryley Scott, above n30 at p137. In modern Russia, the sale of sexual services is prohibited by the Russian Administrative Code: Daria Litvinova, *Amnesty International Highlights Russia's Prostitution Problem*, (online ed, The Moscow Times, 26 August 2015).
[45] Refer Swedish government website: www.nck.uu.se/. Google translation confirmed as accurate by Swedish social anthropology PhD student Isabelle Johansson.
[46] The Alsno Charter of c.1280 prohibited bridal kidnappings to promote *Kvinnofrid*: discussed by Thomas Småberg at "The Ritual Battle of Tournament: *Tornej*, *Dust* and *Bohord*" in *Devising Order: Socio-Religious Models, Rituals, and the Performativity of Practice*, Leiden & Boston, 2013 at p165.
[47] Jay Levy, *Criminalising the Purchase of Sex: Lessons from Sweden*, Routledge Publishing 2015 at p3.
[48] Above at pp5-6.
[49] Above at p6.

regardless of whether it was illegal or not. A different approach was needed if commercial sex was to disappear altogether from Swedish society.

Feminist movements of the same era sought sexual equality for women, but through two very different approaches. Liberal, sex positive feminists such as Margot St James rallied against the traditional double standard which encouraged promiscuous behaviour in men but frowned upon promiscuous behaviour (such as sex work) among women. They considered the best way to balance this historic dichotomy was to adopt a liberal attitude to sex, where women should not be ashamed of expressing their sexuality commercially or otherwise, because society should treat them as having the same entitlements to sexual freedom as men.[50]

On the other hand, abolitionist radical feminists such as Andrea Dworkin, Catherine MacKinnon, Sheila Jeffreys and Janice Raymond viewed sex work and even sexual intercourse as the ultimate exertion of male dominance over women.[51] They claimed that no sex worker could be said to be in the industry by choice and that every sex worker was a victim of gender inequality[52] and societal neglect.[53] Notably absent from radical feminist discourse is the societal position of male and transsexual sex workers.

Radical feminists consider the only appropriate remedy to the gender inequality 'inherent' in sex work is to treat sex workers as victims who lack the agency to make informed choices, and to treat their clients as misogynistic drivers of inequality, or criminals. These feminists claim that *any* legitimisation of sex work creates an environment that condones violence against women and children, and accordingly they seek criminalisation of the purchase of sex and not the sale, to reflect that the seller is too vulnerable to be criminally liable.[54]

In 1981 a Swedish governmental inquiry into sex work's impact on gender equality controversially found that sex work was *not* a gender equality question and that criminalisation of commercial sex would simply drive sex work underground and would increase stigma

[50] J. William Spencer, *Contexts of Deviance: Statuses, Institutions and Interactions*, Oxford University Press 2015 at p43.
[51] Sheila Jeffreys, *The Idea of Prostitution*, Spinifex Press, North Melbourne, 1997 at p194; Andrea Dworkin, *Right-Wing Women: The Politics of Domesticated Females*, The Women's Press, 1983 at p221; Janice Raymond, *Not a Choice, Not a Job: Exposing the Myths about Prostitution and the Global Sex Trade*, Potomac Books 2013; Catherine A. Mackinnon *Are Women Human? And other international dialogues*, Harvard University Press 2006 at p256.
[52] Above.
[53] Jeffreys, Sheila, above n51 at p155; Catherine A. Mackinnon, above n51 at p256.
[54] See Janice Raymond, above n51.

issues.[55] This was followed by several more inquiries throughout the 1980s and 1990s, and from 1982 a series of bills were introduced which proposed penalising the purchase of sex. Interestingly, the only inquiry which recommended criminalisation was a 1993 commission and report published in 1995 which favoured criminalising both client and worker.[56]

During the 1990s, the collapse of the Soviet Union and a relaxation of rules concerning passport-free travel led to an increase in migrant sex workers throughout Europe, including Sweden. A moral panic ensued. Radical feminist commentary fed into the discussion of the perceived prostitution problem.[57] Despite the absence of any conclusive evidence in support of an asymmetric model and a lack of any meaningful consultation with sex workers, the Swedish government passed the *Kvinnofrid* Act in 1998, and from 1999 it has been a crime to purchase sex in Sweden. Section 11, chapter 6 of the Swedish Penal Code provides that a person who 'obtains a casual sexual relation in return for payment' will be subject to a fine or a sentence of imprisonment, while section 12 of the same act prohibits exploiting a third person's engagement in commercial sex and allowing premises to be used for commercial sex.[58] The Swedish Land Code and Condominium Act provide for further penalties where premises are permitted to be used for prostitution.[59]

In addition to making it a crime to purchase sexual services, the law also criminalises all parties who profit from sex work (apart from the worker). It is gender neutral and far-reaching: Swedish courts have held that 'payment' includes the purchase of gifts, drinks or meals in the anticipation of receiving sexual services in return.[60]

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[55] Susan Dewey and Patty Kelly, *Policing Pleasure: Sex Work, Policy and the State in Global Perspective*, New York University Press 2011 at pp20-21.

[56] Yvonne Svanström at "Criminalising the John – a Swedish Gender Model" in *The Politics of Prostitution – Women's Movements, Democratic States and the Globalisation of Sex Commerce*, ed. J Outshoorn Cambridge, Cambridge University Press 2004 at p225.

[57] See for example a translation of Social Democrat Ulla Pettersson's 1991 comment during a parliamentary debate: "By accepting prostitution society tolerates a humiliating perception of women. The view that women can be bought for money expresses a disdain for women as human beings" (Dewey and Kelly, above n54).

[58] May-Len Skilbrei and Charlotta Holmström in *Prostitution Policy in the Nordic Region: Ambiguous Sympathies*, Ashgate Publishing 2013 at pp147-171.

[59] S Dodillet and P Östergren, The Swedish Sex Purchase Act: Claimed Success and Documented Effects, 2011. Conference paper presented at the *International Workshop: Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges*, The Hague, 3 - 4 March, 2011.

[60] New Zealand Prostitutes Collective, "NZPC Analysis of the Swedish law criminalising clients" at [10].

B. The Swedish Model and other States

1. Norway

The next country after Sweden to criminalise the purchase of sex was Norway. In 2008 the Norwegian government amended their General Civil Penal Code to outlaw promoting the engagement of others in prostitution, the letting of premises for the purposes of prostitution, and publicly offering the sale or purchase of sex (section 202).[61] The Norwegian penal code also prohibits procurement (section 202a), provides harsher penalties where victims of procurement are children (section 203), prohibits the importation and dissemination of pornography (section 204), prohibits exploitation and trafficking (section 224) and provides for harsher penalties where any of these activities are part of an "organised criminal group" (Section 60a).[62]

2. Finland

It is often claimed that Finland adopted the Swedish model in 2007. What section 8 of the Finnish Penal Code *actually* provides is that: [63]

> **Section 8 – Abuse of a victim of prostitution (743/2006)**
>
> (1) A person who, by promising or giving remuneration involving direct economic benefit induces a person referred to as victim in section 9 or 9a or in chapter 25, section 3 or 3a to engage in sexual intercourse or in a comparable sexual act shall be sentenced, unless the act is punishable pursuant to section 8a, for abuse of a victim of prostitution to a fine or imprisonment for at most six months.
>
> (2) Also a person who takes advantage of the remuneration referred to in subsection 1 promised or given by a third person, by engaging in sexual intercourse or a comparable sexual act with the victim referred to in said subsection, shall be sentenced for abuse of a victim of prostitution.
>
> (3) An attempt is punishable.

Section 3 of this code defines a victim as a person 'coerced' into performing a sexual act. Section 9 outlaws 'pandering' (benefitting from a child's engagement in prostitution) and section 9a provides for 'aggravated pandering', which outlines aggravating factors which will increase the

[61] Ministry of Justice and the Police, Legislation Department, "The General Civil Penal Code", Act of 22 May 1902 No. 10, December 2008, endorsed by Skilbrei and Holmström above n58.
[62] Above.
[63] Unofficial translation downloaded from the Finnish Ministry of the Interior website: http://www.intermin.fi/en/legislation/acts_and_decrees, endorsed by Skilbrei and Holmström, above n58.

penalty for pandering offences. The Public Law and Order Act also makes it illegal "to purchase sexual services or offer sexual services against payment in a public place".[64]

The law therefore only actually prohibits the purchase of sex if the seller is a victim of trafficking or is a minor, and so therefore does not align completely with the Swedish model.

3. Iceland

The next Scandinavian country to make legislative changes to commercial sex policy was Iceland. In April 2009, the General Penal Code of Iceland was amended to outlaw living on the proceeds of the prostitution of others, encouraging children to engage in sex work, trafficking, and offering remuneration for sexual services.[65] The Icelandic Penal Code also outlaws pornography,[66] and strip clubs are illegal under article four of the Act on Restaurants, Accommodation Establishments and Entertainment, which prohibits benefiting from nudity.[67] Radical feminist Julie Bindel claims that this might just make Iceland "the most female-friendly country on the planet".[68]

4. Canada

Prior to 2013, three provisions of the Canadian Criminal Code (**CCC**) outlawed the keeping of a "common bawdy-house", living off the earnings of sex work and publicly offering to purchase or sell sexual services. This was constitutionally challenged in the Supreme Court of Canada (**SCC**) in the 2013 decision *Canada (AG) v Bedford*.[69]

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[64] Section 7 Finnish Public Order Act 2003: unofficial translation downloaded from the Finnish Ministry of the Interior website: http://www.intermin.fi/en/legislation/acts_and_decrees. The website advises that the translations are unofficial, but the translations are consistent with uncontested media reports. The Public Law and Order Act was not expressly endorsed by Skilbrei and Holmström (above n57) as other Scandinavian translations in this essay have been.

[65] Article 206 General Penal Code 1940 (Iceland); Skilbrei and Holmström, above n58.

[66] Article 210 above n65, endorsed by Skilbrei and Holmström, above n58.

[67] Amendment no. 85/2000: see Office of the High Commissioner on Human Rights, *Report of the Working Group on the issue of discrimination against women in law and in practice on its mission to Iceland from 16 to 23 May 2013*, available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-39-Add1_sp.doc.

[68] Julie Bindel, "Iceland: the world's most feminist country", *The Guardian* (online ed, London, 25 March 2010).

[69] *Canada (AG) v Bedford* 2013 SCC 72.

The SCC found that all three provisions of the CCC ran contrary to section seven of the Canadian Charter of Rights and Freedoms (**CCRF**),[70] which provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The SCC's reasoning was that the three sections of the CCC prevented the implementation of safety measures to protect sex workers from violent clients, which interfered with their right to security of the person. The SCC reasoning in *Bedford* is discussed below in more detail with regard to article five of the ECHR.

The SCC allowed the Canadian legislature one year to update the laws, and they did so by inserting section 286 into the CCC. Section 286 outlaws obtaining sexual services for consideration,[71] materially benefitting from sex work,[72] procuring persons for commercial sex purposes[73] and advertising the provision of sexual services.[74] Sex workers themselves are expressly exempt from prosecution.[75]

It is therefore inaccurate to call the Swedish model a 'Nordic model', as it is often known, because the only other Nordic country to actually adhere to it is Norway. Denmark considered adopting the model, but decided not to do so in 2012, following a review which found that "a ban on buying sex could have negative consequences for a number of prostitutes both in terms of worsening economic conditions and in the form of increased stigma".[76] Currently in Denmark, the exchange of sex for money is legal, but it is illegal to live off the proceeds of sex work,[77] to

[70] The Constitution Act 1982 (Canada), Part One s7.
[71] Section 286.1 Criminal Code 1985 (Canada).
[72] Section 286.2.
[73] Section 286.3.
[74] Section 286.4.
[75] Section 286.5.
[76] Danish Ministry of Justice, Criminal Council, "Criminal Council proposes stricter than for sexual offences" (Press Release, 21 November 2012).
[77] Section 206 Danish Penal Code, Skilbrei and Holmström, above n58.

induce another into ‘sexual immorality’ for profit, to keep a brothel,[78] and other associated activities.

[78] Section 206 Danish Penal Code, Skilbrei and Holmström, above n58.

III. Relevant ECHR Rights

The ECHR rights engaged by the criminalisation of the purchase of sex are articles two, three, five, eight, ten, eleven, fourteen, article one of protocol twelve and article one of protocol seven.

A. Article Two – Right to Life

Article two paragraph one of the ECHR provides:[79]

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Article two paragraph two provides for exceptions to paragraph one.[80] The right to life is also protected by article six ICCPR,[81] which Sweden, Norway, Canada, Iceland, and Northern Ireland are party to.

The ECtHR judgment in *Osman v UK*[82] confirms that the state's obligation to protect the right to life extends to an obligation to take preventive measures to protect the lives of citizens. This was followed by the admissibility decision of *Powell v UK*.[83] The ECtHR found that particular case inadmissible on the facts, but stated in the decision that acts and omissions in the field of health care policy could possibly engage governmental responsibility under article two. The ECtHR added that article two can only be invoked if state inaction to protect citizens arises as a consequence of inadequate policy, rather than as the result of decisions or negligence by an individual health care provider.[84]

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[79] ECHR, above n2 article 2.
[80] "Deprivation of life shall not be regarded as inflicted in contravention of this article when it results fromt eh use of force which is no more than absolutely necessary: a. in defence of any person from unlawful violence; b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c. in action lawfully taken for the purpose of quelling a riot or insurrection."
[81] ICCPR, above n8.
[82] *Osman v United Kingdom* (23452/94) [1998] EHRR 101.
[83] *Powell v United Kingdom* (2000) 30 EHRRCD 362.
[84] Above at p379.

The ECtHR in *Cyprus v Turkey* found that "an issue may arise under article two of the Convention where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally".[85] The threshold was not met in that decision because it could not be proved that the Turkish Republic of Northern Cyprus had "deliberately withheld medical treatment from the population concerned or adopted a practice of delaying the processing of requests of patients to receive medical treatment."[86]

In the Canadian decision of *Canada (Attorney General) v PHS Community Services Society*,[87] the SCC found that a government refusal to permit an exemption from drug possession laws at a safe injection site was unconstitutional because of the risk of death and disease to injecting users of illegal drugs.[88] This was contrary to the section seven "right to life, liberty *and* security", but the SCC's express reference to the risk of death as well as the right to security of the person suggests that the right to life (as protected by article two of the ECHR) was engaged.

In support of the refusal decision, the Canadian government argued that the decision was justified under section one CCRF, which provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The government claimed that the purpose of the refusal was to protect public health and safety, but because the goal of protecting public health and safety was not furthered by the decision,[89] the SCC struck the refusal decision down as unconstitutional.

The right to life is relevant to sex workers and their clients in at least two ways. The first is the right to be protected from life-threatening diseases and complications arising from pregnancy.

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[85] *Cyprus v Turkey* (2001) 25781/94 European Court of Human Rights, 10 May 2001 at [219].
[86] Above.
[87] *Canada (Attorney General) v PHS Community Services Society* 2011 SCC 44, [2011] 3 S.C.R.134.
[88] At p139.
[89] At pp186-187.

The second is the sex worker's right to physical safety, which is discussed below in relation to article five of the ECHR.

The Swedish model limits the ability of sex workers and their clients to access preventive health measures and health checks. A client would have to admit to committing a crime in order to seek a sexual health check-up, while a worker is further stigmatised and degraded if they seek assistance from sexual health providers.[90] A reduction in the engagement of sex workers with health services has been observed in Norway, and is thought to be the product of a reticence to engage with "anything or anyone that may give the police a suspicion of sex work".[91]

There is also a drop in willingness to carry and use condoms for two reasons: condoms are often used as evidence of transactional sex,[92] and workers are more likely to engage in unprotected sex out of desperation for work and the inability to report a client for insisting on unprotected sex.[93] This reluctance to carry condoms applies to both the worker and the client.[94] The decision not to carry condoms for fear of detection has been observed in both Sweden and Norway,[95] while a decrease in both the number (and calibre[96]) of clients reduces the ability of sex workers to make safe sex a transactional condition.[97] It has also become more difficult to access condoms in the requisite quantity.[98] Since sex workers require significantly more condoms than the general population, requesting a large quantity puts health professionals on notice of the sex worker's 'illicit' occupation.

[90] Levy, above n47, at p 157 and at p176.
[91] Wendy Lyon, "Client Criminalisation and Sex Worker's Right to Health", (2014) 13 Hibernian Law Journal 58 at p73.
[92] World Health Organisation 2013, *Implementing Comprehensive HIV/STI Programmes with Sex Workers*, p88.
[93] Christchurch School of Medicine, *The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers' Department of Public Health and General Practice*, University of Otago 2007 at p168.
[94] Levy, above n47, at p191.
[95] Lyon, above n91 at p74.
[96] The word 'calibre' is used to reflect that the clients who do still approach sex workers are less likely to be concerned about the consequences of a criminal conviction (i.e. those who already have convictions for violent offending).
[97] World Health Organisation, above n92 at p75.
[98] Levy, above n47 at p162 and Lyon, above n91 at 973.

The increase in stigma and misinformation about sex work that is associated with any criminalisation model also leads to mental health issues.[99] A Canadian study explained that: "The illegalities of the sex trade and its dishonourable public reputation [tend] to negatively affect how workers feel about themselves and what they [do] for a living."[100] There is also a link between low self-esteem and risk taking behaviour such as drug abuse and unsafe sex.[101]

Despite being aware of the impact that stigma has on the psychological well-being of sex workers, the Swedish government applauds these negative and harmful outcomes, because they believe that it creates a disincentive for sex workers to engage in commercial sex. One senior ranking police officer based in Stockholm, Detective Superintendent Jonas Trolle, said: "It should be difficult to be a prostitute in our society – so even though we don't put prostitutes in jail, we make life difficult for them".[102] Another government official, Anna Skarheds, stated publicly that: [103]

> We do not work with harm reduction in Sweden. Because that is not the way Sweden looks upon this. We see it as a ban on prostitution: there should be no prostitution.

As it is also a crime to make a living from the proceeds of sex work, pimps and agents are more likely to be linked to the criminal world, which increases the exposure of sex workers to illegal drugs and violence. Sex workers are actually *more* dependent on pimps than they are under other legislative models because of the reduction in valid agency when it comes to negotiation.[104]

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[99] Lyon, above n91 at p79.

[100] Cecilia Benoit and Alison Millar, "Dispelling Myths and Understanding Realities: Working Conditions, Health Status and Existing Experiences of Sex Workers", 2001 University of Victoria at p70.

[101] Arvin Bhana, Alan J Flisher, Carl Lombard and Lauren G Wild, "Associations among adolescent risk behaviours and self-esteem in six domains", (2004) Vol 45, Issue 8 Journal of Child Psychology and Psychiatry; Irene Flynn, Susan Moore and Doreen Rosenthal, "Adolescent self-efficacy, self-esteem and sexual risk-taking", (1991) Vol 1, Issue 2 Journal of Community and Applied Social Psychology at p77.

[102] Charlotte Ashton, "Could Sweden's prostitution laws work in the UK?", *BBC News* (online ed., 30 September 2010): www.bbc.co.uk/news/world-europe-11437499.

[103] S Thing, P Jakobsson and A Renland, "When Purchase of Sex is a Crime: About new legal measure and its impact on harm reduction among sex workers in Sweden and Norway", Presentation to the International Harm Reduction Conference, Beirut, 5 April 2011 at p3.

[104] Ulf Stridbeck, "Purchasing Sexual Services in Sweden and the Netherlands: Legal Regulation and Experiences – An Abbreviated English Version. A Report by a Working Group on the legal regulation of the purchase of sexual services", 2004 (Justis-of Politidepartment) at p52.

The ISESCR provides for a right to health at article twelve:[105]

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
>
> (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
>
> (b) The improvement of all aspects of environmental and industrial hygiene;
>
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
>
> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

General comment 14 to article 12 ISESCR provides that this includes a core obligation "to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable and marginalised groups".[106]

Healthcare and safety measures are systemically denied to sex workers and their clients. The denial of access to condoms and sexual health check-ups to parties to commercial sex, but not the population at general, disproportionately exposes the sex worker and her client to life-threatening illnesses and potential pregnancy complications. The sex worker is also unable to lawfully hire staff or work with other workers, which increases their vulnerability and risk of exposure to violence (discussed in more detail below in relation to article five). Most forms of work carry 'occupational hazards' which employees and contractors can take measures to protect themselves against, but the sex worker is denied the opportunity to protect themselves against such risks at the expense of their health and safety. The above quotes by government officials demonstrate that the Swedish state is aware of the risks to health that the Swedish model creates, but that the state considers the risks justified by its end goal.

[105] ISESCR, above n7.

[106] Committee on Economic, Social and Cultural Rights, *General Comment No. 14, the right to the highest attainable standard of health* (UN document E/C.12/2000/4, 11 August 2000) at 43(a).

The primary distinction between the jurisprudence of the ECtHR and the Canadian decisions is that the ECtHR have yet to consider a state's obligations where an individual has *chosen* to expose themselves to a harmful practice, while the Canadian decisions have confirmed that the state has certain obligations to protect the right to life of their citizens despite a 'choice' being made to engage in commercial sex or illicit drug use. Based on this distinction, a Swedish-model state may argue that the risks that sex workers and their clients expose themselves to are a consequence of their 'choice' to engage in harmful and risky practices rather than the state's omission to mitigate those risks, and that because the ECtHR is not bound by the decisions of domestic constitutional courts they should not look to them for guidance.

The argument that sex workers 'choose' to jeopardise their right to life is inconsistent with the radical feminist claim that sex workers are victims in need of rescuing and are incapable of making their own decisions and choices, which lies at the heart of Swedish model rhetoric. It is contradictory for the state to say that sex workers lack the requisite agency to make a free decision to enter the commercial sex industry, but that they have sufficient agency to make a conscious decision to expose themselves to the risks associated with the industry.

The state's adoption of a policy which denies a vulnerable 'minority' group of the population access to sexual healthcare, but not the general population, is an interference with the right to life of the minority group.

B. Article Three – Prohibition of Torture and Inhuman or Degrading Treatment

Article three of the ECHR provides:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Swedish model states also bound by article seven of the ICCPR,[107] which mirrors article three.[108]

[107] ICCPR, above n8.
[108] Article seven ICCPR also provides that "no one shall be subjected without his free consent to medical or scientific experimentation".

The ECtHR has confirmed that article three of the ECHR prohibits inhuman or degrading treatment regardless of whether or not it occurs in the context of state detention. A breach of article three was found in *Selcuk and Asker v Turkey* where state agents had destroyed the applicants' homes and had acted in "utter disregard for [the applicants'] safety and welfare, depriving them of most of their personal belongings and leaving them without shelter and assistance".[109]

An earlier decision which considered article three in the context of state detention was *Ireland v UK*.[110] In *Ireland v UK* the ECtHR addressed, amongst other matters, the employment of the 'five techniques' by the British government when interrogating suspected terrorists. The five techniques involved wall standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink.[111] The ECtHR said that treatment would be deemed degrading where it aroused in its victims "feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[112] Where there is not an 'intention to hurt or degrade',[113] the ECtHR may be reluctant to find a breach of article three. The ECtHR also observed that:[114]

> ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim.

Although the *Ireland v UK* decision involved extreme physical torture over a relatively short period of time[115] as opposed to less severe derogatory treatment over a longer period of time, the ECtHR found a breach of article three on the basis of the *objective* of the treatment (to hurt or degrade), rather than the *nature* of the acts themselves.

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[109] *Selcuk and Asker v Turkey* [1997] 796/998-999 European Court of Human Rights 4 April 1998 at [74].
[110] *Ireland v United Kingdom*, (5310/71) [1978] ECHR 1 (18 January 1978).
[111] At [96]
[112] At [167].
[113] At [181].
[114] At [76].
[115] At [162].

The case of Petite Jasmine highlights succinctly and sadly the degrading treatment that Swedish model authorities subject sex workers to. Swedish sex worker Eva Marree Smith Kullander, better known by her working name 'Petite Jasmine', had two children to her abusive ex-partner. Following their separation, she retained day-to-day care of the children. She then advised social services that she was a sex worker, and because she would not admit to social services that she was thereby subjecting herself to 'self-harm', day-to-day care was transferred to her violent ex-partner, while Petite Jasmine was denied any access whatsoever. During Petite Jasmine's legal battle to secure access, her ex-partner murdered her.[116]

Swedish police harass sex workers by filming sexual encounters, announcing their names from patrol cars and making derogatory comments about them.[117] They have also confirmed that the intention of disincentivising measures such as this is to enhance stigma so as to deter workers from the industry.[118] In summary, they have confirmed that they *intend* to subject sex workers to inhuman and/or degrading treatment. The end goal of discouraging sex work may be well-intentioned, but the use of humiliation and the incitement of "feelings of fear, anguish and inferiority" to achieve this end goal might amount to an interference with the rights protected by article three.

The ECtHR is also required to consider whether the treatment meets a "minimum level of severity". This assessment is based on a variety of factors. Based on the anecdotal information and research discussed above, the ECtHR would not be able to find that the Swedish model interferes with the article three rights of *all* sex workers, but may find a breach of article three where an individual sex worker has suffered "severe physical or mental anguish" as the result of state treatment resulting from the Swedish model. It would be necessary to review the facts on a case-by-case basis.

[116] Oliver Gee, "Selling Sex doesn't make you an unfit parent", (online ed., thelocal.se, 23 July 2013); Levy, above n47 at pp198-199.
[117] Levy, above n47 at pp214-215. Derogatory comments include "you are used to guys looking at you [undressed]", "every girl who is working like that is this. They are shit" and "you're just a fucking whore".
[118] Ashton, above n102; S Thing, P Jakobsson and A Renland, above n103.

The ECtHR has also held that article three will be breached if a state deports a person to a country where there is a "real and immediate risk to the life of an identified individual",[119] or if "substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country".[120]

In Sweden, selling sex is a valid reason for deportation of non-residents.[121] While there is no known instance of Sweden deporting a sex worker to a country where their life is at risk (for example, to a country where the law provides that the sex worker must be executed as an adulterer), the risk is real as long as the deportation policy remains in place.

C. Article Five - Right to Liberty and Security of the Person

Article five, paragraph one of the ECHR provides:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> a. the lawful detention of a person after conviction by a competent court;
>
> b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

[119] *Kaya v Turkey* [1998] IIHRL 12 (19 February 1998) at [86].
[120] *Soering v. United Kingdom* 161 ECHR (ser. A) (1989); *Cruz Varas v. Sweden* 201 ECHR (ser. A) (1991).
[121] Niina Vuolajärvi, "Precarious Intimacies: The European Border Regime and Migrant Sex Work", *Viewpoint Magazine* (online ed., 31 October 2015).

> f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Similar provisions are contained in article nine of the ICCPR.[122]

Many arguments which were relevant to the *Bedford* decision are relevant to article five concerns, because arguments in favour of the criminalisation of activities associated with the sale of sex were rejected in *Bedford* due to their impact on the security of the person.

Bedford concerned an application by three sex workers to strike down sections 210, 212(1)(j) and 213(1)(c) of the CCC. Section 210 made it an offence to keep or be in a 'bawdy-house', section 212(1)(j) prohibited living on the avails of prostitution and section 213(1)(c) outlawed communicating in public for the purposes of prostitution. The cumulative effect of these provisions was to drive sex work onto the streets.[123] Studies have consistently shown that street-based sex work is more dangerous than indoors-based sex work due to the increased vulnerability and risk of violence.[124] These studies were supported by the evidence in *Bedford*.[125]

In upholding the decision of the Ontario Court of Appeal, the SCC noted that:[126]

> The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks.

The SCC also endorsed the application judge's finding that "the safest form of prostitution is working independently from a fixed location".[127]

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[122] ICCPR, above n8.
[123] *Bedford* at [29].
[124] Lynzi Armstrong, Managing Risks of Violence in Decriminalised Street Based Sex Work: A Feminist (Sex Worker Rights) Perspective, Victoria University of Wellington 2011 at pp33-36.
[125] *Bedford* at [64] and [69].
[126] At [60].
[127] At [63].

Working independently from a fixed location is not an opportunity afforded to sex workers under the Swedish model. Most asymmetric criminalisation laws have some form of prohibition on living on the profits of sex work, which effectively bans sex workers from working from rented premises or using their earnings to support their partners and children. The ban on brothels impacts sex worker safety by making it practically impossible for sex workers to work from shared premises. The Swedish model also prevents sex workers from hiring security guards or from 'screening' clients for warning signs of potential danger.[128] Sex workers are also pushed to work from isolated and dangerous places to avoid police harassment.[129]

Clients are often key informants about suspected abusive practices or trafficking in states where sex work is decriminalised. Clients are often the only 'outsiders' that victims of trafficking interact with. Under the Swedish model, clients are unlikely to self-incriminate by reporting suspicious commercial sex situations. Limiting the ability of these witnesses to come forward with crucial evidence makes it easier, not harder, for exploitative practices to occur.

The arguments that persuaded the SCC in *Bedford* therefore apply in almost equal measure to personal security under the Swedish model. This is ironic, because the Canadian legislature's response to the *Bedford* decision was to amend the CCC to adopt the Swedish model.[130] A fresh constitutional challenge is thus inevitable.[131]

D. Article Eight - Right to Respect for Private and Family Life

Article eight of the ECHR provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime,

[128] Lyon, above n91, at p67.
[129] Lyon, above n91, at pp65-66.
[130] See above at p12.
[131] Ella Bedard, "The Failures of Canada's New Sex Work Legislation", *Rank and File* (online ed., 7 April 2015).

> for the protection of health or morals, or for the protection of the rights and freedoms of others.

The right to privacy is also protected by article 17 ICCPR.[132]

The starting point for ECtHR analysis of the right to a private life is that it is incapable of exhaustive definition.[133]

The ECtHR decisions of *Dudgeon v UK*[134] and *Norris v Ireland*[135] considered the state's right to interfere with the sexual activities of consenting adults where such legislative interference was based on moral concerns.

The *Dudgeon* decision concerned a 'consciously homosexual' man who lived in Northern Ireland where the law prohibited 'buggery' and 'sexual indecency' between males. Homosexual practices were no longer criminal offences in the rest of the UK following recommendations made by the Wolfenden report,[136] but remained illegal in the more morally conservative Northern Ireland. Prosecutions were rare in practice,[137] but the existence of the law made investigations into the private lives of suspected homosexuals a live concern. Mr Dudgeon had his private diaries which detailed homosexual activities seized by police authorities, who then subjected him to questioning about his sex life for four and a half hours.[138] Although no prosecution ensued, the law had allowed the police to invade Mr Dudgeon's privacy to a considerable extent.

The ECtHR found that the investigation, despite the absence of prosecution, had directly affected the applicant's enjoyment of his right to respect for his private life,[139] and that the state would need "particularly serious reasons" to interfere with this "most intimate aspect of private life".[140]

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[132] ICCPR above n8.
[133] *Costello-Robert v. United Kingdom* (1993) 19 EHRR 112, 25 March 1993.
[134] *Dudgeon v United Kingdom* (1981) 4 EHRR 149, 22 October 1981.
[135] *Norris v Ireland*, Application no. 10581/83 ECHR, 26 October 1988.
[136] *Dudgeon*, above n125, at [17].
[137] At p29, Dissenting Opinion of Judge Matscher.
[138] At [33].
[139] At [41].
[140] At [52].

The fact that moral decline had not ensued from the state's practice of non-prosecution supported the inference that the law was not necessary to enforce moral standards.[141]

Norris v Ireland also concerned a homosexual man who, while not subjected to a direct state invasion into his privacy, endured stigma and discrimination as a consequence of the Republic of Ireland's laws which criminalised certain homosexual activities. He had been "restricted in or thwarted from engaging in activities which heterosexuals take for granted as aspects of the necessary expression of their human personality and as ordinary incidents of their citizenship".[142] The ECtHR applied *Dudgeon* to find that even though there had not been a state interference with Mr Norris' right to a private life, the difficulties he suffered as a consequence of being a homosexual in a state where certain homosexual activities were forbidden meant that his right to a private life under article eight had been unjustifiably interfered with. *Dudgeon* and *Norris* have since been upheld by *Modinos v Cyprus*,[143] which also concerned a criminal ban on homosexuality which did not result in prosecution, but did cause the applicants "great strain and apprehension".[144] These ECtHR decisions have been paraphrased and summarised as: "when sex is consensual, private and between adults, criminalisation thereof amounts to a breach of Article 8 of the European Convention: the right to a private life".[145]

In *Stübing v Germany*, the ECtHR considered the penalisation of sexual intercourse between two siblings who had four children as the result of a sexual relationship.[146] The applicant was prosecuted under section 173 of the German Criminal Code, which prohibits sexual intercourse between siblings. The law did not forbid all sexual activity between consanguine relatives, only sexual intercourse.

The ECtHR found in support of criminal liability, despite an interference with the rights protected by article eight, because the criminalisation of sexual intercourse between siblings was

[141] At [60].
[142] *Norris* At [9(vii)].
[143] *Modinos v Cyprus*, 7/1992/352/426 ECHR, 23 March 1993.
[144] At [7].
[145] FSE (Freddie) Arps and Mikhail Golichenko, "Sex Workers, Unite! Litigating for Sex Workers' Freedom of Association in Russia", Health and Human Rights 2014, 16/2, 8 December 2014.
[146] *Stübing v Germany* (no. 43547/08),12 April 2012.

necessary for "a combination of objectives, including the protection of the family, self-determination and public health".[147] The ECtHR agreed with the German Federal Constitutional Court "that sexual relationships between siblings could seriously damage family structures and, as a consequence, society as a whole".[148] The ECtHR did not emphasise the risk of genetic defects, despite the fact that three of the four children in *Stübing* were disabled.

Another ECtHR decision which considered the privacy of consensual, but harmful, sexual conduct is *Laskey, Jaggard & Brown v UK*.[149] The applicants were three homosexual men who had filmed themselves engaging in sado-machistic sexual practices with up to 44 other men. Some of the acts amounted to 'torture'.[150] Police found the video footage and charged the applicants with a variety of assault and wounding offences. Consent was not available as a defence. The ECtHR upheld "unquestionably" the state's right to regulate "activities which involve the infliction of physical harm", whether in the "course of sexual conduct or otherwise",[151] because of the importance of public health considerations and the requisite deterrent effect of the criminal law's role in preventing serious physical harm. The ECtHR also questioned the suitability of a privacy claim where a large number of people were present, and where video footage had been made and distributed.[152]

Applying the decisions of *Dudgeon* and *Norris* to factual scenarios which arise under the Swedish model, there appears very much to be a prima facie breach of privacy under article eight. This is because the law prohibits sexual activity between two consenting adults in a private setting where the public is not affected. *Stübing* can be distinguished because sexual intercourse between siblings has serious and harmful consequences for third parties and societal structure. *Laskey Jaggard & Brown* can be distinguished for two reasons. The first is that the risk of physical harm, the importance of deterrence and public health considerations outweighed the right of the individuals to personal autonomy. The second is because the right to privacy was

[147] At [63].
[148] Above.
[149] *Laskey, Jaggard and Brown v. The United Kingdom,* 109/1995/615/703 - 705, Council of Europe: ECHR 19 February 1997.
[150] At [40].
[151] At [43].
[152] At [36].

somewhat limited by the number of participants and the distribution of the video footage . The "particularly serious reasons" needed to justifiably interfere with the right to privacy are only present in commercial sex when the transaction involves exploitation, underage parties, human trafficking or violence.

However the Constitutional Court of South Africa (**CCSA**) considered the same argument in *Jordan*[153] and concluded that criminalisation of the sale of sex did not infringe on a sex worker's right to privacy. The parties in *Jordan* challenged the South African law that criminalised the sale of sex on a variety of grounds, including a claim that the law breached section 13 of the Interim Constitution of the Republic of South Africa (**ICRSA**).

Section 13 provided: [154]

> Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

The judgment was split into two opinions: Ngcobo J; and O'Regan and Sachs JJ. Ngcobo J distinguished the right of homosexuals to privacy from the right of sex workers to privacy because laws which criminalised homosexual practices had:[155]

> intruded into "the sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community" and in doing so affected the sexuality of gay people "at the core of the area of private intimacy.

He considered the difficulty 'compounded' by the fact that the prostitute invites the public generally to come and engage in unlawful conduct in private.[156]

[153] *Jordan v. S.* above n9.
[154] The right to privacy is now governed by section 14 Constitution of the Republic of South Africa 2005.
[155] *Jordan* at [27].
[156] At [28].

However, when quoting the relevant decision on homosexuality,[157] Ngcobo J left the quote incomplete. The full quote reads:[158]

> Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. **If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.**

In the subsequent judgment of O'Regan and Sachs JJ, the court referred to the state's argument that "the prostitute makes her sexual services available to all and sundry for reward, depriving the sexual act of its intimate and private character",[159] and found, in partial agreement with the state, that:[160]

> Commercial sex involves the most intimate of activity taking place in the most impersonal and public of realms, the market place; it is simultaneously all about sex and all about money.

This determination was reached with recognition of the USSC decision in *Roberts v US Jaycees*, which held that the more public an activity is, the lesser the 'zone' of privacy.[161]

This interpretation of the right to privacy essentially assumes that the less discerning a person is with regard to their sexual partner or partners of choice, the lesser their claim to a right to privacy. However neither the constitutional case law in South Africa nor the jurisprudence of the ECtHR provides for a limit on the number of sexual partners or encounters that a heterosexual, homosexual or LGBTI[162] person may have before their right to privacy starts to dissipate.

Commercial sex does not occur in the most "impersonal and public of realms", it is merely the advertising of commercial sexual services which takes place publicly. This is no different to the promiscuous adult who advertises in newspapers and on dating websites for casual sex outside of relationships. The activity itself usually occurs behind a closed door, and indeed if it did take

[157] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6.
[158] At [32].
[159] At [78].
[160] At [81].
[161] *Roberts v US Jaycees* 468 US 609 (1984). The decision did not concern commercial sex.
[162] Lesbian, Gay, Bisexual, Transgender and Intersex.

place publicly the parties would probably find themselves at risk of prosecution for public indecency. An argument that a sex worker waives their right to privacy is much more apt when applied to erotic film actors, where the possibility of dissemination of the sexual activity involves a much greater compromise of privacy than commercial sex 'behind closed doors'.

To argue that such a distinction exists between commercial and non-commercial sex also fails to consider that although sex workers may be less discerning than the rest of the population when choosing a sexual partner, they still have their right to say no enshrined by laws prohibiting sexual violation. To suggest that a sex worker loses her right to privacy by seeking payment is akin to suggesting that a sex worker loses her right to withdraw consent by seeking payment. Imposing conditions on consensual sexual encounters between adults, whether those conditions are 'you must be a cisgender male', 'you must be of Asian ethnicity' or 'you must pay a sum of money' should not be a concern of the law. The law's interference with the right to privacy should focus on the prevention of harm and other legitimate public interest concerns.

O'Regan and Sachs JJ add that "by making her sexual services available for hire to strangers in the market place, the sex worker empties the act of much of its private and intimate character".[163] This, again, reads a distinction into decisions about non-commercial sex that there is no jurisprudential basis for: that a promiscuous person who is open to having sex with a wide range of persons does so at the expense of their privacy. There is nothing in the jurisprudence of either the CCSA or the ECtHR that draws such a distinction. The ECtHR's comments in *Laskey, Jaggard and Brown* suggest that a person's right to privacy might be dissipated if their sexual activity involves a considerable number of parties together with filming and dissemination of footage, but most direct sex work (and the realm where the right to privacy can most strongly be argued) is with regard to commercial sexual activity between two parties that is not filmed.

Therefore any such arguments posited in the ECtHR should be rejected as making an unnecessary moral judgment on sexual practices which have no impact on other members of the public, and pursue no discernible legitimate aim. Although the ECtHR gives a 'wide margin' to

[163] At [83].

states to legislate on moral matters, it also requires states to have "particularly serious reasons" to interfere with the right to privacy.

It is worth noting that O'Regan and Sachs JJ gave considerable weight to the views of the South African Commission for Gender Equality (**CGE**),[164] which currently favours the New Zealand model,[165] and who submitted in *Jordan* that *any* "criminalisation of commercial sex exacerbates the links between prostitution and crime and disease".[166] The CGE, in conjunction with the other appellants, also submitted that because sex work is "a so-called victimless crime, evidence can usually only be obtained by egregious forms of entrapment, which fosters corruption".[167] The wording of these arguments suggests that they can be applied to any criminalisation model.

As for the right to a family life, sex workers in Sweden risk losing custody of their children,[168] while workers in both Sweden[169] and Norway face eviction from their homes.[170] As recently as 2014, Norwegian police enforced the penal code provision prohibiting tenancies to sex workers in "Operation Homeless", deterring sex workers from reporting work-related crimes to avoid eviction.[171]

The Swedish model cannot be seen as consistent with article eight due to the invasion of privacy, the right to a private life and the right to a family life.

E. Article 10 – Freedom of Expression

Article 10 of the ECHR provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not

[164] At [70] and at [88],
[165] Above n21.
[166] *Jordan* at [87].
[167] Above.
[168] Levy, above n47 at p198; Oliver Gee, above n116.
[169] Levy, above n47 at p95.
[170] This is also contradictory to the right to adequate housing protected by Article 11 of the ISESCR (above n7).
[171] Lyon, above n91 at p64.

> prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Similar rights are protected by article 19 ICCPR.[172]

Sex workers have their right to freedom of expression limited "for the protection of morals" and even in states where sex work is decriminalised, freedom of expression is limited to certain modes of advertising.

It is widely accepted that it is not appropriate for people to access sexually explicit material or engage in certain sexual practices until they reach a certain point of maturity, and for this reason it is appropriate that sex workers' freedom of expression is limited to certain fora. For example in New Zealand, where sex work is completely decriminalised, local governments are permitted to pass bylaws limiting the public visibility of commercial sex even where such bylaws are inconsistent with the Bill of Rights Act 1990.[173] while advertisement of commercial sexual services is limited to the classified advertisements section of the newspaper.[174]

The appropriate limits on a state's interference with the right to freedom of expression in relation to sexually explicit material are discussed further below in relation to *Handyside*.[175]

[172] ICCPR. Above n8.
[173] Section 13(2) Prostitution Reform Act 2003.
[174] Section 11.
[175] *Handyside v United Kingdom* (5493/72) [1976] ECHR 5 (7 December 1976).

F. Article 11 – Freedom of Assembly and Association

Article 11 of the ECHR provides:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

A similar right is endorsed by article 22 ICCPR.[176]

1. Brothel-keeping

Swedish model legislation prohibits the letting of premises for the purposes of commercial sex,[177] living on the proceeds of prostitution practiced by others[178] and materially benefiting from commercial sex.[179] This creates a de facto ban on brothel-keeping, which limits the rights of sex workers to associate with one another in breach of their article 11 rights. It also makes their work more dangerous, as discussed above, by encouraging them to work alone and discouraging them from engaging with the police.

2. Trade Unions

The ECHR does not recognise a right to a livelihood or a right to economic activity, but it does recognise the right of those engaged in legitimate economic activities to form trade unions. The status of sex work as a legitimate economic activity was considered by the European Court of Justice (**ECJ**) in *Aldona Malgorzata Jany v Staatssecretaris van Justitie*,[180] which found that sex work is an economic activity despite arguments that it could not be regarded as such because of

[176] ICCPR, above n8.
[177] Section 12 Penal Code1962, as amended 1999 (Sweden); Section 202 General Civil Penal Code Act of 22 May 1902 (Norway).
[178] Article 206 General Penal Code 1940 (Iceland).
[179] Section 286.2 Criminal Code 1985 (Canada).
[180] *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* Case C-268/99, 20 November 2001.

its illegal nature, issues of public morality, and difficulties in ascertaining whether or not sex workers were able to act freely.[181] The ECJ found that these issues did not alter the fact that sex work was a provision of services in exchange for remuneration, meaning that it was an economic activity like any other.[182] Whether or not the economic activity is lawful is a matter for individual states.[183] If an individual member state does not make the sale of sex illegal, then sex work should be viewed as a legitimate economic activity.

Although selling sex is technically a legal economic activity in Swedish model states, because the sale is not prohibited by law, it is not recognised as work. Therefore sex workers are unable to form trade unions or collectives for the purposes of advocacy, negotiation, rights advancement and government liaison.

All Swedish model states are parties to the ICESCR, which recognises a right to work[184] and a right to just and favourable conditions of work.[185]

G. Article 14- Prohibition of Discrimination and Article 1 Protocol 12- General Prohibition of Discrimination

Article 14 provides:

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

Article 1, Protocol 12 provides:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

[181] At [51].
[182] At [49].
[183] At [56].
[184] Article 6 ISESCR, above n7
[185] Article 7 ISESCR, above n7.

Article 26 ICCPR protects all persons from discrimination on the same grounds.[186]

The laws in Sweden, Norway, Iceland, Canada and Northern Ireland are all couched in gender-neutral terms, yet they all claim that the law is necessary to enhance gender equality.[187] It is questionable how a law which implies that women have less agency than men does this. The law implies that women lack the ability to make voluntary decisions about their sexuality to the same extent as children do by portraying them as helpless victims in need of rescuing.

Little to no attention is given to the fact that men frequently sell sex: both to heterosexual women and homosexual men. While it is true that the *majority* of commercial transactions involve a female seller and a male purchaser, by framing the law in gender neutral terms and by making public statements confirming that the purpose of the law is to eradicate sex work altogether, the relevant legislatures interfere with the right of *men* to sell sex, for the purpose of protecting *women* who sell sex. It is also not uncommon for a transgender person to either buy or sell sex. No discourse exists as to their position under the Swedish model.

Even if gender equality was found to be so noble an aim as to justify the law, the wording would surely have to be altered to provide that men, and to some extent transsexuals, could still sell sex.

Another group who are unfairly impacted by the removal of all access to commercial sex are disabled people. Disabled people have greater difficulty than their able-bodied peers in accessing an active social life or in forming romantic relationships, which makes it more difficult for them to have sexual encounters.[188] But just like sex workers and homosexuals, they have a right to 'express their sexuality … consensually and without harming one

[186] ICCPR, above n8.
[187] Dodillet and Östergren, above n59.
[188] Patrick Smith, British Prostitutes are Helping Disabled People Have Sex, *Vice Magazine*, (online ed., 16 February 2015).

another'.[189] The importance of this right is reflected in the decisions of UK local body governments to fund sex workers for disabled people where considered necessary for their "mental and physical well-being".[190]

Yet the Swedish model denies disabled people an opportunity to express their sexuality by forbidding them from offering compensation in exchange for sexual services. The approach unfairly discriminates against males, transsexuals, homosexuals and disabled persons under the guise of protecting women, but in the absence of a plausible link between the resultant discrimination and the legitimate goal pursued.

H. Protocol Seven, Article One – Procedural Safeguards Relating to the Expulsion of Aliens

Protocol seven, article one of the ECHR provides:

> 1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> (a) to submit reasons against his expulsion,
>
> (b) to have his case reviewed, and
>
> (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1.(a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security

This right is also upheld by article 13 ICCPR.[191]

In Sweden, selling sex is a valid reason for deportation of non-residents.[192] While a Swedish model government may be able to argue that a sex worker has acted inconsistently with 'the interests of public order' on a fact-specific case, it is hard to see how the private, consensual and

[189] See p30 (*Jordan*, above n9).
[190] Laura Donnelly, Michael Howie and Ben Leach, "Councils Pay for Prostitutes for the Disabled", *The Telegraph* (online ed., 14 August 2010).
[191] ICCPR above n8.
[192] Niina Vuolajärvi, *Precarious Intimacies: The European Border Regime and Migrant Sex Work*, (online ed., Viewpoint magazine, 31 October 2015).

harmless act of commercial sex in and of itself is contradictory to public order, and is therefore an inappropriate interference with a sex worker's right not to be expelled from a state in which they are lawfully present. Even where there are public order concerns, it is an especially disproportionate rights interference where children are required to leave with their sex worker parent.

This policy also means that migrant victims of trafficking are more likely than other sex workers to be deported, and are therefore limited in their ability to act as witnesses in trafficking prosecutions. This makes trafficking harder to detect and so it is further entrenched, rather than prevented, by the Swedish model.

IV. Margin of Appreciation

A. The European Court of Human Rights

Articles eight, ten and eleven of the ECHR (above) provide for the limitation of their prescribed rights where "necessary in a democratic society". It has been suggested that the phrase "necessary in a democratic society" was included in response to the threat of communism from Stalinist Russia.[193]

The ECtHR first considered the extent to which the phrase applied in the decision *Handyside v UK*.[194] Mr Handyside was the proprietor of 'Stage 1' publishers and had bought the British rights to the controversial "The Little Red Schoolbook". The Little Red Schoolbook made extensive references to sex and drugs, and its target audience was school-age young persons.

After extensive distribution and promotion of the book, copies of the book and associated promotional materials were seized and Handyside was prosecuted for possessing obscene books for publication for gain. He was found guilty and an appeal against conviction was dismissed by UK appeal courts.

The ECtHR confirmed that Mr Handyside's right to freedom of expression had been breached, but that the UK was entitled to do so as the measure had been necessary for the protection of morals. The ECtHR was not actually making an analysis as to whether the measure *was necessary* for the protection of morals, but rather was extending an allowance to the state to make their own decision as to whether or not the measure was necessary. The freshly-coined margin of appreciation was described as going "hand in hand" with a European supervision.[195]

[193] Clare Ovey and Robin C.A. White, *The European Convention on Human Rights*, 5th ed, Oxford University Press 2010 pp1 to 3.
[194] *Handyside v United Kingdom* (5493/72) [1976] ECHR 5 (7 December 1976).
[195] At [49].

The test as to whether or not the ECtHR should intervene where a right is subject to limits as necessary in a free and democratic society was outlined as follows:

- Has the right been interfered with?[196]
- Is that interference prescribed by law?[197]
- Does the interference have a legitimate purpose?[198]
- Is that law "necessary" to secure its aim?[199]
- Is interfering with the applicant's right "necessary" to secure that aim?[200]

The above analyses have established that in the case of Sweden, Norway, Iceland and Northern Ireland, the first two limbs of the above test can be answered in the affirmative. The purpose of the Swedish model is to reduce gender inequality, violence against women, and human trafficking for sexual purposes. These aims are all consistent with international human rights treaties[201] and so can be accepted as 'legitimate purposes'.

The ECtHR will then turn to consider if the Swedish model is 'necessary' to secure its legislative aims. The scholar Moller claims that this can be done by considering if there is a 'less obtrusive yet equally effective alternative'.[202]

Anti-trafficking laws and laws which prohibit all violence, with especially severe penalties where violence is inflicted by men against women, are less obtrusive yet equally effective alternatives to effecting the aims of reducing human trafficking and reducing violence against women. It can therefore be concluded that 'less obtrusive yet equally effective alternatives' exist.

This leaves the ECtHR to consider whether the Swedish model is necessary to combat gender inequality. It cannot be considered necessary where the seller of commercial sex is a male or a

[196] At [43].
[197] At [44].
[198] At [52].
[199] At [45]-[46] and [53].
[200] At [47].
[201] UDHR, above n22; Convention on the Elimination of All Forms of Discrimination against Women, GA Res 34/180, 34 UN GAOR Supp. (No. 46) 1t 193, UN Doc A/34/45, entered into force 3 September 1981; UN General Assembly, United Nations Convention on Transnational Organised Crime: resolution/adopted by the General Assembly , 8 January 2001, A/RES/55/25.
[202] Kai Möller, *Proportionality: challenging the critics*, (2012) 8 International Journal of Constitutional Law 709-731.

transsexual, and so the law as it discriminates against men and transsexuals who sell sex cannot survive the fourth limb of the proportionality test. The law would therefore have to be amended and couched in gender-specific terms before the fifth limb of the proportionality test could be considered.

The ECtHR would then consider if the law was necessary to interfere with a female sex worker's right to privacy, right to a family life, right to freedom of expression, right to association and right not to be expelled in order to achieve gender equality. This requires evidence that the Swedish model furthers the attainment of gender equality, which leads to the consideration of: how can gender equality be measured, and how can the results be linked to commercial sex? Is gender equality stronger in Sweden, under the Swedish model, or in New Zealand, under the New Zealand model? Is the stigma and discrimination suffered by sex workers a consequence of their gender, or the asymmetric criminalisation of their occupation? Or both? Or neither? An accepted methodology for answering these types of questions has yet to be developed.

The ECtHR process will allow the Swedish government a 'margin of appreciation' to determine such matters for itself, as in *Handyside*. The ECtHR has confirmed that the margin will be wider when the law concerns moral matters, but that the margin will "above all" be used "so as to afford better protection to others".[203] Relevant to this decision will be the "nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned".[204] *Handyside* can be applied to conclude that Swedish model states will be allowed the margin of appreciation with regards to article 10 breaches, because that case also concerned the dissemination of sexually explicit material.[205]

Since the ECtHR cases discussed above were decided, ECHR parties have signed two declarations which have widened the margin of appreciation. The first is the Interlaken Declaration on subsidiarity,[206] which reinforces that state parties are primarily responsible for

[203] *Dudgeon* at [52], *Norris* at [43].
[204] *Laskey, Jaggard and Brown v UK* at concurring opinion of Judge Pettiti.
[205] A fresh challenged might be considered with regard to Iceland's ban on pornography in lift of the fact that *Caliornia v Freeman* was decided subsequent to *Handyside*, although the ECtHR is not bound by the USSC.
[206] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010.

enforcing ECHR obligations. This was followed by the Brighton Declaration, [207] which encouraged stronger mechanisms for ECHR enforcement at a national level. These declarations further limit the ECtHR's ability to provide redress for parties affected by the Swedish model because they widen the margin of appreciation.

B. Proportionality in Other Jurisdictions

Other jurisdictions can provide the ECtHR with useful guidance on balancing individual rights with legislative goals.

Shortly after the CCRF entered into force, the SCC considered proportionality in the decision of *R v Oakes*.[208] The SCC developed a test to be applied when interpreting section one CCRF – the limitations clause.[209] The test in *Oakes* considers:

1. Does the law pursue: "an objective related to concerns which are pressing and substantial in a free and democratic society"?[210]

If the answer is yes, then the state must demonstrate that "the means chosen are reasonably and demonstrably justified".[211] This is determined by enquiring: [212]

2. Are the measures "rationally connected" to the objective – they must not be "arbitrary, unfair or based on irrational considerations";
3. The measures must impair "as little as possible" on the right or freedom in question; and
4. There must be proportionality between the objectives and effects of the measure/s.

The SCC does not allow the Canadian legislature the wide margin of appreciation that the ECtHR allows when considering the fourth limb.

[207] High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 19 April 2012.
[208] *R v Oakes* [1986] 1.S.C.R. 103
[209] See above p15.
[210] At [73]
[211] At [77].
[212] At [70].

The CCSA also asks the South African legislative body for a stronger rationale, or 'rational connection', when impeding on constitutional rights. The CCSA held in *S v Makwanyane* that:[213]

> [T]here is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

C. Proportionality and the Swedish Model

There is limited data in support of the Swedish model, and the data that exists is faulty. One report commissioned by the Swedish government claimed that both the number of men who purchased sex and the number of sex workers dropped between 1996 and 2008. However the surveys of people who might have purchased sex only covered 2,810 people (0.03% of the total population) and 1,138 people (0.01% of the total population) respectively, and ignored the fact that the maximum possible drop in the number of males over 18 who had purchased sex would be the 1% of the male population who had died, turned 18 or migrated to Sweden in that 12 year period.[214] The claimed 50% drop in street sex workers does not take into account the increase in cell-phone and internet use, nor does the report explain how the street worker data was captured (so it is unknown how those responsible for the survey determined that a person on the street was a sex worker).[215]

The lack of data on the link between commercial sex and gender inequality would mean that the Swedish model would not pass constitutional muster in Canada or South Africa. Articles two, three and five of the ECHR do not provide for limits 'where necessary in a democratic society',

[213] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) at [104].
[214] New Zealand Prostitutes Collective, above n60 at [14].
[215] Dodillet and Östergren, above n59.

and so there will therefore be no ‘defence’ available to the state where those articles have been breached.

V. Alternative legal approaches

A. Prohibitionism

Prohibitionism only exists in states where extremist religious and political views hold currency over human rights. In some prohibitionist countries, such as Saudi Arabia,[216] prostitution together with associated crimes such as adultery can carry the death penalty.

Laws and penalties which are this extreme breach the rights of sex workers to a much greater extent than any other model, interfering excessively with the right to life, the right not to be subjected to torture or to inhuman or degrading punishment, the right to security, the right to privacy, the right to freedom of expression and the right not to be subjected to discrimination.

B. Abolitionism

Abolitionism is the criminalisation of activities with sex work, such as soliciting. Abolitionist approaches have been held to be inconsistent with constitutional human rights in South Africa and Canada, as seen by the decisions in *Jordan* and *Bedford*, as they tend to be tantamount to a de facto criminalisation of the sale of sex.

C. Decriminalisation

This is the approach followed by New Zealand and New South Wales, with a decriminalisation approach currently proposed for South Australia.[217] Decriminalisation has been lauded as the approach most consistent with sex worker rights,[218] because it recognises sex work as subject to labour laws, giving sex workers the most access to legal redress and remedy if they are subjected to exploitation or other harmful practices commonly associated with sex work.

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[216] Syed Saleem Shahzad, "Brothels and Bombs in Saudi Arabia", Asia Times (online ed., 9 December 2003).
[217] Statutes Amendment (Decriminalisation of Sex Work) Bill 2015 (SA), above n11.
[218] Amnesty International, above n12. Murphy cited the World Health Organisation, UNAIDS, the International Labour Organisation, the Global Alliance against Trafficking in Women, the Global Network of Sex Work Projects, the Global Commission on HIV and the Law, Human Rights Watch, the Open Society Foundations and Anti-Slavery International as fellow supporters of decriminalisation.

D. Regulation

Regulation is the legislative policy which does not criminalise, but does heavily regulate commercial sex. For example in Austria, sex workers are required to have weekly medical examinations, despite the fact that public health concerns surrounding sex workers can be addressed by requiring workers to use a prophylactic device. [219] Sex workers must also work independently as they are forbidden from working as employees.[220] In the Netherlands, the Compulsory Identification Act 2000 requires all self-employed workers to register as sex workers.[221] The Netherlands is also notorious for imposing further restrictions at the municipal level such as Amsterdam's "Red Light District". Heavy regulation can increase stigma and discrimination by treating sex workers as 'different' to other workers, and still exposes sex workers to risk of prosecution in a manner that unfairly interferes with their rights.

E. Abstention

Abstention is the election of a government not to mention sex work or prostitution at all in law. Abstention provides opportunity for exploitation and poor sexual health practices, such as unsafe sex, and is therefore not a suitable legislative approach for consistency with human rights obligations.

F. Swedish Model in Gender-Specific Terms

As identified above, the law unfairly encroaches on the rights of men and transsexuals who sell sex by forbidding them to do so under a law which promotes gender equality for women. While the impact of the Swedish model on gender inequality is studied further, states which criminalise the purchase of sex should consider amending the legislation to prohibit the purchase of sex *from women by men*, in much the same way that the crime of male assaults female is gender specific.

[219] http://en.sophie.or.at/basic_infos/prostitutions-gesetze/laws.
[220] Above.
[221] Sietske Altink and Hendrick Wagenaar, "State of Affairs in the Netherlands: 2012", *Sekswerkerfgoed*¸ 14 August 2013: http://sekswerkerfgoed.nl/state-of-affairs-in-the-netherlands/#section-1.

This would at least create a more direct link between the law and its aim of preventing violence against women.

VI. Conclusion

The Swedish model has been a useful experiment with noble aims, but essentially has not worked for the same reason that bans on commercial sex have never worked: sex work cannot be eradicated. Men, women and, sadly, children enter the world's oldest profession for a variety of reasons, none of which should impact on their right to life, their right to be free from degrading treatment, their right to security, their right to privacy, their right to freedom of association, their right to be free from discrimination or their right not to be arbitrarily expelled from the state in which they are resident.

Both law and practice are emerging to suggest that decriminalisation is the best way to protect the fundamental ECHR rights of all sex workers, even where those workers are victims of exploitation. If Ms Lee fails to achieve legislative change in Northern Ireland following the pending judicial review, she is likely to have success at the ECtHR level with regard to male and transsexual sex workers, with scope to have success for all sex workers if her legal team can satisfy the ECtHR that it is appropriate for them to intervene despite the widening margin of appreciation concerning moral matters.

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