Written evidence submitted by Bridie Sweetman

I am a New Zealand-based lawyer studying towards an LLM in Human Rights Law. I recently wrote a paper asking: *Is the Criminalisation of the Purchase of Sex (the Swedish model) consistent with the European Convention on Human Rights?* I reviewed research from three states with Swedish model legislation (Sweden, Norway and Canada) and considered this in light of case law from the European Court of Human Rights (ECtHR) and domestic constitutional decisions (such as CCSA – the Constitutional Court of South Africa and SCC – the Supreme Court of Canada). At the time of writing (September to November 2015), Northern Ireland had also adopted the model but had done so too recently (June 2015) for any meaningful evidence to emerge for the purposes of my study.

Prior to my study I worked as a Crown Prosecutor in the Taranaki region of New Zealand. I have also worked as a defence barrister in Auckland and with the London-based law firm Freshfields Bruckhaus Deringer on anti-corruption matters. Before my London experience I worked as a legal advisor and as an intern with the United Nations Assistance to the Khmer Rouge Tribunal in Phnom Penh, Cambodia.

My study found that the Swedish model conflicts with Article Two (the Right to Life), Article Three (the Right not to be Subjected to Inhuman or Degrading Treatment), Article Five (the Right to Liberty and Security of the Person), Article Eight (the Right to a Private Life), Article Ten (the Right to Freedom of Expression), Article Eleven (the Right to Freedom of Association), Article Fourteen (the Right not to be Subjected to Discrimination) and Protocol Seven, Article One (the Right to Fair Procedures for Lawfully Resident Foreigners facing Expulsion) of the European Convention on Human Rights (ECHR).¹ I also found a breach of Article Ten (the Right to Freedom of Expression), but concluded that this breach would be legitimately within the margin of appreciation afforded to European Union states.

I also found a breach of rights protected by the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)² and the International Covenant on Civil and Political Rights (ICCPR),³ both of which the United Kingdom is a party to.

In light of these multiple international human rights treaties concerns, I urge the committee to reject any proposal to shift the burden of criminality to those who pay for sex, and to instead consider adopting an approach similar to New Zealand’s decriminalisation model.

During my study I worked with and spoke to current and former sex workers via New Zealand’s sex-worker led organisation NZPC (the New Zealand Prostitutes’ Collective). In dealing directly with sex workers, I observed that they did not see the Swedish model as one which protected them. The workers I met were involved in sex work for a number of reasons: many entered the industry not because they were poor, abused or suffered addiction problems, but because they saw sex as a flexible way to make money. Those who did enter the industry less willingly because of financial or

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¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, entered into force 3 September 1953 (ECHR).
similar constraints still tended to support decriminalisation, because they were more concerned with their rights now that they were working, rather than the situations that led to them being involved in sex work in the first place.

The Swedish model infamously lacks direct consultation with sex workers at it views them as victims in need of protection who ‘don’t know what’s good for them’, rather than as adult human beings capable of and entitled to forming evidence-based views and opinions.

I appreciate that the end goals of those who support the Swedish model are noble in that they aim to bring an end to gender inequality and victimisation of sex workers. However I respectfully submit that the evidence suggests that the practice deviates considerably from the theory, with evidence indicating that the Swedish model creates more problems for sex workers than it prevents.

This is supported by Danish findings in 2012 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”.  

Article Two – the Right to Life

The ECtHR has held 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, and that acts and omissions in the field of health care policy could possibly engage governmental responsibility under Article 2. 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”.

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. 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. 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”.

There is also a drop in willingness to carry and use condoms for two reasons: condoms are often used as evidence of transactional sex, 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. This

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7 Cyprus v Turkey (2001) 25781/94 European Court of Human Rights, 10 May 2001 at [219].
11 Christchurch School of Medicine, The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex
reluctance to carry condoms applies to both the worker and the client.\textsuperscript{12} The decision not to carry condoms for fear of detection has been observed in both Sweden and Norway,\textsuperscript{13} while a decrease in both the number (and calibre\textsuperscript{14}) of clients reduces the ability of sex workers to make safe sex a transactional condition.\textsuperscript{15} It has also become more difficult to access condoms in the requisite quantity.\textsuperscript{16} Since sex workers require and use significantly more condoms than the general population, requesting a large quantity puts health professionals on notice of the sex worker’s ‘illicit’ occupation.

The increase in stigma and misinformation about sex work that is associated with any criminalisation model also leads to mental health issues.\textsuperscript{17} A Canadian study explained that: “The illegality 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.”\textsuperscript{18} There is also a link between low self-esteem and risk taking behaviour such as drug abuse and unsafe sex.\textsuperscript{19}

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”.\textsuperscript{20} Another government official, Anna Skarheds, stated publicly that: \textsuperscript{21}

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\textsuperscript{22} dependent on pimps than they are under other legislative models because of the reduction in valid agency when it comes to negotiation.

These outcomes also indicate a clear breach the right to enjoyment of the highest attainable standard of health which is protected by Article 12 ICSECR.

\textit{Workers’ Department of Public Health and General Practice, University of Otago 2007 at p168.}

\textsuperscript{12} Levy, above n6, at p191.
\textsuperscript{13} Lyon, above n7 at p74.
\textsuperscript{14} 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).
\textsuperscript{15} World Health Organisation, above n92 at p75.
\textsuperscript{16} Levy, above n6 at p162 and Lyon, above n7 at 973.
\textsuperscript{17} Lyon, above n7 at p79.
\textsuperscript{18} 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.
Article Three - the Right not to be Subjected to Inhuman or Degrading Treatment

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”.23

An earlier decision which considered article three in the context of state detention was Ireland v UK.24 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.25 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.”26 Where there is not an ‘intention to hurt or degrade’,27 the ECtHR may be reluctant to find a breach of article three. The ECtHR also observed that:28

> 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 time29 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.

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.30

Swedish police harass sex workers by filming sexual encounters, announcing their names from patrol cars and making derogatory comments about them.31 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.32

In summary, they have confirmed that they intend to subject sex workers to inhuman and/or

23 Selcuk and Asker v Turkey [1997] 796/998-999 European Court of Human Rights 4 April 1998 at [74].
25 At [96].
26 At [167].
27 At [181].
28 At [76].
29 At [162].
30 Oliver Gee, “Selling Sex doesn’t make you an unfit parent”, (online ed., thelocal.se, 23 July 2013); Levy, above n6 at pp198-199.
31 Levy, above n6 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”.
32 Ashton, above n18; S Thing, P Jakobsson and A Renland, above n19.
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 amounts 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.

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” or “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”. In Sweden, selling sex is a valid reason for deportation of non-residents. 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.

This right is also protected by Article Seven of the ICCPR.

**Article Five – the Right to Liberty and Security of the Person**

The Supreme Court of Canada (SCC)’s decision in *R v Bedford* is relevant to the right to 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 Canadian Criminal Code (CCC) on the basis that they were inconsistent with the right to life, liberty and security of the person. This right was protected by article 7 of the Canadian Charter of Rights and Freedoms (CCRF), which has supremacy over other Canadian legislation. Section 210 CCC 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. 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. These studies were supported by the evidence in *Bedford*.

In upholding the Ontario Court of Appeal’s finding that the CCC sections breached article 7, the SCC noted that:

> The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on

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33 *Kaya v Turkey* [1998] IIHRL 12 (19 February 1998) at [86].
36 *Canada (AG) v Bedford* 2013 SCC 72.
37 *Bedford* at [29].
38 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.
39 *Bedford* at [64] and [69].
40 At [60].
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”.

Working independently from a fixed location is not an opportunity afforded to sex workers under the Swedish model. Most criminalisation laws (whether they apply to the worker or the client) 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. Sex workers are also pushed to work from isolated and dangerous places to avoid police harassment.

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. A fresh constitutional challenge is thus inevitable.

The right to liberty and security of the person is also protected by Article 9 ICCPR.

Article Eight – the Right to Respect for Private and Family Life

The ECtHR decisions of Dudgeon v UK\(^45\) and Norris v Ireland\(^46\) 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,\(^47\) but remained illegal in the more morally conservative Northern Ireland. Prosecutions were rare in practice,\(^48\) 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.\(^49\) Although no prosecution ensued, the law had allowed the police to invade Mr Dudgeon’s privacy to a considerable extent.

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\(^{41}\) At [63].


\(^{43}\) Above at pp65-66.


\(^{46}\) Norris v Ireland, Application no. 10581/83 ECHR, 26 October 1988.

\(^{47}\) Dudgeon, above n125, at [17].

\(^{48}\) At p29, Dissenting Opinion of Judge Matscher.
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, and that the state would need “particularly serious reasons” to interfere with this “most intimate aspect of private life.” 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.

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.” 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, which also concerned a criminal ban on homosexuality which did not result in prosecution, but did cause the applicants “great strain and apprehension.” 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.”

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. 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 necessary for “a combination of objectives, including the protection of the family, self-determination and public health.” 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.” 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. The applicants were three homosexual men who had filmed themselves engaging in sado-masochistic sexual practices with up to 44 other men. Some of the acts amounted to ‘torture’. Police found the video footage and charged the applicants with a variety of

49 At [33].
50 At [41].
51 At [52].
52 At [60].
53 Norris At [9(vii)].
55 At [7].
57 Stübing v Germany (no. 43547/08), 12 April 2012.
58 At [63].
59 Above.
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”,62 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.63

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 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.64

As for the right to a family life, sex workers in Sweden risk losing custody of their children,65 while workers in both Sweden66 and Norway face eviction from their homes.67 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.68

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.

Article 17 ICCPR also protects the right to a private life and the right to family life.

Article Eleven - the Right to Freedom of Association

1. Brothel-keeping

Swedish model legislation prohibits the letting of premises for the purposes of commercial sex,69 living on the proceeds of prostitution practiced by others70 and materially benefiting from commercial sex.71 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

61 At [40].
62 At [43].
63 At [36].
64 The CCSA in Jordan disagreed with this analysis. A discussion and critique of the Jordan decision on privacy is attached.
65 Levy, above n47 at p198; Oliver Gee, above n116.
66 Levy, above n47 at p95.
67 This is also contradictory to the right to adequate housing protected by Article 11 of the ISESCR.
69 Section 12 Penal Code 1962, as amended 1999 (Sweden); Section 202 General Civil Penal Code Act of 22 May 1902 (Norway).
70 Article 206 General Penal Code 1940 (Iceland).
71 Section 286.2 Criminal Code 1985 (Canada).
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,*72 which found that sex work is an economic activity despite arguments that it could not be regarded as such because of its illegal nature, issues of public morality, and difficulties in ascertaining whether or not sex workers were able to act freely.73 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.74 Whether or not the economic activity is lawful is a matter for individual states.75 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.

The right is also recognised in article 22 ICCPR.

**Article Fourteen – the Right not to be discriminated against on the grounds of Race, Colour, Sex, Language, Religion, Political or other opinion, National or Social origin, Property, Birth or other status.**

The client criminalisation 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.76 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 and protection.

This gives little to no attention to the reality 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.

73 At [51].
74 At [49].
75 At [56].
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 possibly 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.77 But just like sex workers and homosexuals, they have a right to ‘express their sexuality ... consensually and without harming one another’.78 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”.79

Yet the Swedish model denies disabled people an opportunity to express their sexuality by preventing 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.

Article 26 ICCPR protects all persons from discrimination on the same grounds as Article 14 ECHR.

Protocol Seven, Article One – the Right to Fair Procedures for Lawfully Resident Foreigners facing Expulsion

In Sweden, selling sex is a valid reason for deportation of non-residents.80 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 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 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.

This right is also upheld by article 13 ICCPR.

Article 6 and 7 ISESCR – the Right to Work and the Right to Just and Favourable Conditions of Work

77 Patrick Smith, British Prostitutes are Helping Disabled People Have Sex, Vice Magazine, (online ed., 16 February 2015).
78 National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR (CC) at para 32, endorsed by Jordan v. S. 2002 (6) SA 642 (CC) also reported as 2002 (11) BCLR 1117 (CC) at [76].
These articles recognise a right to work and a right to just and favourable conditions of work.

**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.

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Bridie Sweetman 17 February 2016

I both welcome and invite feedback on this submission.
Appendix One: discussion and critique of the ZACC’s decision in Jordan

The Constitutional Court of South Africa (CCSA) considered the right to privacy argument in Jordan\(^\text{81}\) 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: \(^\text{82}\)

> 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:\(^\text{83}\)

> 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.\(^\text{84}\)

However, when quoting the relevant decision on homosexuality,\(^\text{85}\) Ngcobo J left the quote incomplete. The full quote reads:\(^\text{86}\)

> 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”,\(^\text{87}\) and found, in partial agreement with the state, that:\(^\text{88}\)

\(^\text{81}\) Jordan v. S. 2002 (6) SA 642 (CC) also reported as 2002 (11) BCLR 1117 (CC).

\(^\text{82}\) The right to privacy is now governed by section 14 Constitution of the Republic of South Africa 2005.

\(^\text{83}\) Jordan at [27].

\(^\text{84}\) At [28].

\(^\text{85}\) National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6.

\(^\text{86}\) At [32].

\(^\text{87}\) At [78].

\(^\text{88}\) At [81].
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.99

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 LGBTI90 person may have before their right to privacy starts to dissipate. Nor does the law in England and Wales, Scotland or Northern Ireland.

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

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90 Lesbian, Gay, Bisexual, Transgender and Intersex.
91 At [83].
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),92 which currently favours the New Zealand model,93 and who submitted in Jordan that any “criminalisation of commercial sex exacerbates the links between prostitution and crime and disease”.94 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”.95 The wording of these arguments suggests that they can be applied to any criminalisation model.

A multi-collaborative paper submitted by a number of organisations regarding ‘Human Rights Violations against Sex Workers in Austria’ observed that it is ‘inadmissible to distinguish between a person’s private and professional life’, reinforcing that sex work is still private and not public. 96

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92 At [70] and at [88],
93 Above n21.
94 Jordan at [87].
95 Above.
96 Sex Workers Forum, iBus – Information and Support for Sex Workers in Innsbruck, Association PiA Salzburg, IKF – Institute of Conflict Research, LEFO – Counselling, Education and Accompaniment for migrant women, Platform 20000 Women