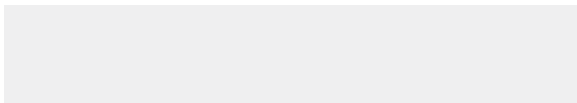
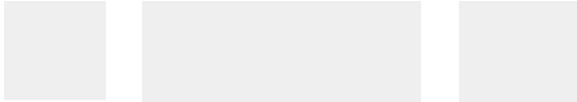




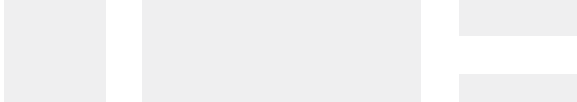
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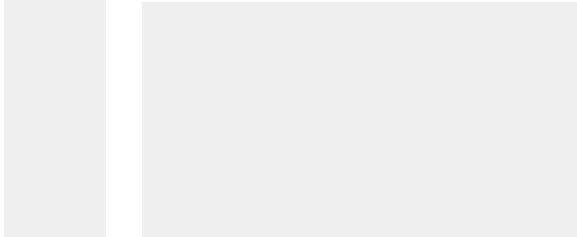
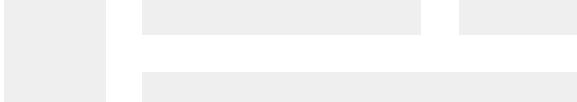
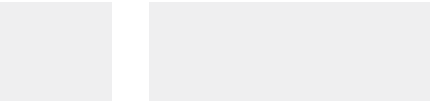
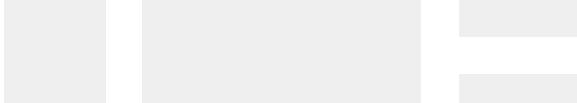
Sex Work Law in Ireland: The State's Failure to Protect Sex Workers' Human Rights under the Swedish Model



Holly O'Callaghan



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SEX WORK IN IRELAND: THE STATE'S FAILURE TO PROTECT SEX WORKERS' HUMAN RIGHTS UNDER THE SWEDISH MODEL

*Holly O'Callaghan**

Abstract:

In 2017 Ireland adopted the Swedish model regarding sex work through the enactment of the *Criminal Law (Sexual Offences) Act, 2017*. It was introduced to reduce the trafficking of women for sexual exploitation and to tackle violence against women with the overall aim of eliminating sex work. However, since the State's adoption of the Swedish model, sex workers' human rights are increasingly being denied resulting in the State failing in its obligations under the International Covenant on Economic, Social and Cultural Rights to protect sex workers' right to health and right to work. Sex workers are being denied their right to access healthcare appropriate to their specific needs and their right to sexual health is therefore being undermined. The Swedish model makes it difficult to work in safe and healthy working conditions thereby exacerbating the dangers associated with sex work. The Swedish model also fails to recognise sex work as a legitimate occupation resulting in the denial of sex workers' right to social security. Through the investigation of Ireland's experiences since its implementation of the Swedish model it is evident that it is time for Ireland to consider an alternative approach to govern sex work laws in the State. An extremely progressive approach implemented by New Zealand in 2003 is the decriminalisation model. Through the analysis of New Zealand's experiences, since its adoption of this model, it is evident that this model better protects sex workers' right to health and right to work thereby increasing State compliance with its obligations under international human rights law.

Key words: Swedish model, decriminalisation, Ireland, sex work, human rights

A. INTRODUCTION

Sex work is often referred to as the oldest profession in the world.² Yet most countries, including Ireland do not recognise it as a legitimate form of occupation. The term "sex work", as defined by Amnesty International, means "the exchange of sexual services ... between consenting adults for some form of remuneration, with the terms agreed between the seller and the buyer."³ The term "sex work" is used instead of the word "prostitute" as it is less stigmatising and it better describes sex workers' experiences.⁴ It recognises that some sex workers view the selling of sexual services as a form of work rather than a form of sexual exploitation.

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² Cecilia Benoit, S. Mikael Jansson, Michaela Smith & Jackson Flagg, "Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers" (2018) 55(4-5) *The Journal of Sex Research* 457 at 457.

³ Amnesty International, *Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers*, POL 30/4062/2016 (Amnesty International, 26 May 2016) at 3.

⁴ UNAIDS, *Sex Work and HIV/AIDS: UNAIDS Technical Update* (June 2002) at 3.

The term “prostitute” can be seen as derogatory and is used throughout law, policies and media, illustrating the negativity associated with sex work.⁵

Addressing sex work laws is an extremely controversial topic.⁶ It has been subjected to contentious debate in Ireland since 2009 with the publication by the Immigrant Council of Ireland of *Sex Trafficking and Prostitution: The Experiences of Migrant Women in Ireland*.⁷ In the same year the Turn off the Red Light (TORL) campaign began which advocated for the adoption of the Swedish model with the aim of ending the demand for sex work.⁸ This led to the review of sex work legislation which resulted in the adoption of the Swedish model through the enactment of the *Criminal Law (Sexual Offences) Act, 2017* in February 2017.⁹ The primary characteristics of the Swedish model are that it criminalises the buyer of sexual services but decriminalises the sex worker.¹⁰

In Ireland sex workers are denied numerous human rights, despite the State being signatories to the major human rights treaties. These human rights abuses are ignored daily by the government. Section 27 of the *2017 Act* provides for a review of part 4 of the *2017 Act* which deals with sex work after three years of its commencement. Although the Department of Justice and Equality announced a review of the *2017 Act* in July 2020 this has been delayed due to the COVID-19 pandemic. Hence, sex workers’ rights are still being denied and their situation is exacerbated during the public health emergency. Accordingly, this Working Paper will analyse Ireland’s in compliance with its binding international obligations due to the adoption of the Swedish model and it will address the human rights that sex workers are denied as a result.

This Working Paper is divided into five sections with Sections B, C and D making up the main body of this paper. Section B will introduce the Swedish model as it stands under Swedish law as this is where the model originates. The principal aim of the Swedish model will then be described and analysed. The second part of this Section will define the law in Ireland as it was under the *Criminal Law (Sexual Offences) Act, 1993*¹¹ prior to the adoption of the Swedish model. Following this, the review process which led to the enactment of the *2017 Act*, thereby the introduction of the Swedish model will be discussed and critiqued. Lastly, part 4 of the *2017 Act* which governs the law on sex work will be introduced.

Section B will provide a strong basis for Section C which will analyse the impact of the Swedish model on sex workers’ lives in Ireland. Section C will demonstrate the State’s denial of sex workers’ human rights and its failure to comply with its international obligations as a result of the *2017 Act*. The two human rights that will be discussed is the right to health and the right to work as defined under the International Covenant on Economic, Social and Cultural Rights.¹² The Convention on the Elimination of All Forms of Discrimination Against Women¹³ and the Convention on Preventing and Combating Violence against Women and Domestic

⁵ *Supra* note 1 at 459.

⁶ *Ibid.* at 457.

⁷ Patricia Kelleher, Monica O’ Connor, Carmel Kelleher and Jane Pillinger, *Globalisation, Sex Trafficking and Prostitution: The Experiences of Migrant Women in Ireland* (Immigrant Council of Ireland, 2009) [hereinafter the ICI report].

⁸ Turn off the Red Light Campaign Leaflet, “Turn off the Red Light: End Prostitution and Sex Trafficking in Ireland” <https://adaptservices.ie/file_uploads/Turn-off-the-Red-Light-Campaign.pdf> accessed 11 February 2022.

⁹ *Criminal Law (Sexual Offences) Act, 2017*.

¹⁰ Wendy Lyon, “Client Criminalisation and Sex Workers’ Right to Health” (2014) 13(1) *Hibernian Law Journal* 58 at 58.

¹¹ *Criminal Law (Sexual Offences) Act, 1993*.

¹² United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 [hereinafter ICESCR].

¹³ United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 [hereinafter CEDAW].

Violence¹⁴ adopted by the Council of Europe will be drawn on throughout this section as they are also important in order to examine the extent to which Ireland is failing in its binding international obligations. It will be argued that the *2017 Act* has resulted in sex workers being denied their right to health particularly their right to access healthcare and their right to sexual health. Although the Swedish model impedes sex workers' enjoyment of the right to mental health, this will not be discussed in this Working Paper due to the limited wordcount.¹⁵ Additionally, it will be demonstrated that sex workers are being denied their right to work. It will be demonstrated that the State is failing in its obligations to ensure sex workers' right to social security. Furthermore, it will be illustrated that the *2017 Act* has exacerbated the dangerousness of sex work. Hence, Ireland is failing in its duty to provide safe and healthy working conditions.

As Section C will demonstrate the negative impact the Swedish model has on sex workers' human rights, Section D will consider an alternative model to govern sex work. There are multiple approaches that can be adopted. Firstly, there is total criminalisation which criminalises the selling and buying of sexual services along with all activities involving sex work.¹⁶ Secondly, there is partial criminalisation which prohibits certain aspects of sex work, for example the Swedish model.¹⁷ Thirdly, there is the legalisation of sex work which legalises sex work but involves a high level of State control.¹⁸ Lastly, there is full decriminalisation which removes sex work from criminal law and regulates it under general labour laws.¹⁹ Although New Zealand is the only country to adopt the decriminalisation model, this Section will argue that this approach is the most appropriate model to realise sex workers' human rights. Section D will begin by introducing the decriminalisation model. It will then be illustrated that this approach will improve the State's compliance with its international obligations to realise sex workers' right to health and their right to work, drawing on New Zealand's experiences. Accordingly, by the end of this Working Paper it will be evident that the decriminalisation model improves Ireland's compliance with its international obligations and better protects sex workers.

B. THE SWEDISH MODEL AND ITS ADOPTION INTO IRISH LAW

1. Introduction

Sex workers in Ireland make up a diverse group from various backgrounds with different nationalities and ethnicities.²⁰ It was estimated in 2020 that 1,000 women work indoors in Ireland with around 800 women

¹⁴ Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, 12 April 2011, CETS 210 [hereinafter Istanbul Convention].

¹⁵ See, United Nations General Assembly, Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* (A/HRC/14/20, 27 April 2010) at [38]-[39], Kathryn McGarry and Paul Ryan, *Sex Worker Lives Under the Law: A Community Engaged Study of Access to Health and Justice in Ireland* (2020) at 45, Lynzi Armstrong, "'I Can Lead the Life That I Want to Lead': Social Harm, Human Needs and the Decriminalisation of Sex Work in Aotearoa/New Zealand" (2021) *Sexuality Research and Social Policy* <<https://doi.org/10.1007/s13178-021-00605-7>> accessed 11 February 2022.

¹⁶ The World Aids Campaign, *Sex Work and the Law: The Case for Decriminalization* (NSWP, 2010) at 18.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Amnesty International, *Explanatory Note on Amnesty International's Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers*, POL 30/4063/2016 (Amnesty International, 26 May 2016) at 21.

²⁰ Corinne Goldenberg, Sarah Gunther, Anne Lieberman, Jesse Wrenn and Gitta Zomorodi, *(Almost) Everything You Wanted to Know But Were Afraid to Ask* (American Jewish World Service, July 2013) at 3.

using the internet to post advertisements to sell sexual services.²¹ Sex workers include male, female and transgender people, however, this Working Paper will focus on female sex workers as they make up the majority of the sex industry.²²

The law on sex work in Ireland has been subject to contentious debate since publication of the ICI report and the beginning of the TORL campaign in 2009.²³ The TORL campaign advocated for the adoption of the Swedish model with the aim of eradicating the demand for sex work.²⁴ The TORL campaign was successful which led to the enactment of the *2017 Act* thereby introducing the Swedish model. Accordingly, the purpose of this section is to introduce the Swedish model and set out the law in Ireland as it currently stands.

This section will provide the basis for Section C which will demonstrate that the State is failing to meet its international obligations to protect sex workers' human rights. The first part of this Section will introduce the law on sex work in Sweden as this is where the model originates. The model's primary aim will be considered which is to eliminate sex work. The two main reasons as to why this is the primary aim will then be discussed and evaluated. The second part of this Section will set out the law in Ireland prior to the adoption of the Swedish model as it was under the *1993 Act*. Following this, the Section will discuss the extensive consultation process which led to the enactment of the *2017 Act* in February 2017. Lastly, the law on sex work in Ireland as it currently stands under the *2017 Act* will be defined.

2. Introducing the Swedish Model

a. Origins of the Swedish model

The Swedish model consists of three primary characteristics. It criminalises the purchasing of sexual service but decriminalises the selling of sexual services. Additionally, most activities around sex work such as organising and promoting the selling of sex are criminalised.²⁵ In 1999, Sweden became the first country to adopt this approach, hence, it is generally known as the Swedish model.²⁶ It is sometimes referred to as the Nordic model as Nordic countries such as Norway in 2008 and Iceland in 2009 have implemented this approach.²⁷ Since then, non-Nordic countries such as Northern Ireland and Ireland have adopted the Swedish model and it is still gaining interest internationally.²⁸

Prior to 1999, Sweden had already criminalised the "[p]rocur[ing] and exploitation of prostitution" known as 'koppleri', meaning that it was an offence to profit from another person engaging in sexual services for

²¹ Geoffrey Shannon, *Interim Report of the High-Level Working Group: The Implementation of the Criminal Law (Sexual Offences) Act 2017, Part IV – An Interim Review* (January 2020) at 6.

²² Rachel Marshall, "Sex Workers and Human Rights: A Critical Analysis of Laws regarding Sex Work" (2016) 23 *William & Mary Journal of Women & the Law* 47 at 50.

²³ Eilís Ward, "'Framing Figures' and the Campaign for Sex Purchase Criminalisation in Ireland: A Lakoffian Analysis" (2020) 28(3) *Irish Journal of Sociology* 314 at 322.

²⁴ *Supra* note 7.

²⁵ Amnesty International, *Norway: The Human Cost of 'Crushing' the Market: Criminalization of Sex Work in Norway* (Amnesty International, May 2016) at 18.

²⁶ Sarah Kingston and Terry Thomas, "No Model in Practice: A 'Nordic Model' to Respond to Prostitution?" (2019) 71(1) *Crime, Law and Social Change* 423 at 425.

²⁷ *Supra* note 24.

²⁸ Global Network of Sex Work Projects, *Policy Brief: The Impact of 'End Demand' Legislation on Women Sex Workers* (NSWP, 12 February 2018) at 1.

money.²⁹ In 2005, this was inserted into chapter 6, section 12 of the Swedish Penal Code. This law is applied broadly and concerns any actions of a third party, including anyone who benefits from the earnings of a sex worker such as a partner and landlords/flat owners who knowingly allow the premises to be used for sex work.³⁰ In 1998, the 'Kvinnofrid' law was passed and came into force on 1 January 1999 which included a provision that criminalised the buying of sexual services.³¹ This was transferred to chapter 6, section 11 of the Swedish Penal Code in 2005 which also amended the offence to include a promised payment or a payment given by another person.³² Anyone who is sentenced for this offence will receive a fine or a prison sentence of no more than one year.³³

b. The primary aim of the Swedish model

The primary aim of the Swedish model is to reduce the demand for sex work, ultimately eradicating sex work.³⁴ Hence, it is sometimes referred to as the "end demand model". States which choose to follow this approach want to eliminate sex work for two main reasons. The first reason is to tackle sex trafficking and the second reason is to combat gender-based violence, thereby promoting gender equality.

Sweden introduced this model as it is believed that sex work not only harms sex workers and the society but it is also associated with organised crime such as sex trafficking.³⁵ Criminalising the buyer of sexual services is hoped to create an environment in which it is more difficult to establish organised sex work in Sweden.³⁶ It is argued that criminalising the purchase of sexual services will assist States in combatting sex trafficking which is one of their obligations under international law. Article 9(5) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, requires States to reduce the demand that enables the exploitation of persons, particularly women, which can result in human trafficking.³⁷ It is argued that with a reduction in demand for the payment of sexual services, there will be a decrease in sex trafficking.³⁸ Perpetrators of human trafficking will be dissuaded from engaging in this type of criminal activity as the "business" would no longer be as lucrative.

However, the conflation of sex work and human trafficking can increase the risk for victims of human trafficking.³⁹ This is because sex workers and their clients are more inclined to report suspected cases of trafficking when they do not risk being criminalised.⁴⁰ In 2020, in a submission to the review of part 4 of the

²⁹ Daniela Danna, "Client-Only Criminalization in the City of Stockholm: A Local Research on the Application of the 'Swedish Model' of Prostitution Policy" (2012) 9(1) *Sexuality Research and Social Policy* 80 at 82.

³⁰ *Ibid.*

³¹ *Ibid.* at 81.

³² Penal Code (1962:700), Chapter 6, Section 11.

³³ Penal Code (1962:700), Chapter 6, Section 11

³⁴ *Supra* note 24 at 29.

³⁵ Government Offices of Sweden (2015), "Legislation on the Purchase of Sexual Services" <https://www.government.se/articles/2011/03/legislation-on-the-purchase-of-sexual-services/?TSPD_101_R0=088d4528d9ab2000e5df98884d11247cc5a15e6ec18278d317915edc29ba03d045a49e30fed02ee008d709cdad143000ac2bf1191288e65f31866442168dffad9bb04c1b2d0e2afdc1946d1a6b8c9f4c56e87e2b5c2dda0eb86519626fa0ee8> accessed 11 February 2022.

³⁶ *Ibid.*

³⁷ United Nations General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000 [hereinafter Palermo Protocol].

³⁸ *Supra* note 24 at 29.

³⁹ Pia Janning, *Submission to the Review of Part 4 of the Criminal Law (Sexual Offences) Act 2017* (HIV Ireland, September 2020) at 13.

⁴⁰ *Supra* note 27 at 10.

2017 Act, HIV Ireland argued that the criminalisation of the purchase of sexual services fails “to address the root causes of trafficking and [creates] the risk of criminalising victims of trafficking.”⁴¹ For example, Norway introduced the Swedish model in 2008 which has now been inserted into sections 315 and 316 of the Norwegian Civil Penal Code. Between November 2014 and February 2015, Amnesty International conducted 54 interviews, 30 of them being with current sex workers to evaluate the impact of the Swedish model in Norway.⁴² The study found that the authorities often target and deport migrant sex workers on the premise that they are illegally in the country not because they are sex workers.⁴³ However, prior to their deportation, there is no attempt to determine whether they are victims of sex trafficking.⁴⁴ Additionally, women who are victims of trafficking are reluctant to contact the police for fear that they may also be deported.⁴⁵ This results in the failure of detecting possible victims of sex trafficking along with a high chance of these women being re-trafficked,⁴⁶ thereby creating a culture of impunity for perpetrators.⁴⁷ Sex workers are the principal focus of immigration enforcement since the introduction of the Swedish model and these immigration laws are used as the primary enforcement mechanism to eliminate the sex industry. Hence, the Swedish model was not introduced in Norway to protect women against sex trafficking. This links back to the argument made by HIV Ireland above, i.e. the Swedish model ultimately fails to protect victims of trafficking.

The deportation of migrant sex workers also occurs in Sweden.⁴⁸ According to chapter 9, section 2 of the Swedish Penal Code, immigrants who are not earning a living in a decent way are deported and for two years they are prohibited from returning to Sweden. Many migrant sex workers are therefore deported without determining whether they are victims of sex trafficking. Despite this provision in the Swedish Penal Code, a study carried out by the Swedish government in 2008 to evaluate the effects of the Swedish model on sex work and human trafficking between 1999 and 2008⁴⁹ reported that the Swedish police believe that the criminalisation of the purchase of sexual services acts as a barrier for the occurrence of sex trafficking in Sweden.⁵⁰ However, the report also stated that it is difficult to estimate the exact figures of sex trafficking.⁵¹ Therefore, it cannot be determined for definite that sex trafficking is reduced due to the Swedish model. Moreover, the argument that one of the Swedish model’s purpose is to combat sex trafficking is flawed by the fact that potential victims of trafficking are not protected. The Swedish model impedes States’ efforts to prevent sex trafficking and increases exploitation of women, thereby reducing States’ compliance with Article 9(5) of the Palermo Protocol.

The second purpose is to combat gender-based violence, thereby, enhancing gender equality. This purpose is underpinned by two arguments. The first argument connects to the first purpose concerning the prevention of sex trafficking and the second argument is based on the idea of false consciousness. The first purpose of the Swedish model, being to prevent sex trafficking, connects to the second purpose as CEDAW

⁴¹ *Supra* note 38.

⁴² *Supra* note 24 at 8.

⁴³ *Ibid.* at 82.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at 84.

⁴⁶ *Ibid.* at 85.

⁴⁷ *Ibid.*

⁴⁸ Global Network of Sex Work Projects, *Community Guide: The Real Impact of the Swedish Model on Sex Workers* (NSWP, November 2015) at 7.

⁴⁹ Swedish Institute, *The Ban against the Purchase of Sexual Services: An Evaluation 1999-2008* (Swedish Institute, November 2010) (selected extracts of the Swedish Government from European Commission) at 2 <https://ec.europa.eu/anti-trafficking/ban-against-purchase-sexual-services-evaluation-1999-2008_en> accessed 11 February 2022.

⁵⁰ *Ibid.* at 29.

⁵¹ *Ibid.* at 14.

recognises sex trafficking as a form of gender-based violence.⁵² Article 6 imposes a duty on States to adopt measures to prevent trafficking and the “exploitation of women”. CEDAW does not define “exploitation of prostitution”. Therefore, there is uncertainty as to whether CEDAW distinguishes between forced and voluntary sex work. Grover, the former Special Rapporteur on the highest attainable standard of health argues that Article 6 “is interpreted to refer to exploitation in the context of prostitution”,⁵³ thereby differentiating between exploitation of prostitution and voluntary sex work. Grover stipulates that Article 6 does not require States to criminalise the purchase of sex between two consenting adults.⁵⁴ This argument is supported by the Declaration on the Elimination of Violence Against Women,⁵⁵ by its use of the term “forced prostitution” to refer to the “type of physical, sexual and psychological violence”.⁵⁶ Overs and Hawkins argue that this highlights that “exploitation of prostitution” is a form of involuntary prostitution.⁵⁷ They argue that by distinguishing “between voluntary and forced prostitution” DEVAW takes the view that sex work does not automatically mean women are being exploited.⁵⁸

Despite these arguments the Swedish approach conflates sex work with trafficking and argues that Article 6 requires States to adopt measures to eradicate sex work. This complies with Balos’ understanding of Article 6, who argues that consent is irrelevant as CEDAW recognises both trafficking and sex work as incompatible with the principle of equality.⁵⁹ Balos further highlights that this argument is supported by the Committee on the Elimination of Discrimination Against Women in General Recommendation No.19.⁶⁰ This General Recommendation discourages “commercial exploitation of women as sexual objects” as this is a form of gender-based violence⁶¹ which negatively affects women enjoying their human rights on an equal basis to men.⁶² It is submitted by the author of this Working Paper that Balos’ argument undermines women’s capabilities to make their own life decisions and is based on the notion of false consciousness which is explained below. Accordingly, the author argues in favour of Grover’s understanding of Article 6.

The second purpose of the Swedish approach is also underpinned by the idea of false consciousness. This means that particular groups of people are unable to fully grasp their own situation.⁶³ These people lack self-awareness thus “their subjective perspective and testimony is undermined in turn as not being indicative of the ‘truth’ of their situation.”⁶⁴ Hence, supporters of the Swedish approach generally use the argument “that sex workers are speaking from a position of false consciousness”.⁶⁵ There are many reasons for this including

⁵² *Supra* note 6 at 119.

⁵³ United Nations General Assembly, Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* (A/HRC/14/20, 27 April 2010) at [30].

⁵⁴ *Ibid.*

⁵⁵ United Nations General Assembly, *Declaration on the Elimination of Violence Against Women*, 20 December 1993, (A/RES/48/104) [hereinafter DEVAW].

⁵⁶ *Ibid.* Article 2(b).

⁵⁷ Cheryl Overs and Kate Hawkins, “Can rights stop the wrongs? Exploring the connections between framings of sex workers’ rights and sexual and reproductive health” (2011) 11(Suppl 3): S6 *BMC International Health and Human Rights* at 7 <<http://www.biomedcentral.com/1472-698X/11/S3/S6>> accessed 11 February 2022.

⁵⁸ *Ibid.*

⁵⁹ Beverly Balos, “The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation” (2004) 27 *Harvard Women’s Law Journal* 137 at 153.

⁶⁰ *Ibid.*

⁶¹ Committee on the Elimination of Discrimination Against Women (1992), *General Recommendation No. 19: Violence Against Women* (A/47/38) at [12].

⁶² *Ibid.* at [14].

⁶³ Global Network of Sex Work Projects, *Advocacy Toolkit: The Real Impact of the Swedish Model on Sex Workers: Sweden’s Abolitionist Understanding, and Modes of Silencing Opposition* (November 2015) at 1:3.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

that sex workers are so traumatised by the work that they engage in that they cannot fully understand their situation.⁶⁶ Another argument is that sex workers have an extremely limited choice in terms of income generating activities and have no other option but to engage in sex work.⁶⁷ Indeed, when sex workers argue that they engage in sex work out of choice, this is significantly undermined due to their limited choices that led them to engage in sex work.⁶⁸ Thus, consent to this form of work is meaningless.⁶⁹ The ICI report stated that because sex workers lack choice, sex work cannot always be consensual.⁷⁰ Finally, it is argued that these women are subjected to the patriarchal oppression and are so blinded by this that they are incapable of realising the true nature of their situation.⁷¹ This idea of false consciousness significantly undermines women and their personal experiences. Sex workers are generally silenced during debates concerning the review of sex work laws because of this very notion of false consciousness. This will be highlighted in section 3(b) below when speaking about the review process of the *1993 Act*.

Accordingly, the overall aim of the Swedish model is to eradicate sex work. States adopt this approach as they believe it will assist in their efforts to combat sex trafficking and to tackle gender-based violence creating a more gender equal society. It will be demonstrated in section 3(b) that this was the government's motive when introducing the Swedish model in Ireland.

3. The Swedish Model in Ireland

a. The Criminal Law (Sexual Offences) Act, 1993

Prior to the enactment of the *2017 Act*, the *Criminal Law (Sexual Offences) Act, 1993* governed the law on sex work in Ireland. The *1993 Act* was introduced when sex work was generally street-based.⁷² Sex work was viewed as a public-order issue rather than an issue involving the exploitation of women.⁷³ Selling and purchasing sexual services was not illegal; however, soliciting or importuning another person for the purposes of commercial sex in a public place was illegal under section 7 which could have resulted in a fine or prison sentence depending on the number of convictions someone had for this offence. Activities around sex work were also criminalised. For the purpose of this Working Paper, "activities around sex work" includes brothel-keeping and living off the earnings of a sex worker. Section 10(1) of the *1993 Act* criminalised knowingly living off the earnings of a sex worker. Section 11 criminalised brothel-keeping stating that it is a criminal offence to keep, manage, act or assist in the management of a brothel including an occupier or landlord of the property that knows that sex work is occurring on their premises. Both sections could result in a fine of up to £1,000 or a prison term of up to 6 months or both.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* at 1:4.

⁶⁸ *Ibid.*

⁶⁹ *Supra* note 47 at 2.

⁷⁰ *Supra* note 6 at 155.

⁷¹ *Supra* note 62 at 1:4.

⁷² Joint Committee on Justice, Defence and Equality, *Report on Hearing and Submissions on the Review of Legislation on Prostitution* (House of the Oireachtas, June 2013) at 9-10.

⁷³ Ivana Bacik, "#MeToo, Consent and Prostitution – The Irish Law Reform Experience" (2021) 86(1) *Women's Studies International Forum* <<https://doi.org/10.1016/j.wsif.2021.102457>> accessed 11 February 2022.

b. The review process of sex work legislation

By 2009 the 1993 Act came into question as the publication of the ICI report sparked interest in the reform of sex work laws in Ireland.⁷⁴ This report concerns the sex trafficking of migrant women. The report's primary argument is that sex work and sex trafficking are profoundly linked⁷⁵ and claims that 97% of sex workers are migrant women.⁷⁶ Indeed, the ICI report essentially claims that Ireland's sex industry is made up of migrant women that have been trafficked. Thus, to combat sex trafficking, the demand for payment of sexual services must be eradicated.⁷⁷ Moreover, the ICI report viewed sex work as gender-based violence, highlighting that it is necessary to adopt measures to end the demand for sex work and trafficking in order to tackle gender-based violence.⁷⁸ Following this important piece of research, the TORL campaign was established. It is an alliance of "umbrella organisations, trade unions and non-governmental bodies"⁷⁹ that aim to eradicate sex work as they believe that it amounts to violence against women and it is fundamentally linked to sex trafficking.⁸⁰ This was the first campaign in Ireland that advocated to decriminalise sex workers and criminalise the purchasers of sexual services,⁸¹ thereby, advocating for the adoption of the Swedish model.

The TORL campaign gained interest amongst politicians which led to the initiation of the review of the 1993 Act by an independent member, Katherine Zappone, who tabled a motion in the Seanad on 12 October 2011. In her motion the former Senator called on the government to adopt the Swedish model arguing that sex work is a form of exploitation.⁸² The former Senator conflated sex work with sex trafficking and referred to the statistic from the ICI report claiming that out of the 1,000 women who sell sexual services 97% of them are migrant women.⁸³ Following this, the former Minister for Justice, Alan Shatter requested a public consultation concerning the reform of sex work laws in Ireland. The Joint Committee for Justice Defence and Equality (the Joint Committee) received 800 submissions and held four public consultation hearings. The majority of these were from members of the TORL campaign or supporters of it.⁸⁴ This illustrates that the TORL campaign along with the ICI report had a major influence on the debate regarding sex work laws. It was the most popular approach to address the Irish sex industry and the role of the TORL campaign in the consultation process cannot be underestimated.⁸⁵

Upon receipt of 800 submissions and the hearing of four oral statements, the Joint Committee for Justice Defence and Equality (the Joint Committee) published the *Report on the Hearings and Submissions on the Review of Legislation on Prostitution*⁸⁶ recommending for the adoption of the Swedish model. It is evident throughout the Joint Committee's report that the submissions to the Joint Committee conflated sex work with trafficking for the purposes of sexual exploitation. These submissions argue that criminalising the

⁷⁴ Sharron FitzGerald *et al*, "Social Justice for Sex Workers as a 'Politics of Doing': Research, Policy and Practice" (2020) 28(3) *Irish Journal of Sociology* 257 at 261.

⁷⁵ *Supra* note 6 at 153.

⁷⁶ *Ibid.* at 23.

⁷⁷ *Ibid.* at 161.

⁷⁸ *Ibid.* at 119.

⁷⁹ Dr. Monica O' Connor and Ruth Breslin, *Shifting the Burden of Criminality: An Analysis of the Irish Sex Trade in the Context of Prostitution Law Reform* (The Sexual Exploitation Research Programme UCD, 2020) at 24.

⁸⁰ Eilís Ward, "'Killing off' the (unbearable) sex worker: prostitution law reform in Ireland" (2019) 12(3) *Journal of Political Power* 358 at 362.

⁸¹ *Supra* note 78 at 24-25.

⁸² Seanad Éireann, Parliamentary Debates (Wednesday, 12 October 2011) 210(13).

⁸³ *Ibid.*

⁸⁴ *Supra* note 71 at 49.

⁸⁵ *Supra* note 79.

⁸⁶ *Supra* note 71 [hereinafter the Joint Committee's Report].

purchasers of sexual services would reduce the demand for sex work, thereby, decrease trafficking.⁸⁷ This would help Ireland comply with its international obligations to combat trafficking and promote gender equality.⁸⁸ It was maintained that this was the only way that the State could comply with its obligations under Article 9(5) of the Palermo Protocol.⁸⁹ The Joint Committee stated that the Swedish model would increase compliance with the State's international obligations to eradicate discrimination against women and suppress the exploitation of women in sex work⁹⁰ which is an obligation under Article 6 of CEDAW. The Joint Committee's rationale for proposing the Swedish approach is in line with the overall aim of the Swedish model as illustrated in section 2(b) above. Accordingly, the Joint Committee's Report concluded that adopting measures to reduce demand for the payment of sexual services will reduce violence against women and tackle sex trafficking.⁹¹

Although it was clear that the Swedish model was the most popular approach amongst the submissions received, the Joint Committee failed to consider alternative approaches and the voices of sex workers. Firstly, it is evident from the outset that the Joint Committee favoured the Swedish model as some of its members travelled to Sweden to gain knowledge of the implementation of the Swedish model.⁹² The Joint Committee did not travel to any other jurisdiction such as the Netherlands to study the legalisation approach or New Zealand to consider the decriminalisation approach. The Joint Committee did not consider the legal framework of alternative models, other than the Swedish model. This resulted in the failure of the Joint Committee to examine the broader human rights implications associated with the Swedish model.

Secondly, sex workers' voices were marginalised throughout the review. This is no surprise as the consultation process involved mostly TORL supporters. Ward highlighted that out of the 21 witnesses invited to the oral hearing of the public consultation, 14 were members of the TORL campaign along with one guard and one campaign supporter.⁹³ Only two current sex workers were invited to an oral hearing, although eight sex workers had made written submissions.⁹⁴ McGarry and Fitzgerald noted that the Joint Committee favoured the voices of former sex workers rather than current sex workers.⁹⁵ Moreover, supporters of the TORL campaign used the false consciousness argument that was mentioned in section 2(b) to silence sex workers. For example, Ruhama a NGO that works with people who have been affected by sex work⁹⁶ insisted that the Joint Committee understand sex workers' choice to enter sex work as being "preceded by and conditioned on earlier traumatic abuse".⁹⁷ FitzGerald *et al*, argue that this denies sex workers' their right to participate in the review process by discrediting their experiences.⁹⁸ In a letter to the former Minister for Justice and Equality, Alan Shatter, the Chairman of the Joint Committee admitted that the Joint Committee "placed a particular value on the evidence" submitted by former sex workers on the premise that they have

⁸⁷ *Ibid.* at 59.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* at 56.

⁹⁰ *Ibid.* at 77.

⁹¹ *Ibid.* at 76.

⁹² *Ibid.* at 17.

⁹³ *Supra* note 22 at 323.

⁹⁴ *Supra* note 71 at 28.

⁹⁵ Kathryn McGarry and Sharron FitzGerald, "The Politics of Injustice: Sex-Working Women, Feminism and Criminalizing Sex Purchase in Ireland" (2019) 19(1) *Criminology and Criminal Justice* 62 at 68.

⁹⁶ Ruhama, *Submission to the Joint Oireachtas Committee on Justice, Equality and Defence: Review of Legislation on Prostitution* (2012) at 7.

⁹⁷ *Ibid.* at 11.

⁹⁸ *Supra* note 73 at 269.

no particular interest on the outcome of the review.⁹⁹ This demonstrates that current sex workers' experiences were not taken as seriously as those who have left the industry, despite the fact that the law would have a direct impact on current sex workers' lives. Hence, the Joint Committee was influenced by the notion that sex workers were speaking under false consciousness.

c. The Criminal Law (Sexual Offences) Act, 2017

The review process ignored the potential negative consequences the Swedish model could have on sex workers' lives. Accordingly, the review process led to the implementation of the Swedish model by amending the 1993 Act through the enactment of the 2017 Act. Section 25(b) amended the 1993 Act by inserting section 7A to prohibit the purchasing of sexual services whether in public or private. Section 7A also sets out the penalties for this offence which can result in a fine not exceeding €500 for a first-time offence and a fine not exceeding €1,000 in the instance of a second time offence and any other subsequent offences. Section 25(a) also deleted section 1(2)(a) of the 1993 Act which removed the prohibition on selling sexual services in a public place as set out under section 7 of the 1993 Act but the offence of purchasing sexual services in a public place remained. This decriminalised sex workers but criminalised the purchasers of sexual services, thereby, following the main characteristics of the Swedish model. Section 25(e) amended section 10(1) of the 1993 Act and section 25(f) amended section 11 of the 1993 Act increasing the penalties for living off the earnings of a sex worker and brothel-keeping, fines were raised from €1,000 to €5,000 and imprisonment from six months to twelve months.

Even though the Swedish model was supposed to decriminalise the sex worker, the 2017 Act not only failed to decriminalise brothel-keeping but also increased the punishment for this offence.¹⁰⁰ Moreover, the punishment for two or more sex workers working together for safety is far worse than the consequences of purchasing sexual services as this does not lead to a prison sentence and the fines are not as high.¹⁰¹ The importance of sex workers being legally permitted to work together and the damaging consequences the criminalisation of brothel-keeping has on sex workers will be demonstrated in Section C.

4. Conclusion

This Section introduced the Swedish model which primarily involves the criminalisation of the purchaser of sexual services and brothel-keeping but the decriminalisation of selling sexual services. It was first adopted in Sweden and its overall aim was to eradicate sex work as it contributes to sex trafficking and is viewed as a form of gender-based violence. It is argued that this would increase compliance with Article 9(5) of the Palermo Protocol and Article 6 of CEDAW. However, the conflation of sex work with sex trafficking is a dangerous route to adopt as it results in the failure to detect potential victims, thereby, failing to protect women against sex trafficking. Moreover, Article 6 of CEDAW does not explicitly prohibit sex work and it is argued that there is a difference between voluntary and forced sex work. Silencing sex workers on the premise that they are speaking through false consciousness is an extremely paternalistic approach that denies sex workers their agency and undermines their lived experiences.

⁹⁹ David Stanton T.D, Letter Regarding the Report of Joint Committee on Justice, Defence and Equality on Hearings and Submissions on the Review of Prostitution Legislation (Office of the Minister for Justice and Equality, 6 November 2013).

¹⁰⁰ Adeline Berry and Patricia Frazer, "How Sex Workers Understand Their Experiences of Working in the Republic of Ireland" (2021) *Sexuality Research and Social Policy* <<https://doi.org/10.1007/s13178-021-00626-2>> accessed 11 February 2022.

¹⁰¹ *Ibid.*

Despite these arguments against the Swedish model, Ireland adopted it in 2017. It was quite predictable that this approach would be implemented as the review process of the 1993 Act was highly in favour of the Swedish model from the outset with many of the contributors being members of the TORL campaign. Indeed, the government conflated sex work with sex trafficking based on the belief that the Swedish model would reduce the demand for sex work, therefore, combat sex trafficking and eradicate gender-based violence.

However, critics of the Swedish model believe that criminalising the purchasers of sexual services to ensure the safety of sex workers is counterproductive.¹⁰² As it has been over 3 years since the adoption of the Swedish approach in Ireland, it is legally required under section 27 to review part 4 of the 2017 Act and the impact it has on sex workers' lives. Therefore, the following Section will demonstrate how the introduction of the Swedish model in Ireland fails to address the negative impacts it has on sex workers' right to health and right to work, resulting in Ireland's failure to comply with its international obligations.

C. IRELAND'S OBLIGATIONS UNDER INTERNATIONAL LAW TO PROTECT SEX WORKERS' HUMAN RIGHTS

1. Introduction

The consequence of the Swedish model is largely negative¹⁰³ and does not fulfil its predicted aim.¹⁰⁴ Sex workers suffer from human rights abuses by States as a result of criminalising the purchasing of sexual services and sex work activities and States are ignoring this.¹⁰⁵ Accordingly, the 2017 Act is no exception to the negative impact the Swedish model has on sex workers' lives.¹⁰⁶ Sex workers in Ireland bear the burden of the law resulting in their basic human rights being violated daily.

Upon ratification of international treaties, the State is obliged to comply with the laws stipulated therein. Although there is no international human rights treaty specifically for sex workers, they are entitled to human rights just like everyone else.¹⁰⁷ The binding international document that will be used throughout this Section is the ICESCR. This was adopted by the United Nations and entered into force in 1976 which Ireland ratified in 1989. This is one of the documents that make up the International Bill of Rights. This document was chosen because of its strong international support due to it being widely ratified. It was the first legally binding document to establish the right to health¹⁰⁸ and it includes multiple work-related rights.¹⁰⁹ As sex workers primarily are women, it is important to consider the international documents that aim to protect women. Therefore, references will also be made to CEDAW and the Istanbul Convention as they impose obligations on signatory States to protect women from discrimination and violence.

This Working Paper will analyse the impact the Swedish model has on sex workers' right to health and their right to work. These two rights were chosen because laws that criminalise the purchasers of sexual services

¹⁰² *Supra* note 94 at 71.

¹⁰³ *Supra* note 25 at 428.

¹⁰⁴ *Supra* note 47 at 5.

¹⁰⁵ *Supra* note 2 at 9. *See also, supra* note 25 at 428.

¹⁰⁶ Kathryn McGarry and Paul Ryan, *Sex Worker Lives Under the Law: A Community Engaged Study of Access to Health and Justice in Ireland* (2020) at 49 [hereinafter the 2020 study].

¹⁰⁷ *Supra* note 15 at 6.

¹⁰⁸ *Supra* note 62 at 6:2.

¹⁰⁹ *Ibid.* at 5:2.

or sex work activities seriously undermine these rights¹¹⁰ which are extremely important for the realisation of multiple other human rights.¹¹¹ As sex workers are constantly being denied their right to health and right to work it is important to consider the extent to which Ireland is failing in its international obligations to protect these rights. Firstly, the right to health will be defined along with the duties it imposes on States. The impact the *2017 Act* has on sex workers' right to health will then be discussed. It will be argued that Ireland is failing to meet its international obligations to ensure sex workers' right to access healthcare along with their right to sexual health. In the second part of this Section the right to work will be defined and analysed. It will be highlighted that due to Ireland's adoption of the Swedish model, the State is failing to comply with its international obligation to protect sex workers' right to work, particularly the right to social security. Moreover, it will be demonstrated that the State is failing in its obligation to realise sex workers' right to just and favourable working conditions, more specifically their right to safe and healthy working conditions.

2. The Right to Health

The right to health first became binding under international law with the adoption of the ICESCR. Article 12 of the ICESCR stipulates that everyone has the right "to the enjoyment of the highest attainable standard of physical and mental health." This right is further defined by the Committee on Economic, Social and Cultural Rights (the Committee) in General Comment No.14. The Committee states that the right to health under Article 12 does not mean the right to be healthy.¹¹² It means that everyone has a right to enjoy the conditions that are necessary for the realisation of this right.¹¹³ Article 12.2 places an obligation on States to realise the right to health. Therefore, upon ratification of the ICESCR, Ireland has an obligation to respect, protect and fulfil the right to health.¹¹⁴ Under the obligation to respect, States must not interfere with the right to health.¹¹⁵ The duty to protect obliges States to adopt measures to ensure that third parties do not interfere with a person's right to health.¹¹⁶ According to the obligation to fulfil, States must adopt measures such as legislation in order to achieve the full realisation of this right.¹¹⁷ As argued by Brookes-Gordan *et al*, States that fail to respect, protect and fulfil the rights of sex workers are failing to comply with their obligations under international law.¹¹⁸ Hence, Ireland has a duty to realise sex workers' right to health. However, it will be highlighted that the State's adoption of the Swedish model results in a failure of the attainment of this obligation.

a. The obligation to ensure the right to access healthcare

In determining whether Ireland is complying with its international obligations regarding sex workers' right to health, the right to healthcare will first be considered. According to the Committee, the right to health includes the right to healthcare.¹¹⁹ One of Ireland's core obligations under this right is to "ensure the right of

¹¹⁰ *Supra* note 18 at 29.

¹¹¹ Committee on Economic, Social and Cultural Rights (2000), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (E/C.12/2000/4, 11 August) at [3].

¹¹² *Ibid.* at [8].

¹¹³ *Ibid.* at [9].

¹¹⁴ *Ibid.* at [33].

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Belinda Brooks-Gordon et al, "Justice and Civil Liberties on Sex Work in Contemporary International Human Rights Law" (2020) 9(1):4 *Social Science* at 6 <<https://doi.org/10.3390/socsci9010004>> accessed 11 February 2022.

¹¹⁹ *Supra* note 110 at [4].

access to health facilities, goods and services”.¹²⁰ The State must ensure its accessibility in a non-discriminatory manner.¹²¹ The Committee, specifically, emphasises the need to ensure it is accessible to the vulnerable and marginalised.¹²² Sex workers are vulnerable and marginalised as most sex workers are women which “bear a disproportionate burden of poverty”.¹²³ Indeed, they engage in sex work because of poverty and inequality.¹²⁴ Additionally, sex workers come from backgrounds of oppression and marginalisation meaning that they face increased prejudice, thus, increasing their vulnerability.¹²⁵

Grover notes that the criminalisation of purchasing sexual services impedes sex workers’ access to healthcare services.¹²⁶ This is primarily due to their fear of being judged and facing possible legal repercussions.¹²⁷ The World Aids Campaign reported that sex workers often feel unwelcome at health clinics as health professionals can be unfriendly or judgemental towards them.¹²⁸ Sex workers in Ireland have often experienced a sense of shame and embarrassment when accessing healthcare services. This was expressed by sex workers in a study carried out by McGarry and Ryan following the introduction of the *2017 Act*.¹²⁹ They highlighted that the criminalisation of purchasing sexual services and brothel-keeping has led to an increase in stigma and discrimination.¹³⁰ This makes it difficult for sex workers to disclose their occupation to healthcare professionals for fear of judgement, thereby, creating a barrier to receiving the appropriate healthcare.¹³¹ This lack of disclosure was generally experienced by sex workers in sexual health services outside of Dublin¹³² with sex workers from urban areas feeling more comfortable in their sexual health clinics but highlighting that they were usually inadequately resourced.¹³³

The failure to disclose sex work can have a detrimental impact on sex workers’ health. When STIs are not treated there is an increased risk of HIV infection.¹³⁴ The World Health Organisation (WHO) emphasised that when people are excluded from health services, it leads to ill health that could have been prevented.¹³⁵ For example, one sex worker had a client who removed his condom during sexual intercourse without her knowledge. The woman went to the hospital to ask for PEP which would have reduced her chances of being exposed to HIV.¹³⁶ The woman did not disclose her occupation due to the stigma attached to sex work.¹³⁷ The hospital refused to give her PEP as they felt there was no risk of exposure to HIV due to the sexual engagement being heterosexual.¹³⁸ However, if it was known to the hospital that the woman was a sex worker, they would have been aware of the increased risk that sex workers have of being exposed to HIV¹³⁹,

¹²⁰ *Ibid.* at [43](a).

¹²¹ *Ibid.* at [12](b).

¹²² *Ibid.*

¹²³ *Supra* note 2 at 5.

¹²⁴ *Supra* note 99.

¹²⁵ *Supra* note 2 at 9.

¹²⁶ *Supra* note 52 at [43].

¹²⁷ *Ibid.* at [36].

¹²⁸ *Supra* note 15 at 15.

¹²⁹ *Supra* note 105 at 5.

¹³⁰ *Ibid.* at 51.

¹³¹ *Ibid.* at 41.

¹³² *Ibid.*

¹³³ *Ibid.* at 42.

¹³⁴ *Supra* note 15 at 15.

¹³⁵ World Health Organization, *Sexual Health, Human Rights and the Law* (WHO, June 2015) at 29.

¹³⁶ *Supra* note 105 at 43.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ Christine Harcourt, *et al*, “The Decriminalisation of Prostitution is Associated with Better Coverage of Health Promotion Programs for Sex Workers” (2010) 34(5) *Australian and New Zealand Journal of Public Health* 482 at 482.

therefore, the woman would have received PEP. This traumatic event demonstrates the importance of disclosing sex work to healthcare professionals to ensure that they are provided with appropriate care. The stigma experienced by sex workers due to their perceived criminal status prevents them from doing so.

Accordingly, the State's failure to ensure that sex workers have access to healthcare services could have a detrimental effect on their health. More importantly, the failure to provide healthcare to sex workers and healthcare services appropriate to their needs can have a damaging effect on sex workers' sexual health.

b. The obligation to ensure the right to sexual health

The right to sexual health is a key component to the right to health under Article 12.1 of the ICESCR.¹⁴⁰ A working definition of sexual health was created by WHO and the World Association of Sexology which stipulates that it is "a state of physical, emotional, mental and social well-being in relation to sexuality".¹⁴¹ Amnesty International argues that criminalising any part of sex work interferes with sex workers' right to sexual health.¹⁴²

In General Comment No.22 the Committee elaborates on the meaning of sexual health highlighting that States must ensure that sex workers have access to sexual health services.¹⁴³ General Comment No.14 stipulates that the right to health includes access to education and information on sexual health.¹⁴⁴ The Committee further highlights that States must ensure that everyone has access to sexual health information, goods and services which includes the duty to remove barriers that certain groups face in accessing these.¹⁴⁵ WHO also emphasises the need to have access to information, sexual healthcare services and "an environment that affirms and promotes sexual health" in order to realise a person's right to sexual health.¹⁴⁶ As highlighted in the previous section sex workers in Ireland experience barriers to accessing healthcare services, therefore they have difficulty accessing sexual health services too. Health clinics tend to be the primary distributors of condoms and information regarding safer sex; thus, sex workers may not avail of these sexual health services.¹⁴⁷ Accordingly, the State is failing in its duties to respect, protect and fulfil sex workers' right to access sexual health services, education and information.

The lack of access to sexual health services can in turn contribute to an increase in STIs and HIV infections within the community. Amnesty International argues that the criminalisation of any aspect of sex work undermines the global effort to prevent HIV infections.¹⁴⁸ Article 12(2)(c) requires States to take steps to ensure "[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases". The Committee states that this requires States to establish programmes concerning prevention and education on health concerns such as STIs and HIV/AIDS.¹⁴⁹

¹⁴⁰ Committee on Economic, Social and Cultural Rights (2016), *General comment No. 22: On the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)* (E/C.12/GC/22) at [1].

¹⁴¹ World Health Organisation, *Defining Sexual Health: Report of a technical Consultation on Sexual Health 28-31 January 2002*, Geneva (WHO, 2006) at 5. See also, *supra* note 134 at 5.

¹⁴² *Supra* note 2 at 10.

¹⁴³ *Supra* note 139 at [32].

¹⁴⁴ *Supra* note 110 at [11].

¹⁴⁵ *Supra* note 139 at [34].

¹⁴⁶ *Supra* note 134 at 4.

¹⁴⁷ *Supra* note 15 at 15.

¹⁴⁸ *Supra* note 2 at 10.

¹⁴⁹ *Supra* note 110 at [16].

Since the introduction of the *2017 Act*, Ireland is failing to comply with its obligation under Article 12(2)(c). In the Interim Report of the High-Level Working Group, three years after the adoption of the Swedish model, it was highlighted that many buyers have engaged in unprotected sex with a sex worker and that women feel more pressured to engage in unsafe sexual acts since the commencement of the *2017 Act*.¹⁵⁰ However, this increasing pressure to engage in unprotected sex and rising concern about STIs is due to the criminalisation of clients, rather than sex work itself. The 2020 study highlighted that since the commencement of the *2017 Act* there has been a decrease in clients because of the risk of a potential conviction. Although the purpose of the Swedish model, as mentioned in section 2(b) above, is to decrease the demand for sex work, the approach fails to consider the adverse impacts that this has on sex workers' sexual health. With less clients, sex workers are pressured to accept clients they would have normally declined due to health risks or the client being potentially dangerous.¹⁵¹ Many of these clients would request unprotected sex which sex workers usually would not agree to but due to the reduction in clients they have limited options of clients and need an income.¹⁵² Additionally, sex workers can request higher payments for unprotected sex, which they have been more inclined to do because of the reduction in clients.¹⁵³ Therefore, since the *2017 Act* sex workers have less power to negotiate safer sex.¹⁵⁴

Interestingly, the Joint Committee, during the review of legislation on sex work, expressed concern about the prevalence of STIs among sex workers and referred to a study carried out in 2007 where it found that 80% (59 out of 73) of sex workers attending the sexual health clinic had an STI.¹⁵⁵ This was expressed as an argument in favour of the Swedish model. However, as illustrated above the increasing pressure to engage in unprotected sex is because of the prohibition of the purchasing of sexual services. Hence, the implementation of the Swedish model impedes sex workers from exercising safer sex and undermines efforts to prevent STIs and HIV infections. Accordingly, the State is failing in its obligation to protect sex workers' right to sexual health and to take steps to prevent the spread of STIs as required under Article 12(2)(c). Furthermore, the increased risk of STIs in the work environment creates unhealthy working conditions which results in the State failing in its obligations to provide safe and healthy working conditions under Article 7 of the ICESCR. This obligation will be discussed in section 3(b) below.

3. The Right to Work

The ICESCR contains multiple obligations in relation to the right to work. Article 6.1 of the ICESCR realises the right to work, emphasising that it includes the right to choose work freely and the right to earn a living. Moreover, Article 11(1)(a) of CEDAW sets out the right to work, highlighting that it is "an inalienable right of all human beings". In the General Comment No.18, the Committee stipulates that the work "must be *decent work*", meaning that the work must respect the basic rights of the individual along with workers' rights such as safe working conditions and remuneration.¹⁵⁶

Article 6.1 also places a binding obligation on States to take steps to protect the right to work. Moreover, paragraph two stipulates that States are obliged to take steps to achieve the full realisation of this right. The

¹⁵⁰ *Supra* note 20 [hereinafter Interim Report].

¹⁵¹ *Supra* note at 105 at 44.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.* at 32.

¹⁵⁵ *Supra* note 71 at 34.

¹⁵⁶ Committee on Economic, Social and Cultural Rights (2005), *General Comment No. 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)* (E/C.12/GC/18, 6 February) at [7] [emphasis in official].

Committee highlighted that Article 6 obliges States to take any measures necessary to ensure that each individual “is protected from unemployment and insecurity in employment and can enjoy the right to work as soon as possible.”¹⁵⁷ Accordingly, States have a duty to take proactive steps to ensure that sex workers’ fundamental rights are respected, protected and fulfilled.¹⁵⁸ This includes the right to work. However, sex work in most countries is not recognised as work. The Global Network of Sex Work Projects (NSWP), an international organisation that advocates for sex workers’ human rights and provides a platform for sex workers¹⁵⁹ highlights that the movement to recognise sex work as work is “a foundational principle of the sex workers’ rights movement”.¹⁶⁰ Hence, when the purchasing of sexual services or activities around sex work is criminalised sex workers’ right to work is violated.¹⁶¹

a. The obligation to ensure the right to social security

The Committee emphasises that States have an obligation under Article 6 to take the necessary measures to ensure that as many workers as possible are operating within the formal economy because the informal economy does not provide workers with protection.¹⁶² The International Labour Conference defined the ‘informal economy’ as involving economic activities that are not covered by the law.¹⁶³ Workers within the informal economy lack rights under labour law.¹⁶⁴ Sex workers in Ireland are not recognised within the formal sector. The Swedish model prevents sex work from being recognised as a legitimate occupation. When work is not recognised as work within the formal sector, workers are not entitled to any social protections.¹⁶⁵ If sex work was recognised as work, sex workers would be entitled to benefits such as maternity leave, sick pay and unemployment benefits.¹⁶⁶ Indeed, labour laws are fundamental to protect sex workers’ right to work.¹⁶⁷

Article 9 of the ICESCR recognises “the right of everyone to social security.” The Committee emphasise that this includes the right to receive benefits due to a reduction in income because of reasons such as sickness or maternity.¹⁶⁸ Moreover, the Committee stipulated that the right to just and favourable conditions of work under Article 7 includes paid sick leave.¹⁶⁹ Article 11(1)(e) of CEDAW also states that women should have a right to social security along with Article 11(2)(b) stating that they have a right to maternity leave. Amnesty International does not comment on whether sex work should be recognised as a legitimate form of work; however, it argues that sex workers could greatly benefit from labour protections if sex work activities were not criminalised.¹⁷⁰ Although, selling sexual services is not criminalised, buying sexual services and brothel-

¹⁵⁷ *Ibid.* at [37].

¹⁵⁸ Global Network of Sex Work Projects, *Consensus Statement: On Sex Work, Human Rights and the Law* (NSWP, 16 December 2013) at 1.

¹⁵⁹ *Supra* note 62 at 1.

¹⁶⁰ Global Network of Sex Work Projects, *Policy Brief: Sex Work as Work* (NSWP, September 2017) at 15.

¹⁶¹ Chi Adanna Mgbako, ‘The Mainstreaming of Sex Workers’ Rights as Human Rights’ (2020) 43 *Harvard Journal of Law and Gender* 92 at 129.

¹⁶² *Supra* note 155 at [10].

¹⁶³ International Labour Conference, *Resolutions and Conclusions Concerning Decent Work and the Informal Economy*, (General Conference of the International Labour Organization, 90th session, Geneva, 2002) at [3].

¹⁶⁴ *Ibid.* at [4].

¹⁶⁵ *Supra* note 159 at 1.

¹⁶⁶ *Ibid.* at 11.

¹⁶⁷ *Supra* note 134 at 28.

¹⁶⁸ Committee on Economic, Social and Cultural Rights (2008), *General Comment No. 19: The Right to Social Security* (Art. 9) (E/C.12/GC/19, 4 February) at [2].

¹⁶⁹ Committee on Economic, Social and Cultural Rights (2016), *General Comment No. 23: On the Right to Just and Favourable Conditions of Work* (Article 7 of the International Covenant on Economic, Social and Cultural Rights) (E/C.12/GC/23, 27 April) at [30].

¹⁷⁰ *Supra* note 2 at 13.

keeping are prohibited, therefore, making it difficult for sex workers to operate legally. The removal of the criminal law would ensure that sex workers can claim their rights and be protected from exploitation without fear of being penalised.¹⁷¹ Sex workers should be afforded the same protections as workers in any other profession.¹⁷² However, this is not the reality for sex workers in Ireland due to the current law. Sex workers in Ireland lack employment and financial security when sick or on maternity leave as sex work is not recognised as a legitimate occupation.

The COVID-19 pandemic highlighted the reality that sex workers lack social security. The International Committee on the Rights of Sex Workers in Europe argue that the pandemic has shown “what sex worker activists have been echoing for decades: sex workers will be the last prioritised population when it comes to providing them with alternative income”.¹⁷³ The Committee has highlighted that Article 9 includes the obligation on States to provide workers with benefits if they are requested to not attend work due to an emergency, such as a public health emergency.¹⁷⁴ However, the COVID-19 pandemic demonstrates that sex workers are forced to work without any of the protections afforded to workers operating in the formal economy.¹⁷⁵ Sex workers have rarely benefited from the pandemic response.¹⁷⁶ Indeed, the majority of sex workers globally were only receiving a small amount of income or no income at all during national lockdowns.¹⁷⁷ Many sex workers were unable to stop working, thereby exposing themselves to the risk of contracting COVID-19.¹⁷⁸ This impeded the State’s obligation under Article 12(2)(c) as mentioned in section 2(b) above, as sex workers had no choice but to work, thereby potentially spreading the virus. As will be demonstrated below, sex workers in Ireland were also in this position.

In Ireland, sex workers are not entitled to the Pandemic Unemployment Payment. Ugly Mugs Ireland is a volunteer-run organisation and its goal is to improve sex workers’ safety by allowing sex workers to come together and share details about potentially dangerous clients.¹⁷⁹ Ugly Mugs set up funds to provide income support for sex workers, thereby demonstrating that the Swedish model impedes their ability to access support and assert their rights.¹⁸⁰ The COVID-19 pandemic is just the latest example of the State failing in its obligations to provide social security to sex workers as a result of unemployment due to a public health emergency. Accordingly, the State fails in its duty to provide social security to sex workers as set out in Article 9. This results in the failure of the State to comply with its obligations to realise the right to work as these two rights are connected.

b. The obligation to ensure the right to safe and healthy working conditions

The Committee stipulates that Articles 6 and 7 are interdependent.¹⁸¹ Article 7 states that everyone has the right to “just and favourable conditions of work” which is also enshrined in Article 11(1)(f) of CEDAW.

¹⁷¹ *Ibid.*

¹⁷² *Supra* note 21 at 51.

¹⁷³ International Committee on the Rights of Sex Workers in Europe, *Policy Demands: The Impact of COVID-19 on Sex Workers in Europe and Central Asia and Recommendations for Policy Makers* (ICRSE, April 2020) at 1.

¹⁷⁴ *Supra* note 167 at [16].

¹⁷⁵ *Supra* note 172.

¹⁷⁶ *Ibid.* at 3.

¹⁷⁷ *Ibid.* at 7.

¹⁷⁸ *Ibid.* at 10.

¹⁷⁹ Graham Ellison and Lucy Smith, *Hate Crime legislation and violence against sex workers in Ireland: Lessons in Policy and Practice* (Queen’s University Belfast School of Law, 2017) at 6.

¹⁸⁰ Elane Lam, ‘Pandemic Sex Workers’ Resilience: COVID-19 Crisis Met with Rapid Responses by Sex Worker Communities’ (2020) 63(6) *International Social Work* 777 at 779.

¹⁸¹ *Supra* note 155 at [8].

According to Article 7 this includes the right to remuneration, safe and healthy working conditions and the right to rest and leisure. The General Comment on Article 7 emphasises that one of the State's core obligations is to "ensure the satisfaction of, at the very least, minimum essential levels of the right to just and favourable conditions of work."¹⁸² For the purpose of this Working Paper, the right to safe and healthy working conditions will be considered as this is one of the State's greatest failures in regard to ensuring sex workers' right to work and it connects to the right to health in the previous section.¹⁸³

When brothel-keeping and buying sexual services are criminalised, sex workers are not in the position to demand safe and healthy working conditions.¹⁸⁴ NSWP highlights that sex workers have a fundamental right to enjoy working environments that are free from sexual and physical violence.¹⁸⁵ However, Grover noted that sex workers face an increased risk of being subject to violence while at work because of the criminalisation of the buyer.¹⁸⁶ This can be seen in Ireland since the enactment of the *2017 Act*. In 2020 a submission made by a group of academics to the Department of Justice's review of the *2017 Act* argued that the law has exacerbated the dangerousness of sex work as it has increased their vulnerability to violence.¹⁸⁷ Due to the criminalisation of the purchasers of sexual services, clients prefer to purchase sexual services in more discrete locations.¹⁸⁸ This leads to sex workers operating in isolated areas, out of sight from the police. Indeed, the Swedish model simply moves demand to more remote locations.¹⁸⁹ This makes it easier for sex workers to be subject to violence. This has been proved by the Ugly Mugs online reporting system. As mentioned earlier, Ugly Mugs is an organisation that advocates for sex workers' rights, more specifically, their right to safety.¹⁹⁰ It has an online presence only, known as UglyMugs.ie which is an online reporting system that enables sex workers to report violence perpetrated against them anonymously. From Ugly Mug's research it was found that there has been a 90% increase in violence and a 92% increase in sexual violence against sex workers between 2017 to 2019 in comparison to the two years prior to the implementation of the *2017 Act*.¹⁹¹ The increase in violence against sex workers is also because sex workers are not allowed to work together. Sex workers work indoors together for safety, but the *2017 Act* makes brothel-keeping a criminal offence.¹⁹² For example, two sex workers were convicted for brothel-keeping after a police raid in 2018. They were sentenced to a nine-month prison sentence but are appealing the case.¹⁹³ Due to the increase in penalties under the *2017 Act* more sex workers fear being charged for brothel-keeping. Therefore, they work alone and increase their risk of being subject to violence. Sex workers have described themselves as being vulnerable because of this.¹⁹⁴ Accordingly, the law prevents sex workers from adopting safer working strategies.¹⁹⁵

¹⁸² *Supra* note 168 at [65].

¹⁸³ *Ibid.* at [25].

¹⁸⁴ *Supra* note 15 at 7.

¹⁸⁵ *Supra* note 159 at 4.

¹⁸⁶ *Supra* note 52 at [27].

¹⁸⁷ Vicky Conway, *Submission to the Department of Justice's Review of Part 4 of the Sexual Offences Act 2017* (August 2020) at 1.

¹⁸⁸ *Supra* note 21 at 60-61.

¹⁸⁹ *Supra* note 19 at 8.

¹⁹⁰ *Supra* note 178.

¹⁹¹ Ugly Mugs, "Crime Has Almost Doubled in the Two Years Since New Law Came in" (UglyMugs.ie, 26 March 2019).

¹⁹² Rosie Campbell, Lucy Smith, Billie Stoica, Beck Leacy and Miriam Ryan, "Not Collateral Damage: Trends in Violence and Hate Crimes Experienced by Sex Workers in the Republic of Ireland" (2020) 27(3) *Irish Journal of Sociology* 280 at 285.

¹⁹³ *Supra* note 20 at 10.

¹⁹⁴ *Supra* note 105 at 32.

¹⁹⁵ *Supra* note 191 at 287.

Moreover, a further analysis of the Ugly Mugs data highlighted that since 2017 the number of sex workers that have reported perpetrators threatening to report them to the police has increased by 98.31%.¹⁹⁶ Campbell *et al*, argue that this indicates that this is an effective intimidation method used by perpetrators.¹⁹⁷ Although it is the buyers that are engaging in illegal activity, sex workers still take these threats seriously especially because more sex workers than buyers are being convicted under the 2017 Act for brothel-keeping offences. The first conviction for a buyer was in January 2019.¹⁹⁸ Between 2017 and 2020 only four buyers have been prosecuted under the 2017 Act.¹⁹⁹ There is no official statistics on how many sex workers have been prosecuted for brothel-keeping. However, according to the latest statistics on the CSO, in 2019 there were 113 sex work offences.²⁰⁰ Therefore, considering this statistic with the fact that between 2017 and 2020 only four buyers have been prosecuted, this demonstrates that the 2017 Act mainly targets sex workers.²⁰¹ Thus, sex workers generally do not report crimes to the police due to the fear of being prosecuted for brothel-keeping.²⁰² The 2017 Act enables perpetrators to use the law to silence sex workers when acts of violence are perpetrated against them. It ignores the fact that the Swedish model increases sex workers' vulnerability to violence and other crimes.²⁰³ The law creates a dangerous work environment and does not improve sex workers' safety. Despite this, supporters of the Swedish model argue that sex work is a form of gender-based violence, thus, signatories of the Istanbul Convention could argue that the model increases compliance with Article 12(2). This requires States to take steps through legislation or alternative measures to prevent violence against women. However, as argued above the Swedish model increases violence against women in sex work. Therefore, Ireland is failing in its obligations under Article 12(2) of the Istanbul Convention.

Most States are more concerned about criminalising activities around sex work rather than protecting sex workers from violence and increasing their safety.²⁰⁴ This in turn, creates a relationship of mistrust between the police and sex workers which creates an environment of impunity for perpetrators.²⁰⁵ As highlighted above, Ireland is no exception to this stark reality in the lives of sex workers. Ireland's obligation to protect the right to just and favourable working conditions, which according to the Committee "includes taking steps to prevent, investigate, punish and redress abuse through effective laws and policies and adjudication."²⁰⁶ However, despite the intention of the Swedish model to decriminalise the sex worker, the 2017 Act has led to the police targeting sex workers which has given rise to a lack of trust in the police. This has led sex workers to engage in self-policing and share information between each other to manage their own risks.²⁰⁷ This is why UglyMugs.ie became a more useful mechanism for sex workers since the 2017 Act.

Sex workers feel that they are treated unequally when reporting crimes.²⁰⁸ Participants from the 2020 study expressed these feelings, highlighting that they do not report crimes to the police for these reasons.²⁰⁹ One

¹⁹⁶ *Ibid.* at 301.

¹⁹⁷ *Ibid.*

¹⁹⁸ Women's Aid, *Submission to the Review of Part 4 of the Criminal Law (Sexual Offences) Act 2017* (September 2020) at 3.

¹⁹⁹ *Supra* note 20 at 10.

²⁰⁰ Central Statistics Office, "Recorded Crime Q4 2019", <<https://www.cso.ie/en/releasesandpublications/ep/p-rc/recordedcrimeq42019/additionalstatisticaltables/>> accessed 11 February 2022.

²⁰¹ *Supra* note 186 at 4.

²⁰² *Supra* note 191 at 288.

²⁰³ *Ibid.* at 307.

²⁰⁴ *Supra* note 2 at 12.

²⁰⁵ *Ibid.*

²⁰⁶ *Supra* note 168 at [59].

²⁰⁷ *Supra* note 178 at 5.

²⁰⁸ *Supra* note 38 at 22.

²⁰⁹ *Supra* note 105 at 31.

sex worker said that they live horrible lives but not as a result of their work but because they do not receive equal treatment when a crime is committed against them.²¹⁰ This fear is exacerbated for migrant women as they have the additional fear of being deported.²¹¹ One migrant sex worker spoke of her experience of being raped but felt unable to report the incident or attend a health clinic.²¹² In a study carried out by Berry and Frazer in 2020 on sex workers' experiences under the *2017 Act*, a sex worker said that she would not contact the police unless she was in a life or death situation.²¹³ Similarly, Amnesty International reported that in Norway sex workers were reluctant to report crimes and would only report a crime if there was an immediate threat to their life.²¹⁴ It was also reported by Amnesty International that sex workers were evicted²¹⁵ or deported after contacting the police because of a crime.²¹⁶ Accordingly, the *2017 Act* exacerbated the climate of impunity for perpetrators. As sex workers do not report crimes they are viewed as easy targets.²¹⁷ This increases the risk of violence against sex workers. Hence, Ireland is failing in its obligations under Article 5(2) of the Istanbul Convention which requires states to adopt measures "to exercise due diligence to prevent, investigate, punish and provide reparation" for acts of gender-based violence. Ireland is failing in this obligation as the *2017 Act* prevents sex workers from reporting violence to the police, which creates a culture of impunity for perpetrators. This also creates an unsafe work environment which results in the State failing to protect sex workers' right to safe and healthy working conditions. Accordingly, Ireland is not in compliance with its duty to realise the right to work.

4. Conclusion

The protection of sex workers' human rights "is not merely good public health practice ... it is a state obligation under international human rights law."²¹⁸ Ireland is party to most international human rights treaties, including the ICESCR, CEDAW and the Istanbul Convention. However, the implementation of the Swedish model in Ireland has resulted in a violation of sex workers' human rights. Thus, the State is failing in its binding international human rights obligations.

According to Article 12 of the ICESCR, States have an obligation to protect the right to health. However, the *2017 Act* has affected sex workers' right to health. Sex workers have difficulty accessing health services due to an increase in stigma and when sex workers do have access to health services, they fail to disclose their occupation for fear of judgement. This in turn affects their sexual health. Lack of access to sexual health clinics and information regarding safer sex has impeded their right to sexual health. Additionally, due to a decrease in bargaining power and a reduction in clients, sex workers feel pressured to offer unprotected sex.

Article 6 places an obligation on States to realise the right to work, while Article 9 sets out the obligation to ensure that everyone has access to social security. As sex work is not regarded as work, they are not entitled to social protection due to loss of earnings. Article 7 further places an obligation on the State to ensure that workers have just and favourable working conditions, including safe and healthy working conditions. However, since the implementation of the Swedish model there has been an increase in violence against sex

²¹⁰ *Ibid.* at 32.

²¹¹ *Supra* note 191 at 288.

²¹² *Supra* note 105 at 31.

²¹³ *Supra* note 99.

²¹⁴ *Supra* note 24 at 55.

²¹⁵ *Ibid.* at 44.

²¹⁶ *Ibid.* at 45.

²¹⁷ *Supra* note 178 at 21.

²¹⁸ Michele R Decker *et. al*, "HIV and Sex Workers 4: Human rights violations against sex workers: burden and effect on HIV" (2015) 385 *Lancet* 186 at 196.

workers, thereby, creating an unsafe working environment. Multiple factors contribute to this, including the need to work in isolated areas due to the criminalisation of clients. Furthermore, the law against brothel-keeping and its increase in penalties have left sex workers with no other choice but to work alone, thereby leaving them vulnerable to violence. The law impedes their ability to adopt safer working practices. Additionally, the State has an obligation to investigate and punish crimes of abuse. However, the mistrust sex workers have with the police prevents sex workers from reporting crimes, thereby, creating a culture of impunity for perpetrators.

Accordingly, the Swedish model has resulted in sex workers' right to health and working conditions being compromised. Hence, it is the framework in which sex work operates in that violates sex workers' human rights rather than sex work itself.²¹⁹ Kate McGrew, the former director of Sex Workers Alliance Ireland, an organisation that promotes sex workers' rights, stated that sex workers are merely just "collateral damage in the futile quest to eradicate sex work entirely".²²⁰ Therefore, the next Section will consider alternative approaches to sex work that better respect sex workers' human rights.

D. A CALL FOR FULL DECRIMINALISATION OF SEX WORK

1. Introduction

The previous Section illustrated that the Swedish model does not comply with Ireland's obligations under international human rights law as the effects of the *2017 Act* denies sex workers their right to health and right to work. The Irish government must acknowledge this and take active steps to comply with its international obligations in order to ensure the protection of sex workers' rights.²²¹ Hence, the aim of this Section is to consider an alternative model that will enhance Ireland's compliance under international law, thereby, protecting sex workers' human rights.

There are multiple approaches to sex work that can be adopted. However, the full decriminalisation model will be considered in this Section as it will be argued that this is the most appropriate model to increase Ireland's compliance with its international human rights obligations. Full decriminalisation removes sex work from criminal law and regulates it under general labour laws that are applied to other workers.²²² It is different to the legalisation of sex work as this approach legalises sex work but involves a high level of State control.²²³ In 2003 New Zealand was the first, and so far, only country, to adopt the full decriminalisation model through the enactment of the *Prostitution Reform Act, 2003*.²²⁴

This Section will first introduce the decriminalisation model. Following this, the impact that the decriminalisation model has on sex workers' right to health will be considered. It will be illustrated that this approach enhances Ireland's compliance, ensuring that sex workers' right to access healthcare and right to sexual health are protected. Sex workers' right to work will be the final focus of this section. It will be

²¹⁹ Tiffany Comprés, "Labor of Love: Using International Labor Law to Achieve Human Rights for Women Sex Workers in the Dominican Republic" (2009) 40 *Georgetown Journal of International Law* 1027 at 1047.

²²⁰ Aoife Moore, "Group Representing Sex Workers Criticises New Report" (November 2018) <<https://www.independent.ie/breaking-news/irish-news/group-representing-sex-workers-criticises-new-report-37523055.html>> accessed 11 February 2022.

²²¹ *Supra* note 21 at 49.

²²² *Supra* note 18.

²²³ *Supra* note 15.

²²⁴ *Prostitution Reform Act, 2003* [hereinafter *PRA*].

demonstrated that decriminalisation increases the State's compliance to ensure sex workers' right to social security and their right to safe and healthy working conditions. Accordingly, this Section will illustrate that full decriminalisation is the most suitable alternative to the Swedish model as it will enhance Ireland's compliance with its international obligations.

2. Introducing the Decriminalisation Model

The decriminalisation of sex work means that all laws criminalising activities around sex work are removed from criminal law.²²⁵ Criminal laws on forced sex work or facilitating children to sell sexual services is still prohibited as this is distinguished from consensual sex work between adults.²²⁶ Amnesty International, who began to advocate for this approach in 2016,²²⁷ highlighted that the decriminalisation approach retains some elements of regulation of sex work but rather than laws focusing on criminalisation this approach concentrates on protecting sex workers from exposure to violence and exploitation.²²⁸ The primary aim of full decriminalisation is to respect sex workers' human rights and improve their health and working conditions.²²⁹ Whereas, the ultimate goal of the Swedish model is to eradicate sex work as highlighted in Section 2.2(b) above.²³⁰ Full decriminalisation is more realistic as it recognises that the sex industry will never be fully eliminated.²³¹

Although the legalisation model is not within the scope of this section it is important to note the difference between decriminalisation and legalisation as the two are often confused with one another.²³² Under legalisation the selling and buying of sexual services is decriminalised along with activities around sex work.²³³ However, sex work under the legalisation model is heavily controlled by the State as it is believed that sex work must "be subject to controls to protect public order and health such as mandatory health checks."²³⁴ The primary difference between the two approaches is the level of State regulation, with decriminalisation usually involving the sex industry being regulated through regular legislation and regulations concerning employment and health.²³⁵

Decriminalisation was chosen to consider for reform instead of legalisation as it better protects sex workers' human rights and is more in line with Ireland's obligations under international law. Unlike the legalisation model, the decriminalisation approach takes the control away from the State and clients and empowers sex workers.²³⁶ When the sex industry is heavily restrictive, as it is under legalisation, it becomes difficult to work legally within sex work and a two-tier system of legal and illegal sex work is created.²³⁷ It is argued that in

²²⁵ Elaine Mossman, *International Approaches to Decriminalising or Legalising Prostitution* (Crime and Justice Research Centre, Victorian University of Wellington, October 2007) at 12.

²²⁶ *Ibid.*

²²⁷ *Supra* note 2 at 2.

²²⁸ *Ibid.* at 12.

²²⁹ *Supra* note 224 at 6.

²³⁰ Bridie Sweetman, "Reflections from the Field: The Judicial System and Sex Work in New Zealand (2017) 31(2) *Women's Studies Association of New Zealand* 61 at 62.

²³¹ Ine Vanwesenbeeck, "Sex Work Criminalization Is Barking Up the Wrong Tree" (2017) 46 *Archives of Sexual Behavior* 1631 at 1636.

²³² *Supra* note 229.

²³³ *Supra* note 18 at 23.

²³⁴ *Supra* note 224 at 6.

²³⁵ *Ibid.*

²³⁶ *Ibid.* at 13.

²³⁷ *Ibid.* at 36.

practice criminalisation exists within the legalisation model.²³⁸ The sex workers that operate within the illegal industry share all the same dangers as those involved in sex work under the Swedish model.²³⁹ The decriminalisation model attempts to avoid the creation of a two-tier system.²⁴⁰ Accordingly, the legalisation approach is not appropriate because it still restricts sex workers' control over their health and working conditions.

New Zealand fully decriminalised sex work in 2003 following the implementation of the *PRA*, thereby becoming the first country in the world to do so.²⁴¹ However, section 19(2) of the *PRA* prohibits persons under a temporary visa to work as a sex worker and subsection one does not allow a visa to be granted to a person who either has been in sex work or intends to be engaged in sex work. The *PRA* represents a harm reduction model that focuses on protecting sex workers' human rights.²⁴² This is evident in section 3 of the *PRA* where it states that, in particular, it was enacted to create a framework that protects sex workers' human rights, prevents them from being exploited and advances their occupational health and safety. Sections 16 and 17 of the *PRA* provides further protections for sex workers. Section 16 states that it is a criminal offence which results in imprisonment of up to 14 years for compelling someone to sell sexual services. Section 17 explicitly states that sex workers' have a right to refuse to provide sexual services or to continue to provide sexual services despite the client having already paid. Moreover, the *PRA* did not decriminalise the buying of sexual services from persons under 18 years. Section 20 states that assisting a person under 18 to sell sexual services is illegal and section 22 states that it is prohibited to receive paid sexual services from a person under 18. Anyone that commits one of these offences can receive up to 7 years imprisonment.²⁴³ Rather than focusing on the enforcement of criminal law, the *PRA* clearly aims to focus on protecting sex workers' human rights.

3. Ensures Sex Workers' Right to Health

a. Increases access to healthcare

In Ireland, as mentioned in section 3.2(a) above, the Swedish model has created a barrier for sex workers to access healthcare services and if they do access healthcare, they do not disclose their occupation to their doctor. WHO argues that when sex work is not fully decriminalised sex workers are prevented from accessing healthcare.²⁴⁴ A full decriminalisation approach reduces the stigma associated with sex work.²⁴⁵ With less stigma healthcare services will be more welcoming to sex workers, therefore, encouraging sex workers to access healthcare services.²⁴⁶ HIV Ireland also argues that full decriminalisation would create an environment where sex workers are comfortable enough to disclose their occupation to healthcare professionals thereby ensuring that they receive healthcare appropriate to their needs.²⁴⁷ Furthermore, Platt notes that provision

²³⁸ *Supra* note 230 at 1632.

²³⁹ *Supra* note 229.

²⁴⁰ *Supra* note 224 at 13.

²⁴¹ Johanna Schmidt, "The Regulation of Sex Work in Aotearoa/New Zealand: An Overview" (2017) 31(2) *Women's Studies Journal* 35 at 36.

²⁴² Gillian Abel *et. al*, "The Prostitution Reform Act" in Gillian Abel, Lisa Fitzgerald, Catherine Healy, Gillian Abel and Aline Taylor (eds), *Taking the Crime out of Sex Work: New Zealand Sex Workers' Fight for Decriminalisation* (Bristol: Policy Press, 2010) at 76.

²⁴³ *Prostitution Reform Act, 2003*, section 23.

²⁴⁴ World Health Organization, *Consolidated Guidelines on HIV Prevention, Diagnosis, Treatment and Care for Key Populations* (WHO, June 2016 Update) at 86.

²⁴⁵ *Supra* note 62 at 8:7.

²⁴⁶ *Supra* note 15 at 16

²⁴⁷ *Supra* note 38 at 26.

of healthcare services for sex workers are more vital during the Covid-19 pandemic as health challenges are worsened during a pandemic.²⁴⁸

The Christchurch School of Medicine published a report in 2007 which analysed the impact of the *PRA* on sex workers' health and safety practices.²⁴⁹ The CSOM report carried out two studies on sex work in Christchurch in 1999 and again in 2006 in order to compare the impact the decriminalisation model has on sex workers' lives. When considering the impact that the *PRA* has had on sex workers' access to healthcare, the report highlighted that there was a slight increase in sex workers having their own doctor (91.8%) with half of these sex workers saying that they disclose their occupation to their doctor (53.9%).²⁵⁰ Additionally, it was found that 41.3% of these sex workers access sexual health needs through their doctor.²⁵¹ Some participants of the study described their doctors as being "a bit more open-minded" since the *PRA*.²⁵² However, the CSOM highlighted that while many sex workers had their own doctor, many still did not feel comfortable enough to disclose their occupation to their doctor due to the stigma still associated with sex work.²⁵³ Decriminalisation has helped reduce the stigma and increased the number of sex workers disclosing their occupation but it has not reduced it significantly as initially hoped. However, societal attitudes around sex work does not change automatically once the decriminalisation model is introduced.²⁵⁴ The CSOM report emphasised that it is too soon for any major changes to occur in this regard as the study was carried out just three years after the commencement of the *PRA*.²⁵⁵ NSW argue that although decriminalisation cannot address all problems immediately, this approach is still an important step to improve sex workers' access to healthcare.²⁵⁶ The decriminalisation model is a starting point as it will help to fight against negative societal attitudes that remain towards sex workers, particularly because it was illustrated in section 3.2(a) above that criminalising brothel-keeping and the buying of sexual services exacerbated the stigma. In an environment in which sex workers are not treated differently to other occupations, the stigma will slowly decrease. Abel and Fitzgerald express their optimism about the decriminalisation model slowly reducing the stigma associated with sex work in New Zealand, highlighting that some people's perceptions have already changed.²⁵⁷

Moreover, the decriminalisation model will improve Ireland's compliance with protecting sex workers' right to access sexual health services. Less stigma would increase access to sexual health clinics. The Report of the Prostitution Law Review Committee identified NZPC as the primary providers of healthcare and information for sex workers.²⁵⁸ The PLRC highlighted that since the *PRA* the NZPC find it easier to communicate with sex workers as they can now "speak openly about sex work and safer sex practices."²⁵⁹ Additionally, NZPC found that there has been a rise in the number of sex workers that feel comfortable disclosing their occupation to

²⁴⁸ Lucy Platt *et al*, "Sex Workers Must Not Be Forgotten in the COVID-19 Response" (2020) 396 *Lancet* 9 at 10 <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31033-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31033-3/fulltext)> accessed 11 February 2022.

²⁴⁹ Gillian Abel, Lisa Fitzgerald and Cheryl Brunton, *Report to the Prostitution Law Review Committee: 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, Christchurch November 2007) [hereinafter CSOM].

²⁵⁰ *Ibid.* at 112-113.

²⁵¹ *Ibid.* at 113.

²⁵² *Ibid.*

²⁵³ *Ibid.* at 114.

²⁵⁴ *Supra* note 240 at 46.

²⁵⁵ *Supra* note 248 at 132.

²⁵⁶ *Supra* note 62 at 6:9

²⁵⁷ Gillian Abel and Lisa Fitzgerald, "Decriminalisation and Stigma" in Gillian Abel, Lisa Fitzgerald, Catherine Healy, Gillian Abel and Aline Taylor (eds), *Taking the Crime out of Sex Work: New Zealand Sex Workers' Fight for Decriminalisation* (Bristol: Policy Press, 2010) at 256.

²⁵⁸ Ministry of Justice, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (May 2008, Ministry of Justice) at 49 [hereinafter PLRC].

²⁵⁹ *Ibid.*

the healthcare professionals in the clinics operated by the NZPC.²⁶⁰ This enables sex workers to receive sexual health services appropriate to their needs. Hence, the decriminalisation model would improve Ireland's compliance with its obligation to ensure the right to access healthcare.

b. Protects sex workers' sexual health

The State also has a duty to protect the right to sexual health as this is included under the right to health. Over and Hawkins argue that removing sex work from the criminal law could change how sex workers' right to sexual health can be realised.²⁶¹ Sex workers are generally most at risk of STIs and HIV infections.²⁶² Therefore, it is particularly important that States ensure that they are complying with their obligation to protect sex workers' right to sexual health.

In New Zealand, the *PRA* enables sex workers to negotiate safer sex practices and requires sex workers, clients and operators to ensure that safe sex practices are adopted. Sections 8 and 9 impose onerous obligations on these parties to implement safer sex practices. Section 8(1)(a) requires operators of a sex work business to ensure that condoms are used when a sex worker and a client engage in commercial sexual activities. This is also required of sex workers and their clients under section 9(1). Promoting the use of condoms are vital for an effective approach to the prevention of HIV infections and STIs.²⁶³ Section 8(1)(b) requires operators to take all reasonable steps to provide sex workers and clients with health information regarding safer sex practices. Subsection (1)(c) requires that health information on safer sex practices be prominently displayed in brothels. Furthermore, operators must not state or imply that the result of a sex worker's STI test means that the sex worker has or does not have an STI.²⁶⁴ This ensures that test results cannot be used to promote the business.²⁶⁵ This is also a duty for sex workers and their clients under section 9(2). Lastly, section 8(1)(e) places a duty on operators to "take all reasonable steps" to decrease the chances of sex workers or clients getting or spreading STIs. Under section 8(3) this is also a requirement for sex workers and their clients. An operator who does not comply with these obligations commits an offence that can lead to a fine of up to \$10,000.²⁶⁶ Sex workers and clients that contravene section 9 will also be committing an offence and required to pay a fine of up to \$2,000.

The CSOM report highlighted that most participants of the study said that they used the law under section 9 to negotiate safer sex practices when clients insisted on sex without a condom.²⁶⁷ It was further stipulated that around three quarters of participants working in managed brothels said that they used the law as a method to make clients wear a condom.²⁶⁸ However, just a third of the participants working in the street reported adopting this strategy.²⁶⁹ This is more than likely because of the hefty fines that operators obtain

²⁶⁰ Catherine Healy, Ahi Wi-Hongi and Chanel Hati, "Reflection from the Field: It's Work, It's Working: The Integration of Sex Workers and Sex Work in Aotearoa/New Zealand" (2017) 31(2) *Women's Studies Association of New Zealand* 50 at 54.

²⁶¹ *Supra* note 56 at 6.

²⁶² *Supra* note 138.

²⁶³ UNFPA, WHO and UNAIDS, "Position Statement on Condoms and the Prevention of HIV, other Sexually Transmitted Infections and Unintended Pregnancy" (July 2015) <https://www.unaids.org/en/resources/presscentre/featurestories/2015/july/20150702_condoms_prevention#13> accessed 11 February 2022.

²⁶⁴ *Prostitution Reform Act, 2003*, section 8(1)(d).

²⁶⁵ *Supra* note 259.

²⁶⁶ *Prostitution Reform Act, 2003*, section 8(2).

²⁶⁷ *Supra* note 248 at 128

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

for not complying with their obligations under section 8. Evidently, the law is an effective strategy to ensure that safer sex practices are adopted. This improves sex workers' right to sexual health, thereby increasing State compliance with Article 12 of the ICESCR.

Moreover, the Swedish model impedes compliance with Article 12(2)(c) which obliges States to control, prevent and treat the spread of diseases. Decriminalisation improves sex workers' control over the negotiation of condom use which leads to a reduction in STIs and HIV infections.²⁷⁰ It is argued that with full decriminalisation there would be a 46% decrease in HIV infections among sex workers and their clients over a ten-year period because of the effect it can have on safer working conditions.²⁷¹ For example, a study carried out in New Zealand over a 12-month period between 2005-2006 found that among the 298 female sex workers that participated in the study, not one of them had a HIV infection.²⁷² Overall, it has been proved that HIV infections are very low among sex workers.²⁷³ Therefore, full decriminalisation prevents the spread of STIs and HIV infections which improves the State's compliance with Article 12(2)(c) of the ICESCR.

4. Ensures Sex Workers' Right to Work

a. Improves access to social security

Section 3.3(a) above highlighted that the right to work includes the right to social security as stipulated under Article 9 of the ICESCR. Sex work in Ireland is not recognised as a legitimate form of work meaning that sex workers are not entitled to social protections. Indeed, one of the main reasons for full decriminalisation is that sex workers should be entitled to social protections just like any other worker.²⁷⁴

By adopting the decriminalisation model, sex work would be recognised as a legitimate occupation. This would enable sex workers to enforce their rights because labour laws along with occupational health and safety laws will be extended to sex work.²⁷⁵ For example, after the enactment of the *PRA* in New Zealand, the Department of Labour published *A Guide to Occupational Health and Safety in the New Zealand Sex Industry*.²⁷⁶ The guidelines highlighted that the minimum employment rights extends to employees in the sex industry.²⁷⁷ This applies despite the terms of the employment agreement.²⁷⁸ Among the employment rights mentioned on the factsheet was the right to sick leave under the *Holidays Act, 2003*²⁷⁹ which allows 5 days' paid annual sick leave.²⁸⁰ Unlike the Swedish model, full decriminalisation would enable sex workers to access these benefits.

²⁷⁰ *Supra* note 21 at 64.

²⁷¹ Kate Shannon, *et al*, "HIV and Sex Workers 1: Global epidemiology of HIV among Female Sex Workers: Influence of Structural Determinants" (2015) 385(1) *Lancet Series* 55 at 66.

²⁷² Susan McAllister, *et. al*, "Unlinked Anonymous HIV Prevalence Among New Zealand Sexual Health Clinic Attenders: 2005–2006" (2008) 19 *International Journal of STD & AIDS* 752 at 754.

²⁷³ John Godwin, *Sex Work and the Law in Asia and the Pacific: Laws, HIV and Human Rights in the Context of Sex Work* (October 2012, United Nations Development Programme) at 195.

²⁷⁴ *Supra* note 159 at 1.

²⁷⁵ *Supra* note 15 at 16.

²⁷⁶ Occupational Safety and Health Service, *A Guide to Occupational Health and Safety in the New Zealand Sex Industry* (June 2004, Department of Labour).

²⁷⁷ *Ibid.* at 89.

²⁷⁸ *Ibid.*

²⁷⁹ *Holidays Act, 2003*.

²⁸⁰ *Supra* note 275 at 90.

The COVID-19 pandemic demonstrated the drastic contrast between sex workers' right to social security under the Swedish model and their right to social security under the decriminalisation model. Sex workers in New Zealand were able to access the government subsidy schemes just like workers from any other industry along with the entitlement to access unemployment benefits.²⁸¹ A self-employed sex worker speaking of her experience during the COVID-19 pandemic, highlighted that it took just 2 days for her to receive a lump sum of \$4,200 to cover 12 weeks of lost income for working part-time after applying for the New Zealand emergency wage subsidy scheme.²⁸² This illustrates that fully decriminalising sex work better protects sex workers' right to social security. This approach would ensure that Ireland is in full compliance with its obligation to protect sex workers' right to social security. Furthermore, social security would financially enable sex workers to stay at home and prevent the spread of the virus, in the event of an additional lockdown. Therefore, Ireland would also increase compliance under Article 12(2)(c) of the ICESCR as mentioned in the previous section under the right to sexual health.

b. Improves working conditions

The right to work also includes the right to safe and healthy working conditions as stipulated under Article 7(b). The *PRA* decriminalises brothel-keeping and introduced the category of small owner-operated brothels (SOOBs) under section 4(1). SOOBs allows up to four sex workers to work together in a brothel without the need of a brothel operator certificate as required under sections 34 and 35 for brothels with more than four sex workers. This is because each sex worker working in the SOOBs has control over their earnings from sex work.²⁸³ This enables sex workers to work together for safety which the Swedish model prohibits. Moreover, decriminalising the purchasers of sexual services creates a safer environment for sex workers as sex workers do not need to hide clients from the authorities.²⁸⁴ In New Zealand this has resulted in sex workers having additional time to screen clients.²⁸⁵ The purpose of screening clients is to determine whether the potential client will keep to the terms of the agreement, thereby, preventing those that may have bad intentions.²⁸⁶ Additional time to screen clients increases sex workers' safety as it minimises the risk of choosing a dangerous client.²⁸⁷ This is because it is easier to determine the client's intentions. In a study carried out between 2009-2010 based on interviews with street-based sex workers, it was found that when clients appeared nervous or agitated, sex workers could rule out that this was out of fear of being detected by the police.²⁸⁸ Moreover, additional negotiation time enables sex workers to negotiate safer sex, thereby, reducing STIs and HIV infections.²⁸⁹ Thus, it protects sex workers' right to sexual health and increases the State's compliance with the right to health as discussed in section 4.3(b) above. Hence, decriminalisation creates an environment in which sex workers can work more openly and assess potential clients more thoroughly, thereby, reducing the potential risks.²⁹⁰

²⁸¹ Lynzi Armstrong, "COVID-19 Illuminates Discriminatory Sex Work Policies" (June 2020) <<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/covid-19-illuminates-discriminatory-sex-work-policies/>> assessed 11 February 2022.

²⁸² Anna Louie Sussman, "'Don't Have to Fight for Pennies': New Zealand Safety Net Helps Sex Workers in Lockdown" (April 2020) <<https://www.theguardian.com/world/2020/apr/28/dont-have-to-fight-for-pennies-new-zealand-safety-net-helps-sex-workers-in-lockdown>> assessed 11 February 2022.

²⁸³ *Prostitution Reform Act, 2003*, Section 4(1)(b)

²⁸⁴ *Supra* note 259 at 56.

²⁸⁵ *Ibid.*

²⁸⁶ Lynzi Armstrong, "Screening Clients in a Decriminalised Street-Based Sex Industry: Insights into the Experiences of New Zealand Sex Workers" (2014) 47(2) *Australian and New Zealand Journal of Criminology* 207 at 210.

²⁸⁷ *Supra* note 259 at 56

²⁸⁸ *Supra* note 285 at 211-12.

²⁸⁹ Louise Cahill, "Decriminalisation of Sex Work" (2019) 28(11) *British Journal of Nursing* 670 at 670.

²⁹⁰ *Supra* note 285 at 219.

Full decriminalisation of sex work enables sex workers and their clients to report to the police without fear of prosecution for brothel-keeping or for purchasing sexual services. The World Aids Campaign highlighted that when purchasers of sexual services are not criminalised they are more likely to report suspected cases of trafficking for sexual purposes.²⁹¹ This will assist in the prevention of trafficking for sexual purposes. Hence, full decriminalisation would increase Ireland's compliance with Article 9(5) of the Palermo Protocol, despite it being one of the purposes of the Swedish model and the primary argument against full decriminalisation as highlighted in section 2.2(b) above. Moreover, full decriminalisation improves relationships between sex workers and the police. This was illustrated in a 3-year study carried out in Wellington and Christchurch which focused on the relationship between sex workers and the police since the introduction of the *PRA*.²⁹² Sex workers in the study expressed that the police are more respectful towards them since the *PRA*.²⁹³ The study highlighted that the law altered the role of the police, placing them in a position to protect sex workers.²⁹⁴ When sex workers have a better relationship with the police they are more inclined to report violence against them. In New Zealand, in *R v Daly*²⁹⁵ a man was found guilty of assaulting a sex worker.²⁹⁶ The sex worker had agreed to engage in sexual activity with the man in return for money.²⁹⁷ During the sexual encounter the man became very rough with the sex worker and this continued despite the sex worker telling him to stop.²⁹⁸ Justice Dunningham recognised the vulnerable position of sex workers during these encounters²⁹⁹ and the offender received a 10 month prison sentence.³⁰⁰ This case demonstrated that the New Zealand judiciary have adopted a 'zero-tolerance' approach to violence against sex workers.³⁰¹ This is also demonstrated in a more recent case, *R v Campos* involving a man that had removed a condom without the sex worker's consent during sexual intercourse.³⁰² The accused was convicted of rape and received a 3-year and 9-month prison sentence.³⁰³ Justice S M Harrop emphasised that "[a] sex worker who is raped is no less a victim than any other woman".³⁰⁴

In the managed sector decriminalisation has empowered sex workers to report sexual violence to the police as they now have labour rights. In *DML v Montgomery*,³⁰⁵ the Human Rights Review Tribunal found that an employer of a brothel sexually harassed one of his employees.³⁰⁶ The Tribunal stated that "[t]he fact that a person is a sex worker is not a licence for sexual harassment".³⁰⁷ The sex worker was awarded \$25,000 in compensation.³⁰⁸ Armstrong noted that this would not have been the result if the decriminalisation model had not been introduced.³⁰⁹ Farley argues that tolerating sexual harassment is part of sex work and questions

²⁹¹ *Supra* note 15 at 23.

²⁹² Lynzi Armstrong, "From Law Enforcement to Protection? Interactions Between Sex Workers and Police in a Decriminalized Street-Based Sex Industry" (2017) 57 *British Journal of Criminology* 570 at 574.

²⁹³ *Ibid.* at 577.

²⁹⁴ *Ibid.*

²⁹⁵ *R v Daly* [2014] NZHC 1922 [hereinafter *Daly*].

²⁹⁶ *Ibid.* at [1].

²⁹⁷ *Ibid.* at [3]

²⁹⁸ *Ibid.* at [6]-[8].

²⁹⁹ *Ibid.* at [31]

³⁰⁰ *Ibid.* at [38]

³⁰¹ *Supra* note 229 at 64

³⁰² *R v Campos* [2021] NZDC 7422 at [18].

³⁰³ *Ibid.* at [38].

³⁰⁴ *Ibid.* at [16]

³⁰⁵ *DML v Montgomery* [2014] NZHRRT 6 [hereinafter *Montgomery*].

³⁰⁶ *Ibid.* at [128].

³⁰⁷ *Ibid.* at [146].

³⁰⁸ *Ibid.* at [148]

³⁰⁹ Lynzi Armstrong, "Commentary: Decriminalisation and the Rights of Migrant Sex Workers in Aotearoa/New Zealand: Making a Case for Change" (2017) 31(2) *Women's Studies Journal* 69 at 71.

how the *PRA* can protect sex workers from sexual harassment.³¹⁰ This argument is futile as *Montgomery* clearly demonstrates that the decriminalisation model ensures that sex workers have access to justice which gives a warning to other potential perpetrators.

The decriminalisation model will ensure that perpetrators will not go unpunished and reduce the culture of impunity that the Swedish model has exacerbated. This will increase Ireland's compliance with Article 12(2) of the Istanbul Convention as an increase in reporting and prosecutions means that perpetrators of violence against sex workers will come to realise that their crimes will not go unpunished. Hence, this also will improve compliance with Article 5(2) of the Istanbul Convention. Accordingly, the decriminalisation model improves sex workers' right to health and safety working conditions, thereby, increasing the State's compliance under Article 7 of the ICESCR.

5. Conclusion

The aim of this final Section was to consider an alternative sex work model. It was argued throughout this section that the decriminalisation approach would be the most appropriate model for Ireland to adopt to improve compliance with international law, thereby, protecting sex workers' human rights. This model was chosen as a better alternative than the Swedish model as it is recognised as a model that enhances sex workers' human rights.³¹¹ Advocating for the decriminalisation model does not mean promoting sex work, it recognises the negative effects of the criminal law.³¹²

This Section argued that sex workers' right to health is better protected under the decriminalisation model. It helps reduce the stigma around sex work, thereby, increasing sex workers' access to healthcare. This results in an improved access to sexual health clinics. Moreover, the *PRA* sets out safeguards to promote safe sex which empowers sex workers to use the law against clients that insist on unprotected sex. Accordingly, sex workers' right to sexual health is improved under this model. The decriminalisation model also enhances the State's compliance with its obligation to ensure sex workers' right to work. When sex work is recognised as a legitimate form of work sex workers are entitled to the same labour rights as other workers. Therefore, they are entitled to receive social protections. This was evidently seen in New Zealand's experience during the pandemic. Furthermore, with decriminalisation, sex workers' have improved working conditions. Removing sex work from criminal law gives sex workers longer time to screen clients. This makes it easier to recognise potentially dangerous situations. Moreover, legalising brothel-keeping means sex workers no longer have to work alone. Additionally, sex workers feel more comfortable reporting violence to the police, thereby, eradicating the culture of impunity.

Accordingly, the decriminalisation model is a more pragmatic approach to address the conditions of sex work.³¹³ It better protected sex workers' rights and improves Ireland's compliance with international law.

³¹⁰ Melissa Farley, "'Bad for the Body, Bad for the Heart': Prostitution Harms Women Even if Legalized or Decriminalized" (2004) 10(10) *Violence Against Women* 1087 at 1117.

³¹¹ *Supra* note 21 at 62.

³¹² *Supra* note 15 at 5.

³¹³ *Ibid.*

E. CONCLUSION

The purpose of this Working Paper was to examine the extent to which the adoption of the Swedish model has led to Ireland's denial of sex workers' human rights, thereby failing in its international obligations. In 2017 Ireland implemented the Swedish model through the enactment of the *2017 Act*. The aim was to eradicate the demand for sex work as it was argued that it increases sex trafficking and is a form of gender-based violence. It was highlighted that the review process was heavily in favour of the Swedish model which led to the Joint Committee failing to study alternative approaches to govern sex work. Moreover, sex workers were silenced throughout the review and their first-hand experiences as sex workers were not examined.³¹⁴

This Working Paper demonstrated that sex workers are being denied the full enjoyment of their right to health. The Swedish model exacerbated the stigma associated with sex work which has resulted in sex workers not receiving healthcare appropriate to their needs. This is because sex workers do not feel comfortable disclosing their occupation to healthcare professionals for fear of judgement. This in turn has denied sex workers access to sexual health services that are specific to their needs. Moreover, the criminalisation of purchasers has led to a reduction in the number of clients which means sex workers engage in riskier sexual activities in order to earn an income. This has resulted in more unprotected sex which increases the risk of STIs and HIV infections, thereby impeding the State's efforts to prevent the spread of diseases.

It was also illustrated that Ireland has a duty to ensure sex workers' right to work. This right includes the right to social security. The COVID-19 pandemic demonstrated that sex workers are being denied this right. This not only resulted in the State's failure to ensure sex workers' right to work but it also resulted in the State failing to prevent and control a pandemic as without an income, sex workers were forced to work during lockdowns, thereby potentially spreading the virus. Moreover, the State has a duty to ensure sex workers' right to safe and healthy working conditions. Section C evidently illustrated that the Swedish model has worsened the working conditions for sex workers as it has led to an increase in violence against sex workers. This is because sex workers are prohibited from working indoors together for safety and must work in isolated areas to protect their clients from prosecution. Moreover, it was highlighted that sex workers do not report violence against them to the police as sex workers are convicted more than clients despite the claim that the *2017 Act* decriminalised sex workers. Not only is the State failing in its obligations to ensure sex workers' right to work but the increase in violence has led to Ireland's failure to comply with the Istanbul Convention.

Due to the evident failure of the Swedish model, Section D considered alternative approaches. Although there are multiple approaches that can be adopted, it was demonstrated that the decriminalisation model is the most appropriate approach to adopt as it is "couched in an explicit recognition that sex workers should have rights".³¹⁵ It was demonstrated that this model is the starting point for reducing the stigma associated with sex work. It was highlighted that this would lead to an increase in sex workers' access to healthcare as they would feel more comfortable disclosing their occupation to healthcare professionals, resulting in sex workers receiving healthcare appropriate to their needs. This would prevent STIs and HIV infections along with assisting the State in its attempt to prevent the spread of diseases.

³¹⁴ *Supra* note 99.

³¹⁵ Lynzi Armstrong, "Decriminalisation of Sex Work in the Post-Truth Era? Strategic Storytelling in Neo-Abolitionist Accounts of the New Zealand Model" (2021) 21(3) *Criminology and Criminal Justice* 369 at 371.

Furthermore, it was illustrated that the decriminalisation model enhances the State's compliance with its obligation to ensure sex workers' right to work. Decriminalisation allows sex work to be recognised as a legitimate occupation. Therefore, sex workers have the same rights as any other worker. Sex workers' experiences of the COVID-19 pandemic in New Zealand demonstrated that the decriminalisation model ensures sex workers' right to social security. Moreover, sex workers' working conditions are safer due to decriminalisation. Sex workers have longer time to openly negotiate with clients. This enables sex workers to assess their clients to determine whether the client could be potentially dangerous. Additionally, longer negotiation time enables sex workers to negotiate safer sex which prevents the risk of STIs and HIV infections. Moreover, the decriminalisation model improves the relationship between sex workers and the police which increases the reporting of violence against sex workers. It is evident from New Zealand case law that violence against sex workers is a serious crime and perpetrators do not go unpunished. This improves the State's compliance under its obligation to ensure that sex workers have safe and healthy working conditions and it improves the State's compliance with its obligations under the Istanbul Convention.

In conclusion, this Working Paper evidently demonstrated that Ireland is failing in its international obligations to ensure sex workers' right to health and right to work through the adoption of the Swedish model. This was important to demonstrate as it highlighted the adverse consequences the *2017 Act* has on sex workers' lives which needs to be addressed by the government immediately. There is no easy solution to addressing sex work. It is still subjected to contentious debates globally, despite sex work being one of the oldest professions in the world. However, the decriminalisation model is a more realistic approach than the Swedish model as it recognises that sex work will never be fully eradicated and adopts a harm reduction approach instead, thereby reducing the dangers that the Swedish model aims to eliminate. Despite which model is adopted during the review of the *2017 Act*, the government must acknowledge the negative impacts the Swedish model has on sex workers' health and working conditions, listen to sex workers' opinions and lived experiences of working in the sex industry and thoroughly consider alternative approaches.