A CRITICAL EXPLORATION OF THE POTENTIAL ROLE OF THE HUMAN RIGHTS ACT 1998 IN THE REFORM OF LAW RELATING TO SEX WORK IN ENGLAND AND WALES

By

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STATEMENT OF COPYRIGHT

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Chapter 1

INTRODUCTION

1.1 Introduction

This thesis considers the law relating to sex work[1] in England and Wales[2] through the lens of the Human Rights Act 1998 (HRA). It examines how laws on prostitution, and policy and policing practice around sex work can and do violate sex workers rights under the European Convention on Human Rights (ECHR). It also analyses the mechanisms within the HRA to consider how and to what extent it could be used to respond to these human rights violations. This thesis argues that a number of laws on prostitution - namely laws on soliciting,[3] brothel keeping,[4] controlling prostitution for gain,[5] and causing and inciting prostitution for gain[6] – violate Article 8 of the ECHR on the right to private and family life by forcing sex workers to choose between working legally (selling sex is legal), and safely. This thesis also argues that some sex workers rights under Article 10 on freedom of expression, and Article 14 on freedom from discrimination. This thesis has also argues that policing practices have the potential to violate sex workers rights under Article 8, Article 3 on freedom from torture and inhuman and degrading treatment, Article 4 on forced and compulsory labour and Article 6 on the right to a fair trial.

[1] The term sex work is used in this thesis to refer to the provision of direct sexual services. This is further explained later in this chapter.
[2] This thesis analyses only those laws relating to sex work in England and Wales, which will be set out in full in Chapter 3. The laws relating to sex work in Scotland and Northern Ireland are devolved and differ from those in England and Wales and, as such, a full analysis of these laws is beyond the scope of this thesis.
[3] Street Offences Act 1959, s 1.
[4] Sexual Offences Act 1956, ss 33-36.
[5] Sexual Offences Act 2003, s 53.
[6] Sexual Offences Act 2003, s 52.

This thesis then examined whether, in light of these real and potential violations, the HRA can provide sex workers remedy. This thesis argues that human rights, and the HRA more specifically, have three functions for sex workers: firstly, human rights provides a language of political and legal power that represents a demand for inclusion, participation and equality in the political sphere; secondly, the HRA offers an avenue for challenging laws that violate sex workers' rights, creating momentum for reform; and finally, the HRA allows for robust examination of policing practices towards sex workers, demonstrating that many police actions may be unjust interferences with sex workers rights, and pushing for more rigorous proportionality tests to be used by the police when responding to sex work.

The HRA creates obligations on the courts and public authorities that can be drawn on to challenge violations of ECHR rights. Laws and police action can, firstly, be challenged through court cases. I argue that, in relation to legislation, this is unlikely to provide the solution sought by sex workers. It is demonstrated that is no European consensus on sex work and states are likely to be afforded a wide margin of appreciation on this matter. Where there is a lack of clear guidance from Strasbourg jurisprudence and the subject matter is considered to fall within the state's margin of appreciation, I show that domestic courts are inclined towards deferring to the Government and Parliament on how best to balance competing rights and interests. Moreover, while a successful claim would have benefits across the sex industry, this still requires someone to bring the claim. Sex workers rights organisations and charities can and do support claims, I demonstrate, but due to rules on standing, there must be a sex worker willing and able to be the claimant in such a case. This has been a key limitation so far. Courts are, it is argued, more likely to find violations by public authorities, such as those discussed in relation to the police. Such challenges, however, rely on the facts of the case, and the impact can therefore be limited to the specific claimant. It is argued that many sex workers, due to their

marginalised status, lack of access and knowledge, and stigma around being 'out', are not in a position to access courts in this way. Therefore, while more likely to be successful, such challenges are out of reach for many.

An alternative approach is to use human rights, and the clear examples of human rights violations apparent in sex work law, policy, and policing, to lobby for change to the law and to policing approaches. Human rights provide a language of political and legal power that represents a demand for inclusion, participation and equality in the political sphere so they can be an important tool for sex workers. This strategy also is not reliant on individual sex workers being able or willing to litigate. Parliament, however, remains sovereign under the HRA, so there is no obligation for them to change legislation even where it is clear that there are violations, as I argue there are. Moreover, sex workers' rights claims not only have to compete with communitarian interests but also alternative human rights arguments posited against sex work. This has two implications: first, Parliament can choose which approach most appeals to them; and secondly, despite these limitations, not using the political power of rights cedes the terms of the debate to the 'other side'. This thesis therefore argues that while the internal structure of the HRA and ongoing deference to Parliament makes it difficult for sex workers to have their rights uphold, it is important to know where these violations take place, highlight them, and continue to lobby for change.

1.2 Aims and Objectives of the Thesis

This thesis aims to fill the gap in knowledge in relation to sex work and the HRA, by critically examining the potential for the HRA to frame challenges to the current law and policing on sex work in England and Wales, demonstrating that sex workers' human rights can and should be

a priority in regulating sex work. Human rights arguments are increasingly significant in debates around sex work and its regulation, yet thus far, there has been a lack of analysis within both campaigns and academic research on how specific human rights legislation could be used to reshape the law in England and Wales. This thesis aims to provide a fuller, more robust analysis of the legal arguments and the significance of human rights in this realm.

In order to achieve these aims, the thesis is aligned with a series of objectives, which are:

1. To delineate the problems surrounding sex work around which law and policy should be focused, by examining and rethinking what we know about sex work and how this knowledge has been constructed into narratives about the problem of sex work.
2. To consider if and why reform of the law is necessary, by evaluating the ways the current legal response to sex work in England and Wales responds to these problems, fails to respond to them, or worsens the impacts of these problems on sex workers' lives.
3. To consider how a human rights approach supports, but goes beyond, a labour-based approach to regulating sex work, by examining the benefits and limitations of regulating sex work through labour law and labour rights.
4. To critically evaluate how the HRA could be used to reform the law around sex work: considering the benefits and disadvantages of using human rights discourse at all; examining the constitutional limitations of the HRA; exploring the possible arguments that could be made in relation to challenging the current law using the HRA; and analysing the ways in which a human rights approach could be used to inform relations between sex workers and public authorities such as the police.

Each chapter of this thesis will primarily focus on one of these objectives, in the order set out here, with the fourth, largest objective being considered across the four last substantive chapters of this thesis, in order that the thesis collectively achieves the aims set out above.

1.3 Original Contribution to Knowledge

Mirroring sex worker campaigns and wider debates,[7] there has been much academic research around legal responses to sex work,[8] and indeed some have argued that sex work is a human rights issue.[9] The approach of previous work has tended to focus on human rights as a general tool in debates around sex work policy,[10] or to consider human rights violations against sex workers internationally more generally (largely focussing on social or economic rights).[11] This research differs from previous contributions in that it considers specific laws and practices in England and Wales and the specific ways that these may infringe sex workers rights under the HRA. The HRA is important because it incorporates human rights enshrined in the European Convention on Human Rights (ECHR) into domestic law, making them directly enforceable in UK courts.[12] Moreover, all public authorities have an obligation under s 6 of the HRA not to act in a way which is incompatible with ECHR rights,[13] meaning infringement of ECHR rights

[7] Discussed below at 1.4 and 1.5.
[8] See, for example: J Scoular and M O'Neill, 'Regulating Prostitution: Social Inclusion, Responsibilization and the Politics of Prostitution Reform' (2007) 47 British *Journal of Criminology* 764; V Munro and M. Della Giusta (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Ashgate: Aldershot, 2008); B Brooks-Gordon, *The Price of Sex: Prostitution, Policy and Society* (Devon: Willan, 2006).
[9] B Brooks-Gordon, 'Clients and Commercial Sex: Reflections on *Paying the Price: A Consultation Paper on Prostitution'* (2005) *Criminal Law Review* 425; S Edwards, 'The Legal Regulation of Prostitution: A Human Rights Issue', in G Scambler and A Scambler (eds), *Rethinking Prostitution: Purchasing Sex in the 1990s* (London: Routledge, 1997). Edwards' argument relies on Articles 1, 4 and 5 of the UDHR and argues that the conditions of prostitution mean that no sex worker is truly free and so their human rights are infringed.
[10] B Brooks-Gordon,(n 8), 47.
[11] M Decker et al, 'Human Rights Violations against Sex Workers: Burden and Effect on HIV' (2015) 385 (9963) *The Lancet* 186; C Overs and K Hawkins, 'Can rights stop the wrongs? Exploring the Connection between Framings of Sex Workers' Rights and Reproductive Health' (2011) 11 (Suppl 3) *BMC International Health and Human Rights* S6.
[12] R Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 (1) *International Journal of Constitutional Law* 86.
[13] Human Rights Act 1998, s 6 (1).

by public authorities (including the police[14]) is now a legitimate ground of legal challenge.[15] The lacuna of research in this area is notable given the wide discussion on sex work and human rights generally, and the fact that other areas of social concern that divide opinion – for example, euthanasia[16] and abortion[17] - have been considered in relation to the HRA.

In developing a critical analysis of the ways in which the HRA could be used in relation to sex work legislation, policy, and practice in England and Wales, this thesis makes two distinctive contributions. First, it provides practical knowledge of the specific challenges that could be made, how these may be framed, and the degree to which a HRA-based approach could improve sex workers' enjoyment of their human rights under the ECHR. In particular, the thesis demonstrates that a strong argument could be made in the courts or before Parliament that four of the current laws on sex work violate sex workers' right to private and family life under Article 8 of the ECHR. It finds, however, that the potential efficacy of these arguments is limited by the constitutional framework of the HRA, which reinforces Parliamentary sovereignty, and the lack of European consensus on sex work and human rights. This thesis further highlights that human rights can and should be embedded into all interactions between the state (and particularly the police) with sex workers under s 6 of the HRA. It finds particularly that direct abuses by the police, and the use of civil orders, raids and closure orders by police may, in certain circumstances, infringe sex workers' rights under Articles 3, 6 and 8 of the ECHR, and that police owe positive obligations to adequately investigate potential breaches of Articles 3 and 4 of the ECHR by private citizens. In relation to police infringements

[14] Joint Committee on Human Rights, Seventh Report, *The Meaning of Public Authority under the Human Rights Act* (2003-04 HL 39), (2003-04 HC 382), 5.
[15] P Craig, 'The Courts, the Human Rights Act and Judicial Review' (2001) 117 *Law Quarterly Review* 589.
[16] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38*;* B Douglas, 'Too attentive to our duty: the fundamental conflict underlying human rights protection in the UK' (2018) 38 (3) *Legal Studies* 360.
[17] D Fenwick, 'The modern abortion jurisprudence under Article 8 of the European Convention on Human Rights.' (2012) 12 *Medical Law International* 249.

of the HRA, the thesis shows that the HRA provides a better range of remedies, but that these may be confined to the facts of a case and so the potential wider impact on police practice may be limited.

Secondly, in providing a doctrinal account of the HRA, and marrying this with a feminist approach that focuses on inclusion, agency, and the lived experiences of sex workers, this thesis can develop both the discourse of sex workers' rights and that of human rights. Rights can be an important way of challenging laws that criminalise or discriminate against sex workers, and the stigma that is associated with sex work.[18] The doctrinal work on the HRA in this thesis provides a practical and focused analysis of human rights, bringing the discussion from the more general realm to the specific, and linking it to important legal interventions. Sex worker rights discussions have often related to economic and social rights,[19] none of which can be directly enforced in UK courts; by looking at the HRA, this thesis provides a more directly applicable account of human rights implications. The approach taken frames the sex worker rights discourse around civil and political rights and how these may be deployed, but also at the tensions of doing so – that is, what is lost by trying to fit the complicated realities of sex work into a formal legal framework. Moreover, this thesis moves away from a traditional 'liberal', 'neutral' account of human rights, using a feminist lens to consider the particular implications of human rights for sex workers as a group. In doing so, this not only examines the emancipatory potential of human rights but the limitations of a human rights approach to make significant practical and concrete changes to sex workers' lives. Bringing together the doctrinal field of human rights with the feminist, critical, socio-legal discussion of sex work,

[18] J Scoular, *The Subject of Prostitution: Sex Work, Law and Social Theory* (Abingdon: Routledge, 2013), 96.
[19] For example, the right to work or the right to health. See, for example, C Overs and K Hawkins, (n 11).

then, allows these two spheres that do not usually speak to each other to influence one other and create a more holistic account of sex workers' rights.

1.4 Regulating Sex Work: A Contested Issue

In order to situate the coming chapters of this thesis in the context of political and legal discourses about sex work regulation and human rights, the following two sections expand upon the debates around these issues respectively. As Jo Phoenix has noted, 'the regulation of prostitution is constituted and shaped by the way that 'the problem' is defined because how a problem is defined necessarily suggests what should be done to address it'.[20] The topic of sex work has been as one of the most divisive issues in modern feminism,[21] with a debate often characterised as a dichotomy between understanding prostitution as violence against women,[22] or sex work as a (potentially empowering, but otherwise legitimate) form of work.[23] In reality, however, to consider the debate a dichotomy is, as Prabha Kotiswaran states, a caricature.[24] That is, there are increasing social science accounts that present the potential for sex work to be both a form of work *and* exploitation.[25] As well as complex understandings about what sex work is, the regulation of sex work is situated among broader concerns about gender equality,[26]

[20] J Phoenix, 'Regulating Prostitution: Controlling Women's Lives', in F Heidensohn (ed), *Gender and Justice: New Concepts and Approaches* (Devon: Willan, 2006), 81.
[21] M O'Neill, *Prostitution and Feminism: Towards a Politics of Feeling* (Cambridge: Polity Press, 2001), 15.
[22] S Jeffreys, *The Industrial Vagina: The Political Economy of the Global Sex Trade* (Abingdon: Routledge, 2009); K Barry, *The Prostitution of Sexuality: The Global Exploitation of Women* (New York: NYU Press, 1995); A Dworkin, 'Prostitution and Male Supremacy' (1993) 1 *Michigan Journal of Gender and the Law* 1.
[23] W Chapkis, *Live Sex Acts: Women Performing Erotic Labour* (London: Cassell, 1997); P Alexander, 'Feminism, Sex Workers and Human Rights', in J Nagle (ed), *Whores and Other Feminists* (London: Routledge, 1997); M St James, 'The reclamation of whores', in L Bell (ed), *Good girls/bad girls: Feminists and sex trade workers face to face* (Toronto: The Women's Press, 1987).
[24] P Kotiswaran, *Dangerous Sex, Invisible Labor: Sex Work and the Law in India* (Princeton: Princeton University Press, 2011), 25.
[25] J Phoenix, *Making Sense of Prostitution* (Basingstoke: Macmillan, 2001); J O'Connell Davidson, *Prostitution, Power and Freedom* (Cambridge: Polity Press, 2006).
[26] S Jeffreys, (n 22); K Barry, (n 22); A Dworkin, (n 22).

globalisation and globalised sex markets,[27] human trafficking,[28] immigration[29] and sex worker safety and rights.[30]

The language used to discuss sex work is politically fraught. There is a wide range of terms to describe people involved in sex work, including 'sex workers, whores, working girls, prostitutes, prostituted women, hookers, women involved in prostitution, and victims of sexual exploitation'.[31] Each of these terms reflect different perspectives on sex work, and generally reflect the ideological position of whoever is using the term. The term 'sex work' was coined in 1978 by sex worker Carol Leigh to refer to 'people who sell or trade their own sexual labour in exchange for a resource, which is often money but can also be drugs, alcohol or shelter'.[32] Sex work can be used to refer to a collection of activities more varied and diverse than 'prostitution' - which generally means the direct provision of sexual services - including indirect sexual services, such as lapdancing, phone sex, stripping, etc.[33] This thesis, however, considers specifically the regulation of direct sexual services, both on and off-street, often referred to as 'prostitution', and will use this term when referring to specific laws and official reports that use it. The term 'prostitution' provides a clearer distinction between those engaged

[27] B Mullings, 'Globalization, Tourism, and the International Sex Trade', in K Kempadoo (ed), *Sun, Sex and Gold: Tourism and Sex Work in the Caribbean* (Oxford: Rowman and Littlefield, 1999); E Penttinen, *Globalization, Prostitution and Sex Trafficking: Corporeal Politics* (Abingdon: Routledge, 2008); S Jeffreys, (n18).
[28] For example, L Hauber, 'The Trafficking of Women for Prostitution: A Growing Problem within the European Union' (1998) 21 (1) *Boston College International and Comparative Law Review* 183; V Munro, 'Exploring Exploitation: Trafficking in Sex, Work and Sex Work', in V Munro and M Della Giusta (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Aldershot: Ashgate, 2008).
[29] S Fitzgerald (ed), *Regulating the International Movement of Women: From Protection to Control* (Abingdon: Routledge, 2011); J Berman, 'Unpopular Strangers and Crises Unbound: Discourses of Sex Trafficking and the Panicked State of the Modern State' (2003) 9 *European Journal of International Relations* 37.
[30] For example, K Kempadoo and J Doezema (eds), *Global Sex Workers: Rights, Resistance and Revolution* (New York: Routledge, 1998); F Delacoste and P Alexander (eds), *Sex Work: Writings by Women in the Sex Industry* (San Francisco: Cleis, 1987).
[31] N Westmarland and G Gangoli, 'Approaches to Prostitution', in G Gangoli and N Westmarland (eds), *International Approaches to Prostitution: Law and Policy in Europe and Asia* (Bristol: Policy Press, 2006), 1.
[32] J Mac and M Smith, *Revolting Prostitutes: The Fight for Sex Workers' Rights* (London: Verso, 2018), 1.
[33] S Kingston and T Sanders, 'New Sociologies of Sex Work in Perspective', in K Hardy, S Kingston and T Sanders (eds), *New Sociologies of Sex Work* (Aldershot: Ashgate, 2010), 3.

in direct sexual services and those individuals engaged in other forms of erotic labour.[34] Yet there are arguments against the use of the term 'prostitute', particularly because it pathologises and 'others'[35] the individuals as a social category, rather than as people involved in a certain type of work.[36] I use the term sex work in my own discussion, then, to recognise and respect the term used by those who identify themselves as 'sex workers',[37] while recognising that sex work is not a monolithic entity and many people involved in the sex industry do not identify as such.

1.4.1 Regulating Sex Work: A Range of Approaches

Regulation of sex work across the world appears to be in a state of flux. In many countries, an understanding of sex work as a form of violence against women[38] has informed policy and law. In 1998, Sweden passed a law,[39] which is also known as 'the Swedish model' or 'the Nordic model', that decriminalises the selling of sex, whilst criminalising paying or offering to pay for sexual services with a punishment of imprisonment up to 6 months and/or fines. The law has been described as a symbolic law, intended to 'send a message that prostitution was unacceptable'.[40] Laws based on this model – but with some practical

[34] P Hubbard, *Sex and the City: Geographies of Prostitution in the Urban West* (Aldershot: Ashgate, 1999), 10.
[35] ibid, 1.
[36] J Bindman, 'Redefining Prostitution as Sex Work on the International Agenda', (1997), available at: http://www.walnet.org/csis/papers/redefining.html#2d (last accessed 1 June 2019).
[37] I discuss this epistemological position below in the Methodology section of this chapter.
[38] G Ekberg, 'The Swedish Law that Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings' (2004) 10(10) *Violence Against Women* 1187; K Barry, (n 22). This will be explored more fully in Chapter 2 of this thesis.
[39] 1999 Act Prohibiting the Purchase of Sexual Services (SFS 1998:408); see also: A Gould, 'The Criminalisation of Buying Sex: The Politics of Prostitution in Sweden' (2001) 30 (3) *Journal of Social Policy* 437; Y Svanström, 'Criminalising the John – a Swedish gender model?' in J Outshoorn (ed), *The Politics of Prostitution: Women's Movements, Democratic States and the Globalisation of Sex Commerce* (Cambridge: Cambridge University Press, 2004).
[40] D Kulick, 'Sex in the new Europe: The criminalization of clients and Swedish fear of penetration' (2003) 3 *Anthropological Theory* 199, 200.

differences[41] - were passed in Norway[42] and Iceland[43] in 2009, Northern Ireland in 2015,[44] France in 2016,[45] Ireland in 2017,[46] and, most recently, Israel in 2018.[47]

In contrast, other countries have marked a distinction between 'voluntary' sex work and 'forced' prostitution,[48] understanding and legislating the former as work, and keeping the latter within the realm of criminal law. In 1999, the Netherlands was one of the first countries to move in this direction, removing its ban on brothels.[49] Laws that allow some forms of sex work under specific (varied) conditions have been passed in Germany,[50] Nevada,[51] and some

[41] S Kingston and T Thomas, 'No Model in Practice: A 'Nordic Model' to Respond to Prostitution' (2019) 71(4) *Crime, Law and Social Change* 423.
[42] Norwegian General Civil Penal Code, Section 202a: The law against buying sexual services.
[43] Icelandic Law No. 54 of 2009, which amended the General Penal Code, s206.
[44] Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, s.15. This came into force on the 1st June 2015 and is punished by up to one year imprisonment or a fine or both.
[45] Act no 2016-444 of the 13th April 2016, Aiming to Strengthen the Fight Against the Prostitution System and to Assist Prostituted Persons, Article 20, creating Article 611-1 of the Penal Code and amending Article 225-12-1 of the Penal Code to 'create a new offence of resorting to the prostitution of another by prohibiting the purchase of a sex act'.
[46] Criminal Justice (Sexual Offences) Act 2017, s25– Amends Criminal Law (Sexual Offences) Act (1993) to include s 7A, which criminalises any 'person who pays, gives, offers or promises to pay or give a person (including a prostitute) money or any other form of remuneration or consideration for the purpose of engaging in sexual activity with a prostitute'.
[47] Prohibition of Consumption of Prostitution Services and Community Treatment (Legislation Amendment) Act 2018, s1, which amends Penal Law 5737-1977[1] to amend s206 whereby 'whoever purchases prostitution services shall be sentenced to six months imprisonment'
[48] J Outshoorn, 'Voluntary and Forced Prostitution: The 'Realistic' Approach of the Netherlands', in J Outshoorn (ed), *The Politics of Prostitution: Women's Movements, Democratic States and the Globalisation of Sex Commerce* (Cambridge: Cambridge University Press, 2004).
[49] On 1 October 2000, Articles 250bis and 432 were removed from the Criminal Code thus lifting the ban on brothels and pimping. For more information, see: Dutch Ministry of Foreign Affairs, *Dutch Policy on Prostitution: Questions and Answers* (Amsterdam: DMFA, 2012); J Outshoorn, 'Debating Prostitution in Parliament: A Feminist Analysis' (2001) 8 *European Journal of Women's Studies* 472.
[50] Germany legalised brothels and enacted legislation protecting sex workers from discrimination in Act Regulating the Legal Situation of Prostitutes 2002. For more information, see: S Laskowski, 'The New German Prostitution Act – An Important Step to a More Rational View of Prostitution as an Ordinary Profession in Accordance with European Community Law' (2002) 18 (4) *The International Journal of Comparative Labour Law and Industrial Relations* 479. It has, however, been argued by Carline and Scoular that Germany and the Netherlands are under increased pressure from anti-prostitution campaigners to abandon legalisation in favour of the Nordic model – J Scoular and A Carline, 'A Critical Account of 'Creeping Neo-Abolitionism' in England and Wales' (2014) 14(5) *Criminology and Criminal Justice* 608.
[51] Nevada has allowed legal brothels in some rural counties since 1971. The brothels have safety measures but strict rules for workers. For more information, see R Weitzer, 'New directions in research on prostitution' (2005) 43 *Crime, Law and Social Change* 211; B Brents and K Hausbeck, 'Marketing Sex: Legal Brothels and Late Capitalist Consumption' (2007) 10 *Sexualities* 425; and B Brents and K Hausbeck, 'Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy' (2005) 20 (3) *Journal of Interpersonal Violence* 270

Australian states.[52] The ways in which sex work is regulated varies across these more permissive jurisdictions, but a commonality is that criminal justice sanctions are not the primary means of dealing with sex work.[53] Rather, civic regulations such as licensing, local zoning laws, and labour laws apply.[54] The popularity of this approach, however, has been waning somewhat across a number of the countries that have adopted it; local authorities and governments in both Germany and the Netherlands have recently been reconsidering their tolerance-based approaches.[55]

In 2003, New Zealand became the first country to remove their criminal laws relating to soliciting, the keeping of brothels and escort agencies, creating a system of minimal criminal regulation.[56] The Prostitution Reform Act, which passed with a one-vote majority, was the result of campaigns to safeguard the human rights of sex workers, and improve their safety in work.[57] The New Zealand law creates minimum employment rights,[58] allows sex workers to work together, but still criminalises the acts of inducing or compelling people to provide

[52] In Australian Capital Territory and New South Wales, sex work is decriminalised by the ACT Prostitution Act 1992 and The Disorderly Houses (Amendment) Act 1995 respectively. In Victoria, Queensland and The Northern Territories, some sex work is licensed under the Prostitution Control Act 1994, Queensland Prostitution Act 1999 and Northern Territory Prostitution Regulation Act 1992 respectively. For more detailed explanation of the different regimes in Australia, see T Crofts and T Summerfield, 'The Licensing of Sex Work in Australia and New Zealand' (2006) 13 *Murdoch Electronic Journal of Law* 269; J Groves et al, 'Sex Workers Working Within a Legalised Industry: Their Side of the Story' (2008) 84 *Sexually Transmitted Infections* 393.
[53] J Phoenix, 'Frameworks of Understanding', in J Phoenix (ed), *Regulating Sex for Sale: Prostitution Policy Reform in the UK* (Bristol: Policy Press, 2009), 17.
[54] J Phoenix, ibid, 17.
[55] J Outshoorn, 'Policy Change in Prostitution in the Netherlands: From Legalization to Strict Control' (2012) 9(3) *Sexuality Research and Social Policy* 233; I Hunecke, 'Germany', in S Jahnsen and H Wagenaar (eds), *Assessing Prostitution Policies in Europe* (Abingdon: Routledge, 2018).
[56] New Zealand Prostitution Reform Act 2003. Criminal laws remain for, inter alia, buying sex from a person under the age of 18 (s 22), inducing or compelling persons to provide sexual services (s 16), non-usage of barrier contraceptives (s 9), and breach of health and safety laws by brother operators (s 8).
[57] G Abel, 'A decade of decriminalization: Sex work 'down under' but not underground' (2014) 14 (5) *Criminology and Criminal Justice* 580; G Abel and L Fitzgerald, 'Decriminalisation and Stigma', in G Abel *et al* (eds) *Taking the Crime Out of Sex Work: New Zealand Sex Workers' Fight for Decriminalisation* (Bristol: Policy Press, 2010); G Abel *et al*, *The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers* (Christchurch: Department for Public Health and General Practice, 2007).
[58] New Zealand Department of Labour, *Minimum Employment Rights and Obligations* (Wellington: DOL, 2011); New Zealand Department of Labour, *A Guide to Occupational Health and Safety in the New Zealand Sex Industry* (Wellington: DOL, 2004).

commercial sexual services,[59] and buying sex from a person under the age of 18.[60] These varied models, from the more penal to the more permissive, and their relatively recent introduction into their respective jurisdictions, reflect the contested nature of sex work and how to respond to it.

1.4.2 Regulating Sex Work in England and Wales

Currently, sex work in England and Wales is largely regulated through criminal law and criminal justice interventions.[61] While buying and selling of sexual services is not in itself illegal, a range of activities around the exchange of sexual services for money or other goods is criminalised.[62] Sex workers' clients face periodic crackdowns[63] and increasing focus in policy,[64] yet it is clear from official crime statistics that sex workers still face the brunt of enforcement of laws relating to sex work. According to official government statistics, in the period from April 2002 – April 2018, there were 18,252 crimes recorded for 'soliciting for prostitution' in England and Wales, averaging 1074 a year, while, in the same period, only 2781 crimes were recorded for the 'exploitation of prostitution'.[65]

[59] New Zealand Prostitution Reform Act 2003, s16.
[60] ibid, s22
[61] L Cusick and L Berney, 'Prioritizing Punitive Responses over Public Health: Commentary on the Home Office Consultation Document Paying the Price' (2005) 25 *Critical Social Policy* 596; L Graham, 'Governing Sex Work Through Crime: Creating the Context for Violence and Exploitation' (2017) 81 (3) *The Journal of Criminal Law* 201.
[62] This ranges from brothel keeping, to soliciting and loitering. The law relating to sex work in England and Wales will be set out and explored in Chapter 3 of this thesis.
[63] See P Hubbard, 'Cleansing the Metropolis: Sex Work and the Politics of Zero Tolerance' (2004) 41 *Urban Studies* 1687; P Hubbard, R Matthews and J Scoular, 'Regulating sex work in the EU: prostitute women and the new spaces of exclusion', (2008) 15 (2) *Gender, Place and Culture* 137; B Brooks-Gordon, 'Bellweather Citizens: The Regulation of Male Clients of Sex Work' (2010) 37 (1) *Journal of Law and Society* 145.
[64] Home Office, *Tackling the Demand for Prostitution: A Review* (London: Home Office, 2008). This will be explained further in Chapter 3.
[65] Office of National Statistics, *Crime in England & Wales, year ending March 2018* (London: ONS, 2019). Statistics for kerb crawling offences – those that target clients of street workers - in this period were not offered by the ONS

Reform of the law relating to sex work has been on the public agenda in England and Wales for over a decade.[66] Between 2004 and 2008, Tony Blair's and Gordon Brown's Labour governments attempted to develop a 'coordinated prostitution strategy',[67] to bring together the wide range of laws relating to sex work and to tackle the sex industry. During this period, the government published: a consultation paper in 2004;[68] a coordinated prostitution strategy in 2006;[69] a report on 'methods for dealing with prostitution' in 2008;[70] and included sex work-related clauses in two Parliamentary Bills,[71] with some reforms eventually being passed into law in England and Wales in the Policing and Crime Act 2009.[72] These reforms included, *inter alia*, the criminalisation of the purchase of sexual services from a prostitute subjected to force.[73]

Even since these legislative reforms, sex work has remained on the legislative and policy agenda. In March 2014, an All Party Parliamentary Group on Prostitution and the Global Sex Trade (APPG) was set up to 'raise awareness of the impact of the sale of sexual services on those involved and to develop proposals for government action to tackle individuals who create demand for sexual services as well as those who control prostitutes; to protect prostituted women by helping them to exit prostitution and to prevent girls from entering prostitution'.[74] The APPG published a report[75] recommending a shift towards criminalising the purchase of sex. This recommendation seems unsurprising given that the remit of the APPG was focused on tackling demand, yet it does demonstrate the push from some quarters to adopt the Nordic

[66] This is discussed more fully in Chapter 3 of this thesis.
[67] Home Office, *A Coordinated Prostitution Strategy* (London: Home Office, 2006).
[68] Home Office, *Paying the Price: a consultation paper on prostitution* (London: Home Office, 2004)
[69] ibid.
[70] Home Office (n 64).
[71] Criminal Justice and Immigration Bill, as introduced to the House of Commons on 26 June 2007; Policing and Crime Bill, as introduced to the House of Commons on 18 December 2008.
[72] Policing and Crime Act 2009, ss 14-21.
[73] ibid, s14.
[74] APPG, *Shifting the Burden: Inquiry to assess the operation of the current legal settlement on prostitution in England and Wales* (London: APPG, 2014).
[75] ibid.

model in England and Wales. Following the APPG's report, Labour MP Fiona MacTaggart attempted to attach an amendment to the Modern Slavery Bill 2014 which would criminalise the purchase of sex.[76] A targeted campaign by sex worker activists and the Hampshire Women's Institute, and a speech by John McDonnell MP, led to the defeat of this amendment on 5 November 2014.[77]

On 15th January 2016, the government launched an inquiry by the Home Affairs Select Committee on Prostitution (HASC) to assess whether the 'burden of criminality' in sex work 'should be shifted to those who pay for sex rather than those who sell it', in order to 'discourage demand which drives commercial sexual exploitation'.[78] During the course of this consultation, the HASC received over 250 written submissions from individuals and organisations, including sex workers, academics, charities and service providers. They noted that 'much of the evidence reflected views which were deeply held and deeply divided, with little common ground.'[79] The HASC was less convinced than the APPG that the purchase of sex should be criminalised, stating that it was 'not yet convinced that the sex buyer law would be effective in reducing demand or in improving the lives of sex workers, either in terms of the living conditions for those who continue to work in prostitution or the effectiveness of services to help them find

[76] House of Commons, Notice of Amendments given on Tuesday 28 October 2014, available at: http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0096/amend/pbc0962810a.665-666.html (last accessed 1 June 2019).
[77] The English Collective of Prostitutes put together a briefing against the amendment, available at: http://prostitutescollective.net/wp-content/uploads/2014/11/Briefing-v-Modern-Slavery-Bill-clause-30-Oct-31.pdf (last accessed 1 June 2019); a lobbying day took place on 4 November 2014 – see J Ramiro, 'Sex Workers Lobby Against Client Criminalisation Bill' *Morning Star* 4 November 2014, available at: http://www.morningstaronline.co.uk/a-429f-Sex-workers-lobby-against-client-criminalisation-Bill#.VWSL99JViko (last accessed 1 June 2019); for information on the Hampshire Women's Institute, see http://www.thewi.org.uk/become-a-member/structure-of-the-wi/england/hampshire/the-hampshire-resolution (last accessed 1 June 2019); and for John McDonnell MP's speech, see HC Deb 4 November 2014, vol 587, cols 769-775.
[78] Home Affairs Committee (2016) Prostitution inquiry. Available at: http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2015/prostitution/ (accessed 15 August 2019).
[79] House of Commons Home Affairs Committee, Prostitution: Third Report of Session 2016-2017, HC 26 (2016), available at: https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/26/26.pdf (last accessed 17 September 2019), 6.

new ways to earn a living'.[80] Conversely, the HASC recommended that 'at the earliest opportunity, the Home Office change existing legislation so that soliciting is no longer an offence and so that brothel-keeping provisions allow sex workers to share premises, without losing the ability to prosecute those who use brothels to control or exploit sex workers'.[81]

In response to the report of the HASC, the Conservative government reiterated its commitment to 'tackling the harm and exploitation' that can be associated with prostitution and sex work and supporting exit from prostitution.[82] Taking 'note' of the recommendations of the HASC, the government's response commented that 'particularly careful consideration of the links between brothels, trafficking and organised criminal gangs' would be needed.[83] The government's response also included the commission of a 'research project into the prevalence and nature of prostitution in England and Wales',[84] which was undertaken by a team at the University of Bristol led by Marianne Hester. The findings highlighted that stigma and managing safety were two of the key issues affecting sex workers' lives.[85] The impact of this report on the Government's approach to sex work is yet to be seen.

Since the HASC report, there has been a further consultation launched in 2019 by the APPG into trafficking for sexual exploitation, asking, inter alia, 'What impact do current laws relating to prostitution and modern slavery have on the scale and nature of trafficking for sexual

[80] ibid 27.
[81] ibid, 38.
[82] Government Response to the Third Report from the Home Affairs Select Committee Session 2016-17 HC26: Prostitution, Cm 9321, available at: https://www.parliament.uk/documents/commons-committees/home-affairs/Govt-Response-Cm9361-Prostitution.pdf (last accessed 17 September 2019), 1.
[83] ibid, 5.
[84] ibid, 1.
[85] M Hester, N Mulvihill, A Matolcsi, A Sanchez and S Walker, *The Nature and Prevalence of Prostitution and Sex Work in England and Wales Today* (Bristol: University of Bristol, 2019).

exploitation into and around England and Wales?'[86] In July 2019, the Women and Equalities Committee also launched an inquiry into prostitution, asking the question 'how can we tackle inequalities and harm?'[87] Despite the regular inquiries and consultations, there has been no new legislation since 2009. At a time of potential change, it is important to critically reflect on sex work regulation in England and Wales.

1.5 Human Rights and Sex Work

Human rights have also been a focus in debates about what to do about sex work. Accounts of the human rights implications of sex work, reflecting understandings of what prostitution is, are deeply divided. Two main perspectives on the relationship between rights and sex work argue that: (i) there are human rights abuses inherent in prostitution; and (ii) sex workers should have the same rights as other workers and citizens. These will each be discussed briefly in turn.

The position that prostitution is, in itself, an abuse of human rights is based on two understandings: that prostitution violates the rights of women who work in the sex industry through the degrading, dehumanising acts involved;[88] and that prostitution violates the rights of women as a class by reinforcing their submissive position in a patriarchal society. Kathleen Barry makes the argument that prostitution is not only inherently a violation of human rights,

[86] APPG on Prostitution and the Global Sex Trade, *Inquiry into trafficking for sexual exploitation: call for written evidence submissions*, available at: https://appgprostitution.uk/events/traffickinginquiry/ (last accessed 17 September 2019).
[87] Women and Equalities Committee, *Prostitution Inquiry*, available at: https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2017/prostitution-inquiry-17-19/ (last accessed 17 September 2019).
[88] Catharine MacKinnon argues that the prostitutes themselves face violations of their rights, stating that '[w]omen in prostitution are denied every imaginable civil right in every imaginable and unimaginable way, such that it makes sense to understand prostitution as consisting in the denial of women's humanity, no matter how humanity is defined' - C MacKinnon, 'Prostitution and Civil Rights' (1993) 1 *Michigan Journal of Gender and Law* 13, 13.

but a 'crime against humanity'.[89] Acting as Executive Director of the international non-governmental organisation Coalition Against Trafficking in Women (CATW), Barry drew on this argument at a United Nations Educational, Scientific and Cultural Organization (UNESCO) meeting on prostitution in 1986,[90] during which participants drafted a 'Convention Against Sexual Exploitation'.[91] This 'Convention' takes into account the Universal Declaration of Human Rights (UDHR)[92] and other human rights Conventions, arguing that prostitution contravenes rights to: freedom from slavery;[93] freedom from cruel, inhuman and degrading treatment;[94] and freedom from discrimination. This 'Convention' was proposed by CATW to the United Nations (UN) Human Rights Commission Working Group on Slavery,[95] although the UN chose not to incorporate it into the following Declaration on the Elimination of Violence Against Women,[96] instead only including 'forced prostitution' under Article 2 (b).

The approach that prostitution is inherently an abuse of human rights has, however, been informed law and policy in a number of national jurisdictions and discourses, and regionally. This argument informs the Nordic model of regulation, which, as noted, has been gaining traction in Europe and beyond.[97] It has also been accepted (not unanimously[98]) at the

[89] K Barry, (n 22), 10.
[90] CATW, *International Meeting of Experts on Sexual Exploitation, Violence and Prostitution: Final Report* (Pennsylvania: UNESCO and CATW, 1992).
[91] CATW, 'Proposed Convention Against Sexual Exploitation' (draft of January 1994), appended in K Barry, (n 18), 323.
[92] Universal Declaration of Human Rights, 1948, General Assembly resolution 217 A (III).
[93] UDHR Art 4; International Covenant on Civil and Political Rights (ICCPR) General Assembly resolution 2200A (XXI) of 16 December 1966, Article 8.
[94] UDHR, Art 5; ICCPR, Art 7.
[95] K Barry, 'Abolishing Prostitution: A Feminist Human Rights Treaty' *Women's Media Center* (New York, 28 August 2012), available at: http://www.womensmediacenter.com/feature/entry/abolishing-prostitution-a-feminist-human-rights-treaty (last accessed 1 June 2019).
[96] Declaration on the Elimination of Violence Against Women A/RES/48/104 of 20 December 1993. For discussion on this matter, see: K Barry, (n 22), 311.
[97] G Ekberg, (n 34); J Kilvington, S Day and H Ward, 'Prostitution Policy in Europe: A Time of Change?' (2001) 67 *Feminist Review* 78.
[98] 343 MEPs voted for, and 139 against passing this report.

European Parliament in 2014 in the Honeyball Report.[99] Similarly to CATW's 'Convention Against Sexual Exploitation', this report drew on human rights under the UDHR and other human rights Conventions (although not the ECHR[100]) to argue that 'prostitution is a form of slavery incompatible with human dignity and fundamental human rights'.[101] By passing the Honeyball report, the 'Nordic model' became the formal approach of the EU Parliament.[102] The EU Parliament does not have any legislative power, but it still carries 'significant symbolic and political weight',[103] and so this resolution was seen as a significant success for this approach.

Conversely, a significant movement within sex worker activism has focused on the idea that, rather than sex work itself, it is the laws and practices around sex work that violate sex workers' human rights. By using human rights framing, sex workers have attempted to challenge the dominant discourses of morality and criminality around sex work.[104] Since the 1970s, sex workers have been organising globally to be acknowledged as, and gain the same rights as, workers in the labour struggle.[105] Sex workers' rights advocacy groups began to be formed in the early 1970s and 1980s; these include Call Off Your Tired Old Ethics in San Francisco in 1973, the English Collective of Prostitutes in 1975, and the Australian Prostitutes Collective in 1981.[106] At the First World Whore's Congress in Amsterdam in 1985, sex workers came together to form the International Committee for Prostitutes' Rights (ICPR) and

[99] Committee on Women's Rights and Gender Equality, 'Sexual Exploitation and Prostitution and its Impact on Gender Inequality' (2014), A Report forwarded by British MEP Mary Honeyball, 2013/2103(INI).
[100] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 (ECHR).
[101] ibid.
[102] For more information, see: T Sanders and R Campbell, 'Criminalization, Protection and Rights: Global Tensions in the Governance of Commercial Sex' (2014) 14 (5) *Criminology and Criminal Justice* 535.
[103] J Scoular, (n 18), 10.
[104] ibid, 95.
[105] S Bell, *Reading, Writing and Rewriting the Prostitute Body* (Bloomington: Indiana University Press, 1994), 104. See also: J Mac and M Smith, (n 32).
[106] K Kempadoo, 'Globalizing Sex Workers' Rights', in K Kempadoo and J Doezema (eds), *Global Sex Workers: Rights, Resistance, and Redefinition* (London: Routledge, 1998), 19.

wrote the World Charter for Prostitutes Rights.[107] The World Charter for Prostitutes' Rights made a distinction between forced prostitution and 'all aspects of adult prostitution resulting from individual decision',[108] defining the latter as work and the former as aggravated sexual assault. Although the ICPR included in their Charter demands on, *inter alia*, laws, public opinion, and working conditions, they also set out human rights demands, which included: 'guarantee prostitutes all human rights and civil liberties, including the freedom of speech, travel, immigration, work, marriage, and motherhood and the right to unemployment insurance, health insurance and housing'.[109]

The Second World Whore's Conference, sex workers attending stated that not only did they want their basic human rights to be recognised, but they wanted their labour to be recognised so that they could access labour rights and protections. [110] A statement was put out that 'prostitutes reject support that requires them to leave prostitution, they object to being treated as symbols of oppression, and demand recognition as workers'.[111] Following these two conferences and Gail Pheterson's *A Vindication of the Rights of Whores*,[112] the discourse of sex workers' rights has grown significantly with further conferences taking place and statements being issued across the world.[113] What is particularly pertinent about this movement is that it stems directly from sex workers, rather than from people wishing to help or rescue sex

[107] International Committee for Prostitutes' Rights (ICPR), *World Charter for Prostitutes' Rights,* Amsterdam 1985, reprinted in G Pheterson, (ed), *A Vindication of the Rights of Whores* (Washington: Seal Press, 1989), 40.
[108] ibid. The ICPR decided not to call the latter 'voluntary prostitution' as they did not believe that truly voluntary choices were common for women. See further, S Bell, (n 102), 114-115.
[109] ICPR, (n 107).
[110] S Lopez-Embury and T Sanders 'Sex Workers, Labour Rights and Unionization', in T Sanders, M O'Neill, and J Pitcher (eds), *Prostitution: Sex Work, Policy and Politics* (London: Sage, 2009), 97.
[111] Draft Statement from the Second World Whores Congress, 1986, published in F Delacoste and P Alexander (eds), (n 26).
[112] G Pheterson, (n 107).
[113] For instance, the European Conference on Sex Work, Human Rights, Labor and Migration, held in Brussels in October 2005, and the Durbar Mahila Samanwaya Committee, *Sex Worker's Manifesto from Calcutta 1997*, available at: http://www.bayswan.org/manifest.html (last accessed 1 June 2015).

workers.[114] In this way, the sex workers' rights movement is a method for political communication between sex workers and other activists.[115]

The sex workers' rights approach has met with far less institutional and governmental support in national jurisdictions, including England and Wales.[116] The significance of sex work and human rights can be seen, however, in two countries which have explicitly engaged with sex workers' human rights and the regulation of sex work – New Zealand and Canada. In New Zealand, the first stated purpose of the Prostitution Reform Act was to create a framework that safeguards the human rights of sex workers and protects them from exploitation,[117] thus giving sex workers' human rights primacy in a policy aimed at reducing harm. A legislative approach was taken, with the New Zealand Prostitutes Collective actively targeting and lobbying Parliament and raising awareness and support for law reform.[118] While the language of human rights was used by sex workers testifying to the Select Committee during the passage of this Act,[119] no submissions to the Select Committee referred explicitly to the 1993 Human Rights Act,[120] nor did sex workers rely on the New Zealand Bill of Rights.[121] This demonstrates the discursive and symbolic power of human rights.

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[114] L Agustín, 'At Home in the Street: Questioning the Desire to Help and Save', in E Bernstein and L Shaffner (eds), *Controlling Sex: The Regulation of Intimacy and Identity* (New York: Routledge, 2004).
[115] G Garofalo, 'Sex Workers' Rights Activism in Europe: Orientations from Brussels', in M Ditmore, A Levy and A Willman (eds) *Sex Work Matters: Exploring Money, Power and Intimacy in the Sex Industry* (London: Zed Books, 2010), 230.
[116]J Bindman, (n 36).
[117] Prostitution Reform Act 2003, s 3(a).
[118] T Barnett, C Healy, A Reed and C Bennachie, 'Lobbying for Decriminalisation', in G Abel, L Fitzgerald, C Healy and A Taylor (eds), *Taking the Crime Out of Sex Work: New Zealand Sex Workers' Fight For Decriminalisation* (Bristol: The Policy Press, 2010), 63.
[119] J Jordan, 'Of Whalers, Diggers and 'Soiled Doves': A History of the Sex Industry in New Zealand', in G Abel, L Fitzgerald, C Healy and A Taylor (eds), *Taking the Crime Out of Sex Work: New Zealand Sex Workers' Fight For Decriminalisation* (Bristol: The Policy Press, 2010), 41.
[120] A Laurie, 'Several Sides to This Story: Feminist Views of Prostitution Reform', in G Abel, L Fitzgerald, C Healy and A Taylor (eds), *Taking the Crime Out of Sex Work: New Zealand Sex Workers' Fight For Decriminalisation* (Bristol: The Policy Press, 2010), 99.
[121] New Zealand Bill of Rights 1990.

By way of contrast, in Canada, sex workers and sex workers' rights organisations brought a human right challenge in the national courts, asking the judiciary to exercise their power under the Canadian Charter of Rights and Freedoms to strike down the legislation.[122] In the case of *Bedford v Canada*,[123] the Canadian Supreme Court held that sex workers' section 7 Charter right to liberty and security of the person and section 2(b) Charter right to freedom of expression were violated by a number of laws surrounding sex work. This case led to the (stayed) repeal of laws prohibiting the keeping of a common bawdy-house,[124] living wholly or partly on the avails of prostitution of another person,[125] and communicating in a public place for the purposes of prostitution.[126] The applicants combined first-hand accounts of victimisation and criminalisation[127] with detailed challenges to specific laws based on specific legal rights enshrined in the Charter. This case was seen as a victory for the sex workers' rights movement, with Valerie Scott, one of the plaintiffs, thanking the court for recognising sex workers as people.[128] Within a year of the decision, however the Canadian Parliament passed the Protection of Communities and Exploited Persons Act 2014,[129] which criminalised the purchase of sexual services,[130] reflecting an understanding of prostitution as inherently exploitative. These two jurisdictions demonstrate both different methods of using human rights

[122] Constitution Act 1983, Canadian Charter of Rights and Freedoms, s 24. For discussion on this case, see M Waltman, 'Assessing Evidence, Arguments, and Inequality in Bedford v Canada' (2014) 37 *Harvard Journal of Law and Gender* 459; S Lawrence, 'Expert-Tease: Advocacy, Ideology and Experiences in *Bedford* and Bill C-36' (2015) 30 (1) *Canadian Journal of Law and Society* 5.
[123] *Bedford v Canada* 2013 SCC 72, [2013] 3 S.C.R. 1101.
[124] Criminal Code, RSC 1985, c C-146, s210.
[125] ibid, c C-146, s212(1)(j).
[126] ibid, c C-146, s213(1)(c).
[127] J Hughes, V McDonnell and K Pearston, Equality & Incrementalism: The Role of Common Law Reasoning in Constitutional Rights Cases after Bedford (ONCA) (2013) *Ottawa Law Review* 467.
[128] A Mulholland, 'Top Court Strikes Down Canada's 'Overly Broad' Anti-Prostitution Laws' *CTV News*, 20 December 2013, available at: http://www.ctvnews.ca/canada/top-court-strikes-down-canada-s-overly-broad-antiprostitution-laws-1.1601790#ixzz3LnYvgNM7 (last accessed 1 June 2015).
[129] Amending the Criminal Code to add in s286.1 which makes buying or offering to pay for sexual services an indictable crime, with a punishment of up to five years imprisonment; S286 also criminalises gaining material benefit from sexual services (up to ten years imprisonment; this does not include sex workers benefitting from their own sexual services), procuring (up to fourteen years imprisonment) or advertising sexual services (up to five years).
[130] See C Bruckert, 'Protection of Communities and Exploited Persons Act: Misogynistic Law Making in Action' (2015) 30 (1) *Canadian Journal of Law and Society* 1.

to challenge and reform national laws, but also the continuing importance (and limitations) of human rights in sex work discourse and in relation to legal regulation.

In March 2021, 261 sex workers from France brought a case to the European Court of Human Rights (ECtHR) to have their case against the criminalisation of clients heard.[131] While the substance of this case and the Court's determinations of its merits will not be publicly available for some time, this demonstrates the importance of human rights instruments and courts for sex workers seeking law reform.

1.5.1 Sex Work and Human Rights Internationally

Sex work has also been recognised as an issue of international human rights law for over half a century. The way in which sex work has been framed within international human rights, however, has shifted over this period and particularly in the last few years. The 1949 UN Convention for the Suppression of Traffic in Persons and of Exploitation of the Prostitution in Others[132] follows the approach that prostitution is a human rights abuse, stating in its Preamble that: 'prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community'. As of May 2022, 82 states are Parties to this Convention and a further 25 states are signatories.[133] Although it has been argued that

[131] *MA and Others v France* (Communicated Case) (Application nos 63664/19, 64450/19, 24387/20, 24391/20, 24393/20). See also: LaStrada, 'European Court of Human Rights will Examine a Complaint Against France', 21 April 2021, available at: https://www.lastradainternational.org/news/european-court-of-human-rights-will-examine-a-complaint-against-france/ (last accessed 10 November 2021).
[132] GA Resolution 317(IV) of 2 December 1949, UN Doc A/1251.
[133] See: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VII-11-a&chapter=7&clang=_en (last accessed 27 May 2022). The UK is not a signatory or a party to this Convention.

the Convention distinguishes between 'voluntary' and 'forced' prostitution,[134] this suggestion is rejected by a number of academics, human rights bodies and activists, who state that no such distinction is made and both types of prostitution are seen in this Convention as morally unacceptable.[135]

The later UN Convention on the Elimination of All Forms of Discrimination Against Women 1979, Article 6 says States should 'take all appropriate measures … to suppress all forms of traffic in women and the exploitation of prostitution of women'.[136] Although this follows similar wording to the 1949 Convention, Jo Doezema notes that an amendment proposed by Morocco to add in the suppression of prostitution as well as the suppression of the *exploitation of prostitution* was rejected, suggesting that Article 6 *does* make a distinction between free and forced prostitution and *does not* frame all prostitution as inherently coercive.[137] This interpretation has also been supported by the UN's Special Rapporteur on Violence Against Women.[138] Yet, the clearest move away from the 'prostitution as an inherent human rights violation' approach in the international community came with the 1993 Declaration on the Elimination of Violence Against Women,[139] which stated that violence against women included 'trafficking in women and forced prostitution', making clear a distinction between forced and non-forced prostitution. This distinction was followed in the

[134] L Reanda, 'Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action' (1991) 13 (2) *Human Rights Quarterly* 202, 210.
[135] Dutch Advisory Committee on Human Rights and Foreign Policy, *The Traffic in Persons Report* (The Hague, 1992); J Doezema, 'Forced to Choose: beyond the Voluntary v Forces Prostitution Dichotomy', in K Kempadoo and J Doezema (eds), *Global Sex Workers: Rights, Resistance, and Redefinition* (London: Routledge, 1998), 39; J Fitzpatrick, 'Using International Human Rights Norms to Combat Violence Against Women', in R Cook (ed) *Human Rights of Women: National and International Perpectives* (Philadelphia: University of Pennsylvania Press, 1994), 552.
[136] GA Resolution of 1979 34/180, Article 6.
[137] J Doezema, (n 135), 39
[138] SRVAW, *General discussion on trafficking in women and girls in the context of global migration*. *Submission of the UN Special Rapporteur on violence against women, its causes and consequences Dubravka Šimonović* , 7 February 2019, available at: https://www.ohchr.org/Documents/HRBodies/CEDAW/GRTrafficking/SRVAW.docx (last accessed 20 June 2019).
[139] GA Resolution 48/104.

majority of international instruments that followed,[140] including the Beijing Declaration and Platform for Action 1995,[141] which condemns only forced prostitution rather than prostitution as a whole.[142]

There has been an even more significant shift in the international community's approach to sex work, largely relating to sex workers' vulnerability to HIV.[143] A number of UN bodies have issued statements and documents stating that sex work ought to be decriminalised to uphold the human rights and health of sex workers globally. In 2008, then UN Secretary General, Ban Ki-Moon, stated that the only way to tackle HIV is to remove harsh laws relating to sex work and stop crack-downs on sex workers.[144] In 2012, UNAIDS published a *Guidance Note on HIV and Sex Work*, which centralises sex workers' human rights in its guidance about how to respond to the global HIV epidemic, emphasising the importance of 'programmes and policies on HIV and sex work that are truly human rights-based'.[145] Following this, in July 2012, the UN Development Program's Global Commission on HIV and the Law published a report, *HIV and the Law*, which calls for the decriminalisation of voluntary sex work to ensure 'an effective, sustainable response to HIV that is consistent with human rights obligations'.[146] The report notes that criminalisation of either the sex worker or their client heightens the risks of sex work and marginalises the sex worker, which is inconsistent with sex workers' human rights.[147] Then, in October 2012, the UN Development Program, the

[140] J Doezema, (n 135), 40.
[141] Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF 177/20 (1995) and A/CONF 177/20/Add 1 (1995).
[142] ibid, [123] [131] [224].
[143] C Overs and K Hawkins, (n 11).
[144] M Ditmore, 'Punishing Sex Workers won't curb HIV/AIDS, says Ban-Ki Moon' (2008) *RH Reality Check* 24 June 2008, available at: http://rhrealitycheck.org/article/2008/06/24/punishing-sex-workers-wont-curb-hivaids-says-banki-moon/ (last accessed 1 June 2015).
[145] UNAIDs, *Guidance Note on HIV and Sex Work* (Geneva: UNAIDS, 2012) UNAIDS/09.09E/JC1696E, 2.
[146] Global Commission on HIV and the Law, *HIV and the Law: Risk, Rights and Health* (New York: Bureau for Development Policy, 2012), 10.
[147] ibid, 36.

UN Population Fund, and UNAIDS published a joint report, *Sex Work and the Law in Asia and the Pacific*, which supports the call to decriminalise sex work, arguing that only the removal of laws against sex workers and their clients would support public health, sex workers' human rights, and provide work place labour rights to sex workers, thus making sex work safer.[148]

Beyond just health concerns, a number of UN actors and committees have recognised potential human rights abuses created or exacerbated by national laws and policies around sex work. In May 2013, the UN Human Rights Council published a written statement from the NGO, Global Alliance Against Traffic in Women, recommending that States 'consider the potential of decriminalising sex work and practices around it, as a strategy to reduce the opportunities for exploitative labour practices in the sex sector'.[149] In response to criticism of these recommendations by a US-based NGO, Equality Now,[150] UN Women issued a statement that sex work and sex trafficking should not be conflated, and, importantly, that 'sex workers are right holders like all other women and men and should be recognized as such'.[151] UN Women have subsequently declared neutrality on the issue of decriminalising sex work.[152] The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health reported to the Human Rights Council that: 'sex workers remain subject to stigma and marginalization, and are at significant risk of

[148] UNAIDS, UNDP, and UNFPA, *Sex Work and the Law in Asia and the Pacific: Laws, HIV and human rights in the context of sex work* (Bangkok: UNDP Asia-Pacific Regional Centre, 2012), 29.
[149] UN General Assembly, *Written statement submitted by the Global Alliance Against Traffic in Women, a non-governmental organization in special consultative status: The need for a critical approach to 'demand' discourses in work to end human trafficking* 10 May 2013 A/HRC/23/NGO/29.
[150] Equality Now, 'United Nations: Listen to survivors – don't jeopardize efforts to prevent sex trafficking' 20 September 2013, available at: http://www.equalitynow.org/sites/default/files/UN_51_1_EN.pdf (last accessed 1 June 2019).
[151] UN Women, *Note on Sex Work, Sexual Exploitation and Trafficking*, 9 October 2013, available at: http://www.nswp.org/sites/nswp.org/files/UN%20Women's%20note%20on%20sex%20work%20sexual%20exploitation%20and%20trafficking.pdf (last accessed 1 June 2019).
[152] UN Women, *Global Letter from UN Women Executive Director on Beijing 25 and Generation Equality Forum*, 25 October 2019, available at: https://www.passblue.com/wp-content/uploads/2019/11/Global-Letter-from-UN-Women-Executive-Director-re-Beijing25-and-Generation-Equality-Forum.pdf (last accessed 1 June 2021).

experiencing violence in the course of their work, often as a result of criminalization', and that 'basic rights afforded to other workers are also denied to sex workers because of criminalization, as illegal work does not afford the protections that legal work requires, such as occupational health and safety standards'.[153]

The Special Rapporteur on Violence Against Women has taken a more complicated approach to the issue of human rights and sex work, noting that both 'criminalization of prostitution and commercial exploitation of prostitution make women more vulnerable to sexual abuse and increase their inability to seek redress'.[154] The Committee on the Elimination of Discrimination Against Women (CEDAW) has also refrained from aligning itself to one human rights approach to sex work, suggesting that programmes that support exit from prostitution are important, but also that there are human rights abuses against sex workers that must be dealt with. In one country report, they state that more needs to be done to 'provide specific shelters and crisis centres, exit and reintegration programmes and alternative income-generating opportunities for women who wish to leave prostitution'. [155] Alongside this, however, they have recognised the 'widespread violence and discrimination against women in prostitution, in particular by the police, the performance of illegal forced testing for HIV/AIDS and other sexually transmitted diseases on them, the limited assistance available to them'.[156] CEDAW also stated in its General Recommendation No. 35 on Gender-Based Violence

[153] UN General Assembly Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover* (2010) A/HRC/14/20, 10.
[154] OHCHR, *15 Years of the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences* (2009), available at: https://www.ohchr.org/Documents/Issues/Women/15YearReviewofVAWMandate.pdf (last accessed 21 July 2019).
[155] CEDAW, *Concluding observations on the fourth periodic report of Kyrgyzstan* (2015) CEDAW/C/KGZ/CO/4, 6; This was reiterated in CEDAW, *Concluding observations on the combined eighth and ninth periodic reports of Sweden* (2016) CEDAW/C/SWE/CO/8-9.
[156] ibid, 6.

Against Women that provisions that discriminate against and criminalise women in prostitution can 'encourage, facilitate, justify or tolerate' gender-based violence.[157]

In late 2018, CEDAW called for contributions on a draft general recommendation on trafficking of women and girls in the context of global migration. Although the call for contributions and the subsequent recommendation includes trafficking for the purposes of 'forced prostitution', the consultation concept note explicitly stated: '[i]t will not broach a policy discussion on the theme of prostitution'.[158] Some of the responses to the consultation from other UN bodies, however, provide further insights into the ways that sex work is being framed in the international sphere. For instance, the response from UNAIDS, UNFPA, and UNDP explicitly challenges the conflation of sex work and trafficking: first, it refers to sex work rather than prostitution, noting the value judgment of the latter term; secondly, it clarifies its position that consensual sex work and trafficking are not the same, noting that conflation of the two leads to 'increasing harassment and confinement of sex workers and reducing their access to life-saving HIV and violence prevention interventions' and 'is an abuse of sex workers' human rights'; and finally, it argues that anti-trafficking interventions should be 'drafted in such a way that they do not allow for a broad interpretation that would include sex work and sex workers' and 'anti-trafficking efforts should not justify or result in criminal prosecution or other coercive measures against adults who engage in sex work on a consensual basis'.[159]

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[157] CEDAW, *General Recommendation No.35 on Gender-Based Violence against Women, Updating General Recommendation No.19* (2017) CEDAW/C/GC/35.

[158] CEDAW, *Concept Note prepared for the Committee on the Elimination of Discrimination Against Women on its elaboration of a General Recommendation on Trafficking in Women and Girls in the Context of Global Migration* (CEDAW, 2018); CEDAW, *General Recommendation No 38 (2020) on Trafficking in Women and Girls in the Context of Global Migration* (2020) CEDAW/C/GC/38.

[159] UNAIDS, UNDP, and UNFPA, 'Joint Oral Submission to CEDAW on Trafficking in Woman and Girls in the Context of Global Migration, 22 January 2019', available at: https://www.ohchr.org/Documents/HRBodies/CEDAW/Trafficking/UNAIDS_UNDP_UNFPA.docx (last accessed 1 September 2019).

While none of these documents is binding on states, they demonstrate development in the international community of a recognition of sex workers as human rights bearers who are marginalised by criminalisation. This is not a blanket UN position, but it is important to note this increasing trend among UN bodies to consider sex workers as objects of human rights violations as opposed to understanding sex work as the human rights abuse.

1.5.2 Thinking about Sex Work and Human Rights in England and Wales

The language of human rights is apparent in a number of campaigns around sex work in England and Wales. The position that prostitution as a human rights abuse informs many campaigns about prostitution, such as the Nordic Model Now! campaign, which argues that the Nordic Model is the 'human-rights based approach'.[160] In contrast, sex worker groups such as the English Collective of Prostitutes and the London-based International Union of Sex Workers campaign for 'human, civil and labour rights' and 'sex workers' human, civil, legal and economic rights' respectively.[161] These campaigns, however, have used human rights as a 'political discourse'[162] that 'pervades not only the formal political culture but also just about every milieu where people argue about who should do what'.[163]

This discursive approach to human rights sits in contrast to more concrete legal human rights arguments, such as those made in *Bedford v Canada.*[164] For instance, despite the various

[160] https://nordicmodelnow.org/2018/03/12/raising-awareness-of-the-nordic-model-as-the-equality-and-human-rights-based-approach-to-prostitution/ (last accessed 1 June 2019).
[161] http://prostitutescollective.net (last accessed 1 June 2019); wwww.iusw.org (last accessed 1 June 2019).
[162] M Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), 12.
[163] D Kennedy, 'The Critique of Rights', in W Brown and J Halley (eds), *Left Legalism/Left Critique* (Durham: Duke University Press, 2002), 180.
[164] 2013 SCC 72, [2013] 3 S.C.R. 1101

obligations on the state in relation to the ECHR created by the HRA,[165] the particular Articles of the ECHR have rarely been pinpointed by sex workers campaigners; instead, there has been a reliance on the political power of the term 'rights'. Two notable exceptions to this are *The Declaration of the Rights of Sex Workers in Europe*[166] and x:talk's *Human Rights, Sex Work and the Challenge of Trafficking*.[167] Both of these publications draw on a range of international human rights treaties, including the ECHR, the UN International Covenant on Civil and Political Rights,[168] and the UN International Covenant on Economic, Social and Cultural Rights,[169] to set out specific rights that sex workers hold under these conventions. Some examples include the right to life, the right to liberty and security of the person, and the right to participate.[170] While both highlight the rights most pertinent to sex workers, neither report goes beyond the rights stated in the treaties to analyse the ways in which these rights have been interpreted, how specific laws infringe these rights, and how a rights challenge could be framed.[171] Although not in England and Wales, it is also worth noting that a sex worker/activist, Laura Lee, launched a HRA challenge to the law criminalising purchase of sex in Northern Ireland.[172] This was given leave to be heard in a full judicial review proceedings, but after Lee's untimely and tragic death, her legal team were unable to find a new complainant, and her case

[165] This is discussed more fully in Chapter 6.
[166] International Committee on the Rights of Sex Workers in Europe, 'The Declaration of the Rights of Sex Workers in Europe' (European Conference on Sex Work, Human Rights, Labour and Migration, 15-17 October 2005, Brussels, Belgium)
[167] x:talk, *Human Rights, Sex Work and the Challenge of Trafficking* (London: x:talk, 2010). The International Union of Sex Workers has also published a report on sex work and human rights focusing on the ways the law infringes the Universal Declaration on Human Rights, rather than the ECHR – IUSW, *Sex Work and Human Rights* (March 2014), available at: http://www.iusw.org/wp-content/uploads/2014/04/SexWorkAndHumanRightsIUSWMar14.pdf
(last accessed 1 June 2019).
[168] International Covenant on Civil and Political Rights (ICCPR) General Assembly resolution 2200A (XXI) of 16 December 1966.
[169] International Covenant on Economic, Social and Cultural Rights (ICESCR) General Assembly resolution 2200A (XXI) of 16 December 1966.
[170] ICRSWE, (n 166), 5; x:talk, (n 167).
[171] These limitations are noted in the x:talk report, (n 167), 28.
[172] H McDonald, 'Sex worker to launch legal challenge against NI prostitution ban' *The Guardian*, 22 March 2015, available at: http://www.theguardian.com/uk-news/2015/mar/22/sex-worker-to-launch-legal-challenge-against-ni-prostitution-ban (last accessed 1 June 2019).

had to be withdrawn.[173] As such, the arguments that would be made using the HRA are not publicly available, and there is still an important gap in knowledge in relation to how the HRA may be used to promote sex worker rights in England and Wales, a gap that this thesis seeks to fill.

1.6 Methodology

This thesis takes a feminist legal approach to research methodology.[174] One of the aims of feminist research is to 'support social justice and social transformation',[175] and as such much feminist research is committed to social change and policy recommendations.[176] This thesis does just that, reflecting on how and to what extent the HRA can effect such change. Gayle Letherby notes that there is no one feminist methodology; the way one uses the methods are what can characterise them as feminist.[177] In this thesis, I use various methods but through a feminist lens. I use doctrinal methods to provide rigorous analysis of the law, 'making connections between seemingly disparate doctrinal strands',[178] in order to provide an insight into how the law itself works. A feminist approach to doctrinal law rejects the understanding of law as 'neutral' and interpretations as 'objective', instead recognising the gendered underpinnings and effects of law.[179] This thesis also uses socio-legal research methods in order to recognise the symbiotic relationship between law and society; as Denis Galligan states, a

[173] A Erwin, 'Laura Lee legal battle over prostitution laws formally withdrawn following her death', *The Belfast Telegraph*, 8 March 2018, available at: https://www.belfasttelegraph.co.uk/news/northern-ireland/laura-lee-legal-battle-over-prostitution-laws-formally-withdrawn-following-her-death-36684798.html (last accessed 1 September 2019).
[174] G Letherby, *Feminist Research in Theory and Practice* (Buckingham: Open University Press, 2003).
[175] S Hesse-Biber, 'A Re-Invitation to Feminist Research', in S Hesse-Biber (ed), *Feminist Research Practice: A Primer* (London: Sage, 2014), 3.
[176] S Reinharz, *Feminist Methods in Social Research* (Oxford: Oxford University Press, 1992), 251.
[177] G Letherby, (n 174), 81.
[178] T Hutchinson and N Duncan, 'Defining and Describing What we Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83.
[179] R Graycar and J Morgan, *The Hidden Gender of the Law* (Sydney: The Federation Press); J Conaghan, *Law and Gender* (Oxford: Oxford University Press, 2013).

study on law and society 'on the one hand must reveal the qualities particular to law, and on the other hand unravel its entanglement with society.'[180] He argues that this should begin by understanding the law before understanding its impact on society.[181] This thesis also engages with legal theory on human rights to consider their political value to sex workers.

1.6.1 Doctrinal and Socio-Legal Research

This research uses doctrinal methods in relation to both the substantive law around sex work, and also in its exploration of the HRA and ECHR case law. Doctrinal research has long been the dominant method used by legal researchers within the common law system, and 'constitutes the foundation or starting point of most legal research projects'.[182] Doctrinal research begins with the search for general principles underlying laws, the 'mapping of a legal order'.[183] In doctrinal work, 'arguments are derived from authoritative sources such as existing rules, principles, precedents and scholarly publication'.[184] This thesis examines primary sources, such as statutes, case law, and international treaties, in order to provide a rigorous analysis of the law on both sex work and human rights. Legal commentaries, academic research and analyses are used to support this research and create a more complete understanding of the legal issues and the ways in which the law relating to sex work, and the legal doctrine of human rights, has developed.

[180] D Galligan, *Law in Modern Society* (Oxford: Oxford University Press, 2007), 4.
[181] ibid, 15.
[182] T Hutchinson, 'Doctrinal Research: Researching the Jury', in D Watkins and M Burton (eds), Research Methods in Law (Oxford: Routledge, 2018), 38
[183] D Galligan, (n 180), 35.
[184] R Van Gestel and H Micklitz, 'Revitalising Doctrinal Legal Research in Europe: What About Methodology?' (2011) *European University Institute of Working Papers Department of Law* 2011/05, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824237 (last accessed 1 May 2019).

This research, however, cannot be considered to be strictly a piece of doctrinal research. Tony Bradney argues that 'the question which cannot be legitimately answered by reference to a statute or judgment lies outside of the doctrinal gaze'.[185] Questions such as the effect of laws, how laws are used in practice, or whether the law creates injustices cannot be answered using only doctrinal methods. The doctrinal method's limits have been criticised by a range of scholars,[186] not least feminist legal researchers, who have highlighted that this formal approach to research is premised upon 'unarticulated but nevertheless deeply operative gendered assumptions and viewpoints'.[187] Because this thesis asks questions beyond these limits, it has had to draw on further methods, and can more accurately be termed socio-legal.

Sally Wheeler and Phil Thomas define socio-legal studies as 'an interface with a context within which law exists, be that a sociological, historical, economic, geographical or other context'.[188] Contrary to some assumptions, 'socio-legal' is not a synonym for 'empirical',[189] and there is a growing field of socio-legal research focused on theoretical insights.[190] In fact, there are no strict rules to socio-legal research, with socio-legal research using qualitative, quantitative and theoretical methods.[191] In fact, researchers undertaking socio-legal research can gather 'data wherever appropriate to the problem'.[192] In the case of this thesis, data was drawn from a range of interdisciplinary sources: qualitative and quantitative research undertaken by social science scholars, research from criminology, sociology, anthropology,

[185] A Bradney, 'Law as a Parasitic Discipline' (1998) 25 *Journal of Law and Society* 71, 76
[186] F Cownie and A Bradney, 'Socio-Legal Studies: A Challenge to the Doctrinal Approach' in D Watkins and M Burton (eds), *Research Methods in Law* (Oxford: Routledge, 2018), 64
[187] J Conaghan, (n 179), 7.
[188] S Wheeler and P Thomas, 'Socio-Legal Studies' in D Hayton (ed), *Law's Futures* (Oxford: Hart Publishing, 2000), 271.
[189] F Cownie and A Bradney, (n 186), 64.
[190] L Whitehouse, 'Making the Case for Socio-legal Research in Land Law: Renner and the Law of Mortgage.' (2010) 37 (4) *Journal of Law and Society* 545.
[191] R Banakar and M Travers, 'Law, Sociology and Method', in R Banakar and M Travers (eds), *Theory and Method in Socio-Legal Research* (London: Bloomsbury, 2005), 29.
[192] A Bradshaw, 'Sense and Sensibility: Debates and Developments in Socio-legal Methods', in P Thomas (ed) *Socio-Legal Studies* (Aldershot: Dartmouth, 1997), 99.

and psychology, and other socio-legal studies. Taking a socio-legal approach and drawing on a wide set of sources from various disciplines, has allowed this research to situate the law in its social setting and examine the ways law reflects society but also the way it constitutes social norms and practices.[193]

As with any method used, there are limitations to the approach taken here. In particular, the use of secondary data in this research, drawing on mainly external published data and material, must be noted. In using other researchers' data, one is subject to the limitations of that particular research. As Andrea Greenhoot and Chantelle Doswett note, 'because the data are already collected, the researcher has no control over who was sampled, what constructs were measured, or how they were measured'.[194] The original researchers' ontological and epistemological assumptions inevitably affect the knowledge produced by that research. As such, it is key that the methodology used in that research is interrogated, particularly to determine if the 'existing data provides a good match to an investigator's research questions'.[195]

Moreover, secondary data may be out of date or relate to different groups to the one in the intended study. This is something of particular note given the global nature of sex work research. This was mitigated to a degree by focusing on UK-based research when discussing the empirical realities of sex work (although research from other jurisdictions was considered when discussing the ways sex work has been theorised and problematised). Where research used data that would be considered out of date, it was triangulated with more current research to consider whether the findings were still relevant in the current socio-legal context. Social

[193] J Scoular,(n 18), 20.
[194] A Greenhoot and C Dowsett, 'Secondary Data Analysis: An Important Tool for Addressing Developmental Questions' (2012) 13(1) *Journal of Cognition and Development* 2, 5.
[195] ibid, 5.

research may also have small samples, which, while providing deep insights into the particular participants, are not generalisable. This is particularly true in sex work research, where sex workers are a hard-to-reach and non-homogenous group.[196] In particular, more hidden populations (such as off-street sex workers) may be underrepresented in research, while more visible populations (such as street sex workers) may be oversampled, leading to a bias in the results found, skewing what we 'know' about sex work.[197] While this is a limitation of particular studies, one could argue that where patterns emerge across a range of smaller studies, one can still create a relatively insightful picture of the context. The choice not to undertake my own empirical research was made in order to give adequate space and time to the human rights analysis that provides the distinctive knowledge in this thesis. There is already a large body of research from the social sciences about the empirical realities of sex workers lives upon which I was able to draw to provide social context.[198] Despite this, these limitations are still recognised.

1.6.2 Feminist Legal Research

There is no singular feminist approach, but as Vanessa Munro states, diverse feminist approaches share 'a common belief that the value, integrity and justice of our historical and present day society, and its practices and institutions, is undermined by a pervasive tendency to privilege the interests and experiences of men over women.'[199] Feminist legal research, she argues, includes the following:

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[196] F Shaver, 'Sex Work Research: Methodological and Ethical Challenges' (2005) 20 (3) *Journal of Interpersonal Violence* 296.
[197] Ibid, 296.
[198] There have also been debates about over researching sex workers, with concerns about burnout and being treated as 'guinea pigs' - see S Metzenrath, 'In touch with the needs of sex workers' (1998) 1 *Research for Sex Work* 11.
[199] V Munro, *Law and Politics at the Perimeter: Re-evaluating Key Debates in Feminist Theory* (Abingdon: Hart, 2007), 11.

> (1) a rejection of abstraction and commitment to the importance of context; (2) a sceptical approach towards claims of law's rationality and neutrality; and (3) a reflective attitude towards the role of power and the limits of law as a mechanism of social control.[200]

Key to this is placing the law in context, considering the particularities of people's daily lives.[201] This thesis uses feminist legal research methods to place women, and particularly sex workers, (recognising the gendered nature of sex work[202]) and their lives central to the research.[203] Rather than beginning with a doctrinal analysis of the inconsistencies of the law, this thesis is framed around how the law can respond to the experiences of sex workers and their human rights.[204] In doing so, this thesis does not take an essentialist approach to sex workers' lives,[205] instead recognising the heterogeneous nature of sex work, following Joanne Conaghan's exhortation to pay 'much greater attention to the particularities of women's lives and to the differences such attention is likely to reveal'.[206]

1.6.2.1 Feminist Epistemology and Standpoint Theory

When claiming to do feminist research on sex work, one must clarify what *kind* of feminism. This thesis is based on the feminist position that sex workers have agency and have the ability

[200] V Munro, 'The Masters Tools: A Feminist Approach to Legal and Lay Decision-Making', in D Watkins and M Burton (eds), Research Methods in Law (Oxford: Routledge, 2018), 196.
[201] ibid, 197.
[202] This is explored in Chapter 3.
[203] Women-centredness is a key feature of feminist research – see: J Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 (3) Journal of Law and Society 351.
[204] S Wahab, 'Creating knowledge collaboratively with female sex workers: Insights from a qualitative, feminist and participatory study' (2003) 9 (4) *Qualitative Inquiry* 625.
[205] Feminist research has been criticised for its essentialism – see, for example, A Harris, 'Race and essentialism in feminist legal theory' (1990) 42 *Stanford Law Review* 581.
[206] J Conaghan, (n 179), 371.

to make decisions, and resist the frameworks and discourses placed upon them by 'dominant social actors'.[207] There is evidence that sex workers 'have had, and have, little control over what is written about them' and that representations of them which do not accord with their lived experiences serve to further marginalise them.[208] Juno Mac and Molly Smith, two sex workers writing their own account of sex worker's rights, note that 'sex working feminists have long found themselves harshly excluded, and not only by de-humanising language in academia, but by explicit lack of invitation into spaces'.[209] The in/exclusion of particular voices skews the resulting knowledge produced and reproduces power structures of 'those entitled to consideration within the community in matters of distribution, recognition and ordinary political representation'.[210] This thesis considers whether a human rights approach could support sex workers' claims, using their own voices.

The position that sex workers' voices ought to be involved in discussions about sex work – following the campaign slogan 'Nothing about us without us'[211] – is informed by feminist standpoint epistemology. This questions what knowledge is and who gets to 'know' it. In terms of sex work research, then, can we understand sex work without including and listening to sex workers? Traditional epistemology has 'consisted in attempts to formulate universal accounts of knowledge which ignore the social contexts within which knowers are located'.[212] Standpoint epistemology, conversely, 'stresses the importance of the social

[207] A Basu and M Dutta 'Participatory Change in a Campaign Led by Sex Workers: Connecting Resistance to Action-Oriented Agency' (2008) 18 (1) *Qualitative Health Research* 106.
[208] L Nencel, 'Epistemologically privileging the sex worker: Uncovering the rehearsed and presumed in sex work studies', in M Spanger and M Skilbrei (eds) *Prostitution Research in Context: Methodology, Representation and Power* (Abingdon: Routledge, 2017), 71.
[209] J Mac and M Smith, (n 32), 12.
[210] N Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Cambridge: Cambridge University Press, 2010), 19.
[211] C Provost, ''Nothing About Us Without Us': Sex Workers the Decision Makers in New Fund', *The Guardian*, 3 Jan 2013, available at: https://www.theguardian.com/global-development/poverty-matters/2013/jan/03/sex-workers-decision-makers-new-fund (last accessed 1 September 2019).
[212] A Tanesini, *An Introduction to Feminist Epistemologies* (Oxford: Blackwell, 1999), 17

position of the knower for an evaluation of the validity of her claim to know'.[213] In doing so, voices of marginalised should be part of knowledge production. This is not the same as simply accepting an experience as truth. Experience must also be conceptualised, and how this is done depends on the concepts available to the person – as Joan Scott puts it, experience is 'not the origin of our explanation, but that which we want to explain'.[214] According to standpoint epistemology, knowledge is a process by which experiences are represented and objectified, so 'it is impossible to separate the structure and thematic content of thought from the historical and material conditions shaping the lives of its producers'.[215] The role of the researcher, then, can include 'translating, interpreting and transforming experiential knowledge',[216] drawing on their own expertise and skills. This recognises the dialogical nature of research – both that the researcher has expertise, but also that 'the researched have power and knowledge which the researchers need'.[217]

Donna Haraway argues that because knowledge is situated, it is inevitably a partial perspective. [218] However, in much research, some perspectives are 'epistemically privileged'.[219] Allesandra Tallesini notes that 'no group can legitimately claim to possess that unique standpoint which permits a completely adequate account of social reality'. [220] Standpoint epistemology, however, argues that while all accounts to knowledge are partial, not all partial accounts to knowledge are equal. Instead, it considers the idea of the 'outsider within' – that is the person on the margins of dominant structures – who may have a unique perspective,

[213] ibid, 18.
[214] J Scott, 'The Evidence of Experience' (1991) 17 (4) *Critical Inquiry* 773, 797.
[215] P Hill Collins, 'Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought' (1986) 33 (6) *Social Problems* S 14, S16.
[216] L Nencel, (n 208), 78.
[217] L Stanley and S Wise, *Breaking Out: Feminist Consciousness and Feminist Research* (London: Routledge, 1983), 20.
[218] D Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 (3) *Feminist Studies* 575.
[219] A Tanesini, (n 212), 10.
[220] ibid, 152.

in that they can see the dominant perspective, but also have a different standpoint, which is not observed by somebody located totally 'within' the dominant structure.[221] Sandra Harding, for example, relates this to knowledge on women's lives and experience, noting that 'women's lives' must be 'the place from which feminist research should begin'.[222] Feminist standpoint epistemology has been criticised as being 'essentialist' in its quest for an ideal knower,[223] one who must belong to the most oppressed group of all.[224] Hill Collins, however, argues that this criticism shows a misunderstanding of oppression as layered rather than a matrix with no pure victims and no pure oppressors.[225] She notes while there will be commonalities within each group, universal themes will be experienced and expressed differently according to, for instance, class, region, age, and sexual orientation.[226] As such, drawing on a range of partial perspectives, while recognising their comparative values and limits, can help us to create better knowledge.

1.6.2.2 The Standpoint of Sex Workers?

In making the argument to take seriously the standpoint of sex workers, we must also question whether there is, in fact, a sex worker standpoint. Assuming only one standpoint could raise criticisms of essentialism, and also obscure the diversity of lived experiences of sex workers. Graham Ellison notes the difficulty in positioning sex workers narratives to reflect their diverse experiences and voices.[227] Mac and Smith reflect on the implications of this difficulty, noting

[221] P Hill Collins, (n 215).
[222] S Harding, *Whose Science? Whose Knowledge?: Thinking from Women's Lives* (Ithaca: Cornell University Press, 1991), 123.
[223] S Harding, 'Standpoint Theory as a Site of Political, Philosophic and Scientific Debate', in S Harding (ed) *The Feminist Standpoint Reader* (New York: Routledge, 2004), 8.
[224] ATanesini, (n 212), 153.
[225] P Hill Collins (n 215).
[226] ibid, s16.
[227] G Ellison, 'Who Needs Evidence? Radical Feminism, the Christian Rights and Sex Work Research in Northern Ireland', in S Armstrong, J Blaustein and H Alistair (eds) *Reflexivity and Criminal Justice: Intersections of Policy, Practice and Research* (London: Palgrave Macmillan, 2016).

that ‘many sex worker activists find their testimonies are dismissed in feminist spaces on the grounds that, by virtue of being activists, they are not representative; that they speak from an exceptional, privileged and anomalous position’.[228] While they argue that there is, of course, no perfect spokesperson for sex workers, able to ‘represent the community’, some are more able to speak out at less personal risk – that is, in their words:

> Precarious immigration status, fear of eviction and police violence, and potential loss of child custody mean that migrant and indigenous workers, the insecurely housed, and parents (particularly mothers) all face higher stakes when organising or speaking up than sex workers who have secure long-term tenancies, hold a passport or citizenship, or have no children’.[229]

As such, challenging exclusion might not just require us to listen to sex workers, but to reflect upon and challenge the structures that allow some voices to be heard. In doing so, we can bring a range of sex workers’ standpoints to bear on the process of knowledge production, producing more nuanced results.

1.6.2.3 My Positionality and Assumptions

All researchers start their research with a set of assumptions about the topic being researched.[230] James Banks argues that ‘the biographical journeys of researchers greatly influence their values, their research questions, and the knowledge they construct’.[231] Liz Stanley and Sue Wise state

[228] J Mac and M Smith, (n 32), 18
[229] ibid, 20
[230] S Merriam et al, ‘Power and positionality: negotiating insider/outsider status within and across cultures’ (2001) 20 (5) *International Journal of Lifelong Education* 405, 406.
[231] J Banks, ‘The Lives and Values of Researchers: Implications for Educating Citizens in a Multicultural Society’ (1998) 27 (7) *Educational Researcher* 4, 4.

that this is the case 'whether this is library research or research 'in the field''.[232] As such, this current research does not avoid this issue by not being empirical. Because of the impact of the researcher's positionality, feminist research suggests that researchers should 'practice reflexivity, a process by which they recognise, examine, and understand how their social background, location and assumptions can influence the research'.[233] My positionality in the design of, and during, this research has had an effect on my research questions, my research methods, and the knowledge I have produced, and so, in this subsection, I aim to reflect upon this. In doing so, I accept Cryer et al's assertion that 'it is better to be open about the bases of research and to think about them than to leave them unaddressed and uncritically accepted'.[234]

Beginning this research, I was a new researcher with a doctrinal education in law. Although I had studied some research methods during my MA degree, this training was limited in comparison to my exposure to black-letter law, so I began from a position that law can be transformative for the issue of sex work: 'the application of formal law is considered to operate in purely instrumental ways – according to an internal logic – and changes in behaviour in society are assumed to follow its prescribed codes'.[235] Because of this, perhaps naïve, faith in law, my focus lay with the HRA as a piece of legislation that should be considered doctrinally, to consider its potential impact in changing sex workers' lives. In order to develop a doctrinal analysis in depth, there was no space in the thesis to undertake empirical research on, for example, whether sex workers themselves considered the HRA valuable. This early position on the law and choice of method, therefore, has led to a different piece of research than if I had chosen to undertake empirical research. Having noted the limitations of this methodology

[232] L Stanley and S Wise, (n 217), 49.
[233] S Hesse-Biber, (n 175), 3.
[234] R Cryer, T Hervey and B Sokhi-Bulley, *Research Methodologies in EU and International Law* (Oxford: Hart, 2011), 5
[235] J Scoular, (n 18), 12.

above, I still assert that the knowledge that this thesis has produced is valuable. This also leaves open the possibility for further projects based on my findings here, using other methodology.

Although through a more critical lens, I do still hold the position that law matters. In research and campaigning around sex work, from a multitude of perspectives, a particular regulatory approach is often posited as 'the answer' to 'the problem'.[236] Jane Scoular's research into a number of jurisdictions, however, suggests that jurisdictions with similar regulatory approaches may have different impacts on sex markets, while others with very different legal approaches may look very similar 'on the ground' in terms of marginalisation of street sex work, ignorance of off-street sex work, and lack of structural support.[237] That is, local practices, economics, location, etc. can have as significant an effect on the realities of sex work as can 'top-down' regulatory approaches.[238] Laura Agustín argues that, in light of the fact that 'no matter which sociolegal regimes are put into place, people continue to sell and to buy sex wherever they can',[239] that it is irrational to focus on legal regimes because they do not matter. This reflects an anxiety held by many feminist legal scholars of 'ceding too much power to law as a form of knowledge and control'.[240] While 'blind faith' in the law is unsustainable',[241] law still matters in that it determines who is inside and who is outside of legality, who has what legal rights, what local regulations can be put into place, and who is in/excluded from law's protections.[242] A further reason for not ignoring law is provided by Vanessa Munro:

[236] J Mac and M Smith, (n 32), 190.
[237] J Scoular, 'What's Law Got to Do With It? How and Why Law Matters in the Regulation of Sex Work' (2010) 37 (1) *Journal of Law and Society* 12, 13.
[238] J Scoular, (n 14); P Kotiswaran, (n 20).
[239] L Agustín, 'Sex and the limits of enlightenment: The irrationality of legal regimes to control prostitution' (2008) 5 *Sexuality Research & Social Policy* 73, 82.
[240] V Munro, (n 199), 199.
[241] J Scoular, (n 237), 24.
[242] ibid.

> Legal power, like other forms of power, is diffuse, complex, and interdisciplinary, allowing for the possibility of attaining some level of reform through mechanisms of legal challenge not only makes logical sense, it also becomes a practical necessity integral to the prospect of achieving subversive change.[243]

As such, abandoning the law leaves untouched legislation and regulation that affects sex workers. Law, 'as an inseparable dimension of social relations',[244] cannot simply be ignored. Rather than abandon law, then, taking a critical approach to law can help us to understand how it constitutes social issues, but also what effects it could have in changing them (and the extent to which it can or cannot do so).

A second point that should be noted in terms of positionality relates to my inter-related intersectional identities.[245] I am a white, relatively well-educated, woman who has not, and does not, work in the sex industry. I am, however, gay and from a working-class background. My status in society and in relation to this research is reflected in my approach to the research, my perception of reality, and also in my choice of topic. My outsider status in relation to sex work has meant that initially meeting and discussing ideas with sex workers was not possible – I had not yet built up the trust required to access members of the sex work population.[246] Although I now have developed some networks with sex workers, the knowledge to which I have access is still limited by my outsider status. While I have no 'insider' knowledge of sex work itself, I do have lived experience of being part of a number of marginalised communities

[243] V Munro, 'Legal Feminism and Foucault – A Critique of the Expulsion of Law' (2001) 28 *Journal of Law and Society* 546, 566.
[244] J Scoular, (n 18), 16.
[245] K Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour' in K Crenshaw *et al* (eds), *Critical Race Theory: the Key Writings that Formed the Movement* (New York: The New Press, 1995), 357.
[246] F Shaver, (n 196).

that are often (mis)represented in research and society. This experience has undoubtedly affected my choice to research another marginalised community, but also my epistemological position that sex workers have agency and that they, as a marginalised community, have knowledge of their lives that others do not.

1.7 Structure of the Thesis

Chapter 2 considers the problems related to sex work to which the law should respond. Drawing on empirical research on sex work, this chapter examines how the realities of sex work have been understood and moulded into narratives about the nature and problems of sex work. This chapter challenges the dominant narratives of sex work as deviant or as inherently violent, arguing that these fail to recognise the heterogeneity of sex work experiences. This chapter argues that the key issues facing sex workers are stigma, violence, and poor working conditions. The problems delineated in this chapter form the basis for analysing current legal responses to sex work, as well as setting the priorities for a human rights approach.

Chapter 3 then examines the way the current law on sex work in England and Wales, and its enforcement, respond to these problems. This chapter argues that the current law both constructs and exacerbates the stigma, violence, and poor working conditions faced by sex workers. This chapter demonstrates how the development of the law has been informed by cyclical interpretations of sex work, and thus places the law in its political and cultural context. This chapter then analyses specific sex work offences and police powers and practices, and their impact on sex workers. It argues that much of the criminal law on sex work should be reformed and repealed to reduce its negative impact on sex workers and give space for alternative priorities such as labour and human rights. The analysis in this chapter forms the

basis for later human rights challenges to both the law and policing practices relating to sex work in England and Wales.

Chapter 4 assesses the benefits and limitations of labour-based regulation of sex work, as part of a wider human rights approach. This chapter considers how international labour law standards and obligations, alongside ECHR law and jurisprudence, set the parameters of what can be considered acceptable work. The chapter then examines the extent to which the conditions of sex work could be improved by the current English and Welsh labour law framework, which is limited by its focus on a traditional working arrangement. This chapter finds that the specific labour rights available to workers, such as minimum wage, working time regulations, and health and safety requirements, would provide a floor of benefits for sex workers but would be limited in their impact on most sex workers due to the varied working organisation of sex work. Finally, this chapter performs a comparative analysis of alternative labour law approaches, where specific labour laws are created to uphold sex workers' rights. It is argued that certain sector-specific labour law protections may tackle problematic working conditions for sex workers and have an indirect positive impact on sex workers' vulnerability to stigma and violence. While arguing that labour rights are necessary as part of a human rights approach to sex work, this chapter demonstrates the limitations of labour law, particularly in the way it relates to sex workers' working relationships, but not to their wider inclusion and interactions with the state.

Chapter 5 considers the benefits and disadvantages of taking a human rights approach to sex work. It argues that human rights are a mark of equal participation and inclusion in the political community. While highlighting the importance of human rights instruments such as the ECHR and HRA for enforcing rights, this chapter argues that human rights have an a priori

existence based on equality in the political community. As such, sex workers already have human rights, even if they are not fully recognised or realised. This chapter explores the various functions of human rights for sex workers, including challenging interferences from the state, making claims from the state, and providing a language of political legitimacy to marginalised groups such as sex workers. Chapter 5 then engages with criticisms of rights, and the challenges that might arise from using rights, particularly in relation to the conflict with competing rights claims (as discussed earlier). It argues that the potential positive effects outweigh any disadvantages and abandoning rights because of their limitations would cede the terms of the debate to those who seek to abolish the sex industry. This chapter, therefore, demonstrates the broader theoretical and practical reasons for using human rights to respond to the problems of sex work, before the thesis moves on to consider the HRA as a specific rights instrument.

Chapter 6 is a shorter chapter clarifying the framework of the HRA to demonstrate how human rights challenges, the substance of which are found in Chapters 7 and 8, might proceed under the HRA. Chapter 6 draws on statutory and case law to explain the HRA duties of courts, Parliament and public bodies in relation to the ECHR. This chapter also reflects on the constitutional status of the HRA, and the ongoing deference to parliamentary sovereignty found in both the law and its application. This is a significant constraint on the power of the HRA to provide an effective remedy for sex workers, particularly in relation to changing the law itself. The duties on public bodies, however, are not subject to such engrained deference and so the scope to use the HRA to challenge policing practices and activities is broader.

Chapter 7 moves on to the substance of the HRA arguments. It examines how an HRA challenge, through the courts or to Parliament, could potentially lead to repeal or reform of laws relating to sex work and in turn reduce their negative impacts on the stigma, violence, and

poor working conditions exacerbated by the criminal laws. This chapter analyses domestic and ECHR jurisprudence and applies it to the laws relating to soliciting, brothel keeping, controlling prostitution for gain, and causing/inciting prostitution for gain. It finds that these laws constitute unjustified violations to sex workers' rights to private and family life under Article 8 of the ECHR. There is a further consideration of the Article 10 right to freedom of expression and the Article 14 right to freedom from discrimination in the enjoyment of the ECHR rights. This analysis, however, does not find that the four impugned offences violate these rights.

The final substantive chapter, Chapter 8 addresses the way the HRA could be used to challenge police practices towards sex workers before the courts, as well as providing a more robust framework for police to consider the proportionality of their actions in their everyday work. This chapter examines a range of potential violations of sex workers rights under the ECHR by police, beginning with direct abuses of sex workers' rights to freedom from inhuman degrading treatment under Article 3. Recognising that police interference with human rights goes beyond direct abuse, however, this chapter then assesses the HRA implications of the use of civil orders against sex workers and raids and closures of brothels. Finally, this chapter considers the positive obligations that police have under the HRA to adequately investigate interferences with their rights by private citizens.

In Chapter 9, I conclude, drawing the previous analyses together to consider the overall potential impact of the HRA on the problems set out in Chapter 2.

Chapter 2

THE 'PROBLEMS' OF SEX WORK: EMPIRICAL REALITIES AND THEORIES

2.1 Introduction

The first aim of this thesis is to explore the 'problems' of sex work in order to provide the parameters for the analysis of the current law and the human rights-based approach considered in this thesis. In this chapter, I delineate the problems that should be the focus of any law or policy reform, examining what we know about sex work, and how this knowledge has been constructed into narratives around the problems of prostitution. This chapter sets out the analytical framework for the thesis, clarifying the position taken by the thesis on the contested topic of sex work, and the issues that should be the focus of law reform. It provides the foundation upon which the human rights analysis in later chapters will be based.

The complexities and diversity of sex workers' lives[1] are often lost in attempts to find a grand narrative of the 'problem' of sex work. Jo Phoenix argues that 'two centuries of research on the empirical realities of selling sex in the UK has told a remarkably consistent tale'.[2] Yet, how those realities have been constructed shifts across time and space,[3] reflecting particular values and concerns. This leads to different forms of governance and regulation, which in turn have implications for the way sex work is practiced.[4] This chapter seeks to provide a more nuanced account of the diversity of sex work and the 'problems' that are key to sex workers' lives, focusing on the 'practical and material rather than the symbolic or

[1] S Kingston and T Sanders, 'New Sociologies of Sex Work in Perspective', in K Hardy, S Kingston and T Sanders (eds), *New Sociologies of Sex Work* (Farnham: Ashgate, 2010), 1.
[2] J Phoenix, 'Frameworks of Understanding', in J Phoenix (ed), *Regulating Sex for Sale* (Bristol: Policy Press, 2009), 3.
[3] N Zatz, 'Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution' (1997) *Signs* 277, 278.
[4] J Scoular, *The Subject of Prostitution: Sex Work, Law and Social Theory* (Abingdon: Routledge, 2013), 20.

metaphorical'.[5] In doing so, I interrogate the ways that sex work has been problematised and theorised, particularly considering constructions of sex work: as deviancy; as violence against women; as a form of sexual empowerment and liberation; and as a type of work. Examining how empirical realities and theoretical approaches can influence one another in a symbiotic way, I argue that the dominant constructions flatten the intricacies of sex work and have material effects on sex workers' lives.

Instead of trying to provide a universal understanding of sex work in this chapter, I examine the empirical realities of sex work in England Wales, exploring particularly the diversity of 'its nature, organization, presentation and…responses to it'.[6] Drawing on first-hand accounts of sex work written by sex workers, reports from sex work support organisations, and a wide range of research into the empirical realities of the industry, this chapter argues that the key material problems facing sex workers relate to stigma, violence and risk of crime, and varied, and often poor, working conditions. The problems have been grouped in this way because, while sex workers face these problems in different ways, and to different degrees, as discussed in this chapter, they are each endemic within the sex industry. Understanding these problems and considering how to respond to these issues is important when contemplating sex work reform, and, as such, the examination of these problems undertaken in this chapter forms the basis for later chapters considering what the law and policy around sex work ought to do and how the HRA can help to get us there.

[5] J Mac and M Smith, *Revolting Prostitutes: The Fight for Sex Workers' Rights* (London: Verso, 2018), 3.
[6] S Kingston and T Sanders, (n 1), 1.

2.2 Challenging Homogeneity: Diversity in Sex Work

There is no one single experience of sex work. As examined in Chapter 3, policy and law are often focused on narrow constructions of sex workers as either victims of coercion and exploitation, or nuisance to communities. There is growing recognition in research,[7] however, that sex workers and their experiences are heterogeneous, in terms of sex workers' level of involvement in the industry; in the markets in which they work; and in their experiences, backgrounds, and marginalised identities. Challenging the homogenous representations of sex workers is imperative to developing law and policy that reflects the varied realities of sex work.

There have been a number of attempts to create a typology of involvement in the sex industry. Graham Scambler developed a typology of six adult sex work careers, drawing on paradigmatic examples, to demonstrate the 'heterogeneity of those involved and their circumstances and motivations'.[8] Scambler defines these as: the 'Coerced', who have been abducted or trafficked; the 'Destined', who have family or peers in the sex trade; the 'Survivors', who use sex work to survive alongside debt and drug use; the 'Workers', who are those who work in sex work as a permanent job; the 'Opportunists', who might be involved on a transient basis to pay for specific needs at specific times; and the 'Bohemians', who work on a casual basis, without a particular financial need.[9] Jane Pitcher's typology similarly differentiates between career patterns, relating them to both aspirations and opportunities in the sex industry and other work.[10] Pitcher distinguishes between: 'interim pathways', where 'sex

[7] G Scambler, 'Sex Work Stigma: Opportunist Migrants in London' (2007) 41 (6) *Sociology* 1079; J Pitcher, 'Intimate Labour and the State: Contrasting Policy Discourses with the Working Experiences of Indoor Sex Workers' (2019) 16 *Sexuality Research and Social Policy* 138; R Bowen, *Work, Money and Duality: Trading Sex as a Side Hustle* (Bristol: Polity Press, 2021).
[8] G Scambler, ibid, 1080.
[9] ibid.
[10] J Pitcher, (n 7).

work is a pragmatic option while considering further possibilities' and 'reacting to circumstances'; 'multiple transitions', where people shift between different sectors, often while undertaking work in other sectors; and 'longer-term careers', where sex work is the person's main job, and they develop careers in the sex industry.[11] Pitchers' typology highlights the 'varied modes of entry, patterns of re-entry and mobility between sectors'.[12]

Finally, Raven Bowen presents a continuum of what she terms 'duality', which represents people's involvement in both the sex industry and other industries. This continuum reflects on sets of practices, including: 'dabbling', where monetary motivation leads to workers in non sex industry jobs adding sex work as a 'side hustle', or vice versa; 'sexiting', where people engage in both sex work and non sex work with the intention of moving towards working solely in one or the other; and 'sustained duality', where people work in both sex and non sex industries for a sustained period.[13] Financial reasons and pressure points were cited by Bowen's participants as reasons for involvement in sex work and non sex work – for example, the lead up to Christmas, paying tuition fees, where they found themselves temporarily unemployed or suddenly ill, or having to pay unexpected bills.[14] Others engaged in duality to pay for longer-term projects, such as paying off debt or buying a house, while some were involved on a sustained basis for long-term financial stability.[15]

While these typologies differ in focus, all three reflect on the varied economic and social factors shaping involvement in the industry. For some, entry into sex work is based on historical social factors, including 'dysfunctional socialization involving childhood

[11] ibid, 144.
[12] ibid, 142.
[13] R Bowen, (n 7), 44.
[14] ibid, 43.
[15] ibid.

victimization, parental neglect, or isolation from social networks'.[16] Those people would fall somewhere within Scambler's 'Coerced' or 'Destined' categories. Socio-economic factors also have an important influence for most. Some people may have few options but to sell sex because of persistent poverty or an inability to find alternative work due to drug use, homelessness, or mental or physical health issues (Scambler's 'Survivors').[17] For others, casualisation of labour markets and increasing precarity of work,[18] alongside the contraction of the welfare state,[19] have led people to either begin to sell sex or increase their reliance on sex work. In a report by the English Collective of Prostitutes, the effect of reduced benefits and a reliance on child tax credits was cited by many single mothers as the reason they entered or re-entered sex work.[20] The shift from a range of benefits to a standardised structure of Universal Credit, alongside associated sanctions, and the fact that many of the benefits forms require online applications (which, in turn, require computers and internet access), mean that some people may be left with little to no money for periods of time, and therefore rely on sex work income during that time (Scambler's 'Opportunists').[21] Research also suggests that for many (Scambler's 'Workers'), involvement in the sex industry is based on decisions similar to those made about choosing other jobs, and that sex work may simply be preferable to alternatives – that is, sex work may provide better income, flexibility, and control than other jobs.[22] The diversity of involvement, and reasons for involvement, in the industry, reflect the varied life experiences of those in the sex industry and challenge the unidimensional way that sex workers are framed in policy and law.

[16] C Benoit et al, 'Would You Think About Doing Sex for Money? Structure and Agency in Deciding to Sell Sex is Canada' (2017) 31 (5) *Work, Employment and Society* 731, 732.
[17] Barefoot Research and Evaluation, *Selling Sex for Survival: Adult Sexual Exploitation and Prostitution in the North East and Cumbria*. (Newcastle: Northern Rock Foundation, 2016).
[18] S McKay et al, *Study on Precarious Work and Social Rights* (London: Working Lives Research Unit, 2012).
[19] D Edmiston, 'Welfare, Austerity and Social Citizenship in the UK' (2017) 15 *Social Policy and Society* 261.
[20] English Collective of Prostitutes, *What's a Nice Girl Like You Doing in a Job Like This: A Comparison Between Sex Work and Other Jobs Commonly Done by Women* (London: ECP, 2020), 12.
[21] R Bowen, (n 7), 139.
[22] Pitcher, (n 7), 139.

There is also significant variation in the markets of sex work. Ronald Weitzer argues that 'when it comes to prostitution, the most serious blunder is equating all prostitution with street prostitution, ignoring entirely the indoor side of the market'.[23] Often research has been situated in street sex work, with 'findings presented as a feature of sex work per se'.[24] This part of the industry is the most visible, most easily accessed,[25] and is also often linked to topics that bring media interest, such as drugs and crime.[26] This market, however, is increasingly small, and as much research suggests,[27] makes up a minority of the sex industry.

Street sex markets have been reducing over a number of years, largely due to growing digital sex industries,[28] but the COVID-19 pandemic has had a profound impact on the existence of the street sex industry. For many sex workers, laws and regulations that restricted movement and in person meeting[29] led to a complete loss of income. During the pandemic, many sex workers were only able to survive due to community support and mutual aid.[30] As the Sex Worker Advocacy and Resistance Movement stated, 'like other precariously employed workers, sex workers do not have a monthly salary we can rely on. We don't get sick pay. Many of us exist without savings of any kind'.[31] Moreover, due to the illegitimate nature of the industry, most sex workers were ineligible for furlough support or economic initiatives that

[23] R Weitzer, *Sex for Sale: Prostitution, Pornography and the Sex Industry* (London: Routledge, 2000), 4.
[24] R Weitzer, 'New Directions in Research on Prostitution' (2005) 43 *Crime, Law and Social Change* 211, 214.
[25] F Shaver, 'Sex Work Research: Methodological and Ethical Challenges' (2005) 20 (3) *Journal of Interpersonal Violence* 296.
[26] S Kingston and T Sanders, (n 1), 1.
[27] B Brooks-Gordon, N Mai, G Perry, and T Sanders, *Production, Income, and Expenditure from Commercial Sexual Activity as a measure of GDP in the UK National Accounts*. Report for Office of National Statistics (ONS, 2015).
[28] T Sanders, L Connelly and L King, 'On Our Own Terms: The Working Conditions of Internet-Based Sex Workers in the UK' (2016) 21 (4) *Sociological Research Online* 15
[29] Coronavirus Act 2020; The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.
[30] National Ugly Mugs, *Second Report: COVID-19 Emergency Response Project for UK Sex Workers* (Manchester, NUM: 2019); Sex Work Advocacy and Resistance Movement, *How We Ran a Mutual Aid Fund* (London: SWARM, 2020).
[31] SWARM, ibid, 5.

supported businesses.[32] Many were financially unable to stop working in person, and thus risked illness, fines, increased violence, and even deportations.[33] Although local authorities were compelled by the government to house anyone rough sleeping within 72 hours,[34] Lucy Platt et al reported that those sex workers who were homeless (but not rough sleeping) or used drugs faced exacerbated problems including loss of shelter due to increased demand for shelters and supported housing.[35] Moreover, many of the most marginalised, such as migrant sex workers, were unable or unwilling to access the support provisions due to fear of deportation.[36] Some sex workers with more stability were able to move their work entirely online, but many became reliant on indirect services, as some adult service platforms removed the ability to make bookings from their sites to comply with lockdown restrictions.[37] Since lockdown, the street sex industry does continue to exist,[38] but at a significantly reduced size, and involves largely those who, for a range of reasons, do not have the ability to work indoors or online. Focusing predominantly on the street market in law, policy and research, therefore fails to recognise the realities of contemporary sex work. Yet, it would also be a disservice to the remaining street workers to ignore them, especially as they are often the most vulnerable to violence, stigma, and police attention, as discussed below.

[32] L Platt et al, 'Sex Workers Must Not be Forgotten in the COVID-19 response' (2020) 396 *The Lancet* 9, 9.
[33] ibid.
[34] H Cromarty, *Coronavirus: Support for Rough Sleepers (England) No. 9057* (London: House of Commons Library, 2021).
[35] L Platt et al, (n 32), 10.
[36] ibid, 10.
[37] National Ugly Mugs, (n 30), 6.
[38] Homeless Link, *Covid-19 and Women's Homelessness: A Learning Review of the Situation of Women Who Sex Work in Leeds* (Leeds: Perry Richards Management Services, 2021); National Ugly Mugs, (n 30).

There is a growing body of research into other areas of sex work,[39] most recently looking at the effects of technology and the internet on the way sex markets are shaped.[40] The more hidden indoor markets[41] are often less apparent in policy and legal discourses around sex work, as well as in the construction of the problems of sex work, meaning understandings are often skewed towards street work. When examining the problems related to sex work, it is important therefore to consider the differences across the markets, what we claim to know about them, and the limits of our knowledge about sex work in England and Wales. Phil Hubbard et al highlight the increase in off-street sex work, and further that 'information and communication technologies have increasingly allowed for the selling of virtual sex'.[42] The expansion of the internet has led to shifts in working practices – where previously sex workers might have advertised in more traditional media such as newspapers and magazines, most now advertise profiles on large web platforms or by using their own websites.[43] The internet provides people with the opportunity to advertise their services directly to clients, and, therefore, sex workers working through the internet can access clients more easily than before.[44] In fact, for many working off street, having viable internet advertising has become 'almost essential'.[45] In Stewart Cunningham et al's research, participants referred to the internet as 'fundamentally important', 'absolutely crucial', and 'the number one important

[39] Eg. B Brooks-Gordon, *The Price of Sex: Prostitution, Policy and Society* (Devon: Willan, 2006); S Day, *On the Game: Women and Sex Work* (London: Pluto Press, 2007); C Harcourt and B Donovan, 'The Many Faces of Sex Work' (2005) 81 *Sexually Transmitted Infections* 201.
[40] T Sanders et al, *Internet Sex Work: Beyond the Gaze* (London: Palgrave Macmillan, 2017); T Sanders, L Connelly and L King, (n 28).
[41] T Sanders, 'Behind the Personal Ads: The Indoor Sex Markets in Britain', in R Campbell and M O'Neill (eds), *Sex Work Now* (Devon: Willan, 2006), 93.
[42] P Hubbard et al, 'Away from Prying Eyes? The Urban Geographies of 'Adult Entertainment' (2008) *Progress in Human Geography* 363, 364. See further T Sanders et al (n 15).
[43] T Sanders, M O'Neill and J Pitcher, *Prostitution: Sex Work, Policy and Politics* (London: Sage, 2018), 34.
[44] T Sanders, L Connelly and L Jarvis King (n 28), 16.
[45] S Cunningham et al, 'Behind the Screen: Commercial Sex, Digital Spaces and Working Online' (2018) 53 *Technology in Society* 47, 49.

thing to my working life', with many noting that without the internet they would not continue with sex work as other ways of working would not appeal to them.[46]

The internet can be used solely for advertising followed by the delivery of sexual services in person, or may be used to interact with clients online, for example, by webcamming.[47] There has been a growth of sex work-specific platforms, which, for a fee, provide sex workers a dedicated space to post adverts and meet clients. These platforms facilitate in-person sex work, but also indirect 'live' experiences such as camming, or asynchronous experiences, such as interaction with materials created and uploaded by sex workers.[48] Many sex workers offer a combination of these services.[49] The internet has also provided a range of places that sex workers can find clients, beyond sex work-specific platforms. For instance, some sex workers use non sex-based websites, such as social media platforms and chat rooms to meet clients.[50] Some sex workers with sufficient cultural capital and IT knowledge have also created their own websites, where they are not required to follow the terms and conditions of specific platforms and do not pay fees to the platform.[51] What is apparent is that, like other modes of sex working, internet-facilitated sex work is diverse and the context in which it takes place affects the levels of control and safety sex workers experience.

[46] ibid.
[47] A Jones, *Camming: Money, Power and Pleasure in the Sex Work Industry* (New York: NYU Press, 2020).
[48] J Swords, M Laing, and I Cook, 'Platforms, Sex Work, and their Interconnectedness' (2021) 0 (0) *Sexualities* 1, 2.
[49] A Jones, 'Sex Work in a Digital Era' (2015) 9 (7) *Sociology Compass* 558. For the purpose of this thesis, which as noted in Chapter 1, is focused on direct sexual services, it is only these that are of interest.
[50] L Jonsson and M Svedin, 'Without the Internet, I Would Never Have Sold Sex: Young Women Selling Sex Online' (2014) 8 (1) *Cyberpsychology* 1.
[51] S Cunningham et al, (n 45), 51.

There are no reliable figures on the makeup of the markets – that is, how many people work in sex work, how many indoor (online or otherwise), how many on the streets.[52] The question of numbers has been considered a key one – as Sanders et al note, 'various stakeholders are, understandably, keen to comprehend the size of the phenomena they are involved in governing or responding to'.[53] The reasons for this interest may vary, from attempts to track criminal activity to identifying the health and support needs of sex workers.[54] There are methodological difficulties in doing this type of mapping, and in gaining realistic estimates.[55] The most obvious is that, to an extent, the sex worker population is hidden,[56] especially in the indoor markets, and much sex work remains in the informal economy.[57] The involvement of particular individuals fluctuates, with many working on a transient basis.[58] This makes it difficult to ascertain the number of people working as sex workers at any one time. Even if it was easier to access sex workers, due to the 'threat of police interference, the fear of being recognised as a 'prostitute' and the stigma that is attached to sex work,[59] many sex workers are not open about their involvement in the industry. There are also theoretical challenges in defining what a sex worker is, particularly if the involvement is incidental[60] or opportunistic. Even if we limit our definition of sex work to the direct provision of sexual services, defining 'sexual' and distinguishing between sex work and other sexual relationships where money or benefits are transferred from one partner to another can be problematic.[61]

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[52] L Cusick et al, 'Wild Guesses and Conflated Meanings? Estimating the Size of the Sex Worker Population in Britain (2009) 29 (4) *Critical Social Policy* 703; T Sanders et al, 'The Point of Counting: Mapping the Internet Based Sex Industry' (2018) 7 (5) *Social Sciences* 233.
[53] ibid, 233.
[54] ibid, 236; Global Network of Sex Work Projects, *Mapping and Population Size Estimates of Sex Workers: Proceed with Extreme Caution* (2015), available at: http://www.nswp.org/resource/mappingand-population-size-estimates-sex-workers-proceed-extremecaution (last accessed 2 September 2019).
[55] T Sanders, *Sex Work: A Risky Business* (Devon: Willan, 2005), 12.
[56] L Cusick et al, (n 52), 708.
[57] T Sanders et al, (n 52).
[58] T Sanders, (n 55), 19; P Hubbard and T Sanders, 'Making Space for Sex Work: Female Street Prostitution and the Protection of Urban Space' (2003) 27 (1) *International Journal of Urban and Regional Research* 75.
[59] T Sanders, (n 55), 12.
[60] M Morris, 'The Limits of Labelling: Incidental Sex Work Among Gay, Bisexual and Queer Young Men on Social Media' (2021) 18 *Sexuality Research and Social Policy* 855.
[61] L Cusick et al, (n 52), 709.

Some research has *estimated,* using mathematical equations, the size and make-up of the sex worker population. Estimates should be evaluated critically as 'reasonable governance and social policy should ensure service provision decisions are informed by reasonable estimates of the number, profile and distribution of people in the sex industry'.[62] In 1999, Hillary Kinnell estimated that there were 80,000 sex workers in the UK,[63] including women, men, and transgender sex workers working in both the street and off-street markets. Sixteen specialist sex work outreach services gave estimations of the number of sex workers thought to be working in their geographical area, and the average number was then multiplied by 120, which was the number of services, including non-specialist services, Kinnell knew were working with sex workers.[64] Kinnell has noted the problems with this methodology – that some sex workers might use more than one service, but also that some may not be on the radar at all.[65] While the research recognised that the figure was speculative, the 80,000 figure has been unquestioningly reported by the media,[66] MPs,[67] and the Government.[68] The unquestioning use of these estimates as facts is problematic because 'policy is being created and implemented without information to calculate either its financial cost or impact'.[69]

In 2015, Belinda Brooks-Gordon et al drew on data held by specialist sex work services, Genito-Urinary Medicine clinics, and drugs services, and data from the directories of the UK Network of Sex Work Projects, alongside estimates by those services of how many sex workers

[62] L Cusick et al, (n 52), 704.
[63] H Kinnell, 'Sex Workers in England and Wales: Europap-UK Briefing Paper for Department of Health, National Sexual Health Strategy' (Europap, 1999).
[64] L Cusick et al, (n 52), 706.
[65] Is the number of trafficked call girls a myth?' 9 January 2009, *BBC News Magazine,* available at: http://news.bbc.co.uk/1/hi/magazine/7819984.stm. (last accessed 1 June 2019).
[66] S Morris, 'Sex for Sale: The Truth about Prostitution in Britain', 26 November 2008, *The Independent*, available at: http://www.independent.co.uk/life-style/love-sex/sex-industry/sex-for-sale-the-truth-about-prostitution-in-britain-1035038.html (last accessed 1 June 2019).
[67] Jacqui Smith, quoted in *BBC News Magazine* (n 65).
[68] Home Office, *A Co-ordinated Prostitution Strategy* (London: Home Office, 2006), 7; Home Office, *Tackling the Demand for Prostitution: A Review* (London: Home Office, 2008), 6.
[69] L Cusick et al, (n 52), 704.

operated in their area, to come to an estimate of 72,816 sex workers across the UK.[70] They further estimated that, of those sex workers, only around 15% worked on the street.[71] Although they recognise that these findings are only estimates and their methodology was still subject to many of the same limitations of previous studies, Brooks-Gordon et al note that the use of local data, gathered by services to meet funding requirements, is likely to be more accurate than national data, and that the difficulty is faced when establishing the appropriate multiplier to account for people who see more than one service, and those who are not known to any.[72]

More recently, Marianne Hester et al have published a government-commissioned report on the prevalence and nature of sex work in England and Wales.[73] They did not estimate the overall number of sex workers in England and Wales, but they drew on police reports, health data, local authority records, surveys, academic literature, charities and NGOs, online platforms and case studies, to find local data on the prevalence of sex work.[74] Two of the authors, Alba Lanau and Andrea Matolsci, have further discussed how this local data can provide more accurate mapping of the diversity of sex work, highlighting, for instance that: while some cities have almost non-existent street scenes, others have larger and well-defined street sex areas; while London and Manchester have a significant male escort provision, other cities have no significant male sex work; and while London is 'largely international and multi-ethnic', other cities have few black or ethnic minority sex workers.[75] Although it is difficult to know exactly how many sex workers work in the different markets, more people work off-street than on the street, and these markets vary spatially across cities and regions.[76]

[70] B Brooks-Gordon et al, (n 27).
[71] ibid.
[72] ibid, 9.
[73] M Hester et al, *The Nature and Prevalence of Prostitution in England and Wales Today* (Bristol: University of Bristol, 2019).
[74] ibid, 35.
[75] A Lanau and A Matolsci, 'Prostitution and Sex Work, Who Counts? Mapping Local Data to Inform Policy and Service Provision' (2022) *Social Policy and Society* 1, 8.
[76] ibid; B Brooks-Gordon et al, (n 27).

Beyond varied levels of involvement in the sex industry, and diverse markets of sex work, sex workers' experiences are also impacted by their backgrounds and 'other social markers of identity, such as race, ethnicity, age, ability, nationality, and class position'.[77] There is some research on the impact of race and ethnicity on sex work, highlighting that for some ethnicities, being seen as 'exotic' can be enhance profitability,[78] while for others, such as black women, racism means that they are often valued less highly and could command less money.[79] Race, migrant status, and trans status also has an impact on sex workers' trust in police (discussed in Chapters 3 and 8).[80] Class also has important impacts on sex workers' experiences. There has been an increase in recent years of students and middle-class people becoming involved in sex work, and they often have transferable skills, cultural capital, and business acumen to be able to charge more for their services and have more control over their work than others.[81] Conversely, those from working class backgrounds may be more likely to be choosing the best option out of very few, and may be more open to being exploited by others.[82] Male and trans workers' work is also limited by where markets exist, and trans workers experience a 'disproportionate level of physical and sexual violence compared to cisgender sex workers'.[83] An intersectional approach to sex work, reflecting on the compounded marginalisations sex workers face is therefore important in research and policy.

[77] A Jones, (n 49), 566.
[78] G Scambler, (n 7), 1090.
[79] R Bowen, (n 7), 103; A Jones, 'For Black Models Scroll Down: Webcam Modelling and the Racialization of Erotic Labour' (2015) 19 (4) *Sexuality and Culture* 776.
[80] National Ugly Mugs, *Sex Workers of Colour* (Manchester, National Ugly Mugs, 2020); M Laing et al, 'Trans Sex Workers in the UK: Security, Services and Safety', in T Sanders and M Laing, *Policing the Sex Industry: Protection, Paternalism and Policy* (London: Routledge, 2007).
[81] R Bowen, (n 7), 30.
[82] A Agathangelou, *The Global Political Economy of Sex: Desire, Violence and Insecurity in Mediterranean Nation States* (London: Palgrave, 2004).
[83] M Laing et al, (n 80), 41.

So, with all this diversity, is it possible to speak of sex workers as a group? Sex workers have in common the exchange of sex for money, but beyond that, as elaborated on in this chapter, sex workers all work in an illegitimate industry (whether they work legally or otherwise) and their work is tied up in discussions around crime and deviance. Moreover, there are a number of harms that sex workers face across the industry. While these are experienced to different degrees, the impact of stigma, the fear of violence, real and potential criminalisation, and possible exploitation of their labour are all factors which affect sex workers' work and lives. Gayatri Spivak coined the term 'strategic essentialism' when referring to the category of 'Third World Women'.[84] This approach suggests that at times temporarily downplaying differences may be important for the sake of achieving political goals and challenging oppression.[85] Even speaking about 'women' in feminism employs strategic essentialism, as 'minorities within the "women" category (lesbians, transsexuals, ethnic and religious minorities) may feel estranged by majority discourses and priorities'.[86] Yet, the term 'women' is employed regularly in academic and political discussions. Such strategic essentialism does not mean an acceptance that there are no differences within a category, but rather that for the sake of pragmatic political unity, we recognise where there are similar issues facing a group and focus on how to bring about change for the group. This must be done while being 'vigilant about our own practice'[87] to ensure that the grouping does not further marginalise the most marginalised within a group. Therefore, I argue, it is possible to discuss the problems facing sex work, and the way that the law impacts on these (as this thesis does), but this must be done reflectively.

[84] G Spivak, 'Subaltern Studies: Deconstructing Historiography?' in D Landry and G MacLean (eds), *The Spivak Reader* (London: Routledge, 1996), 203.
[85] E Eide, 'Strategic Essentialism' in N Naples (ed), *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies* (London: Wiley, 2016), 2.
[86] ibid, 1.
[87] E Grosz, 'Criticism, Feminism and the Institution' (1984) 10 (11) *Thesis Eleven,* 184.

Interpretation of research is affected by the assumptions that are brought to bear on the task, leading to a multitude of understandings about the problem of prostitution. By recognising the heterogeneity of sex work, the following sections of this chapter interrogate understandings of sex work and focus on the particularities of sex workers' lives in order to understand the problems surrounding sex work in a contextual manner. These problems have been determined and grouped, drawing on sex workers' accounts and empirical research, because of the profound impacts they have across the many sectors of the sex industry. The first problem that is considered is stigma. Sex work has long been constructed as a form of deviant sexuality,[88] associated with the 'fallen woman',[89] an approach which has largely been connected to the Victorian era, but which still has impacts on the way that sex work is understood and regulated today.[90] Next I consider the problems of violence and risk, and working conditions faced by sex workers. In examining these problems, I analyse the ways that sex work has been constructed as the 'absolute embodiment of patriarchal male privilege'[91] or 'a liberatory terrain for women',[92] or a form of work,[93] and the way that these narratives can obscure material realities of sex work.

2.3 Stigma

The first problem that I consider in relation to sex work is stigma. Gayle Pheterson's landmark work, *Whore Stigma*, highlighted the way sex workers are stigmatised and shamed for selling

[88] C Lombroso and G Ferrero, *The Female Offender: The Normal Woman and the Prostitute* (London: Fisher Unwin, 1895).
[89] H Self, *Prostitution, Women and Misuse of the Law: The Fallen Daughters of Eve* (London: Cass, 2003).
[90] See J Mac and M Smith, (n 5), Chapter 4.
[91] K Kesler, 'Is a Feminist Stance in Support of Prostitution Possible? An Exploration of Current Trends' (2002) 2 *Sexualities* 219, 219.
[92] W Chapkis, *Live Sex Acts: Women Performing Erotic Labour* (London: Cassell, 1997), 1.
[93] E McLeod, *Women Working: Prostitution Now* (London: Croom Helm, 1982).

sex for gain.[94] Stigma has been noted as a pervasive harm of sex work by sex workers,[95] sex work organisations,[96] human rights groups,[97] and researchers.[98] Stigma and stigmatisation is intimately linked to the reproduction of the inequality of sex workers and their exclusion from society.[99] It has been described as 'an imputation of inferior status to those who have either a visible discrediting trait (e.g. physical disability) or some perceived moral defect'.[100] In relation to sex workers, it is largely the latter. The pathologisation of the 'prostitute' has separated sex workers from other 'normal' women on the basis of her perceived morals.[101] By 'Other'ing sex workers, it becomes more possible to devalue, reject and exclude them.[102] This is done both spatially,[103] and in terms of excluding sex workers from participation in discussions about sex work.[104] Stigma is also exacerbated by membership of other marginalised groups, such as for sex workers of colour, LGBT sex workers, drug users, and transgender sex workers.[105] Maggie McNeill, a sex worker and commentator, refers to this as a 'whorearchy', which she says is a 'sort of class system among sex workers'.[106]

[94] G Pheterson, 'The Whore Stigma: Female Dishonor and Male Unworthiness' (1993) 37 *Social Text* 39.
[95] J Mac and M Smith, (n 5).
[96] English Collective of Prostitutes (n 20).
[97] 'Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers' POL 30/4062/2016, 26 May 2016.
[98] G Scambler, (n 7).
[99] G Scambler, (n 7).
[100] R Weitzer, 'Resistance to Sex Work Stigma' (2018) 21 (5) *Sexualities* 717, 717. See also E Goffman, *Stigma: Notes on the Management of Spoiled Identity* (New Jersey: Prentice-Hall, 1963).
[101] L Graham, 'Governing Sex Work Through Crime: Creating the Context for Violence and Exploitation' (2017) 81 (3) *The Journal of Criminal Law* 201.
[102] B Link and J Phelan, 'Conceptualising Stigma' (2001) 27 *Annual Review of Sociology* 367.
[103] P Hubbard, 'Out of Touch and Out of Time? The Contemporary Policing of Sex Work' in R Campbell and M O'Neill (eds), *Sex Work Now* (Devon: Willan, 2006).
[104] M O'Neill, 'Community Safety, Rights, Redistribution and Recognition: Towards a Coordinated Prostitution Strategy', in J Phoenix (ed), *Regulating Sex for Sale* (Bristol: Policy Press, 2009), 53.
[105] Amnesty International, (n 97).
[106] M McNeill, 'Whorearchy', *The Honest Courtesan* [blog post], 10 May 2012, available at: https://maggiemcneill.com/2012/05/10/whorearchy/ (last accessed 13 May 2022).

2.3.1 Sex Work and Deviance

The 'deviancy model' of sex work is centred on a traditional construction of femininity, known as the Madonna/whore dichotomy.[107] In contrast, male sex workers' deviancy is more likely to be constructed around who they are selling sex to, rather than their selling sex in itself. Whowell and Gaffney suggests that most male sex workers sell sex to other men, so constructions of deviancy are entangled with constructions of homosexual deviancy.[108] As such, the following discussion largely focuses on constructions of female sex workers. The Madonna/whore dichotomy is based, as Michèle Barrett states, on 'the twin images of women as, on the one hand, the sexual property of men and, on the other, the chaste mother of their children'.[109] Within this binary of good-girl/bad-girl,[110] if a woman transgresses the rules and norms that control women, for instance by entering sex work,[111] she risks being named a whore. The 'whore' is the bad girl, able to 'inflame men's passions', a unique and dangerous power in need of control.[112] From this perspective, therefore, 'normal' femininity is threatened by the 'prostitute',[113] who is both reviled as deviant, and seen as necessary as an outlet for men's 'natural urges'.[114]

[107] E Bernstein, 'What's Wrong with Prostitution? What's Right with Sex Work? Comparing Markets in Female Sexual Labor' (1990) 10 *Hastings Women's Law Journal* 91, 111.
[108] M Whowell and J Gaffney, 'Male Sex Work in the UK: Forms, Practice and Policy Implications', in J Phoenix (ed), *Regulating Sex for Sale: Prostitution Policy Reform in the UK* (Bristol, Policy Press, 2009), 117.
[109] M Barrett, *Women's Oppression Today: Problems in Marxist Feminist Analysis* (London: Villers, 1980), 45.
[110] M O'Neill, *Prostitution and Feminism: Towards a Politics of Feeling* (Cambridge: Polity Press, 2001), 19; M St James, 'The Reclamation of Whores' in L Bell (ed), *Good Girls/Bad Girls: Feminists and Sex Trade Workers Face to Face* (Toronto: Seal Press, 1987).
[111] J Doezema, 'Forced to Choose: beyond the Voluntary v Forces Prostitution Dichotomy', in K Kempadoo and J Doezema (eds), *Global Sex Workers: Rights, Resistance, and Redefinition* (London: Routledge, 1998), 47.
[112] C Feinman, *Women in the Criminal Justice System* (Westport: Greenwood, 1994), 4.
[113] M O'Neill, (n 110), 128-9.
[114] Royal Commission, *Report from the Royal Commission on the Administration and Operation of the Contagious Diseases Acts 1868-1869 (1871)* PP 1871 (C.408-I) XIX.

The consequence of this understanding is that sex workers are not imagined, in this model, as 'normal' women. Rather they are grouped together as 'prostitutes', 'a historical construction… to define and categorize a particular group of women'.[115] Although this understanding of sex workers as 'abject' predates the Victorian period, this construction was galvanised through legal terminology used in the 19th century,[116] for example, the term 'common prostitute', which appeared in this era.[117] By labelling sex workers as 'prostitutes', or 'common prostitutes' linguistically and legally, sex workers '*become* prostitutes in the eyes of others; that is, publicly they are more identified with their work than are people in other jobs'.[118] It is worth noting that male sex workers were not part of this construction – the term 'common prostitute' was held to refer only to women in *DPP v Bull.*[119]

Central to the construction of the deviant 'prostitute' is the question of why people become sex workers. This question has informed historical academic research that looked at what makes a woman 'become a prostitute' and what makes a 'prostitute' different to other women.[120] For example, in 1895, Cesare Lombroso and Guglielmo Ferrero's research on biological causes of degeneracy and criminality concluded that 'prostitutes are individual women possessed of a pathological nature resulting from evolutionary degeneracy and the influence of various social factors'.[121] They also stated that sex workers' skull capacity and circumference is lower when compared to 'respectable women',[122] suggesting innate biological

[115] S Bell, *Reading, Writing and Rewriting the Prostitute Body* (Bloomington: Indiana University Press, 1994), 42.
[116] J Scoular, (n 4), 20.
[117] This term was used to categorise women working in prostitution under the Vagrancy Act 1824, the Contagious Diseases Acts 1864, 1866 and 1869, and, later, the Street Offences Act 1959. Provisions relating to prostitution were only made gender neutral in the Sexual Offences Act 2003, ss 51-54. The term 'common prostitute' was removed by the Policing and Crime Act 2009, s16.
[118] D Brock, *Making Work, Making Trouble: Prostitution as a Social Problem* (Toronto: University of Toronto Press, 1998), 11.
[119] *DPP v Bull* [1994] 4 All ER 411.
[120] J Phoenix, *Making Sense of Prostitution* (Basingstoke: MacMillan, 1999), 37.
[121] C Lombroso and G Ferrero, (n 88), in J Phoenix, ibid, 38.
[122] C Lombroso and G Ferrero, (n 88), 190.

differences between sex workers and other women. Taking a similar approach, Havelock Ellis argued that sex workers were likely to 'present a congenital condition of sexual inversion… a predisposition of the adoption of a prostitute's career'.[123] These positivist studies reinforced sex workers as a category – the prostitute as opposed to the normal women – and left limited potential for recognising differences across those termed 'prostitutes'.

This 'othering' of sex workers can still be seen in many discourses today. One example is the way that media reports on sex workers' murders – often defining them entirely by their work, as 'prostitutes' rather than individuals. Kristen Aspevig argues that this approach implies that the sex workers had exposed themselves to danger and therefore, while unfortunate, their deaths were predictable,[124] and as such, perhaps less tragic than the murder of a 'normal woman'. This construction can also increase the risks faced by sex workers. When sex workers are conceptualised as 'immoral' or 'fallen' women, they are arguably more susceptible to attack. Hillary Kinnell reports that one of the most cited justifications by attackers in trial reports is that 'they deserve to be raped'.[125] The conceptual segregation of sex workers is also apparent in the Government's policies which focus on exiting prostitution. These policies are based on moving sex workers into 'legitimate' work and resuming 'normal' lifestyles, which will increase the 'quality of life' of these women, provide 'emotional benefits' and enhance 'bodily integrity'.[126] Underlying this is the presumption that no 'normal' woman would choose to stay in sex work if given the opportunity to exit, and fails to recognise the varied levels of involvement that people have in the sex industry and other industries.[127]

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[123] H Ellis, *Studies in the Psychology of Sex, Volume 2* (Kingston: Davis, 1906), 273.
[124] K Aspevig, 'Fact and fiction: representations of prostitution in contemporary British news media and novels' (Ryerson University: Unpublished thesis, 2011), 215.
[125] H Kinnell, *Violence and Sex Work in Britain* (Willan: Devon, 2008), 104.
[126] J Scoular and M O'Neill, 'Regulating Prostitution: Social Inclusion, Responsibilization and the Politics of Prostitution Reform' (2007) 47 *British Journal of Criminology* 764,772.
[127] R Bowen, (n 7).

The construction of sex workers as different to 'normal women' and deviant is not supported by research around sex workers' life trajectories. Teela Sanders notes that once sex workers cease working in sex work, often they are no longer involved in any other 'deviant' behaviours, and often *during* their time in sex work, they are also involved in what would be considered 'non-deviant' feminine behaviours such as child-rearing and running a household.[128] Raven Bowen's research in the UK and Canada on the simultaneous involvement in sex industry work and non-sex work also draws attention to the ways in which this construction fails to adequately reflect the complexities of sex workers' lives.[129] The limited nature of sex workers' 'deviance' suggests that it is specific rather than general.[130] Therefore, it is argued that rather than being different to other women, sex workers are considered different *because* of the construction of sex work as deviant.

Jo Phoenix notes that the focus on biological determinants for sex work ignores sex workers' sociality, and that a more social focus for research would be what social differences there may be between sex workers and other women.[131] Constructing sex workers as deviant women precludes sex work from being understood as a rational economic decision made in response to structural inequalities or social issues, such as poverty. The structural, social reasons behind sex work are not addressed, but rather sex workers are made individually responsible for their involvement in the industry.[132]

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[128] T Sanders, 'Becoming an Ex–Sex Worker: Making Transitions Out of a Deviant Career' (2007) 2 (1) *Feminist Criminology* 74, 89.
[129] R Bowen, 'In Plain Sight: An Examination of 'Duality', the Simultaneous Involvement in Sex Industry Work and Square Work' (York University: Unpublished thesis, 2018); R Bowen, 'Squaring Up: Experiences of Transition from Off-Street Sex Work to Square Work and Duality - Concurrent Involvement in Both - in Vancouver, BC.' (2015) 52 (4) *Canadian Review of Sociology* 429.
[130] T Sanders, (n 128), 89.
[131] J Phoenix, (n 120), 42.
[132] J Phoenix and S Oerton, *Illicit and Illegal: Sex Regulation and Social Control* (Abingdon: Routledge, 2012), 100.

Resisting this narrative, some sex workers have argued that sex work, rather than being deviant, is empowering. They, Scambler's 'Bohemians', suggest that the stigma around sex work comes from outdated cultural morals, and that sex work can be 'about taking pleasure in sex, unleashing repressed energies, and exploring dangerous border zones of eroticism'.[133] For example, some sex workers have stated that 'they engage in sex work not simply out of economic need but out of satisfaction with the control it gives them over their sexual interactions'.[134] Others have described deriving a lot of pleasure from their work: 'it was very clear from the first that clients were there for me and my desires'.[135] Pat Califia argues that even in a world without gender inequality and capitalism, sex work would not disappear.[136] He suggests that the material conditions of sex work might change, but that 'even in a just society' there would be people who were simply too busy, too unattractive or otherwise unable to engage in traditional courtship, and there will be some people who consider sex work their preferred occupation.[137]

Linking sex work with pro-pleasure politics, Call Off Your Tired Old Ethics (COYOTE)'s Margo St James was able to place sex workers' rights within the 1970s counterculture.[138] She stated that 'I've always thought that whores were the only emancipated women... we are the only ones who have the absolute right to fuck as many men as men fuck women'.[139] Following this approach, some sex workers writing in the late 1980s noted that they did not draw a clear line between work and pleasure, with one stating: 'I decided to

[133] E Bernstein, *Temporarily Yours: Intimacy, Authenticity and the Commerce of Sex* (Chicago, University of Chicago Press, 2007), 80.
[134] N Zatz, (n 3), 291.
[135] A Kontula, 'The Sex Worker and her Pleasure' (2008) 56 *Current Sociology* 605, 610.
[136] P Califia, *Public Sex: The Culture of Radical Sex* (Pittsburgh: Cleis, 1994), 242.
[137] ibid, 246-7.
[138] J Mac and M Smith, (n 5), 7.
[139] M St James, quoted in E Bernstein, (n 107), 98.

combine business and pleasure. I was able to come a lot at work and therefore take better care of my mother and daughter at home'.[140] This empowerment framework also constructs sex work as a form of consciousness-raising or sex education; Irene Muscio states: 'whores are the people who can teach us all the stuff we grow up not knowing about sexuality, our bodies and our innate sexual power'.[141]

While these understandings of sex work as empowering are intended to be subversive of the more entrenched positions, few would agree that they could be considered universal or even common. In fact, as Mac and Smith note:

> working class sex workers and sex workers of colour have long criticised the class privilege of these politics; labour rights and safety are not the same as pleasure, and those who do experience sexual gratification at work are likely to be those who already have the most control over their working conditions.[142]

As such, this construction can obscure both the economic impetus behind most sex work, and how legal constructions and responses place the sex industry into a framework of illegitimacy and illegality, while denying labour rights and protections. By positing sex work as empowering and upholding the notion of the 'happy hooker', concrete concerns about risks of violence and criminality are downplayed, and the complex realities of sex work are collapsed into a simplified caricature.[143] Stigma and its effects are unlikely to be reduced by relying on the empowerment narrative put forth by a small number of sex workers.

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[140] Mistress Lilith Lash, in F Delacoste and P Alexander, *Sex Work: Writing by Women in the Sex Industry* (Pittsburgh: Cleis, 1987), 51.
[141] I Muscio, *Cunt: A Declaration of Independence* (Emeryville: Seal Press, 2002), 78.
[142] J Mac and M Smith, (n 5), 13. See also G Lockett et al, 'Showing up Fully: Women of Colour Discuss Sex Work', in J Nagle (ed) *Whores and Other Feminists* (New York: Routledge).
[143] J Mac and M Smith, (n 5), 35.

The stigma faced by sex workers has material effects on the lives of sex workers, linked with violence and risk. 'Other'ing sex workers, and linking all sex workers to drugs, violent crimes, and disease,[144] places them at increased risk of community violence. This is reflected in the reasons given for community campaigns and vigilante activity. For instance, in Balsall Heath, where community picketing and street watch campaigns were used to contest visible sex work, organisers and media reports stated that their actions were taken 'for the sake of decent residents', to protect from 'human scavengers plaguing our streets', and to challenge the 'strong and volatile link between vice and drugs'.[145] John Lowman refers to this as the 'doctrine of disposal', whereby contempt and hostility towards sex workers enables the conditions for such violence.[146] Stigma can also increase some sex workers' risks of being subject to harassment or blackmail, as they may fear the repercussions of being 'outed' as a sex worker.[147]

Stigma may also lead to wider social and health impacts, such as reinforcing shame in sex workers.[148] This has impacts on sex workers' relationships outside of their work, with partners and family members (and even sex work researchers) being subject to secondary stigmatisation.[149] Stigma, however, is experienced differently across sex work markets, with some sex workers, particularly independent escorts, marketing themselves as 'upscale' or 'exclusive'.[150] Although such sex workers do not escape the stigma of sex work, they may feel

[144] G Scambler, (n 7), 1096.
[145] P Hubbard, 'Sexuality, Immorality and the City: Red-light districts and the marginalisation of female street prostitutes' (1998) 5 (1) *Gender, Place and Culture* 55, 66-69.
[146] J Lowman, 'Violence and the outlaw status of street prostitution in Canada' (2000) 6 (9) *Violence Against Women* 987.
[147] L Blissbomb, 'Sex work for the Soul: Negotiating Stigma as a Feminist Activist and Closeted Sex Worker' (2010) *Wagadu: A Journal of Transnational Women's & Gender Studies*, 8; G Scambler, (n 7).
[148] G Scambler, (n 7), 1087.
[149] N Hammond and S Kingston, Experiencing stigma as sex work researchers in professional and personal lives (2014) 17(3) *Sexualities* 329.
[150] J Mac and M Smith, (n 5), 33.

the effects less acutely than, say, a drug-using street worker.[151] Stigma can affect the mental health of sex workers, and also act as a barrier to health services, when sex workers feel unable to disclose their work and receive non-judgmental services.[152] Sex workers often face social deprivation, and may have multiple vulnerabilities marginalising them from society and creating risk.[153] Research suggests that outreach and support services are beneficial to sex workers,[154] for HIV prevention,[155] drug and alcohol services,[156] welfare and advice,[157] and protection from violence.[158] Stigma, inconsistent funding and subsequent reliance on volunteers can create significant barriers to support provision, and there is no obligation on the state to provide funding for targeted sex work support services.[159] This can have serious implications for sex workers who may be unable to access support they need. A decade of government austerity and the consequent shrinkage of support for the third sector[160] have exacerbated these effects, meaning that this is a real issue for the health and wellbeing of sex workers, particularly during the Covid-19 pandemic. As such, stigma can be considered one of the key issues facing sex workers.

[151] This is what Anne Flintock refers to as the 'whorearchy', whereby some sex workers are more deviant the further away from the hegemonic norm their identity – A Flintock, 'Screwing the System: Sexwork, Race, and the Law' (1992) 19 (2) *Boundary* 70.
[152] S Day and H Ward, 'Sex Worker and the Control of Sexually Transmitted Disease' (1997) 73 *Genitourinary Medical* 161.
[153] L Cusick, A Martin, and T May, *Vulnerability and Involvement in Drug Use and Sex Work,* Home Office Research Study 268 (London: Home Office, 2003); J Phoenix, 'In the Name of Protection: Youth Prostitution Policy Reforms in England and Wales' (2002) 22 *Critical Social Policy* 353.
[154] J Pitcher, 'Support Services for Women Working in the Sex Industry', in R Campbell and M O'Neill (eds), *Sex Work Now* (London: Routledge, 2006), 235.
[155] H Ward et al, 'Declining Prevalence of STIs in the London Sex Industry 1985 to 2002' (2004) 80 *Sexually Transmitted Diseases* 374.
[156] G Hunter and T May, *Solutions and Strategies: Drug Problems and Street Sex Markets. Guidance for Partnerships and Providers* (London: Home Office, 2004).
[157] R Campbell, S Coleman and P Torkington, *Street Prostitution in Inner City Liverpool* (Liverpool: Liverpool City Council, 1995).
[158] C Penfold et al, 'Tackling client violence in female street prostitution: Inter-agency working between outreach agencies and the police' (2004) 14 (4) *Policing and Society* 365.
[159] J Pitcher, (n 154), 256; J Pitcher, 'Policies and Programmes to Address Disadvantage Among Young People: Issues for Evaluation' (2002) 8 (4) *Evaluation* 474.
[160] A Papasolomontos and K Hand, *Public Funding Cuts in the Third Sector: Scale and Implications* (London: Charity Finance Directors' Group, 2009).

Weitzer argues that work can be done to reduce stigmatisation in sex work at a societal level, suggesting that neutral language, challenging mass media, removing criminal laws around voluntary sex work, sex worker mobilisation, and activism could all have an impact on destigmatising sex work.[161] The rest of this thesis will consider the extent to which reforming the law through the HRA could resist and reduce the stigma faced by sex workers, arguing that even beyond changes in the law, the language of rights can go some way to reframing sex workers as equal citizens, rights bearers and part of the political community, challenging their stigmatising separation.

2.4 Violence and Risk of Crime

Managing risks of violence and crime is at the forefront of many sex workers' work,[162] and the culture, rules and practices of sex work across varied markets are often ordered around risk – whether that is risk of being a victim of crime, commercial risk, or risk of arrest.[163] There are, however, competing narratives about how violence and risk affect sex workers, from understanding violence as *inherent* to sex work, versus seeing it as *endemic*. In this section, I will explore these in turn to analyse how violence and risk affect sex workers' lives.

2.4.1 Sex Work as Violence Against Women

One dominant understanding of sex work is one that characterises 'prostitution' as a form of violence against women (VAW) and a primary factor in women's subordination under the

[161] R Weitzer, (n 100), 717.
[162] National Ugly Mugs, English Collective of Prostitutes and Umbrella Lane, *Sex Workers Too: Summary of Evidence for VAWG 2020-2024 Consultation* (Manchester, NUM: 2021).
[163] T Sanders et al, (n 43), 33; S Day, (n 39); J Lewis, E Matycka-Tyndale, F Shaver and H Schamm, 'Managing Risk and Safety on the Job: The Experience of Canadian Sex Workers' (2005) 1(1) *Journal of Psychology and Human Sexuality* 147; Mac and Smith, (n 5).

patriarchy. This position, as exemplified in the works of radical feminists such as Catherine MacKinnon,[164] Kathleen Barry,[165] Carole Pateman,[166] and Sheila Jeffreys,[167] holds that violence is *the* inherent problem of prostitution. This position is often characterised as the VAW approach or the 'feminist abolitionist' approach,[168] as proponents' ultimate goal is to abolish prostitution altogether. The problem of sex work is not considered to be an individual one, but rather a structural form of men's violence. It categorises the violence of prostitution in a number of ways: that prostitution is a form of slavery; that prostitution results in multiple harms to women who sell sex; and that prostitution reinforces harmful gender structures and is therefore bad for all women. In this subsection, I will analyse these constructions, arguing that they are flawed and remove agency from sex workers, make invisible other complex power structures, and remove focus from actual incidents and risks of violence against sex workers.

2.4.1.1 Patriarchy and Prostitution

One of the key arguments of the VAW approach to sex work is that it reflects and reinforces women's sexual subordination as a 'collective female class condition'[169] and therefore harms all women. Drawing from Marxist theories of power and domination,[170] Catharine MacKinnon argues that 'sexuality is the social process through which social relations of gender are created,

[164] C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Massachusetts: Harvard University Press, 1987); C MacKinnon, *Towards a Feminist Theory of the State* (Cambridge, Massachusetts: Harvard University Press, 1989); C MacKinnon, *Women's Lives: Men's Laws* (Cambridge, Massachusetts: Harvard University Press, 2005).
[165] K Barry, *The Prostitution of Sexuality* (New York: New York University Press, 1995).
[166] C Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988).
[167] S Jeffreys, *The Idea of Prostitution* (Melbourne: Spinifex Press, 1997).
[168] J O'Connell Davidson, ''Sleeping with the Enemy?' Some Problems with the Feminist Abolitionist Calls to Penalise those who Buy Commercial Sex' (2003) 2 (1) *Social Policy and Society* 55, 55.
[169] K Barry, (n 165), 8.
[170] Karl Marx argues that power is not based on the relationship between individuals but is rather about the domination and subordination of social classes based on the relations of production. – K Marx, *Capital: An Abridged Version (edited with an introduction and notes by D McLellan)* (1818 – 1833) (Oxford: Oxford University Press, 1999). This is used by radical feminists, such as MacKinnon, to argue that gender is a system of class subordination of women: 'Gender is also a question of power, specifically of male supremacy and female subordination' - C MacKinnon, *Feminism Unmodified* (n 164), 40.

organized, expressed, and directed'.[171] Therefore, sexuality, 'which institutionalizes male sexual dominance and female sexual submission' is, in itself, 'the linchpin of gender inequality'.[172] Based on this understanding, prostitution creates and reinforces the dominance of men over women, supporting constructions of male sexuality as being able to access women's bodies when they want to, as long as they can pay. Carole Pateman claims that this means that 'prostitution is the public recognition of men as sexual masters, it puts submission on sale as a commodity on the market'.[173] A man can 'exhibit his masculinity by contracting for use of a woman's body'.[174] Therefore, not only does prostitution reflect the systematic domination of women by men, but also augments it by positioning women as objects to be bought and sold.

This argument has some overlap with the deviancy position. If sex workers do not conform to this narrative, they are considered to be complicit in the subordination of their gender.[175] Others argue that the approach taken by MacKinnon and others constructs womanhood negatively, enforcing victimhood,[176] and refusing to accept accounts from sex workers that consider sex work as a form of consensual work. The VAW approach has been criticised for essentialising women as totally passive beings, preventing 'us from seeing the areas of life in which women have had an effect, in which we are less determined by the will of the other(s), and in which some of us have and do exert power over others'.[177] Such a construction conflicts with research around sex work that suggests more complex and

[171] C MacKinnon, *Towards a Feminist Theory of the State* (n 164), 3.
[172] C MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1982) 7 (3) *Feminist Theory* 515, 533.
[173] C Pateman, 'Defending Prostitution: Charges Against Ericsson' (1983) *Ethics* 561, 564.
[174] C Pateman, (n 166), 199.
[175] In fact, sex workers who argue that sex work is work have been labelled members of the 'pimp lobby' – see, for example, J Davies, 'The Criminalization of Sexual Commerce in Canada: Context and Concepts for Critical Analysis' (2015) *Canadian Journal of Human Sexuality* 1, 3.
[176] J Flax, 'Postmodernism and Gender Relations in Feminist Theory', in L Nicholson (ed) *Feminism/Postmodernism* (New York: Routledge, 1990).
[177] ibid, 56.

challenging relationships of violence, control, and power that vary across markets of sex work and individuals.[178]

The VAW approach also focuses on the male/female buyer/seller sex work relationship.[179] As Kamala Kempadoo notes, however, 'social relations involving sexual labour are not inherently tied to gendered roles or bodies'.[180] Although they are the minority, sex workers who are not female, or who do not engage in heterosexual exchanges, do exist. The proportion of sex workers who are male or trans has been estimated in a number of studies as being between 10 and 30%.[181] The VAW position can obscure the experiences of these sex workers, reinforcing the invisibility and marginalisation of male and transgender sex workers who already receive fewer resources and attention.[182] Some women also pay for sex.[183] This gender dynamic is often seen, for example, when a white woman travels to the Caribbean to meet a younger, black man to buy sex and 'relationships' for the duration of her stay.[184] In this context, gender is merely one structuring force at play; others include class, race, and poverty.[185] The idea that the problem of sex work is always one of male domination over women does not explain these complexities, concealing a range of power dynamics.

[178] J Pitcher, *Diversity in sexual labour: An occupational study of indoor sex work in Great Britain* (University of Loughborough: Unpublished PhD Thesis, 2014).
[179] K Barry, *Female Sexual Slavery* (New York: New York University Press, 1979).
[180] K Kempadoo, 'Globalizing Sex Workers' Rights', in K Kempadoo and J Doezema (eds), *Global Sex Workers: Rights, Resistance and Redefinitions* (London: Routledge, 1998), 5.
[181] G Scambler, (n 7); T Sanders et al (n 52); B Brooks-Gordon et al, (n 27).
[182] UKNSWP, *Working with Male and Transgender Sex Workers* (London: UKNSWP, 2008), 1.
[183] S Kingston, N Hammond, S Redman, *Women Who Buy Sex: Converging Sexualities* (London: Taylor and Francis, 2020).
[184] J Phillips, 'Tourist Oriented Prostitution in Barbados: The Case of the Beach Boy and the White Female Tourist', in K Kempadoo (ed), *Sun, Sex and Gold: Tourism and Sex Work in the Caribbean* (Oxford: Rowman & Littlefield, 1999), 190.
[185] J Scoular, 'The 'Subject of Prostitution': Interpreting the Discursive, Symbolic and Material Position of Sex/Work in Feminist Theory' (2004) 5 (3) *Feminist Theory* 343.

2.4.1.2 Prostitution as Slavery and Violence

Proponents of the VAW approach challenge the very possibility of minimising the risks of violence to sex workers while the sex industry continues to exist, because prostitution *is* violence. Barry invokes the notion of 'slavery', arguing that prostitution is not work because it can never be consented to given that one cannot consent to one's own oppression.[186] Barry writes that 'female sexual slavery is present in all situations where women and girls… are subject to sexual violence and exploitation'.[187] In fact, any assertion of consent should be disregarded because 'prostitution, with or without a woman's consent, is the institutional, economic and sexual model for women's oppression'.[188] According to Sheila Jeffreys, it does not matter whether women claim the right or choice to be prostituted or whether they see themselves as victims of men's abuse; how or why female bodies get into the male consumer market is irrelevant to the market.[189] In fact, referring to sex workers' choice to sell sex means 'men's rights are concealed beneath the idea of women's choice'.[190] Liz Kelly compares sex workers' claims that they choose to sell sex with neutralising techniques used in cases of domestic violence, where the abuse is not recognised as such until after they leave the situation.[191] This is an argument supported by organisations such as Women Hurt in Systems of Prostitution Engaged in Revolt (WHISPER), a group that aims to help to remove women from prostitution; WHISPER uses the testimony of ex-prostitutes to claim that victimhood is the only truth of prostitution.[192] WHISPER argues that a prostitute has no autonomy, as at most she can be 'in charge of her exploitation', and the 'manager of her own victimage'.[193] In

[186] K Barry (n 179), 24.
[187] ibid, 39.
[188] K Barry, (n 165), 24.
[189] S Jeffreys, (n 167), 135.
[190] ibid, 129.
[191] L Kelly, *Surviving Sexual Violence* (Minneapolis: University of Minnesota Press, 1989), 151.
[192] S Bell, (n 115), 124.
[193] ibid, 125.

considering sex work to be a system of VAW, the victim cannot have any autonomy[194] – she is only able to exercise free choice about her life after she has exited prostitution.

Moreover, Pateman argues, understanding sex work as a 'voluntary agreement' ignores the importance of gender and dominance in its analysis.[195] Rather, in a context where there is high and increasing female unemployment, sex discrimination in the labour market, routine sexual harassment for those who do have paid employment, the choices and options available to women are minimal.[196] As such, Jeffreys argues, sex work is only consensual insofar as 'consent is defined as inability to see, or feel entitled to, any alternative'.[197] That is, the choice to sell sex is not really a choice at all.

This approach rejects the subjectivity and personal agency of sex workers. Any alternative account can be disqualified as false consciousness, whereby sex workers are unable to see or understand the ways they are being oppressed, an approach which Mac and Smith argue silences dissenting accounts.[198] This also privileges the voices of radical feminists over the voices of sex workers who argue that their activities are a form of work and that they have entered sex work voluntarily. Gayle Rubin argues that when people seek to find meaning in sexual behaviour that is not their own, what results is often 'an accusation that sexual dissidents have not paid close enough attention to the meaning, sources, or historical construction of their sexuality'.[199] Such accounts, therefore, fail to recognise the constructions that affect their own interpretations,[200] so they present their position as the truth, free of social and cultural forces.

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[194] ibid, 125.
[195] C Pateman, (n 166), 564.
[196] L Kelly, 'The Wrong Debate: Reflections on Why Force is Not the Key Issue with Respect to Trafficking in Women for Sexual Exploitation' (2003) 73 *Feminist Review* 139, 141.
[197] S Jeffreys, (n 167), 135.
[198] J Mac and M Smith, (n 5), 13.
[199] G Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality', in C Vance (ed) *Pleasure and Danger: Exploring Female Sexuality* (London: Pandora, 1989), 304.
[200] L Shrage, *Moral Dilemmas in Feminism: Prostitution, Adultery and* Abortion (New York: Routledge, 1994), 81.

The rejection of the possibility of sex workers having choice accepts the dominant interpretation of sex work as violence as truth and any other as a mistaken understanding.

To recognise sex workers' agency does not necessarily ignore the power dynamics involved in the sex industry and the various freedoms and unfreedoms experienced by sex workers. Many sex workers' accounts would not argue that the consent given in the context of sex work is 'free' – as Lisa Hofman states: 'we would never call it a "free choice", but "free choice" in the contemporary labor market is something that very few people really have'.[201] Barbara Sullivan argues that '[f]ree choice' can only occur in the absence of power relations; that is, when individual freedom and autonomy is untrammelled by power relations'.[202] Yet, as Julia O'Connell Davidson notes, 'people are constantly subjected to the effects of power, but to varying degrees they themselves have powers that they deploy to greater or lesser effect'.[203] We live in a world where choice is always constrained by various structural and personal limitations, but where people also have their own sources of power. Recognising these structures provides a context for understanding the, often, rational decisions to sell sex.

Sex work has also been constructed as slavery and violence based on the idea that sex is the 'most intimate' of emotional connections and, therefore, a marker for the authentic self'.[204] Pateman, for example, argues that 'identity is inseparable from the sexual construction of the self'.[205] From this position, then, submitting to someone else's sexual desires for money violates the sex worker's bodily integrity and estranges her from her own sexuality and sexual identity. The essence of the sex work contract is that the sex worker agrees, in exchange for

[201] L Hofman, Director of Dutch Foundation Against Trafficking in Women, quoted in W Chapkis, (n 92), 61
[202] B Sullivan, 'Prostituion and Consent: Beyond the Liberal Dichotomy of 'Free or Forced'', in M Cowling and P Reynolds (eds), *Making Sense of Sexual Consent* (Aldershot: Ashgate, 2004), 132.
[203] J O'Connell Davidson, *Prostitution, Power and Freedom* (Cambridge: Polity Press, 1998), 38.
[204] W Chapkis, (n 92), 73.
[205] C Pateman, (n 166), 207.

benefit or money, not to use her personal desire or erotic interests as the determining criteria for her sexual interaction.[206] There is no desire or satisfaction on the part of the sex worker because, according to Pateman, 'prostitution is not mutual, pleasurable exchange of the use of bodies, but the unilateral use of a woman's body by a man for money'.[207] Drawing on Karl Marx's theory of alienation, what is produced by sex work is 'something alien, as a power independent of the producer'.[208] In Marx's account of alienating labour, the worker is estranged from their labour, he is only himself outside of work, and the labour itself stops being voluntary and becomes forced, a means to satisfy his needs outside of work.[209] The difference, according to the VAW approach, is that what is alienated in sex work is fundamental to the person's bodily integrity. The sex worker is estranged from her sexuality, 'left with an impoverished sexual and emotional life'.[210]

When sexuality is understood as inseparable from the self, the sale of sex involves a fundamental sale of the self.[211] Pateman argues that prostitution is not comparable to other forms of work because in other forms of work, the capitalist has no intrinsic interest in the body and self of the non-sex worker; the employer is primarily interested in the commodities produced by the worker, the profits. Conversely, in sex work, the commodity is sex, and 'when sex becomes a commodity in the capitalist market so, necessarily, do bodies and selves'.[212] Pateman argues that 'to have bodies for sale in the market, as bodies, looks very much like slavery'.[213] That is, it is the sex worker that is bought or sold. Maddy Coy argues that this

[206] J O'Connell Davidson, 'The Rights and Wrongs of Prostitution' (2002) 17 (2) *Hypatia* 84, 91.
[207] C Pateman, (n 166), 198.
[208] K Marx, 'Alienated Labour', reproduced in H Clark, J Chandler and J Barry (eds), *Organisation and Identities: Text and Readings in Organisational Behaviour* (London: Thomson, 1994), 387.
[209] ibid 388.
[210] C Hoigard and L Finstead, *Backstreet: Prostitution, Money and Love* (Philadelphia: Pennsylvania University Press, 1992), 183.
[211] W Chapkis, (n 92), 71.
[212] C Pateman, (n 173), 562.
[213] C Pateman, (n 166), 204.

commodification reduces bodies to their economic value, meaning they become interchangeable objects, and are subject to the contractual nature of the free markets.[214] Margaret Radin also includes sexuality as one characteristic – along with love, friendships, politics, religion, etc – which is integral to the self.[215] She argues that to understand any of these characteristics as monetisable or completely detachable from the person is to do violence to our deepest understandings of what it is to be human.[216] Sex work is, therefore, 'inherently degrading'.[217]

Following this logic, the practices by which sex workers keep their life and work separate are interpreted as evidence of the inherent harm of selling sex. Some sex workers have reported keeping certain sexual practices, aspects of the self, and segments of the body strictly off-limits during work, to maintain boundaries between sex and work.[218] In Sanders' research, some respondents reported avoiding intimate relationships while they were working, because of the difficulties surrounding trust and exploitation;[219] making a conscious effort not to enjoy sex at work;[220] or using physical barriers such as condoms to separate sex at work and sex at home.[221] These empirical realities could be considered as risk-minimising strategies, or ways in which sex workers ensure that their sense of self is, in fact, protected.

Barry, however, suggests that these boundaries are reflective of, and exacerbate, the alienation felt by sex workers. She argues that such strategies demonstrate that they are

[214] M Coy, 'The Consumer, The Consumed and the Commodity: Women and Sex Buyers Talk About Objectification in Prostitution', in V Munro and M Della Giusta (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Abingdon: Ashgate, 2008), 184.
[215] M Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things* (Cambridge, Massachusetts: Harvard University Press, 1996), 56.
[216] ibid, 56.
[217] N Zatz, (n 3), 286.
[218] E Bernstein, (n 133), 49.
[219] T Sanders, (n 55), 146.
[220] ibid, 149.
[221] ibid, 150.

objectified in the process of prostitution in a number of ways: they employ distancing strategies, such as geographical barriers and fake names, to separate their sense of themselves from the act of prostitution;[222] they disengage emotionally during the act, so that they are 'not there';[223] they dissociate, allowing the men to buy not a self, but a body that performs as a self;[224] and finally, they disembody themselves, acting as if the experience is embodied, to fulfil the men's desire that they appear to have some sexual and emotional engagement.[225] In segmenting themselves in these ways, Barry argues, they are distorting and dehumanising themselves.[226] As such, no matter what a sex worker might do to protect herself from the destructive forces of selling sex, she is unable to maintain her bodily integrity while selling sex, and it is therefore inherently harmful and oppressive. These conflicting interpretations of the same empirical realities demonstrate the way that in constructing the 'problems' of sex work, knowledge can be organised and shaped to fit contrasting approaches.

The arguments discussed here have been criticised for essentialising sex workers' experiences and presenting a myopic account of sexuality.[227] To consider sexuality as the 'core' of a person demonstrates a simplified approach to the impact of power and regulation on what is understood to be sex.[228] Michel Foucault questions the notion of sex as a 'natural' bodily activity, suggesting that it is only since the 17th century that sex and sexuality has been given such prominence in terms of identity and selfhood.[229] In *The History of Sexuality,* he maps out the ways in which discourse surrounding sex has developed and been controlled, to construct

[222] K Barry, (n 165), 30.
[223] ibid, 31.
[224] ibid, 34.
[225] ibid, 35.
[226] ibid, 33.
[227] J Scoular and M O'Neill, (n 126), 764.
[228] J Scoular, 'Book Review: J Phoenix and S Oerton, *Illicit and Illegal: Sex, Regulation and Social Control*' (2006) 46 (3) *British Journal of Criminology* 525, 525.
[229] M Foucault, *The History of Sexuality, Volume 1: The Will to Knowledge* (1976) (reprinted London: Penguin Books, 1998), 17.

sex to be 'our truth', our 'fundamental secret'.[230] He argues that in the last few centuries, 'a certain inclination has led us to direct the question of what we are, to sex'.[231] So, this link between sex and the truth of a person obscures the socially constructed nature of sexuality and, ironically, reinforces the same understanding of sexuality that is used by those who suggest that demand for sex work comes from 'natural' urges.[232] Laurie Shrage argues that by rejecting the impact of social context on the meaning of sexuality, minorities and those who do not fit with this understanding of sexuality are marginalised further.[233]

While of course there are some who do feel degraded by selling sex, many sex workers aim to focus on the *work* rather than the *sex* of sex work.[234] Some sex workers do not employ distancing techniques at all because they do not consider their employment to be problematic. They may consider themselves to be providing a socially valuable service.[235] Sex, particularly transactional sex, can be simply a mechanical act which does not hold great importance to their personhood. Moreover, where distancing techniques are used, they are not necessarily damaging. In fact, the manipulation of feeling can be similar to that used in other forms of emotional labour. Separating elements of work, body and emotions does not need to be seen as a destructive action – Arlie Hochschild notes feelings 'are not stored inside us, and they are not independent of management… in managing feeling, we contribute to the creation of it'.[236] Emotional management may simply be evidence of the 'plasticity of emotion'.[237] If it is accepted that sexuality need not be inseparable from identity, the selling of sex does not have

[230] ibid, 69.
[231] ibid, 78.
[232] G Pheterson, *A Vindication of the Rights of Whores* (Seattle, Seal Press, 1989), 23.
[233] L Shrage, (n 200), 79.
[234] J Mac and M Smith, (n 5), 22.
[235] P Califia, (n 136), 247.
[236] A Hochschild, *Managed Heart: Commercialization of Human Feeling* (Berkeley: University of California Press, 1983), 106.
[237] W Chapkis, (n 92), 78.

an inherent meaning and the differentiation between prostitution and non-sex work becomes less clear.

A close examination of the VAW construction of sex work reveals that it relies on narrow understandings of gender, sex, and sexuality that are not borne out in the varied accounts of sex work. This construction relies on discounting numerous sex workers' accounts of their lives as false, failing to value knowledge produced through sex workers' own interpretation and conceptualisation of their experiences. This approach epistemologically privileges an external, rather than the 'outsider within'[238] standpoint of the marginalised group. In doing so, it conceals the assumptions made in its interpretation of empirical realities, for example in the case of distancing techniques. By framing sex work around the singular structure of gender, this construction also obscures the impact of other structural forces, such as race, class, poverty, and sexuality, on sex workers' lived experiences. It also draws attention away from the direct risks and violence faced by sex workers during the course of their work.

2.4.2 Violence and Risk as a Problem of Sex Work

Even if sex work is not inherently violent, violence and risk of crime (and the fear of them) are important issues facing most sex workers and can significantly impact on their lives and how they organise their work. The way that sex work is ordered tends to focus on managing and minimising risk, and this is borne out in the practices apparent in the sex markets, whether that be by keeping names and faces off the internet or working in a brothel to avoid lone working. Sanders suggests that the greatest risks facing sex workers are the 'potential physical harms from violent clients', which are 'an unpredictable occupational hazard to be guarded against in

[238] P Hill Collins, 'Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought' (1986) 33 (6) *Social Problems* S 14, S16.

each commercial transaction'.[239] The most serious crime risked is murder. Sex workers' risk of being murdered is significantly higher than that of the general population, and they are the occupational group at most risk of homicide in the UK.[240] This sits alongside risks of physical and sexual violence. Violence may not only come from clients, but also from acquaintances, pimps, members of the public, and even the police.[241] Many street sex workers have reported that violence from members of the public is frequent, with verbal abuse, spitting and having objects thrown at them regular occurrences.[242]

Experience of physical and sexual violence amongst sex workers is variable, but 'most results indicate that street workers are much more vulnerable than indoor workers'.[243] Laura Connelly et al's analysis of a large data set of 2,056 crime incident reports between 2012 and 2016 found that 60.9% of the crimes reported were against street sex workers; 29.7% against independent sex workers; and 5.9% against those working indoors in brothels or massage parlours.[244] Violence was present in 46.1% of crimes reports in this study, with street workers reporting the most violent incidents.[245] Similarly, in Kinnell's research, of 61 violent incidents over a nine month period in 2007, 34% related to violence from a pimp, partner, ex-partner or other family member; 31% related to violence from other people, such as muggers, vigilantes, acquaintances, other sex workers, drug dealers and men committing sexual violence who did not approach as clients; and 34% related to men who approached as clients.[246]

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[239] T Sanders, (n 55), 45.
[240] M Goodyear and L Cusick, 'Protection of Sex Workers' (2007) 334 (7584) *British Medical Journal* 52; S Cunningham et al, 'Sex work and Occupational Homicide: Analysis of UK murder database' (2018) 22 (3) *Homicide Studies* 321.
[241] H Kinnell, (n 125), 49. The latter point is discussed further in Chapter 8.
[242] ibid, 148.
[243] B Brooks Gordon, (n 39). S Church et al, 'Violence by Clients Towards Female Prostitutes in Different Work Settings: Questionnaire Surveys' (2001) 322 *BMJ* 524, 524.
[244] L Connelly, D Kamerāde, and T Sanders, 'Violent and Nonviolent Crimes Against Sex Workers: The Influence of the Sex Market on Reporting Practices in the United Kingdom' (2018) *Journal of Interpersonal Violence* 1, 9.
[245] ibid, 12.
[246] H Kinnell, (n 125).

There is less risk of physical or sexual violence in indoor sex work – in Teela Sanders and Maggie O'Neill's study of 90 indoor sex workers, 71 said that they had never experienced violence from clients in the course of their work.[247] Despite not having to negotiate day to day violence, indoor sex workers note that they are concerned with the risks of robbery, non-negotiated sex acts, attempts to remove condoms, verbal abuse, or being financially ripped off.[248] In Sanders et al's study of online sex workers, experiences of violent crime were much less common than in other studies, with only 5% having been physically assaulted and 7.6% sexually assaulted in the last year.[249] Respondents did, however, commonly experience 'persistent or repeated unwanted contact or attempts to contact through email, text or social media; threatening or harassing texts, calls or emails; verbal abuse; and non-payment or attempts to underpay for services'.[250]

Across all markets, sex workers employ strategies to limit their risk of being victims of crimes, violence or harassment.[251] Forms of risk-management in indoor sex work include working with others, using CCTV, locks, spyholes in doors, and building up a clientele of regular customers.[252] For on-street sex workers, risk management strategies include working close to other sex workers, watching out for each other, taking down car registrations, screening clients before getting in cars and working closer to residential areas.[253] For those who advertise through the internet, there are further safety procedures.[254] In Sanders et al's research, 75% of

[247] T Sanders and R Campbell, 'Designing out Vulnerabilities, Building in Respect: Violence, Safety and Sex Work Policy' (2007) 58 *The British Journal of Sociology* 1, 7.
[248] ibid, 7-10.
[249] T Sanders et al (n 40), 90.
[250] ibid, 90.
[251] J Mac and M Smith, (n 5), 3.
[252] T Sanders et al (n 43), 56; J Pitcher, 'Sex Work and Modes of Self-Employment in the Informal economy: Diverse Business Practices and Constraints to Effective Working' (2015) 14 (1) *Social Policy and Society* 133.
[253] T Sanders et al (n 43); M O'Neill and R Campbell, *Working Together to Create Change: Walsall Prostitution Consultation Research* (Walsall: Walsall Health Authority, 2001); L Graham, (n 101), 201.
[254] A Jones, (n 49).

respondents reported that the internet played an important role in their safety. This included screening customers by checking numbers and addresses, networking with other sex workers, accessing information about safety and bad clients, and sharing information about potentially dangerous clients.[255] While the internet allows people the ability to screen clients to some degree, violence can still happen, and there is an increased risk of stalking if clients are able to track IP addresses or link sex workers' profiles to social media accounts.[256]

The expansion of technology has enabled the development of global networks across borders and physical social boundaries and has allowed sex workers who are able to use the internet more independence and the capacity to limit some of the risks.[257] Yet, their capacity to do so is not only limited by domestic regulatory landscapes, but international ones too. Due to the globalised nature of the internet sex industry, shifts in legal regulation of online spaces in one jurisdiction can have impacts on the market in another. For example, in 2018, the US House of Representatives and the US Senate enacted two laws – the Fight Online Sex Trafficking Act (FOSTA) and the Stop Enabling Sex Traffickers Act (SESTA) – which criminalised sites that host content linked to sex trafficking.[258] The breadth of these provisions allowed the seizure and prosecution of advertising platforms hosted in the US, including Backpage.com.[259] Therefore, sex workers based in England and Wales who advertised through Backpage were

[255] T Sanders et al (n 40), 97.
[256] A Jones, (n 49), 565
[257] S Kingston and T Sanders, (n 1), 2.
[258] Allow States and Victims to Fight Online Sex Trafficking Act 2017, Public Law No: 115-164 s 3 creates s2421A of the Federal Criminal Code which creates penalties of a fine or up to 10 years imprisonment for anyone who 'using a facility or means of interstate or foreign commerce, owns, manages, or operates an interactive computer service (or attempts or conspires to do so) to promote or facilitate the prostitution of another person'. S 2 also clarifies that s230 of the Communications Act 1934 does not provide protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims'. The Stop Enabling Sex Traffickers Act 2017, Report No 115-199, s 4 amends s 1591(e) of Title 18, United States Code, to include that 'participation in a venture' means knowingly assisting, supporting or facilitating 'sex trafficking of children or sex trafficking by force, fraud or coercion.
[259] E Goldman, 'The Complicated Story of Fosta and Section 230' (2018) 17 *First Amendment Law Review* 279; L Chamberlain, 'FOSTA: A Hostile Law with a Human Cost' (2019) 87 *Fordham Law Review* 2171.

no longer able to do so, and had to adjust their working practices in light of laws enacted in the US in order to manage their work and any risks faced.[260]

Focusing on the context of sex workers' lives rather than considering sex work to be a form of violence in itself, this section has examined how the issue of violence and risk in sex work is a problem that sex workers face. Sex workers do manage these risks to different degrees, but the regulatory conditions under which they work can affect sex workers' capacity to engage in these risk management strategies.[261] This thesis goes on to consider the effect of the current law on the risk of violence and crime faced by sex workers, and the extent to which an HRA based reform could reduce this problem.

2.5 Work Organisation and Working Conditions

The final problem examined in this chapter is that of work organisation and working conditions. The ability to work safely and under good conditions is a key part of the sex worker rights movement. This is based on a construction of sex work as a form of work, within which various forms of labour are utilised and the exercise of power and control varies. Before interrogating this understanding of sex as work, it is worth questioning why sex workers might want sex work to be understood as a form of work. The arguments put forward by the sex worker rights movement are multiple. First, these sex workers argue for recognition of their occupation as a form of work as a matter of justice and equality. As Liz Highleyman argues, most of the criticisms about sex work are not 'criticisms of "wage slavery" or of economic systems that exploit the labor of some for the benefit of others', but are rather about 'anti-sex sentiments'

[260] J Mac and M Smith, (n 5), 21.
[261] This is explored in Chapter 3 of this thesis.

that separate sex work from other types of work,[262] continuing to stigmatise sex workers. If sex work was considered to be comparable to other work, as an economic choice rather than a marker of deviancy, then perhaps this stigma and marginalisation of sex work could be resisted and reduced.[263] Secondly, recognising sex work as a form of work could, it has been argued, be the first step towards producing policy focused less on criminal sanction but instead de-exceptionalising sex work and providing labour rights and employment protection to sex workers.[264] Thirdly, the conceptualisation of sex work as work enables the sex workers rights movement to 'make links to international divisions of labor and to support broader working peoples' struggles for change'.[265] In doing so, there would be recognition that many of the problems faced by many sex workers – such as exploitation, poor working conditions, and low pay – are also faced by other workers, and sex workers would be able to support and be supported by others in their struggle. This section begins by examining the understanding of sex work as work, before considering the ways that work organisation and working conditions can be a problem for sex workers.

2.5.1 What is Work?

Much like sex work, the definition of work is not fixed – there is no objective and permanent thing called work, but rather it is historically and socially bound.[266] Work has often been understood in juxtaposition to leisure or pleasure: 'we may define labour as any exertion of mind or body undergone partly or wholly with the view to some good other than the pleasure

[262] L Highleyman, 'Professional Dominance', in in J Nagle (ed), *Whores and Other Feminists* (New York: Routledge, 1997), 148.
[263] R Weitzer, (n 100).
[264] R Weitzer, 'Prostitution as a Form of Work' (2007) *Sociology Compass* 143, 144.
[265] K Kempadoo, 'Prostitution, Marginality and Empowerment: Caribbean Women in the Sex Trade' (1995) 5(14) *Beyond Law* 69, 80.
[266] K Grint, *Sociology of Work* (Cambridge: Polity Press, 2005), 1.

derived from the work'.[267] This distinction does not always fit; not all societies make the distinction that we do between work and leisure,[268] and even within the social context of the UK, an activity might be considered work or leisure depending on the context. Moreover, the 'work' aspect of some relationships and activities might become indistinguishable from other, for example, emotional, aspects.[269] While work may often be undertaken out of necessity of one kind or another, it can also, therefore, be undertaken mainly for reasons related to the pleasure of the activity, [270] with the production element a secondary concern. However, practices of production (even in unpaid work) are more commonly undertaken to make life possible rather than to give meaning to life.[271] For example, those in poverty are unlikely to consider their labour to be about self-actualisation, but rather about ensuring that they have basic food and shelter.

An alternative understanding of work posits it as a marketable activity. That is, work is seen through the contemporary model of paid employment, undertaken out of economic necessity, whether this is understood solely as a contract to sell labour services to either a consumer or an employer,[272] or through a Marxist lens as the selling of labour to the capitalist, transforming labour into a commodity.[273] In a market economy, 'almost everyone sells their labour power for some fraction of its value in order to sustain themselves, and those who are economically dependent upon them'.[274] This market-based model, however, excludes forms of

[267] A Marshall, *Principles of Economics* (1980), quoted in K Thomas (ed), *The Oxford Book of Work* (Oxford: OUP, 1999), 9.
[268] L Shrage, (n 200), 121.
[269] J Parry et al, 'Confronting the Challenge of Work Today: New Horizons and Perspectives', in L Pettinger, et al (eds), *A New Sociology of Work?* (Oxford: Blackwell, 2005), 10.
[270] K Marx, (n 208), 19.
[271] K Grint, (n 266), 12.
[272] J Clarke, 'Dissolving the Public Realm: The Logics and Limits of Neo-Liberalism' (2004) 33 *Journal of Social Policy* 27, 33.
[273] K Marx and F Engels, *The Communist Manifesto* (with an introduction by G Stedman Jones) (London: Penguin Books, 2002), 227.
[274] C Overall, 'What's Wrong with Prostitution? Evaluating Sex Work' (1992) 17 (4) *Signs* 705, 709.

work that are not recognised by payment.[275] The distinction between unpaid and paid labour has been widely criticised, particularly by feminists. Elizabeth Bernstein argues that this 'understanding is premised on the structuring dualisms of home and work, private and public, interior and exterior, and formal vs casual employment'.[276] The same activity might be undertaken informally on an unpaid basis, or paid and treated as formal employment.[277] For example, domestic work is often undertaken without payment in the home, yet is also undertaken for money elsewhere, demonstrating that this distinction is flawed.[278] Paid work is also often used as a means for paying someone else to do what would otherwise be unpaid work – for example where a worker uses their wages to pay another person to clean their house.[279] The valorisation of paid work over unpaid work is androcentric, it is argued, and fails to recognise what is traditionally seen as women's work, work within the home, as work unless someone else is being paid to do it.[280]

These conflicting interpretations of what work is suggest that the difference between work being recognised as work, or not, seldom lies in the actual activity itself and more generally inheres in the social context that supports the activity.[281] Seeing work in market terms provides a limited picture of what is work, but is largely how work is recognised in this cultural context. Payment is one determining factor of what work means, along with others, including the production (of a thing or a feeling) and whether its main purpose is not leisure/pleasure. We can use these factors to compare sex work with other work.

[275] T Strangleman and T Warren, *Work and Society: Sociological Approaches, Themes and Methods* (Abingdon: Routledge, 2008), 1.
[276] E Bernstein, (n 133), 48
[277] J Parry et al, (n 269), 10.
[278] K Grint, (n 266), 30.
[279] M Glucksmann, 'Shifting Boundaries and Interconnections: Extending the 'total social organisation of labour', in L Pettinger et al (eds), *A New Sociology of Work?* (Oxford: Blackwell, 2005), 29.
[280] D Barker and S Feiner, *Liberating Economics: Feminist Perspectives on Families, Work, and Globalization* (Michigan: University of Michigan Press, 2004), 33.
[281] K Grint, (n 266), 11.

2.5.2 Is Sex Work Work?

Sex work can be compared to other forms of work, recognising similarities and differences in pay structure and working conditions. Eileen McLeod argues that the decision to sell sex can often bring 'comparatively substantial financial returns', and can be attractive because of its 'compatibility with the demands of childcare and domestic labour'.[282] She notes that the scale of earnings may not necessarily be particularly high, but it is often high compared to what the vast majority of women earn.[283] She also suggests that sex work can afford the worker greater control over their work than other jobs can.[284] The control and power afforded to the sex worker within her work depend on a number of factors. Martha Nussbaum argues that in all professions, we use part of our bodies, 'for which we receive a wage in return'.[285] She compares sex work to other professions, suggesting that income, working conditions, choice, the extent of bodily contact, stigma and legal status vary across working spheres.[286] Nussbaum's account suggests that while sex workers do not *necessarily* earn less or have less control over their working conditions, they often do face more stigma, low respect in society, and higher risk of violence than other professions.[287] In constructing sex work as work, account can be taken of variations in working conditions and lived experiences of sex workers. Rather than problematic working conditions leading us to the conclusion that sex work is not work, understanding sex work as work and responding to it as such could be a starting point for making improvements in these working conditions.[288]

[282] E McLeod, (n 93), 1.
[283] ibid, 17.
[284] ibid, 36.
[285] M Nussbaum, *Sex and Social Justice* (Oxford: Oxford University Press, 1999).
[286] ibid, 285.
[287] ibid, 282.
[288] For a fuller analysis, see Chapter 4 of this thesis.

Taking a more critical approach to the idea of work, O'Connell Davidson argues that what is bought in wage labour contracts is the 'power to labour over an agreed amount of time'[289] and that 'the wage labour contract involves a transfer of powers of command over the person'.[290] She argues that, likewise, in sex work, the client gives money in order to secure powers over the sex worker's person they would not otherwise have.[291] Cecile Fabre supports this understanding, stating that sex workers sell 'a service which consists in granting access to their body, for certain sexual purposes and/or for a certain amount of time'.[292] The access granted is not limitless, as sex workers impose boundaries,[293] but their capacity to do so also depends on the control they have over their work and their lives more generally.

Unlike individual contractarian accounts that suggest that sex work is simply a voluntary arrangement between two consenting adults,[294] the construction proposed by both O'Connell Davidson and Fabre acknowledges structural powers, such as capitalism, that affect the transaction. The respective power of the two parties is shaped by these and, as such, the amount of power a sex worker wields over the transaction is variable depending on the specific situation and the market of sex work in which she is involved.[295] Poverty and gender are structural dynamics that affect the negotiations between the sex worker and the client. Yet, importantly, neither commentator considers these structures to be exclusive to sex work. Similar power structures exist in other service provider/service user relationships, as has been

[289] J O'Connell Davidson, (n 203), 9.
[290] J O'Connell Davidson, (n 206), 85.
[291] ibid, 86.
[292] C Fabre, *Whose Body is it Anyway?* (Oxford: Oxford University Press, 2006), 160.
[293] Mac and Smith, (n 5).
[294] L Ericsson, 'Charges Against Prostitution: An Attempt at a Philosophical Assessment' (1980) 90 (3) Ethics 335, 338.
[295] J O'Connell Davidson, (n 203), 18.

recognised by materialist and Marxist accounts of work,[296] but because the sex worker allows the client access to her body, the power relationship is more apparent in sex work.

A similarly complex construction of sex work as work can be seen in some sex workers' own accounts of their work; for example, in Phoenix's interviews of sex workers, many of the sex workers saw themselves as both 'commodified bodies' and 'workers'.[297] This identification was contextualised by the respondents' experience of poverty, and an understanding of working as necessary to get by.[298] As one of Phoenix's interviewees stated: 'You do it because you need the money for yourself. It's a job'.[299] Many sex workers have the same attitudes to their work as people have toward other jobs. That is, going out to work as a sex worker is born from economic necessity, and sex workers' attitudes towards sex work are not singular. Sanders quotes a sex worker as stating: 'this work can be oppression or freedom; just another assembly-line job; an artistic act that also pays well; comic relief from street realities; healing social work for an alienated culture… the only safe thing to say is that we're all in it for the money'.[300] What is seen here is that sex workers often recognise the capitalist structures within which they are working, but 'no less than any other worker, and no less than any other woman, engage in acts of negotiation, resistance, and subversion that belie their designation as passive objects'.[301] As such, the primary purpose of sex work can be seen as economic (and thus, like the definition of wage labour, not done purely for leisure/pleasure).

[296] K Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries* (Durham, Duke, 2011), 3.
[297] J Phoenix, (n 120), 127.
[298] ibid, 127.
[299] Sammy, quoted in J Phoenix, ibid, 128.
[300] Vicky Funari, quoted in T Sanders, (n 128), 37.
[301] W Chapkis, (n 92), 20.

2.5.3 Work Organisation and Working Conditions in Sex Work Markets

Alongside sex workers' diverse backgrounds and life experiences, Joanna Brewis and Stephen Linstead suggest, 'stratification correlates with the geographical place in which the labour is actually carried out, and affects key characteristics of the work'.[302] Beyond the simple division of off-street and on-street sex work, there is further segmentation in the markets. Sanders identifies six different markets which make up the sex industry in the UK: licensed saunas and massage parlours officially endorsed to sell massage; illegal brothels where women pay to work; working premises where one or more sex workers work; independent escorts (whether working online or through an agency); women who work from home; and the street market.[303] Licensed saunas are typically sex work businesses operated 'behind the front of another business that offers legitimate services/facilities'.[304] While massages are given, sexual services tend to be negotiated as extras between the sex worker and the client.[305] The sex worker's freedom to withdraw from contracts made with clients can depend on the parlour, and may be highly circumscribed given that 'a masseuse who consistently refused to provide clients with anything other than a straight massage would quickly find herself without an income'.[306] Licensed saunas tend to be highly organised establishments, with tight 'house rules', the two most reported being 'no juveniles on the premises' and 'no drugs allowed'.[307] The sex worker will often pay a shift fee to the sauna or massage parlour to cover the expenses of running the parlour.[308] There are also often set prices and high 'massage fees' paid directly to the owner of

[302] J Brewis and S Linstead, *Sex, Work and Sex Work: Eroticizing Organization* (London: Routledge, 2000), 260.
[303] T Sanders, (n 55), 14.
[304] J O'Connell Davidson, (n 203), 21.
[305] A Sprinkle, quoted in W Chapkis, (n 92), 90.
[306] J O'Connell Davidson, (n 203), 24.
[307] T May, A Harocopos and M Hough, *For Love or Money: Pimps and the Management of Sex Work* (Home Office: Police Research Series Paper 134, 2000), 26.
[308] J O'Connell Davidson, (n 203), 22.

the building from the client.[309] This is seen as payment for advertising and protection for the management for costs. It does, however, mean that sex workers who do not receive much business in a day might well pay more to work a shift than they earn.[310] Massage parlours are not prevented from advertising as long as they are only advertising their legitimate business.[311]

A brothel is legally defined as premises where two or more people sell sex.[312] Although this legal definition could cover a number of types of indoor sex establishment, Sanders notes a social distinction between brothels, which include a brothel keeper, and working premises, where sex workers work independently or cooperatively.[313] Unlike saunas, brothels are illegal[314] and therefore are not licensed, inspected or registered by local authorities.[315] Moreover, in brothels, the sexual nature of the exchange is explicit.[316] That is, they are not disguised as other types of businesses. Brothels are not confined to inner cities, and are often located in residential areas,[317] and can be more attractive for women who prefer to work on a casual, flexible basis.[318] What is considered a brothel is varied, in terms of size, management practices, charges, and safety precautions put in place.[319] Sex workers in brothels face the risk of management exploitation – through, for example, high fees, fines, or withholding of payment[320] – although they are technically self-employed.[321] Like saunas, 'management imposed "house rules" may limit a brothel, club, or escort worker's ability to select among

[309] T Sanders, (n 55), 15.
[310] J O'Connell Davidson, (n 203), 22.
[311] J Phoenix, 'Prostitution: Problematizing the Definition', in M Maynard and J Purvis (eds), *(Hetero)Sexual Politics* (London: Taylor and Francis, 1995), 71.
[312] *Gorman v Standen, Palace Clarke v Standen* (1964) 48 Cr App R 30.
[313] T Sanders, (n 55), 14.
[314] Sexual Offences Act 1956, s33.
[315] T Sanders, (n 55), 15.
[316] D Whittaker and G Hart, 'Managing Risks: The Social Organisation of Indoor Sex Work' (1996) 18 (3) *Sociology of Health and Illness* 399, 401.
[317] J Morton, 'Legalising Brothels' (2004) 68 *Journal of Criminal Law* 87, 88.
[318] T Sanders, (n 55), 16.
[319] J Pitcher and M Wijers, 'The impact of different regulatory models on the labour conditions, safety and welfare of indoor-based sex workers' (2014) 14 (5) *Criminology & Criminal Justice* 549, 553.
[320] J Phoenix, (n 311), 74.
[321] J Pitcher and M Wijers, (n 319), 554.

clients and services'.[322] Jane Pitcher's study on indoor sex work in the UK found that while some brothels are well managed and have strict rules about working practices and client behaviour, others are less well organised and may leave sex workers with less autonomy over which clients they see and what acts they perform.[323] Migrant workers face particular risks as they are more reliant on work in the informal sector,[324] may have language barriers, and the management are able to exercise greater degrees of control as they risk deportation if they report abuse.[325] Therefore, materialistic forms of power and control from the sauna or brothel owner vary widely across the market.[326]

Working premises, while also legally brothels, are usually organised collectively by two or more sex workers. These are usually private flats or houses,[327] and as such often create a blurring of the home-based world and business practices. If renting, sex workers risk being evicted if their businesses are exposed,[328] or higher rents may be charged by landlords who know the way the premises is being used, as they then take on some of the risk under the law, and can threaten the workers with exposure to the police.[329] In working premises, each sex worker risks criminalisation for brothel keeping, while in a managed brothel, that risk would fall onto the management.[330] There may be others working in the premises, such as receptionists, cleaners, or security, but they are employed *by* the sex workers, rather than

[322] W Chapkis, (n 92), 98.
[323] J Pitcher, (n 178).
[324] ibid, 54.
[325] N Mai, *Migrant workers in the UK sex industry – Final policy-relevant report.* (ESRC final project report, 2009), available at: http://www.londonmet.ac.uk/researchunits/iset/projects/esrc-migrant-workers.cfm (last accessed 2 September 2019). This is considered further in Chapter 8.
[326] J O'Connell Davidson, 'Will the Real Sex Slave Please Stand Up' (2006) 83 *Feminist Review* 4; J O'Connell Davidson, (n 203), 17.
[327] E Cooper, I Cook, and C Bilby. 'Sex work, sensory urbanism and visual criminology: Exploring the role of the senses in shaping residential perceptions of brothels in Blackpool.' (2018) 42 (3) *International Journal of Urban and Regional Research* 373.
[328] Sexual Offences Act 1956, ss33-36.
[329] J Mac and M Smith, (n 5), 107-8.
[330] ibid, 109; Sexual Offences Act 1956, s 33A.

managing them.[331] As such, advertising, managing clients and managing the financial side of the work is carried out by the sex workers themselves (often, but not exclusively through the internet) or they employ someone to do it. Through collective working, sex workers have a higher degree of autonomy, although their working practices are still constrained by the fact that their premises fall under the brothel keeping laws.[332]

Escorts may operate independently using the internet or through an agency and visit clients in their own homes or in hotels. The 'date' might include dinner, business functions, or even holidays, and if the distance travelled is far, the client might be asked to pay beforehand on credit card or bank deposit.[333] Even those who work for agencies negotiate directly with the customer for the price, and there is an increasing number of sex workers conducting their own marketing and communication primarily through the internet.[334] Weitzer argues that although independent escorts face greater risks of violence or crime because of their isolation, they tend to work with a greater proportion of regular, low risk clients and also have risk-management techniques, often including calls to check in with their agencies (if they have one) or using email or number screening online.[335]

Unlike the indoor markets, the street sex market relies on the physical presence of the street sex workers to advertise to potential customers. In contrast to those who work indoors, street workers are highly flexible, some with regular hours[336] but many with little pattern to their work.[337] As previously noted, the reduction in the street markets mean that often those

[331] T Sanders, (n 55), 4.
[332] J Pitcher, (n 178).
[333] T Sanders, (n 55), 18.
[334] S Jenkins, 'New Technologies, New Territories: Using the Internet to Connect with Sex Workers and Sex Work Organizers', in K Hardy, S Kingston and T Sanders (eds), *New Sociologies of Sex Work* (Farnham: Ashgate, 2010), 91.
[335] R Weitzer, (n 23), 10.
[336] J Phoenix, (n 311), 68.
[337] T Sanders, (n 55), 19.

who continue to work on the street have multiple vulnerabilities and marginalisation, making more restricted working patterns difficult. Many work on 'away days', arriving from another location just to work.[338] Although contact with the client may take place on a street, the actual sexual service usually takes place in a car, or an alley that is usually isolated.[339] The service is usually straightforward 'hand relief', fellatio or intercourse with little else on the side.[340] Street sex work may take place in 'red light zones', which are either informal or officially tolerated.[341] Like indoor sex work, there is a vast array of experiences of street sex work; factors such as homelessness, drug dependency, third party control from pimps,[342] and the location of their work can affect the control sex workers have over their work, the risks that they face, and the way that they conceptualise their activities.[343]

Some sex workers move between indoor work and outdoor working. Moving indoors might be a response to 'police crackdowns, aggravation from communities, or increasing violence on the street',[344] and more recently, the Covid-19 pandemic. Sanders et al found that a small number combine street work with internet based work.[345] Yet, many sex workers simply cannot access a private space for sex work, either because of the cost of rent or fees, or because of reluctance from indoor sex work establishments to employ people with substance dependencies.[346] For male sex workers, the lack of male brothels can also limit the options of

[338] J Phoenix, (n 311), 68.
[339] T Sanders 'Female street sex workers, sexual violence, and protection strategies' (2001) 7 (1) *Journal of Sexual Aggression* 5.
[340] T Sanders et al, (n 43), 19.
[341] P Hubbard, 'Sex Work, Urban Governances and the Gendering of Cities', in G Brown and K Browne (eds) *The Routledge Research Companion to Geographies of Sex and Sexualities* (London: Routledge, 2016), 314.
[342] M O'Neill, R Campbell, P Hubbard, J Pitcher and J Scoular, 'Living with the Other: Street sex work, contingent communities and degrees of tolerance' (2008) 4 (1) *Crime, Media, Culture* 73, 78.
[343] T Sanders et al (n 43), 46
[344] ibid, 53.
[345] T Sanders et al (n 40), 967
[346] J Porter and L Bonilla, 'The Ecology of Street Prostitution', in R Weitzer (ed), *Sex for Sale: Prostitution, Pornography and the Sex Industry* (London: Routledge, 2000), 164.

where to work, meaning street work or independent work are the only options available.[347] Some sex workers may also move from indoor sex work to street sex work for a number of reasons, including increasingly problematic drug use, or eviction from private or council properties as a result of enforcement measures.[348] There are some patterns that emerge in terms of the risks faced across the different markets, with a number of studies finding 'huge, differences between street and indoor prostitution in occupational practices, job satisfaction, self-esteem, physical and psychological health, and several types of victimization'. [349] Nevertheless, mobility between these sectors, as well as the barriers to mobility, demonstrate that the boundaries between street and indoor sex work can be malleable. It is not possible, therefore, to neatly separate the issues faced by one set of sex workers from another.

What is produced by sex workers and the methods of production also differ across markets and are often affected by the regulatory and discursive context in which they operate. Street workers, as the most visible sex workers, and, therefore, the most at risk of arrest, tend to spend the least time with their clients, largely providing only straightforward sexual acts, without extras.[350] Street sex workers are often placed in risky situations alone with a client, and an inability to sexually satisfy the customer might result in the client becoming violent or aggressive.[351] With this in mind, the sex worker must use some sexual skill not only to uphold her side of the arrangement, but to preserve her own safety. Moreover, while the fleeting, quick nature of street sex work could suggest that the activity is mainly physical or sexual in nature, even within the street market, it could be argued that there are various forms of labour

[347] T Sanders et al (n 40), 80.
[348] J Pitcher et al, *Living and Working in Areas of Street Sex Work: From Conflict to Coexistence* (Bristol: Policy Press, 2006). This is discussed further in Chapter 8.
[349] R Weitzer, 'The Mythology of Prostitution: Advocacy Research and Public Policy' (2010) 7 *Sex Research and Social Policy* 15, 19.
[350] T Sanders et al, (n 43), 19.
[351] H Kinnell, (n 125), 58.

employed. The presence of the sex workers is its own advertisement, so creating the right image to gain custom can be significant. For many sex workers, 'much of the "work" resides in the preparation, packaging, and gruelling nightly display of the body that sells itself (rather than in specifically sexual labor, per se)'.[352] This part of the work comes even before the sex worker gets on the street (when they come from elsewhere) and requires knowledge of what will attract clients. The preparation in relation to sexualised labour has been labelled 'aesthetic labour'.[353]

Once on the street, sex workers must also negotiate with clients, enforce contracts made with clients, and limit risks when accepting and going with a client. This requires sex workers to employ mental labour to manage the client and the danger, particularly when in more secluded areas.[354] An agreement must be made about where they may go and how much will be paid – the negotiation is often a case of agreeing what services will be performed; each service is usually separately chargeable and if the client wants something extra he must pay extra.[355] Sex workers may adopt strategies to take control of the encounter and reduce risks, 'such as never going with more than one client at a time, checking the rear seat of cars before getting into them, etc – working with other women and carrying weapons'.[356] Additionally, sex workers often have geographical knowledge about where to work without risking arrest for either themselves or their clients.[357] The skills involved in this negotiation are comparable to other tradespeople, but with the added risk of violence and arrest. As such, street sex work is usually more than an unskilled sexual transaction.

[352] ibid, 50.
[353] C Warhurst and D Nickson, 'Who's Got the Look?: Emotional, Aesthetic and Sexualised Labour in Interactive Services' (2009) 16 (3) *Gender, Work and Organisation* 385.
[354] H Kinnell, 'Murder Made Easy: the final solution to prostitution?', in R Campbell and M O'Neill (eds), *Sex Work Now* (Devon: Willan, 2006), 149.
[355] H Kinnell, (n 125), 57.
[356] J O'Connell Davidson, (n 203), 64.
[357] T Sanders, (n 55), 97.

Others involved in the street sex markets work on a transient and needs-based basis. They might not consider themselves to be sex workers or wish to be recognised as such, highlighting once again the difficulties in defining 'sex worker'. Some who sell sex do so because they are 'dislocated, propertyless, and rightless [and] do not approach prostitution as an occupation or a job as such, but merely as a strategy to get by'.[358] This has been described as 'survival sex', where the individuals involved do not change into a 'uniform', do not travel to a special place to work, and do not cultivate their sexual capital as an abstracted feature of the self, rather exchanging sex for small amounts of money, for drugs, or for a place to stay.[359] This is one of the reasons why the street market persists even after Covid-19. Figures relating to drug use in sex work vary across studies, yet research suggests it is more prevalent in street sex markets. In Marianne Hester and Nicole Westmarland's Home Office report, out of 228 women surveyed across five project areas, 93% used non-prescribed drugs, with 68% using crack cocaine, and 88% using heroin.[360] Among London street workers interviewed by Tiggey May and Gillian Hunter, an average of between £80 and £100 a day was spent on crack cocaine by each sex worker.[361] Transactions of sex for drugs or a place to stay have been described as 'more closely resembl[ing] a bartering situation'[362] than a labour process. This highlights the difficult distinction between services and labour – these transactions could still be considered to be the ad hoc provision of services without the individuals involved self-defining as sex workers - yet framing it as work has ethical implications if we are to take seriously sex workers' own accounts of their lives.

[358] J O'Connell Davidson, 'Men, Middlemen and Migrants: The Demand Side of "Sex Trafficking"' 27 July 2006, *EuroZine* 8, 9.
[359] E Bernstein, (n 133), 48.
[360] M Hester and N Westmarland, 'Tackling Street Prostitution: Towards an Holistic Approach' Home Office Research Study 279 (London: Home Office, 2004), 80.
[361] T May and G Hunter, 'Sex Work and Problem Drug Use in the UK: The Links, Problems, and Possible Solutions', in R Campbell and M O'Neill (eds), *Sex Work Now* (Devon: Willan, 2006), 177.
[362] H Feldman et al, 'Street Status and the Sex for Crack Scene in San Francisco', in M Ratner (ed), *Crack Pipe as Pimp: An Ethnographic Investigation of Sex-for-Crack Exchanges* (New York: Lexington, 1993), 149.

In contrast to street sex work, 'indoor interactions are typically longer, multidimensional and more reciprocal', although this varies across markets.[363] Services provided can be more specialised. For example, some sex workers focus on BDSM activities.[364] Often, these sex workers are able to charge more for their services and have skills that 'would more usually be associated with the work of sex therapists and actors'.[365] Sex workers providing these types of specialist services may also have to use intuition to ensure that the desires of the client are met, without the client having to explicitly state them, which might detract from the pleasure or submission sought.[366] Sex workers who provide more prolonged sexual services may self-consciously attempt to 'integrate an ethos of bodily pleasure, appreciation, and authenticity into their occupational practices and their aesthetic ambitions'.[367] This has been conceptualised as a form of body work as it involves 'direct, hands-on activities, handling, assessing and manipulating bodies' in order to produce pleasure.[368]

The transaction between indoor sex workers and the client might also include more than a sexual aspect – the sex worker must also ensure that 'customers are comfortable, relaxed, and happy, ensuring this by being conversational, supportive, and pleasant'.[369] Sex workers in these contexts may produce what is termed a 'girlfriend experience' (GFE).[370] As one account puts it, 'this may include a lengthy period of foreplay in which the customer and the escort touch, rub, fondle, massage, and perhaps even kiss passionately… and usually has a period of cuddling and closeness at the end of the session.[371] The GFE has been described as a form of emotional

[363] R Weitzer, (n 264), 146.
[364] J Brewis and S Linstead, (n 302), 259.
[365] J O'Connell Davidson, (n 203), 93.
[366] ibid, 93.
[367] E Bernstein, (n 133), 104.
[368] J Twigg, C Walkowitz, R Cohen and S Nettleton, 'Conceptualising Body Work in Health and Social Care' (2011) 33 (2) *Sociology of Health and Illness* 171, 172.
[369] R Weitzer, (n 264), 146.
[370] T Sanders, *Paying for Pleasure* (Devon: Willan, 2008), 102.
[371] E Bernstein, (n 133), 126.

labour. Hochschild defines 'emotional labour' as that which 'requires one to induce or suppress feeling in order to sustain the outward countenance that produces the proper state of mind in others'.[372] This is employed in much of the service industry, where a smile and a positive attitude is required to ensure that the customer enjoys the experience.[373] Maggie O'Neill suggests that this type of sex work is like emotional labour in that it involves sex workers 'manipulating, suppressing and falsifying their own feeling life in order to do the intimate work of fulfilling clients' sexual needs/desires and manufacturing care, concern, consideration and, indeed, a devoted stance to their clients'.[374] These understandings of the labour involved in sex work push at the boundaries of what is usually considered to be work, yet the skills, control of emotions, and physical and mental energy involved in the sex industry demonstrate that there are different modes of production involved in sex work than simply the sexual act.

Understanding sex work as work provides the most flexible framework of understanding, allowing for the possibility of varied experiences. This approach does have its limits; as noted, not everybody wishes to be constructed as a sex worker. What is advantageous in this approach, however, is that it does not assume one singular lived experience of sex work – frames of work recognise the various labour practices, conditions, and power structures across both markets and individuals' experiences of sex work. In framing sex work this way, we are able to consider the variegated problems faced by sex workers through their work. Poor or variable working conditions and unequal power dynamics within sex work are, I have noted, key problems faced by sex workers. This includes broad and contested concepts such as exploitation[375] and power imbalances in labour relations, as well as more easily definable

[372] A Hochschild, (n 236), 7.
[373] ibid, 106.
[374] M O'Neill, (n 110), 89.
[375] V Munro, 'Exploring Exploitation: Trafficking in Sex, Work and Sex Work', in V Munro and M Della Giusta (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Aldershot: Ashgate, 2008).

factors such as the ability to make decisions on who to work for, whether to see a particular client, working time, pay, and health and safety protections.[376] The effects of these working conditions are apparent in the day to day lives of many sex workers, affecting not only how they experience their work and whether they have the means of making money, but also in relation to managing risk of crime. That is, variations of working conditions may limit or exacerbate the risks that sex workers face in order to meet their economic needs. Therefore, this thesis will consider work organisation and working conditions to be a problem associated with sex work that must be focused on, both when evaluating the current law, but also when considering reforms using labour law and the HRA.

2.6 Conclusion

This chapter has interrogated the dominant narratives around sex work and its problems, and has drawn on sex workers' own accounts, the work of sex worker organisations, and empirical research to provide an account of what *this thesis* considers to be the key problems relating to sex work. These problems will provide the framework for examining the potential of a human rights, and particularly HRA, response to sex work in Chapters 7 and 8 of this thesis. This chapter has examined the complex markets and lived experiences of sex work, arguing that accounts of sex work that provide a one-dimensional construction fail to take into account the diversity of such experiences.

This chapter has delineated three interconnected problems that are considered to be integral to sex workers' lives: stigma; violence and risk of crime; and work organisation and working conditions. These problems are experienced differently by sex workers but are, I argue,

[376] T Sanders, (n 128).

pervasive across the industry. I have argued that stigma is a consequence of framing sex work as deviant, and therefore 'othering' sex workers from 'normal women'. In doing so, sex workers are reduced to the identity of 'prostitute', and excluded spatially and in terms of participation. This has a number of effects, including: shame; increased risk of violence and crime; and reduced access to services, including health care. This chapter also argues that violence and the risk of crime is a problem that is key to the lives of sex workers, and the way that they organise their work. I have challenged the construction of sex work as inherently violent against women, arguing that this does not recognise diverse experiences or allow for the possibility of agency of sex workers while they remain in the sex industry. I have also argued that this framing ignores other structural forces such as race, poverty, sexuality and capitalism, as well as obscuring the diverse and tangible risks of violence and crime faced by sex workers in their work. Instead, I have drawn on research to elucidate the risks faced by sex workers across varied markets, and how sex workers attempt to manage these. In particular, I have noted that the risk of physical assault and murder are higher in the street market, while indoor sex workers are more likely to risk property offences, stalking, harassment, and verbal abuse. Sex workers manage these risks to a degree by employing strategies to work together or with third parties, or by using tools such as internet checks.

Finally, this chapter has considered the way that work organisation and working conditions are a problem for sex workers. My examination of the construction of sex work as work finds that this is a more compelling, but not universalisable, understanding of sex work, as compared to deviancy or violence against women. This is particularly so because of its flexibility and breadth, allowing for a range of practices, conditions and realities to fit under the umbrella concept of work. In my examination of the labour of sex work, I have explored the variety of forms and practices of work that are employed across the markets. This

highlighted that sex work does not only require sexual labour, but also physical, mental, emotional and aesthetic labour, to varying degrees. This chapter has also demonstrated that the forms of control, the fees paid by sex workers, and the conditions under which sex workers work fluctuate across markets and individuals. How the law can respond better to the labour of sex work is considered further in Chapter 4 of this thesis.

This chapter has argued that any construction of sex work that assumes one experience fails to consider the heterogeneity of sex work. By instead focusing on concrete issues that are experienced to varying degrees by sex workers, the following chapters will consider the extent to which law does, or can, respond to these problems of stigma, violence and risk, and work organisation and conditions. The next chapter sets out the current law around sex work and examines the degree to which the current legislative and policy approach to sex work in England and Wales deals with, ignores, or worsens the problems set out in this chapter. In so doing, the following chapter highlights the areas of the law most in need of reform, which is considered in the later chapters on human rights.

Chapter 3

LAW AND SEX WORK IN ENGLAND AND WALES

3.1 Introduction

Whether enforced or not, nearly all states have some kind of law and policy on sex work.[1] How it is regulated, in turn, affects the organisation of sex work and sex workers' capacity to manage the problems they face in sex work. This can be both directly, through enforcing laws against sex workers, clients or third parties, or by encouraging these individuals to act in self-disciplining ways. In England and Wales, the regulation of sex work is largely performed through a range of criminal laws, that delineate the aspects of 'prostitution' that are criminal.[2] As so many sex work-related activities are criminalised, sex workers' power to negotiate the problems they face in the industry can be weakened by potential prosecution and a lack of labour rights or recognition. It is notable that criminalisation and illegality was not one of the problems set out in Chapter 2; this is because the legal framework does not constitute just one problem, but rather has a role in exacerbating or responding to all the problems I set out there – stigma, violence and risk, and problematic working conditions.

In this chapter, I set out in detail the law relating to prostitution in England and Wales, before analysing whether reform of the law is necessary, in line with the second objective of the thesis. This analysis will inform the examination undertaken in the following chapters of how and to what extent reform could be implemented using a Human Rights Act (HRA)

[1] G Ganjoli and N Westmarland, *International Approaches to Prostitution: Law and Policy in Europe and Asia* (Bristol: Policy Press, 2006), 11.

[2] While recognising the stigmatising impact of this term (as discussed in Chapter 1), I will use the term 'prostitution' when referring to the law as this is the language that the law uses. I will also use it in discussion of historical work, as it would be anachronistic to refer to sex work in the Victorian ages, for example, when this concept had not been coined.

approach. In doing so, I consider the way that the law constructs, responds to, fails to respond to, and worsens the problems of sex work, as defined in Chapter 2. I also examine the enforcement of laws and police practice towards sex workers. Law and its enforcement are not discrete; rather the law provides the framework of powers that the police can enforce, while police discretion allows the proliferation of a variety of 'on the ground' responses and can have a determinative effect on the impact of the law. This chapter, therefore, considers how far the effects on sex workers' lives are the result of 'bad law' and how far they result from 'bad implementation'.

This chapter begins by explaining the development of the law relating to prostitution in England and Wales. This section provides an overview of the law from the 19th century until the current day, mapping how shifts in understandings and approaches to sex work have been reflected in the law. It ends with a table setting out clearly the laws that currently apply to sex workers for ease of reference and understanding. In doing so, this section highlights the cyclical nature of constructions of narratives around sex work, demonstrating that constructions of sex work and its problems depend on the most pressing concerns of the time.

This chapter then divides the current laws thematically into related areas, considering the effects of each in turn. The areas that are considered are: soliciting and loitering and kerb-crawling (the outdoor offences); brothel keeping and causing/inciting/controlling prostitution for gain (the largely indoor offences); paying for sexual services of a prostitute subject to force; and policing and trust. Through this examination, I argue that the laws on soliciting and loitering and kerb crawling, brothel keeping, controlling prostitution for gain, and paying for sexual services of a prostitute subject to force should be reformed or repealed. I also argue inconsistency in policing approaches reduces certainty and trust between the police and many

sex workers, particularly those who may be vulnerable to criminal or immigration laws. This can cause sex workers to act in self-disciplining ways, which, in turn increases the risk of violence and crime faced by sex workers and decreases the likelihood that these crimes will be reported. This chapter forms the basis for the analysis in Chapters 7 and 8, wherein I consider how the HRA can be used to challenge some of these laws and the police practice around these laws.

3.2 The Development of Sex Work Law in England and Wales

The law has never sought to regulate sex work as an industry; instead, criminal laws are focused on delineating the criminal aspects of prostitution. The actual act of receiving payment for sexual acts is legal, as is purchasing sexual services (as long as the person selling the acts is not 'subject to force'[3]). Many of the activities related to commercial sex are, however, criminalised. Sex workers, therefore, occupy a liminal space whereby the way they individually carry out their work may be legal but they work in an illegitimate industry so are not able to benefit from, for example, labour rights and protections. While some areas of the sex industry are not criminalised – for example, there are no specific criminal laws against advertising online – even sex workers who advertise online are still impacted by the criminal laws in terms of where they can provide services, as discussed below. The state profits from sex work in so far as sex workers are still liable for income tax[4] and, in some cases VAT.[5] Although many sex

[3] Policing and Crime Act 2009, s 14.
[4] *Inland Revenue Commissioners v Aken* [1990] 1 WLR 1374.
[5] *Commissioners of Customs and Excise v Polok* [2002] 2 CMLR 4. In this case, Jacobs, J asked 'Should procurers, pimps, panders, call them what you will, pay VAT?', deciding that where an escort agency provided their employee's time to customers, this was separable from the actions of the sex workers and so the agency could not escape VAT liability on the basis of the criminality of procuring women for prostitution.

workers therefore contribute to public funding, this is rarely acknowledged, although it is sometimes justified as a way of discouraging the industry.[6]

The law on prostitution is not easily identifiable in a single statute, but rather has developed through legislation and common law throughout the last century and a half. This means the law can be incoherent and disparate provisions can combine to create effects that may be unintended or unforeseen, but which serve to exacerbate the problems faced by sex workers. Many of the laws relating to prostitution in England and Wales today are based on the Wolfenden Report of 1957,[7] but some can be traced back as far as the Vagrancy Act 1824 and the Contagious Diseases Acts of the 1860s. This section traces the development of the law from the 19th century to today. Doing so allows us to position the current law, and any HRA challenges to it, within the political and social context that informs it, allowing some consideration of the likely success of such claims.

3.2.1 Vagrancy Act 1824 – Early 20th Century

In the early 19th century, prostitution was treated as a vagrancy offence under the Vagrancy Act 1824. This allowed the police to arrest any 'common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner.'[8] The term used in this statute, 'common prostitute', began to form an identity around women engaged in selling sex, based on the idea of recurrent indecent behaviour, allowing the

[6] I Crowhurst, 'The Ambiguous Taxation of Prostitution: the Role of Fiscal Arrangements in Hindering the Sexual and Economic Citizenship of Sex Workers' (2019) 16 *Sexuality Research and Social Policy* 166.
[7] Home Office and Scottish Home Department, *Report of the Committee on Homosexual Offences and Prostitution* (London: HMSO, 1957).
[8] Vagrancy Act 1824, s3.

police to target women for being on the streets.[9] These powers were extended by the Metropolitan Police Act 1839, which created an offence of 'any common prostitute loitering or soliciting for the purposes of prostitution to the annoyance of inhabitants or passers-by'.[10] Although neither of these laws criminalised solicitation *per se,* but rather controlled the conduct of those soliciting,[11] together they were used to police women's behaviour in public,[12] with the aim of protecting the rest of the public from indecency and nuisance.

Later in the 19th century, there was a shift to seeing prostitutes as vectors of disease[13] and powers to punish them were therefore extended. The Contagious Diseases Acts of 1864, 1866, and 1869 were introduced to control the spread of venereal diseases in garrison towns and ports.[14] If a woman (and it was only women who were included in this definition) was suspected of being a 'common prostitute', they would then be subjected to a fortnightly internal examination.[15] There was an assumption by policy makers that the internal examination was not degrading for the women as 'the women who satisfied male sexual urges were already so degraded that further indignities scarcely mattered'.[16] If she was found to be suffering from a venereal disease, she could be detained in a hospital for up to nine months to be treated.[17] If she did not submit to the testing then she could be brought before a magistrate, who could punish her with up to a month's hard labour.[18] The term 'common prostitute' was vague and

[9] S Edwards, 'The Legal Regulation of Prostitution: A Human Rights Issue', in G Scambler and A Scambler (eds), *Rethinking Prostitution: Purchasing Sex in the 1990s* (London: Routledge, 1997), 58; A Sherry, 'Vagrants, Rogues and Vagabonds – Old Concepts in Need of Revision' (1960) 48 (4) *California Law Review* 557, 564.
[10] Metropolitan Police Act 1939, s54.
[11] J Walkowitz, *Prostitution and Victorian Society: Women, Class and the State* (Cambridge: Cambridge University Press, 1980), 14.
[12] J Laite, 'Paying the price again: the UK's new co-ordinated prostitution strategy in historical perspective,' *History and Policy*, 20 September 2006, available at: http://www.historyandpolicy.org/policy-papers/papers/paying-the-price-again-prostitution-policy-in-historical-perspective (last accessed 1 June 2019).
[13] J Walkowitz, (n 11), 48.
[14] ibid, 1.
[15] ibid, 2.
[16] P McHugh, *Prostitution and Victorian Social Reform* (New York: St. Martin's Press, 1980), 17.
[17] M Hamilton, 'Opposition to the Contagious Diseases Acts 1864 – 1886' (1978) 10 (1) *Albion* 14, 14.
[18] F Smith, 'The Contagious Diseases Acts Reconsidered' (1990) *Social History of Medicine* 197, 198.

offered a broad discretion to police to arrest women, who would then have the burden of proof at trial to prove she was virtuous.[19]

The Contagious Diseases Acts were passed quietly, with little press coverage, but once people became aware of them, there was a significant movement for their repeal.[20] The National Association for Repeal of the Contagious Diseases Acts, and the Ladies' National Association for Repeal of the Acts, led by Josephine Butler, were formed to campaign for the repeal of the Acts.[21] Butler denounced the Acts as examples of class and sex discrimination, depriving women of habeus corpus rights against arbitrary imprisonment,[22] forcing them to submit to degrading examinations, and sanctioning male vice.[23] The campaign was split, with reformers displaying different attitudes to the Acts.[24] Some repeal reformers argued that 'virtuous wives and daughters' might be falsely accused of being prostitutes and subjected to the vaginal examination,[25] clearly focusing on the effects to 'innocents'. In contrast, some women campaigners moved to consider prostitution as a form of 'degradation of women',[26] wherein women were 'used as beasts'[27] and the Acts reinforced police and medical domination of their 'fallen sisters'.[28] The Royal Commission of 1871, set up to investigate the operation of the Acts, rejected the argument that the women were victims, instead stating that 'with the one sex the offence is committed as a matter of gain; with the other it is an irregular indulgence of

[19] J Walkowitz and D Walkowitz, '"We are not Beasts of the Field": Prostitution and the Poor in Plymouth and Southampton Under the Contagious Diseases Acts' (1973) 1 (3) *Feminist Studies* 73, 74.
[20] M Hamilton, (n 17), 15.
[21] ibid.
[22] J Butler, *The Constitution Violated* (1871), republished (Cambridge: Cambridge University Press, 2010), 47-49.
[23] J Walkowitz, (n 11), 2.
[24] ibid, 6.
[25] ibid, 109.
[26] E Hopkins, *A Plea for the Wider Action of the Church of England in the Prevention of the Degradation of Women* (London: Hatchards, 1879), 5.
[27] J Butler, (n 22).
[28] J Walkowitz, (n 11), 6.

a natural impulse',[29] thus placing the blame for prostitution squarely on those selling sex. Despite wide official support for the Acts as a method of protecting men (and particularly the armed forces) from disease and the temptation of vice, the repeal campaigners were successful, and the Acts were repealed in 1886.

The repeal of the Contagious Diseases Acts did not, however, signal a permissive shift in the regulation of prostitution. Rather, fuelled by concerns around child prostitution,[30] 'white slavery',[31] and social purity,[32] Parliament passed the Criminal Law Amendment Act 1885, which provided for summary proceedings to take place against brothels.[33] The offences covered anyone who 'keeps or assists in the management of a brothel' or any tenant or landlord who knowingly let their premises be used as a brothel.[34] The procurement of a woman or girl under the age of 21 for the purposes of prostitution was also covered by this statute.[35] This Act was passed after W T Stead published a newspaper report exposing the 'atrocities and brutalities' of the white slave trade, where 'virgins' were procured and 'entrapped' in brothels before being traded internationally for the purposes of sex.[36] A widespread fear that white women were being abducted in large numbers[37] led to these offences (together with laws raising the age of sexual consent for girls).

[29] Royal Commission, *Report from the Royal Commission on the Administration and Operation of the Contagious Diseases Acts 1868-1869 (1871)* PP 1871 (C.408-I) XIX.
[30] S Jeffreys, ''Free from all Uninvited Touch of Man': Women's Campaigns around Sexuality 1880-1914' (1982) 5 (6) *Women's Studies International Forum* 629, 634.
[31] W T Stead, *The Maiden Tribute of Modern Babylon I: the Report of our Secret Commission* (The Pall Mall Gazette, July 6, 1885).
[32] J Walkowitz, 'The Politics of Prostitution' (1980) 6 (1) *Signs* 123, 129.
[33] Criminal Law Amendment Act 1885, s13.
[34] Criminal Law Amendment Act 1885, s13. See further, J Laite, *Common Prostitutes and Ordinary Citizens: Commercial Sex in London, 1885-1960* (Basingstoke: Palgrave MacMillan, 2012).
[35] Criminal Law Amendment Act 1885, s 2(2).
[36] W T Stead, (n 31). William Stead himself was later imprisoned for three months for abduction and indecent assault after buying Eliza Armstrong to demonstrate the existence of the trade.
[37] M Ditmore, *Encyclopaedia of Prostitution and Sex Work: Volume 2* (Westport: Greenwood Press, 2006), 540.

Under the 1885 Act, the laws relating to procuring a woman under the age of 21,[38] inducing a girl or woman to inhabit a brothel in the UK or abroad,[39] and procuring a woman to have sex with a third party under false pretences[40] excluded any woman or girl who was a 'common prostitute' or a girl of 'known immoral character'. This meant that if a woman was already selling sex, she could not be protected from trafficking, deception, or controlling under these offences. Prostitutes' exclusion from these protections suggests that rather than an interest in reducing victimisation and exploitation of those selling sex, these offences were concerned with protecting the morality and purity of women and girls who had not already been tainted by prostitution. Moreover, the passage of these Acts and the repression of off-street prostitution were pushed by powerful 'social purity' organisations whose aim was to remove vice from society.[41] In this way, those selling sex were again clearly constructed as outside of the society that needed protection, and the sex industry was portrayed as inherently linked to external forces of organised crime – part of what Jonathan Simon calls the 'catalog of "monsters"… [that] forms a constantly renewed rationale for legislative action'.[42]

There was also public pressure for police to enforce the laws and crack down on brothels and solicitation. As Judith Walkowitz notes, 'the prosecution of brothels increased fourteenfold, and similar drives against solicitation were instituted in the capital and major provincial cities'.[43] The arrests were usually against the lower classes, with upper class brothel-keepers rarely convicted.[44] Section 13 of the 1885 Act was amended in 1912 to include anyone who was in charge of a brothel, in order to broaden the provision and augment the suppression

[38] Criminal Amendment Act 1885, s 2(1).
[39] ibid, s 2(4).
[40] ibid, s 3(2).
[41] J Laite, (n 34), 57.
[42] J Simon, *Governing Through Crime* (New York: OUP), 77.
[43] J Walkowitz, (n 32), 128.
[44] J Laite, (n 34), 61.

of brothels.[45] The term brothel remained vague and was not defined until it was held in *Gorman v Standen* that a brothel was a 'house resorted to or used by more than one for the purpose of fornication'.[46] The absence of definition prior to this case allowed for the capture of a number of lodgings, as it was not uncommon for women to work together in low class lodging houses, or in 'externally respectable establishments'.[47] The provisions of the 1885 and 1912 Acts around causing, procuring, and controlling prostitution and the provisions around brothels were later consolidated in the Sexual Offences Act 1956.[48]

Although they are no longer in force or updated by more recent legislation, these 19th century provisions provide a context within which to understand the recurring themes of nuisance, disease and exploitation that remain apparent in current law, and offer a background upon which more recent law has been built.

3.2.2 Wolfenden Report – 2000s

In the 1950s, there was a re-examination of the laws relating to prostitution. Eileen McLeod describes the social climate at the time as one of concern about post war family breakdown foreshadowing social dislocation. Women were encouraged to confine their sexualities to the marital relationship and focus on childbearing and childrearing.[49] As such, prostitution was seen as undermining these values, providing a visible example of alternative sexuality.[50] In 1954, the Wolfenden Committee was appointed to consider the 'law and practice relating to offences against the criminal law in connection with prostitution and solicitation for immoral

[45] Criminal Law Amendment Act 1912, s 4 (1).
[46] *Gorman v Standen, Palace Clarke v Standen* (1964) 48 Cr App R 30.
[47] J Walkowitz, (n 11), 24.
[48] Sexual Offences Act 1956, ss22-36. See also, J Laite, (n 34), 195.
[49] E McLeod, *Women Working: Prostitution Now* (London: Croom Helm, 1982), 92.
[50] ibid, 92.

purposes'.[51] The Wolfenden Committee stated that they were 'not charged to enter into matters of private moral conduct'.[52]

The Wolfenden Report placed an emphasis on the public nuisance created by the 'visible and obvious presence' of prostitutes,[53] which meant 'ordinary citizens...cannot, in going about their daily business, avoid the sight of a state of affairs which seems to them to be an affront to public order and decency'.[54] The Sexual Offences Act 1956, which reformed the law on brothels, had been passed in isolation of the Wolfenden Report, which was primarily focused on the impact of street prostitution.[55] The Wolfenden Committee did not recommend the criminalisation of prostitution as such, recognising that 'the failure of repressive legislation shows that [prostitution] cannot be eradicated through the agency of the criminal law'.[56] Nevertheless, they felt that the law at the time failed to adequately protect citizens. Particularly concerning to the Committee was that the fine of forty shillings, which was the penalty for the loitering and soliciting offence, was not seen as a deterrent, but rather as an 'indirect and not very onerous form of taxation or licence...making a farce of the criminal law'.[57] The Wolfenden Report recommended that the fines should be greater, increasing incrementally with every offence, and culminating in three months' imprisonment for the third or subsequent offences.[58]

The need to prove 'annoyance'[59] was deemed unnecessary for arrest – it was often inferred in the absence of a statement by the person accosted; persons accosted rarely attended

[51] Home Office and Scottish Home Department, (n 7), 7.
[52] ibid, 9.
[53] ibid, 81.
[54] ibid, 82.
[55] J Laite, (n 34), 196.
[56] Home Office and Scottish Home Department, (n 7), 79.
[57] ibid, 85.
[58] ibid, 92.
[59] Seen in the Metropolitan Police Act 1839.

court to give evidence;[60] and the annoyance of citizens could be attributed to the presence of prostitution in general.[61] In recommending that the annoyance requirement was removed, there was an assumption that the mere presence of prostitution in a public place was enough to amount to nuisance.[62] The Wolfenden Report did not, however, recommend criminalising 'kerb-crawlers' because of the difficulties in policing and the fear of a 'very damaging charge being levelled at an innocent motorist'.[63] The Committee attempted to justify this by reference to the element of nuisance involved – 'prostitutes do parade themselves more habitually and openly than their prospective clients'.[64] As such, the imbalanced gendered approach of the Contagious Diseases Acts was replicated in the Wolfenden Report, and clients were spared from being associated with the deviant construction of sex work.

Following the publication of the Wolfenden Report, Parliament passed the Street Offences Act 1959, which specifies that it is an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution.[65] Because of the meaning of 'common prostitute' – undefined at the time by statute, but held in *De Munck* to mean a woman who 'offers her body commonly for acts of lewdness for payment'[66] – the loitering and offence could only be perpetrated by women. This offence was not made gender neutral until the Sexual Offences Act 2003. The 1959 legislation allowed arrest where the police had a *reasonable suspicion* that a 'common prostitute' was soliciting or loitering. This meant that, after the first arrest, whereby a woman would be labelled a common prostitute, all that was needed to prosecute them was the evidence of one police officer. On this basis, arrests were made of

[60] Home Office and Scottish Home Department, (n 7), 86.
[61] ibid, 86.
[62] J Phoenix, *Making Sense of Prostitution* (Basingstoke: Palgrave, 1999), 22. This is still seen with the use of anti-social behaviour powers.
[63] Home Office and Scottish Home Department, (n 7), 90.
[64] ibid, 87.
[65] Street Offences Act 1959, s 1(1).
[66] *R v de Munck* (1918) 1 KB 635, 637.

prostitutes not just for working but simply for being in public space.[67] The use of imprisonment as a direct punishment for women convicted of this offence was removed by the Criminal Justice Act 1982.[68] Non-payment of fines can lead to custody, however, so imprisonment remains a possibility for sex workers arrested for soliciting and loitering.[69]

Nearly thirty years later, the Sexual Offences Act 1985 was the first piece of legislation to include the offence of kerb-crawling. It created an offence when a man 'solicits a woman for the purpose of prostitution' from a 'motor vehicle while it is in a street or a public place' or 'while in the immediate vicinity of a motor vehicle he has just got out of' 'persistently' and is 'likely to cause annoyance to the woman (or any of the women) solicited, or nuisance to other persons in the neighbourhood'.[70] This Act also made it an offence to 'persistently solicit a woman (or different women) for the purpose of prostitution'.[71] This legislation was the product of left wing and right wing pressure – feminist reformers who wanted equality in the law, and residents who wanted the nuisance of kerb crawlers removed – and was a hastily drafted compromise.[72] Notably, unlike the Street Offences Act, the kerb crawling offence did require annoyance, so there was not a presumption that the mere presence of the kerb crawler was enough to be nuisance. Moreover, the need for persistence placed a burden of proof on the police that was often impossible to meet, and as such, it was more likely that kerb crawlers would receive warning letters to their address (intended to shame them) than be prosecuted.[73]

[67] S Day, *On the Game: Women and Sex Work* (London: Pluto Press, 2007), 84.
[68] Criminal Justice Act 1982, s 71.
[69] H Kennedy, *Eve Was Framed: Women and British Justice* (London: Vintage, 1992), 147.
[70] Sexual Offences Act 1985, s1.
[71] ibid, s2.
[72] S Edwards, 'The Kerb-Crawling Fiasco: Criminalising the Prelude to Sexual Conduct' (1987) 137 *New Law Journal* 1209, 1209.
[73] P Hubbard, *Sex and the City: Geographies of Prostitution in the Urban West* (Aldershot: Ashgate, 1999), 109.

3.2.3 Early 2000s

At the start of the 21st century, the idea of sex work being a form of nuisance did not disappear. For example, advertising sexual services on or in the immediate vicinity of a public telephone was made illegal by the Criminal Justice and Police Act 2001,[74] targeting the indoor sex market and creating a 'mechanism to regulate the visibility of illicit sexuality'.[75] There has been, however, a growth in other discourses around sex work that have impacted its regulation.

In this period, there has been a shift back to focusing on sexual exploitation, trafficking and slavery, alongside the nuisance approach, reflecting similar worries in the late 19th century. In 2002, the Home Office published *Protecting the Public*, a White paper proposing to modernise sexual offences,[76] taking the position that 'the selling of sex is inherently exploitative'.[77] The report also announced that the Government would perform a review of the laws relating to prostitution, to 'examine the scope for a review of the issues surrounding prostitution and the exploitation, organised criminality and class A drugs associated with it'.[78] While not creating any new set of prostitution offences, the Sexual Offences Act 2003 that followed this report made the offences relating to prostitution gender neutral,[79] and created a new offence of keeping a brothel for the purposes of prostitution.[80] The 2003 Act also provided a definition of prostitute and prostitution: '"prostitute" means a person (A) who, on at least one occasion and whether or not compelled to do so, offers or provides sexual services to another person in return for payment or a promise of payment to A or a third person; and "prostitution"

[74] Criminal Justice and Police Act 2001, s 46.
[75] T Sanders, *Sex Work: A Risky Business* (Devon: Willan, 2005), 96.
[76] Home Office, *Protecting the Public: Strengthening protection against sex offenders and reforming the law on sexual offences* (London: Home Office, 2002), 5.
[77] V Munro, 'Dev'l-in disguise? Harm, privacy and the Sexual Offences Act 2003', in V Munro and C Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Abingdon: Routledge, 2007), 8.
[78] Home Office, (n 76), 31.
[79] Sexual Offences Act 2003, s 56 and Schedule 1.
[80] ibid, s55.

is to be interpreted accordingly.'[81] The Act further created offences against the 'abuse of children through prostitution and pornography';[82] inciting for gain another person to become a prostitute or controlling a prostitute for gain;[83] and trafficking into, out of, and within the UK.[84] Vanessa Munro notes that the Sexual Offences Act 2003 modernised the form but not the substance of the pre-existing offences.[85]

As announced in *Protecting the Public*, in 2004, the Labour Government began a review of sex work related offences. The first of a series of government publications on this topic, the consultation paper, *Paying the Price,*[86] was published in 2004. *Paying the Price* consulted on a narrow range of issues around sex work, including: routes into prostitution; children's coercion and exploitation in prostitution; supporting adults in prostitution; exploitation in the sex industry; links with serious crime; protecting communities; and potential reform options.[87] After receiving responses, the Government then published its *Coordinated Prostitution Strategy*, which set out its five key areas of concern: prevention; tackling demand; developing routes out; ensuring justice; and tackling off street prostitution.[88] The Strategy's only legislative aim was to reform the law on loitering and soliciting.[89] The Government's review was criticised for not attempting a more wholesale reform of the law, or showing a commitment to a more ideologically coherent model.[90]

[81] ibid, s 54.
[82] ibid, ss47-51. This was amended to 'controlling a child in relation to sexual exploitation' by the Serious Crime Act 2015, s 68 (4) (b).
[83] Sexual Offences Act 2003, ss52-54, which updated the 'living on the avails offence'.
[84] ibid, ss 57-60.
[85] V Munro, (n 77), 8.
[86] Home Office, *Paying the Price: A Consultation Paper on Prostitution* (London: Home Office, 2004).
[87] ibid, 3.
[88] Home Office, *A Coordinated Prostitution Strategy* (London: Home Office, 2006), 2.
[89] ibid, 3.
[90] V Munro and M Della Giusta, 'The Regulation of Prostitution: Contemporary Contexts and Comparative Perspectives', in V Munro and M Della Giusta (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Aldershot: Ashgate, 2008), 5.

In order to put the Strategy into effect, the Criminal Justice and Immigration Bill (CJIB) included clauses to remove the term 'common prostitute' from the Street Offences Act, inserting the word 'persistently' instead,[91] and introduce rehabilitative orders as an alternative method of disposal for those found guilty of soliciting.[92] There was also an attempt to include provisions to criminalise the purchase of sex in this Bill.[93] All clauses relating to prostitution were abandoned, however, during the second reading of the Act. These proposed reforms were later included in the Policing and Crime Bill 2008.

Following from the 'tackling demand' branch of the Coordinated Prostitution Strategy, in 2008, the Home Office published a review, *Tackling the Demand for Prostitution*.[94] This review focused attention on the sex buyer – as 'the person responsible for creating the demand for prostitution markets'.[95] It recommended the introduction of a strict liability offence of 'paying for sex with someone who is controlled for another person's gain, in order to protect vulnerable individuals, for example those who have been trafficked or exploited by any other means'.[96] This demonstrates a shift in responsibility for prostitution, from the person selling sex to the person buying sex, reflecting narratives accepted elsewhere, such as in Sweden, that sex workers are victims of male violence.

Tackling the Demand also recommended removing the requirement for persistence in the kerb-crawling offence in the Sexual Offences Act 1985,[97] and creating closure orders for premises 'linked to sexual exploitation'.[98] Provisions based on these recommendations were

[91] Criminal Justice and Immigration Bill, as introduced to the House of Commons on 26 June 2007, clause 71.
[92] ibid, clause 72.
[93] J Phoenix, 'Frameworks of Understanding', in J Phoenix (ed), *Regulating Sex for Sale: Prostitution Policy Reform in the UK* (Bristol: Policy Press, 2009), 24.
[94] Home Office, *Tackling the Demand for Prostitution: A Review* (London: Home Office, 2008).
[95] ibid, 2.
[96] ibid, 4.
[97] ibid, 4.
[98] ibid, 4.

passed into law in the Policing and Crime Act 2009 (PCA),[99] alongside: the removal of the term 'common prostitute';[100] and the creation of Engagement and Support Orders, whereby sex workers, when convicted of soliciting or loitering can be ordered to attend three meetings with a supervisor to support them in exiting sex work.[101] Jane Scoular and Anna Carline have argued that this Act 'represents the most recent and radical legislative representation of neo-abolitionism',[102] centred on the idea that sex work is 'the quintessential expression of patriarchal gender relations and male domination'.[103] There have been further consultations about, and attempts towards, criminalising the purchase of sex since 2009, as discussed in Chapter 1. Therefore, while there have been no legislative changes since the PCA, there remains the potential for future reform in this direction.

3.2.4 The Current Law Clarified

The current law, as explained, has developed over the last century. Below is a table of laws relating to prostitution currently in force in England and Wales, for ease of reference. There are also trafficking offences[104] and child prostitution offences[105] not laid out here because thorough and separate analysis of these is outside of the scope of this thesis.

Soliciting and Loitering for Prostitution Street Offences Act 1959, s 1 (as amended by Policing and Crime Act 2009).	It is an offence for a person (whether male or female) persistently to loiter or solicit in a street or public place for the purposes of offering services as a prostitute. Punishment: Fine or Engagement and Support Order.

[99] Policing and Crime Act 2009, ss14, 19, and 21 respectively.
[100] ibid, s 16.
[101] ibid, s 17.
[102] J Scoular and A Carline, 'A Critical Account of 'Creeping Neo-Abolitionism': Regulating Prostitution in England and Wales' (2014) 14 (5) *Criminology and Criminal Justice* 608, 611.
[103] ibid, 609.
[104] Sexual Offences Act 2003, ss 57-60.
[105] ibid, ss 47-51.

Engagement and Support Orders Street Offences Act 1959, s 1 (as created by Policing and Crime Act 2009).	An alternative disposal for soliciting and loitering offence: Orders requiring the offender to attend three meetings with a designated supervisor, to: address the causes of the conduct constituting the offence, and find ways to cease engaging in such conduct in the future.
Causing or Inciting Prostitution for Gain Sexual Offences Act 2003, s 52.	An offence if a person: intentionally causes or incites another person to become a prostitute in any part of the world, and does so for or in the expectation of gain for himself or third party.
Controlling Prostitution for Gain Sexual Offences Act 2003, s 53.	An offence if a person: intentionally controls any of the activities of another person relating to that person's prostitution in any part of the world; and he does so for or in the expectation of gain for himself or a third party
Brothels Sexual Offences Act 1956, s 33. Sexual Offences Act 1956, s33A (as amended by Sexual Offences Act 2003, s55). Sexual Offences Act 1956, s34. Sexual Offences Act 1956, s35, s 36.	An offence for a person to keep a brothel, or to manage, or act or assist in the management of, a brothel. An offence for a person to keep, or to manage, or act or assist in the management of, a brothel to which people resort for practices involving prostitution (whether or not also for other practices). An offence for a landlord to let his premises to be a brothel. An offence for a tenant to allow premises to be a brothel.
Paying for Sexual Services of a Prostitute Subjected to Force, etc. Sexual Offences Act 2003, s53A (as created by Policing and Crime Act 2009, s14).	An offence if: (A) makes or promises payment for the sexual services of a prostitute (B); A third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual offences for which A has made or promised payment; and C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

	This is a strict liability offence and 'exploitative conduct' is defined as: force, threats (whether or not relating to violence) or any other form of coercion, or any form of deception.
Kerb Crawling Sexual Offences Act 2003, s51A (as created by Policing and Crime Act 2009, s19).	An offence for a person in a street or public place (including a vehicle) to solicit another for the purpose of obtaining their sexual services as a prostitute.
Advertising Criminal Justice and Police Act 2001, s 46.	An offence to advertise prostitution in a public telephone box.

3.3 The Effect of the Law: Responding to or Exacerbating the Problems of Sex Work?

The law on prostitution has developed in such a fragmented way that it is not possible to find a unified approach to framing or tackling the problems of sex work. Rather, the aims of the laws have depended on the most potent concerns at the specific time in which they were created. Analysis of these laws and their effects, therefore, needs to consider both what the particular legislation intended to do, and also its effects. The effects of enforcement must also be examined. Laws provide the mechanism for police to manage sex work, and so laws and enforcement work in tandem. While enforcement differs 'on the ground', the police are still bound by the legislation, so while enforcement matters and may have effects that were not originally intended by legislators, legislation still provides the framework for these enforcement decisions. That is, police have discretion about when and how to enforce laws,

but policy and legal approaches inevitably shape policing practices.[106] Like legal approaches, trends and strategies in policing have followed a number of approaches including regulationism, suppression, and welfarism.[107] Police also use a range of non-prostitution specific laws and powers to target sex workers. These are considered in more detail in Chapter 8. Policing approaches can and do vary significantly across England and Wales, all the while limited by the parameters of the law. This chapter, therefore, considers the effects of the law, recognising the symbiotic relationship between law, its enforcement, and its impact.

3.3.1 Soliciting and Loitering and Kerb Crawling

3.3.1.1 The Stigmatising Construction of the Street Sex Worker

The stigmatising construction of sex workers as deviant pervades the law and discourses behind the law. This idea of the sex worker as deviant is in part *because of* the laws that define their actions as criminal, but also because of the way commercial sex challenges normative assumptions about sexuality, as discussed in Chapter 2. Although the street sex market is increasingly small, part of the law and much police attention still focuses on street sex workers. S 1(1) of the Street Offences Act 1959 states that it 'is an offence for any person (whether male or female) persistently to loiter or solicit in a street or public place for the purposes of offering services as a prostitute'.[108] The Wolfenden Report recommended using the criminal law to manage the more visible elements of the industry in order 'to preserve public order and decency, to protect the citizen from what is offensive and injurious'.[109] Basing the law around the

[106] T Sanders and M Laing, 'Policing the Sex industry: Tackling Exploitation, Facilitating Safety?', in T Sanders and M Laing (eds), *Policing the Sex Industry* (London: Routledge, 2018), 1.
[107] A Feis-Bryce, 'Policing Sex Work in Britain: A Patchwork Approach', in T Sanders and M Laing (eds), *Policing the Sex Industry* (London: Routledge, 2018), 19.
[108] Street Offences Act 1959, s 1 (1).
[109] Home Office and Scottish Home Department, (n 7), 9.

protection of the 'ordinary citizen', the constructed victim of crime and offence cause by the sex worker, the criminal law reinforces the symbolic separation of the 'common prostitute' from the rest of society. This narrative both results from and exacerbates the problem of stigma, as described in Chapter 2.

Sex workers are also presented as a nuisance to the rest of the public in more recent policy documents. A whole chapter of *Paying the Price: A Consultation Paper on Prostitution* is dedicated to 'Protecting Communities',[110] and both the Government's *Coordinated Prostitution Strategy*[111] and their review, *Tackling the Demand*[112] include a focus on nuisance to neighbourhoods where sex work exists. These reports link sex work to pollution, crime, and offence to communities, reflecting the stigmatising narrative of sex workers as contaminants. These documents lay out three particular issues from which communities require protection. The first issue surrounds the physical remnants of sex work in a community – that it leaves a litter of 'used condoms, dirty needles and other drug paraphernalia' in the public places where it takes place.[113] Second, there is a fear of links to serious and violent crime, particularly those relating to drug dealing and gangs – the Government notes in *Paying the Price* that '[s]treet prostitution is often associated with local drug markets, bringing Class A drugs and gun culture to local communities'.[114] According to the Home Office, 'dealing effectively with prostitution could have a dramatic effect on reducing more serious crime and help to stifle drug supply'.[115] Third, these documents again identify a need for community protection from the mere presence of sex work in communities – the *Coordinated Prostitution Strategy* refers to the 'general

[110] Home Office, (n 86), Chapter 7.
[111] Home Office, (n 88), 13.
[112] Home Office, (n 94), 2.
[113] Home Office, (n 86), 63.
[114] ibid, 74.
[115] ibid, 74.

degradation of areas used for street prostitution',[116] while *Paying the Price* states that, due to the presence of prostitution, 'an area becomes undesirable, unpleasant and unsafe, deterring families and businesses from moving in, contributing to a spiral of decline'.[117] By framing its approach as a means of preventing and challenging violent crime in communities, and protecting communities from the pollution of sex work,[118] the Home Office preserves moral undertones against sex work.

The construction of victimised communities opposed to deviant and criminal sex workers leaves little room to understand the complex relationships between sex workers and the neighbourhoods they work in. Maggie O'Neill et al have noted that the Home Office documents have used the term 'community' in a 'homogenous fashion that erases difference and complexity'.[119] Communities are constructed as a solid entity, brought together through their shared experiences of victimisation. Sex workers are rarely constructed as part of this community,[120] even when they work and live in those very neighbourhoods. Little attention is given to the ways that some street sex workers may attempt to mitigate the impact of their work, by working less visibly and keeping their transactions as unobtrusive as possible.[121] Nor is much attention paid to those voices in the community who are more tolerant of street sex work, where it still exists. For instance, Jane Pitcher et al's research in five neighbourhoods found that, for many residents, 'sex work was not considered a high priority in terms of their overall quality of life'.[122] That is, while street sex work has tended to be found in relatively deprived

[116] Home Office, (n 88), 13.
[117] Home Office, (n 86), 62.
[118] P Hubbard, (n 73), 164.
[119] M O'Neill et al, 'Living with the Other: Street Sex Work, Contingent Communities and Degrees of Tolerance' (2008) 4 *Crime, Media and Culture* 73, 80.
[120] M O'Neill and R Campbell, 'Street Sex Work and Local Communities: Creating Discursive Space for Genuine Consultation and Inclusion' in R Campbell and M O'Neill, *Sex Work Now* (Devon: Willan, 2006), 38.
[121] T Sanders, M O'Neill, and J Pitcher, *Prostitution: Sex Work, Policy & Politics* (London: Sage, 2009), 133.
[122] J Pitcher et al, *Living and Working in Areas of Street Sex Work: From Conflict to Coexistence* (Bristol: The Policy Press, 2006), 18.

neighbourhoods, not all residents blame sex workers for local deprivation and disorder.[123] By excluding sex workers from the construction of the community, there is a disregard for the corollary ways that the neighbourhood may, in fact, be dangerous for sex workers, for the reasons expressed by other residents, such as fear of violent or serious crime,[124] and because of vigilante attacks on sex workers.[125]

An attempt to reduce the stigmatising effect of this construction was made when the PCA 2009 removed the term 'common prostitute'.[126] Instead, the word 'persistently' was included so that the offence can only be committed if the person acts persistently.[127] The term 'common prostitute' had been recognised as stigmatising by the Government in the Coordinated Prostitution Strategy in 2006.[128] Its removal was welcomed by sex workers projects,[129] although it was seen as a minimal victory as the law criminalising soliciting and loitering remained. Moreover, the term 'prostitute' continues to frame the law relating to sex work,[130] so while 'common' has been removed, this has not marked a complete shift away from pathologising language.

3.3.1.2 The Laws on Soliciting and Loitering and Kerb Crawling

The soliciting and loitering provision also encourages the physical separation of sex workers from other people, by criminalising sex workers for working in a street or public place. This

[123] M O'Neill et al, (n 119), 79.
[124] J Pitcher et al, (n 122), 19.
[125] H Kinnell, *Violence and Sex Work in Britain* (Devon: Willan, 2008), 89.
[126] Policing and Crime Act 2009, s 16 (2) (a).
[127] ibid, s 16 (2)(b).
[128] Home Office, (n 88), 9.
[129] UK Network of Sex Work Projects, *Memorandum Submitted by UKNSWP to the Public Bill Committee on the Policing and Crime Bill*, January 2009, available at: https://publications.parliament.uk/pa/cm200809/cmpublic/policing/memos/ucm202.htm (last accessed 10 June 2019).
[130] For instance, in Controlling Prostitution for Gain under Sexual Offences Act 2003, s 53.

targets some of the most marginalised sex workers, as discussed in Chapter 2. The soliciting and loitering law defines 'street' widely, to include any 'bridge, road, lane, footway, subway, court, alley or passage… the doorways and entrances of premises abutting onto a street, and any ground adjoining and open to a street'.[131] 'Public place' has not been defined, although case law suggests that this will be widely interpreted and will include areas where the public are invited to go, even if payment is required to do so.[132] It has also been held in *Smith v Hughes* that the person who is doing the soliciting does not need to be in the street or public place, as long as the soliciting extends to that place – for instance if the sex worker is at a window and signals to somebody outside.[133] Lord Parker CJ opined in that case that:

> Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes. Viewed in that way, it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window, or whether the window is shut or open or half open; in each case her solicitation is projected to and addressed to somebody walking in the street.[134]

As such, sex workers may be at risk of arrest in a broad range of areas if suspected to be soliciting or loitering.

Soliciting is not defined in the legislation, and it has been referred to as a 'word of common meaning'.[135] It has been interpreted broadly in case law, not requiring specific words,

[131] Street Offences Act 1959, s 1(4)(c).
[132] *Glynn v Symonds* [1952] 2 All ER 47.
[133] [1960] 1 WLR 830, 832.
[134] ibid, 832.
[135] *Behrendt v Burridge* [1977] 1 WLR 29, 33.

and including tapping on windows, signals, and hissing,[136] waving, sitting in front of a window illuminated by a red light, wearing revealing clothing, and making suggestive gestures.[137] In *Behrendt v Burridge,* the factors that were taken into account were whether the sex worker was 'in the position described in order to advertise that she was a prostitute, that she was then available to render the services of a prostitute, and that the premises were available for such use'. [138] The current availability of both herself and a location to use were pivotal to distinguishing this from merely advertising.[139] Loitering has also not been defined, leaving it up to the police and courts to decide if particular activity is loitering. The lack of definition leaves the possibility of sex workers being arrested for simply being in a street or public place, if it is suspected that she is doing so 'for the purposes of offering services as a prostitute'.[140]

Persistence is defined by the Street Offences Act as taking place on two or more occasions in any period of three months.[141] This could be argued to be a low threshold given that many of the most marginalised sex workers may engage only in street sex work, potentially as their only income source and due to few other options. For the first two occasions, police use a 'Prostitutes' Caution' before they can prove persistence. A Prostitutes' Caution, does not require an admission of guilt or evidence of the criminal offence of soliciting or loitering – all that is required is that two officers have reasonable cause to believe a person has committed the offence, leaving sex workers open to being policed out of areas solely on the basis of police belief.[142] If convicted of a soliciting or loitering offence, they can be liable to a fine not exceeding level 2 on the standard scale,[143] which currently translates to £500,[144] or be ordered

[136] [1960] 1 WLR 830, 832.
[137] [1977] 1 WLR 29, 32.
[138] ibid, 30.
[139] *Weisz v Monaghan* [1962] 1 WLR 262.
[140] Street Offences Act 1959, s 1(4)(b).
[141] ibid, s 1(4)(a).
[142] Home Office, *Home Office Circular No. 109/1959* (1959).
[143] Street Offences Act 1959, s 1(2).
[144] Criminal Justice Act 1982, s 37 (2).

to attend three meetings with a supervisor (engagement and support order).[145] The breadth of the soliciting and loitering offences places street sex workers at a significant risk of arrest, which often leads to self-disciplining behaviour, to avoid police surveillance.

The other law that relates most directly to street sex workers is the kerb crawling provisions, which make it an 'offence for a person in a street or public place (including a vehicle) to solicit another for the purposes of obtaining their sexual services as a prostitute'.[146] The punishment for conviction under this offence is a fine not exceeding level 3 on the standard scale,[147] which is £1000 currently.[148] The definition of street and public place is the same as for the soliciting and loitering offence.[149] It is notable that there is no persistence requirement for this client-focused offence and the fine on conviction is greater. This reflects the shift in policy discourse to see clients as the creators of demand, and therefore more blameworthy in the proliferation of the sex industry. In *Tackling the Demand,* for example, the Home Office stated that it wished to send out 'a clear message to those creating the demand for street-based markets that their behaviour will not be tolerated'.[150] Clients are therefore at risk of conviction in the first instance. Although not directly targeting sex workers, the effects of this law can be significant for sex workers, as discussed below. Therefore, any reform of soliciting and loitering should also consider reform of kerb crawling offences.

[145] Street Offences Act 1959, s 1(2).
[146] Sexual Offences Act 2003, s51A (1).
[147] ibid, s 51A (3).
[148] Criminal Justice Act 1982, s 37 (2).
[149] Sexual Offences Act 2003, s 51A (4)
[150] Home Office, (n 94), 18.

3.3.1.3 Enforcement of Soliciting and Loitering and Kerb Crawling

Soliciting and loitering and kerb crawling are summary offences, with broad definitions, meaning that the police have significant discretion around their enforcement. This is apparent in the varying ways that this is policed. In a number of cities, there are unofficial or official tolerance zones where police allow street sex work to remain as it is contained in a few streets that can be more easily monitored and controlled.[151] Many of these, however, were removed during the Covid-19 pandemic, partly as a result of lockdown laws and strict controls over in-person meetings.[152] Even where more permissive approaches have been taken, this is not necessarily based on understandings of sex workers as workers in need of a safe area to work, but rather still may be about reducing the effects on the community as a priority. [153]

Enforcement policies vary across different cities and change over time. For instance, the West End of London has seen a shift from unofficial police tolerance to 'zero tolerance' policies, 'bolstered by a rhetoric of spatial cleansing and purification', in an attempt to deal with both street and off-street sex work.[154] In some areas, such as Balsall Heath in Birmingham, periodic 'crackdowns' against sex workers have taken place, which have the effect of shifting sex work out of the area temporarily until the police presence has died down and the sex workers return to their beats.[155] Another example of this is Nottinghamshire police force's policing approach, which is based on enforcement, in order to 'tackle the demand through

[151] P Hubbard and T Sanders, 'Making Space for Sex Work: Female Street Prostitution and the Protection of Urban Space' (2003) 27 (1) *International Journal of Urban and Regional Research* 75, 78.
[152] J Rogers and P Money, 'Report to Consider Future Developments with Regards to Addressing and Reducing On-Street Sex Work in the City', 23 June 2021. Available at: https://democracy.leeds.gov.uk/documents/s222594/Managed%20Approach%20Cover%20Report%20140621.pdf (last accessed 13 May 2022).
[153] ibid.
[154] P Hubbard, 'Cleansing the Metropolis: Sex Work and the Politics of Zero Tolerance' (2004) 41 *Urban Studies* 1687, 1688.
[155] P Hubbard and T Sanders, (n 151), 78.

enforcement'. [156] Clients are regularly arrested and required to undertake rehabilitation programmes to address their use of sex work.[157]

An alternative approach can be seen in Liverpool, where police have worked with sex work NGOs to create a policy focused on reducing violent crimes against sex workers, in 2006 appointing a sex work liaison officer and agreeing a policy that all crimes against sex workers be treated as hate crimes.[158] This reflects a broader trend of attempts to recognise a range of motives for hate crimes. For example, in 2016, Nottinghamshire police worked with Nottingham Women's Centre to begin treating misogyny as a hate crime. [159] This led to recommendations to make this a national policy, and to increase education and support around misogynist behaviours,[160] and a House of Lords amendment to the Police, Crime, Sentencing and Courts Bill 2021 to add sex and gender as a protected characteristic in hate crimes.[161] Both the Government[162] and the Law Commission[163] argued that making misogyny a hate crime may be more harmful than helpful in terms of securing convictions and tackling violence against women and girls. This was based on expert evidence from Women's Aid and Rape Crisis that reporting barriers were deeply embedded and that there was no evidence that the Nottingham

[156] A Feis-Bryce, (n 107), 30.
[157] ibid, 30.
[158] R Campbell and S Stoops, 'Taking Sex Workers Seriously: Treating Violence Against Sex Workers as Hate Crime in Liverpool', in *Research for Sex Work: Special Edition on Violence Against Sex Workers* (December 2010), available at: http://www.nswp.org/sites/nswp.org/files/research-for-sex-work-12-english-russian_0.pdf (last accessed 1 June 2019); R Campbell, 'Not Getting Away With It: Linking Sex Work with Hate Crime in Merseyside', in N Chakraborti and J Garland (eds), Responding to Hate Crime: The Case for Connecting Policy and Research (Bristol: Policy Press, 2014).
[159] I Zempi and J Smith, 'Introduction', in I Zempi and J Smith, *Misogyny as Hate Crime* (Abindgon: Routledge, 2022), 1.
[160] L Mullany and L Tricket, 'The Language of Misogyny Hate Crimes: Politics, Policy and Policing', in L Mullany (ed), *Professional Communication: Communicating in Professions and Organisations* (London, Palgrave, 2020).
[161] Baroness Newlove Amendment, After Clause 131 (219) Police, Crime Sentencing and Courts Bill 2021.
[162] Home Office, Policy Paper: Making Misogyny a Hate Crime: Police, Crime, Sentencing and Courts Bill 2021 Factsheet (May 2022), available at: https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-making-misogyny-a-hate-crime-factsheet (last accessed 14 May 2022).
[163] Law Commission, *Hate Crime Laws: Final Report* (Law Comm No 402, 2021), Recommendation 8, para 5.381.

approach had increased reporting of violence against women.[164] The House of Lords amendment was subsequently rejected by the House of Commons.[165] Similarly, Sanders, Scoular and Campbell have suggested that rolling out the Liverpool model, to create a national policy of recognising crimes against sex workers as hate crimes might have important symbolic and material protections for sex workers.[166] Yet, Victoria Holt and Chloe Gott, two academics with lived experience in sex work, argue that hate crime legislation is reactive, gives more power to the police, and fails to deal with the bigger issue facing sex workers, which they argue is criminalisation.[167] While there is debate about whether hate crime is the best approach to responding to violence against sex workers, there is evidence that moving away from an enforcement based strategy in Liverpool has led to improved relations between street sex workers and the police.[168] This model also highlights the possible ways that sex work can be policed and that enforcement-heavy policing is not the only option.

Even within forces, the approach to enforcement can vary across time and depending on the make-up of the sex markets. For instance, in Lancashire, the police force has worked with partners to safeguard sex workers and has tried to avoid enforcement activities where possible.[169] However, in 2013, they pursued heavy enforcement strategies in Blackburn, where the sex work population is more visible and is made up of street sex work beats, in an attempt

[164] Centre for Women's Justice, End Violence Against Women Coalition, Imkaan and Rape Crisis England and Wales, The Decriminalisation of Rape: Why the Justice System is Failing Rape Survivors and What Needs to Change (November 2020), available at https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/C-Decriminalisationof-Rape-Report-CWJ-EVAW-IMKAAN-RCEW-NOV-2020.pdf. (last accessed 14 May 2022).
[165] BBC, 'Crime Bill: MPs Reject Proposal to Make Misogyny a Hate Crime', *BBC News*, 28 February 2022, available at: https://www.bbc.co.uk/news/uk-politics-60565216 (last accessed 14 May 2022).
[166] T Sanders, J Scoular and R Campbell, 'Sex Work, Hate Crime and the Criminal Law' (2022) 86 (2) *The Journal of Criminal Law* 109, 125.
[167] V Holt and C Gott, 'The limits of vulnerability: Arguments Against the Inclusion of Sex Workers within Hate Crime Policy in England and Wales' (2022) 2 *International Journal of Gender, Sexuality and Law* (forthcoming).
[168] Campbell, R, 'Not Getting Away With It: Linking Sex Work with Hate Crime in Merseyside', in N Chakraborti and J Garland (eds), *Responding to Hate Crime: The Case for Connecting Policy and Research* (Bristol: Policy Press, 2014).
[169] A Feis-Bryce, (n 107), 29.

to reduce the size of the street market. After lobbying from a local NHS support project, Lancashire police then reformed its approach to bring it back into line with the rest of its strategy.[170] Once Lancashire's approach was made consistent, the relationship between sex workers and police improved, and sex workers were more likely to report crimes.[171]

When police enforce soliciting laws, this tends to revolve around responding to neighbourhood complaints and managing street sex work. This has the effect of keeping sex work from 'spilling over'[172] into better-off neighbourhoods, as those 'wielding the most political and social power [are] generally most effective in prompting police surveillance and repression'.[173] Notably, these neighbourhoods are nearly always 'wealthier, whiter and more politically articulate'.[174] This often keeps street sex work in more socially deprived areas, and many street sex workers are themselves from deprived backgrounds.[175] This selective enforcement, therefore, reinforces hegemonic structures where the more affluent and powerful citizens are given the most protection from 'deviant' behaviour and nuisance, while those with less power, including street sex workers, are ignored or further stigmatised through their association with 'crime'. The policing of sex work acts as a 'gate' to particular communities, securitising specific geographical locations.[176] This can reinforce the stigma faced by sex workers who are managed out of particular areas.

[170] ibid, 30.
[171] ibid.
[172] P Hubbard and T Sanders, (n 151), 78.
[173] P Hubbard, 'Community Action and the Displacement of Street Prostitution: Evidence from British Cities' (1998) 29 (3) *Geoforum* 269, 272.
[174] P Hubbard, 'Out of Touch and Out of Time? The Contemporary Policing of Sex Work' in R Campbell and M O'Neill (eds), *Sex Work Now* (Devon: Willan, 2006), 2.
[175] M Hester and N Westmarland, *Tackling Street Prostitution: Towards a Holistic Approach* (London: Home Office Development and Statistics Directorate, 2004), 59.
[176] J Simon, (n 42), 19.

Zero-tolerance approaches to either sex workers or their clients can have significant consequences for sex workers' capacity to manage risk of crime and violence. Crackdowns and zero-tolerance enforcement, whether against sex workers or their clients rarely have the desired effect of removing sex workers from the streets. Crackdowns often simply provide reassurance to neighbourhoods that something is being done to deal with the perceived problem, while 'sending out a message to new sex workers and clients that the area is off limits'.[177] Some sex workers, however, prefer to work on the streets[178] or, as discussed in Chapter 2, are unable to work off-street.[179] Therefore, when crackdowns occur, street sex workers do not leave the streets but are often simply displaced to other, more marginal, and less well surveyed areas.

'Cracking down' can lead both street sex workers and their clients to act in a self-disciplining way.[180] Doing so relies on internal, ''self-regulatory' mechanisms of ordering the individual',[181] whereby, in the knowledge that some areas are 'out-of-bounds', and guessing the way that they will be policed, sex workers will move to avoid arrest or police surveillance. This is also true of clients; risk-averse clients will simply re-adjust their activities in terms of time and space.[182] Evidence suggests that punitive policing and crackdowns on kerb crawling may cause sex work to disappear from the area targeted, but only to resurface in another area.[183] Sex workers will follow the clients and work in 'different beats'.[184]

[177] P Hubbard, (n 174), 10.
[178] J Phoenix, 'Prostitution: Problematizing the Definition', in M Maynard and J Purvis (eds), *(Hetero)Sexual Politics* (London: Taylor and Francis, 1995), 68.
[179] J Porter and L Bonilla, 'The Ecology of Street Prostitution', in R Weitzer (ed), *Sex for Sale: Prostitution, Pornography and the Sex Industry* (London: Routledge, 2000), 164.
[180] T Newburn, *Criminology* (Devon: Willan, 2007), 325.
[181] B Fischer and B Poland, 'Exclusion, Risk and Social Control: Reflections on Community Policing and Public Health' (1998) 29 *Geoforum* 187, 187.
[182] A Collins and G Judge, 'Client Participation and the Regulatory Environment', in V Munro and M Della Giusta (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Aldershot: Ashgate, 2008), 143.
[183] P Hubbard, (n 73), 131.
[184] P Hubbard, (n 174), 280.

The displacement of prostitution into more marginal areas disrupts contact between sex workers and their regular clients, who they know are safe,[185] and increases the likelihood of sex workers encountering dangerous clients.[186] The safeguards used by sex workers to lessen risks of violence, abuse, and harassment are threatened. For instance, the process of screening clients, which allows the sex worker to use their intuition and past experience to assess whether a client is likely to be violent or refuse to pay,[187] might be disrupted if the client or the sex worker is afraid of being arrested. Under circumstances where there is less time for the sex worker to screen potential customers, they are at greater risk of picking a 'dodgy' customer.[188]

Working in unfamiliar and less populated environments also breaks up peer networks which are used by those involved in prostitution as safeguards,[189] and breaks contact between sex workers and sex worker support services,[190] meaning that health risks increase. This disruption also means that sex workers might have to work for longer hours to make their money.[191] Some sex workers may also have to rely on third parties, such as pimps, as protection both from the police and from violence on the streets.[192] This increases sex workers' vulnerability to economic exploitation, while displacing sex workers and their clients from usual beats may create a shortage of custom and money that could lead to increased likelihood of third party violence.[193] This has been exacerbated by Covid-19 lockdown measures and increased policing, whereby some of the most marginalised street workers continued to work

[185] H Kinnell, 'Murder Made Easy: the final solution to prostitution?', in R Campbell and M O'Neill (eds), *Sex Work Now* (Devon: Willan, 2006), 147.
[186] L Cusick and L Berney, 'Prioritizing Punitive Responses over Public Health: Commentary on the Home Office Consultations Document Paying the Price' (2005) 25 *Critical Social Policy* 596, 600.
[187] T Sanders, (n 75), 57.
[188] H Kinnell, (n 185), 147.
[189] P Hubbard, (n 174), 284.
[190] L Cusick and L Berney, (n 186), 601.
[191] H Kinnell, (n 185), 147.
[192] J O'Connell Davidson, *Prostitution, Power and Freedom* (Cambridge: Polity Press, 1998), 49.
[193] T Sanders and R Campbell, 'Why Hate Men who Pay for Sex? Exploring the Shift to 'Tackling Demand' in the UK', in V Munro and M Della Giusta (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Aldershot: Ashgate, 2008), 175.

on the streets if possible and faced increased violence along with an almost total loss of income.[194]

The effects on the ground depend significantly on the policing approach taken. Yet, it is the law that creates the possibility of these approaches to sex work, giving police the power to enforce them. The lack of clear definition in the soliciting and loitering offence provides a very broad framework for police enforcement. Policing that relies on non-enforcement correlates with a reduction in crimes against sex workers. Because policing strategies shift across time, however, while these offences continue to exist, police are empowered to use them to detrimental effects. As such, the exacerbation of the stigma and risk of violence and crime that stem from soliciting, loitering and kerb crawling offences can be traced directly back to the legislation, and so a potential HRA challenge to these laws is considered in Chapter 7.

3.3.1.4 Engagement and Support Orders: An Alternative Disposal

The PCA 2009 created an alternative disposal method for soliciting and loitering convictions.[195] These orders, given instead of a fine, require the sex worker to attend three meetings with a designated supervisor to 'help them address the underlying causes of their engagement in prostitution'[196] and 'find ways to cease engaging in such conduct in the future'.[197] The aim of these Engagement and Support Orders (ESOs) is to support sex workers out of sex work with its corollary risks. Teela Sanders argues, however, that these orders are a form of 'forced welfarism' – that is, a criminal sanction that orders sex workers to make

[194] Platt, L et al, 'Sex Workers Must Not be Forgotten in the COVID-19 response' (2020) 396 *The Lancet* 9.

[195] Policing and Crime Act 2009, s 17.
[196] Home Office, *Guidance on Section 17 Policing and Crime Act 2009: Engagement and Support Orders* (London: Home Office, 2010), 2.
[197] ibid, 37.

changes to their lives for their own good and to be rehabilitated back into the community.[198] This reflects the approach that sex work is the result of individual failings.[199] Although ESOs are intended to help people leave sex work, and therefore, indirectly reduce the stigma, violence, and risk of crime they face, these orders may in fact reinforce sex workers' stigma. There is an assumption within these that no normal person would choose to be involved in sex work if they were helped out and alternative options were available. This approach maintains the separation of sex workers from 'normal' people who make 'normal' choices. Further, these orders fail to address the underlying structural and social reasons that sex workers choose to sell sex. As Maggie O'Neill and Jane Scoular put it, 'the realities of violence and vulnerability are not the focus of policy but instead removing uncivil individuals from the streets and communities is the priority'.[200]

The approach to enforcing ESOs may also inadvertently be an aggravating factor for the stigma sex workers face and in terms of sex workers' access to support. The Home Office noted that 'exit' is unlikely to happen after the three meetings subscribed by the order and so repeat orders may be made.[201] In Anna Carline and Jane Scoular's study of the use of ESOs, it was recognised by police that if someone does not engage with the first order, they are unlikely to engage with a second.[202] Yet, it is the practice in many police forces to give two ESOs.[203] Breach of an order leads to either another order or a fine.[204] The use of fines as punishments for not 'being helped' reflects 'the conditionality of welfare', where 'support is only offered

[198] T Sanders, 'Policing Commercial 'Sex Work' in England and Wales' in P Johnson and D Dalton (eds) *Policing Sex* (Abingdon: Routledge, 2012), 142.
[199] A Carline and J Scoular, 'Saving Fallen Women Now? Critical Perspectives on Enforcement and Support Orders and their Policy of Forced Welfarism' (2015) 14 (1) *Social Policy and Society* 103, 108.
[200] J Scoular and M O'Neill, 'Regulating Prostitution: Social Inclusion, Responsibilization and the Politics of Prostitution Reform' (2007) 47 *British Journal of Criminology* 764, 770.
[201] Home Office, (n 196), 39.
[202] A Carline and J Scoular, (n 199), 107.
[203] ibid, 107.
[204] Home Office, (n 196), 29.

with deterrence, containment and discipline'.[205] Moreover, the 'supervisor' is under a duty to inform the court if the sex worker fails to comply with an order.[206] Often the 'supervisor' is someone who works with a sex work outreach project already, meaning that by obliging them to report a breach they are forced into becoming agents of the state.[207] Many supervisors who are also support workers are concerned about informing about a breach as this then affects their 'street cred', the trust placed in them by sex workers,[208] making it more difficult for the projects to support sex workers in a long-term capacity. By making engagement with these agencies and projects mandatory, the ESOs may in fact be reducing the effectiveness of engagement. This is significant in terms of stigma because, as noted in Chapter 2, many sex workers do not access appropriate health and welfare services for fear of being 'outed' or judged. The reduction of engagement with sex worker specific services will augment this issue.

While it can be seen as positive to encourage sex workers to engage with support if it is needed, doing this on a voluntary basis is more likely to create the context for relationships of trust to be formed. The link between the ESOs and criminal breaches is problematic, but, as noted above, ESOs are simply a disposal order for the soliciting and loitering offence, and their effects can be traced directly back to these broadly defined offences. If these offences were repealed, then ESOs and their potentially negative effects would no longer exist. Instead, the same end could be met more effectively by funding sex worker services that already offer support to sex workers wishing to transition away from sex work.

[205] T Sanders, (n 198), 144.
[206] Policing and Crime Act 2009, Schedule 1, para 2(1).
[207] T Sanders, (n 198), 143.
[208] A Carline and J Scoular, (n 199), 109.

3.3.1.5 Civil Orders

Simply removing the soliciting and loitering and kerb crawling offences is not likely to be sufficient to change the police's approach to street sex work. This is because police also use non sex work-specific orders and powers to spatially manage sex work out of certain areas. One example is the use of injunctions and Criminal Behaviour Orders (CBO),[209] which replace Anti-Social Behaviour Orders (ASBO).[210] CBOs can be given when the court is satisfied beyond reasonable doubt that the person has 'engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person',[211] and 'making the order will help in preventing the offender from engaging in such behaviour'.[212] Injunctions can also be put in place to 'prohibit the respondent from doing anything described in the injunction'[213] or 'require the respondent to do anything in the injunction'[214] where the 'court is satisfied, on the balance of probabilities, that the respondent has engaged *or threatens to engage* in anti-social behaviour'.[215] Anti-social behaviour is defined widely as 'conduct that has caused, or is likely to cause, harassment, alarm or distress to any person', 'conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises, or 'conduct capable of causing housing-related nuisance or annoyance to any person'.[216] These can be used, therefore, where sex workers simply threaten annoyance or nuisance whether on the street or indoors, which as noted, has long been imputed to the mere presence of sex workers in public spaces. Civil orders are considered in more detail in Chapter 8, which considers whether their use may, at times, be a violation of sex workers' rights under the ECHR.

[209] Anti-Social Behaviour, Crime and Policing Act 2014, ss 1 and 22.
[210] Crime and Disorder Act 1998, s 1(1).
[211] Anti-Social Behaviour, Crime and Policing Act 2014, s 22(3).
[212] ibid, s 22(4).
[213] Anti-Social Behaviour, Crime and Policing Act 2014, s 1(4)(a).
[214] ibid, s 1(4)(b).
[215] ibid, s 1(2).
[216] ibid, s 1(1).

Data suggests that there has been a reduction in the use of soliciting and loitering offences, in favour of civil orders as they 'can be issued without impunity' and are a way of displacing sex workers without having to demonstrate that all of the requirements of the soliciting and loitering offences, such as the persistence requirement, have been fulfilled.[217] Civil orders, therefore, are often seen as more efficient than a fine in removing sex workers from certain areas.[218] Although they are civil orders, breaching a CBO or an injunction, or failing to comply with a dispersal order can lead to a conviction punished by imprisonment or a fine.[219] Sex workers often live in the same areas as they work, and these orders have the effect of banning them from public space in their own neighbourhoods.[220] This use of non sex work-specific laws demonstrates the ways in which policing can reinforce the exclusion of sex workers, even from their own communities. As such, removal of soliciting and loitering and kerb crawling offences *alone* is unlikely to significantly reduce the problematic effects of punitive policing of street sex work, and so policing approaches more broadly must also be reconsidered.[221]

3.3.2 Brothel Keeping and Causing/Inciting/Controlling Prostitution for Gain

3.3.2.1 Victims and Nuisances Under the Law

Despite the prevalent focus on publicly offensive behaviour, indoor sex work has far from escaped the remit of legislation. Indoor offences were consolidated and expanded in the Sexual

[217] A Feis-Bryce, (n 107), 22.
[218] T Sagar, 'Tackling On-Street Sex Work: Anti-Social Behaviour Orders, Sex Workers and Inclusive Inter-agency initiatives' (2007) 7 (2) *Criminology and Criminal Justice* 153, 155.
[219] Anti-Social Behaviour, Crime and Policing Act 2014, s 30. Breach of an injunction is dealt with as contempt of court under the Contempt of Court Act 1981.
[220] See, for example, http://prostitutescollective.net/2013/07/26/we-won-not-guilty-of-breaching-an-anti-social-behaviour-order/ (last accessed 1 June 2019).
[221] Chapter 8 considers potential HRA implications of several areas of policing practice.

Offences Act 2003, which included the offences of causing and inciting prostitution for gain;[222] controlling prostitution for gain;[223] and created an offence of keeping a brothel for the purposes of prostitution, with an increased penalty of up to seven years imprisonment.[224] This latter offence was included because the existing offence of keeping a brothel did not require payment for sexual services but just that more than one woman was offering sexual intercourse therein[225] (although when creating the new offence, the old broad offence of keeping a brothel was not repealed).

Off-street offences have been typically concerned with tackling 'pimps, brothel keepers and others who seek to encourage, control and exploit the prostitution of others'.[226] This approach is reiterated in *Tackling the Demand*, where the Home Office states that sex workers 'working both on and off street, are subject to coercion, control, and exploitation',[227] and therefore all sectors should be tackled. In the Government's *Coordinated Prostitution Strategy*, an entire section was dedicated to 'Tackling Off Street Prostitution'.[228] In this, the Home Office stated that 'working off street can be as dangerous and exploitative as working on the streets'.[229] Criminal justice responses and powers have been augmented due to the spectre of (ill-defined) exploitation[230] and the rising concern about sex workers' 'vulnerability'.[231] There is a failure to recognise that this might make working in off-street locations more risky for sex workers

[222] Sexual Offences Act 2003, s52.
[223] ibid, s53.
[224] ibid, s55.
[225] *Winter v Wolfe* (1931) 1 KB 549.
[226] S Edwards, 'Prostitution, Ponces and Punters: Policing and Prosecution' (1987) 137 *New Law Journal* 928, 928.
[227] Home Office, (n 94), 6.
[228] Home Office, (n 88), 60.
[229] ibid, 60.
[230] J Phoenix, 'Be helped or else! Economic exploitation, male violence and prostitution policy in the UK', in V Munro and M Della Giusta (eds) *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (London: Ashgate, 2008).
[231] V Munro and J Scoular, 'Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK' (2012) 20 *Feminist Legal Studies* 189.

and increase sex workers' vulnerability to more mundane forms of economic exploitation, where they rely on third parties or online platforms, exacerbated by lack of legal protections, and imbalanced power structures throughout their working lives. The 'nuisance' of indoor premises has also remained part of the policy discourse around off-street sex work. In the *Coordinated Prostitution Strategy*, the Home Office stated that premises can 'cause considerable nuisance in the neighbourhood'.[232] This mirrors narratives that, like those around street sex, posit sex worker premises as 'noxious neighbours',[233] reinforcing stigma for sex workers.

3.3.2.2 The Law on Brothel Keeping and Causing/Inciting/Controlling Prostitution for Gain

Laws around brothel keeping and controlling/causing/inciting prostitution for gain[234] make it difficult for sex workers to work with others. This can result in indoor sex workers having to choose between working with another person to help to manage risk of crime or working legally. This has an impact on all sex workers who sell in-person sexual services indoors, whether they advertise online or not, as the law regulates where the services may take place. Under ss33-36 of the Sexual Offences Act 1956, a range of actions relating to brothels are criminalised. These include: keeping a brothel, managing, or assisting in the management of a brothel,[235] for the purposes of prostitution, whether or not also for other practices;[236] letting a premise to be a brothel;[237] and, as a tenant, allowing a premises to be used as a brothel.[238] Brothel is not defined

[232] Home Office, (n 88), 60.
[233] P Hubbard, S Boydell and P Crofts, 'Noxious neighbours? Interrogating the impacts of sex premises in residential areas' (2013) 45 (1) *Environment and Planning A* 126.
[234] These are often considered together but actually have separate definitions.
[235] Sexual Offences Act 1956, s 33.
[236] ibid, s 33A.
[237] ibid, s 34.
[238] ibid, s35-36.

by the statute, but has been defined in case law as 'where more than one woman resorts to premises for the purpose of prostitution then those premises are a brothel.'[239]

The breadth of these brothel offences and the definition of brothel mean that any flats, saunas and massage parlours can fall within the definition of brothel if more than one person is using it for prostitution. This is the case, even if the two people do not work at the same time, or if one person is the tenant and is allowing another person to work in their flat.[240] It was held in the case of *Stevens v Christy* that 'if there is a joint use of them then such premises were not precluded from being a brothel by the fact that on any one day only one prostitute was present.'[241] The definition of brothel has also been held in *Donovan v Gavin* to include rooms or flats in the same building even if they are let separately. [242] If only one sex worker works in the premises, it is not, therefore, a brothel. This means that landlords do not break the law by renting to one sex worker but break the law if they knowingly allow two to work there.[243] This contrasts with the offence where a tenant knowingly permits the premises to be used for prostitution, even if only by one sex worker,[244] even though that particular sex worker is not doing anything illegal. The wide definition of brothel and the numerous situations covered by this law can also have an impact on the family of sex workers, as it is an offence to allow a child or young person between the ages of four and 15 years old to live in or visit a brothel.[245] This can then open up sex workers with children to prosecution and repercussions with social services if they work from their home with another sex worker, even if the work never occurs

[239] *Stevens v Christy* (1987) 85 Cr App R 249, 251
[240] ibid, s 36.
[241] (1987) 85 Cr App R 249, 251.
[242] [1965] 2 QB 648, 649.
[243] Sexual Offences Act 1956, s 34.
[244] Sexual Offences Act 2003, s 36.
[245] Children and Young Persons Act 1933, s 3.

while the child is in the home. The law leaves little capacity for sex workers to work indoors unless done alone.

To determine whether a person is keeping, managing, or assisting in managing a brothel,[246] there needs to be a degree of control exercised over the running of the brothel. When two sex workers are working together in a shared premises, they are both at risk of being arrested under brothel keeping laws. The law does not define what level of control is required, leaving a lack of certainty for those sex workers who wish to work with another person, for example a maid or receptionist, to manage the risk of violence or crime. Simply working as a maid, for example, would not necessarily be managing or assisting in the management of a brothel, but if their involvement is key to the running of the brothel, they may be charged.[247] Activities that might be used as evidence include: having a say in what services are offered and their cost; taking money and banking or bookkeeping; putting up adverts; paying bills; and supplying materials.[248] The legal uncertainty around what could be determined to be brothel keeping makes it difficult for sex workers to know if they would be breaking the law, and so they might choose to work alone to avoid that risk.

A similar issue is raised by the controlling prostitution for gain offence. [249] Section 53 (1) states that a person commits the offence of controlling prostitution for gain if they 'intentionally control any of the activities of another person relating to that person's prostitution in any part of the world'[250] and 'does so for or in the expectation of gain for himself or a third

[246] Sexual Offences Act 1956, ss 33-33A.
[247] CPS, *Prostitution and Exploitation of Prostitution*, available at: https://www.cps.gov.uk/legal-guidance/prostitution-and-exploitation-prostitution (last accessed 1 September 2019).
[248] Release, *Sex Workers and the Law* (London: Release, 2018), 21.
[249] Sexual Offences Act 2003, s 53(1).
[250] ibid, s 53(1)(a).

party'.[251] 'Gain' is defined widely as 'any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount',[252] or 'the goodwill of any person which is or appears likely, in time, to bring financial advantage'[253]

The offence of controlling prostitution for gain was considered in the decision of *R v Massey,*[254] where the Court of Appeal held that the word 'control' does not require any force or coercion, and can be fulfilled where a 'defendant instructs or directs the other person to carry out the relevant activity or do it in a particular way'.[255] Although this offence was originally intended to focus on exploiters, it can now cover a range of people. The *Massey* judgment expands the offence beyond controlling the sex worker's 'prostitution' to controlling any activities related to that prostitution.[256] This makes the term controlling almost meaningless as so many activities could be covered. Any person who directs a sex worker in any way (this could be keeping their diary, for example), to make a gain (wages from the sex worker employing them, for example), could now be covered by this offence. The range of people who could be prosecuted includes family members or partners, if they share income or support one another financially.[257]

The offence of causing or inciting prostitution for gain[258] is also poorly defined. Neither of the terms cause or incite are defined in the provision, although the explanatory notes to the Act state that it intends to cover 'those who, for gain, recruit others into prostitution, *whether*

[251] ibid, s 53(1)(b).
[252] ibid, s 54 (1)(a).
[253] ibid, s 54 (1)(b).
[254] [2007] EWCA Crim 2664.
[255] ibid, [20].
[256] D Ormerod, 'Case Comment: Controlling a prostitute for gain: Sexual Offences Act 2003 s.53 - "control" – meaning' (2008) *Criminal Law Review* 719.
[257] G Pheterson, 'The Whore Stigma: Female Dishonour and Male Unworthiness' (1993) 37 *Social Text* 39, 45.
[258] Sexual Offences Act 2003, s 52.

this be by the exercise of force or otherwise' (emphasis mine).[259] There is no need for force so, like s 53, this provision could be used to prosecute a vast range of working relationships, where sex workers have been 'recruited' into prostitution by simply being employed in a brothel, for example.[260] This offence is based on the understanding that sex work is not a valid choice and therefore recruiting is in itself problematic, in a way that recruiting into other work would not be. Moreover, where non-consensual incitement occurs, this situation would already be criminal under the offence of causing a person to engage in sexual activity without consent.[261] Therefore, causing or inciting prostitution for gain adds criminality to otherwise voluntary involvement in sex work, making it difficult for sex workers to work with others in a legal way.

The combination of these laws has the effect of creating a loophole whereby the only way to sell sex without potentially risking breaking the law is if sex workers work alone.[262] Sanders' research with indoor sex workers demonstrates that sex workers who work alone face heightened risk and vulnerability to crime and violence. [263] Many of her respondents stated that they favoured collective working environments because of the risk that clients might become violent, even though they then risked arrest. [264] Laura Connelly et al found similar results when they performed a data analysis of 2,227 reports made to National Ugly Mugs (NUM) database between 2012 and 2016.[265] NUM is a charity that supports sex workers when they are victims of crime.[266] Sex workers confidentially report crimes to NUM and the information is collected into one database, which is then used to send alerts and warnings out to other sex workers about

[259] Sexual Offences Act 2003 Explanatory Notes, Commentary on s 52.
[260] B Brooks-Gordon, 'Gendered Provisions in The Sexual Offences Bill 2003: Prostitution.' (2003) 53 (1) *Criminal Law Matters* 28, 28.
[261] Sexual Offences Act 2003, s 4.
[262] T Sanders, (n 75), 94.
[263] ibid, 78.
[264] ibid, 78.
[265] L Connelly, D Kamerāde, and T Sanders, 'Violent and Nonviolent Crimes Against Sex Workers: The Influence of the Sex Market on Reporting Practices in the United Kingdom' (2018) *Journal of Interpersonal Violence* 1.
[266] National Ugly Mugs, available at: www.uglymugs.org (last accessed 20 September 2019).

potentially dangerous clients.[267] In Connelly et al's analysis, 29.7% of reports were from independent sex workers, compared to only 5.9% coming from indoor sex establishments, such as brothels and massage parlours, where sex workers work together.[268] This examination of the laws relating to indoor sex work suggests that the legal context exacerbates sex workers' risk of crimes against them, by encouraging sex workers to work alone or risk criminalisation.

Many off-street sex workers do, in fact, prefer to break the law and work together or within a managed establishment, because of the increased likelihood of violence or being victims of crime when working alone. Sex workers tend to face less risk of violence in brothels and saunas, but they do face increased risk of poor management practices.[269] Where sex workers work with a third party whether they are working for a 'pimp' or they are working under the 'house rules' of brothels,[270] they are vulnerable to economic exploitation (such as high fees, withheld payment, and fines) and poor working conditions. Although the working conditions facing indoor sex workers vary greatly across markets of indoor sex work,[271] reduced options to work legally can increase the power that third parties have to enforce poor working conditions and control over sex workers' work. In contradiction to the intention to protect sex workers from exploitation in indoor markets, tight criminal controls with overly broad definitions may in fact increase the problems of work organisation faced by sex workers, as they rely on third parties whose actions are not regulated by labour law. Again, it can be argued that even with varying enforcement approaches, the law affects the organisation of sex work, pushing sex workers to choose between working alone and facing increased risk of

[267] L Connelly, D Kamerāde, and T Sanders, (n 265), 6.
[268] ibid, 9.
[269] J Phoenix, (n 178), 74.
[270] W Chapkis, *Live Sex Acts: Women Performing Erotic Labour* (London: Cassell, 1997), 100.
[271] T Sanders, (n 75), 14.

violence and crime, or working with others and risking prosecution or problematic work conditions.

In order to support sex workers' capacity to work with others to manage the risk of violence, crime and poor working conditions, the laws on indoor sex work need to be reformed or repealed. In particular, I argue that s 53 no longer holds any meaning and should be repealed or reformed to more narrowly define control, and s 52 should either be reformed to require coercion or force (although I argue in Chapter 4 that labour law would more appropriately respond to these issues) or be repealed. Finally, brothel laws should be reformed to allow collective working, allowing at least two sex workers to work together without potentially breaking the law.

3.3.2.3 Closure Orders

The Policing and Crime Act 2009 also increased police powers against indoor sex establishments, giving them the power to close sex work establishments.[272] These provisions give the police powers to close down properties if they have reasonable grounds for believing[273] that the premises have been used within the previous three months[274] for one of the relevant offences. Along with child sexual offences, these offences include controlling prostitution for gain and causing or inciting prostitution for gain.[275] The offence of keeping a brothel is not one of the specified offences under the closure powers. Given that all that is required is 'reasonable grounds for believing' that one of the third-party offences exists, however, the fact that a premises is a brothel might be used as evidence for this belief.

[272] Policing and Crime Act 2009, s.21 and Sch 2.
[273] ibid, s 136B (6).
[274] ibid, s 136B (5)
[275] ibid, s 136A (2).

The breadth of the controlling offence has the effect that if a sex worker is working with a third party, such as a receptionist, maid, or security person, and they are considered to be 'directing' the sex work, under the broad definition of *Massey*, she may be forced out of the premises and the premises closed. Because this can apply to both residential and business premises,[276] this could result in the sex worker losing her home or at least access to it. Moreover, raids of brothels can impact sex workers, who have reported being 'dragged out onto the streets and photographed by journalists who have been invited along by the police'.[277] The impact of closure orders therefore reflects the serious consequences of *Massey*'s broadening of the controlling prostitution for gain offence. In one instance, the police attempted to use a sign advertising the premises as proof of a person profiting and therefore controlling, causing, or inciting prostitution for gain.[278] It is not only the closure orders per se that create the risks for sex workers in this situation, but rather that they are applied in light of a poorly and widely defined criminal offence, and police may exploit this wide offence to enact heavy enforcement. Therefore, both the controlling/causing/inciting for gain offences and police practice around raiding premises more generally needs to be rethought to avoid these closure orders being misused. Analysis on both of these points is found in Chapters 7 and 8 of this thesis.

3.3.4 Paying for Sexual Services from a Prostitute Subject to Force, etc.

The Policing and Crime Act further created a strict liability offence of paying for sexual services of a prostitute subject to force.[279] The Home Office has stated that this provision was made 'to enable the UK to meet its international obligations to discourage the demand for

[276] ibid, s 136C.
[277] A Feis-Bryce, (107), 24.
[278] ibid, 25.
[279] Policing and Crime Act 2009, s 14.

sexual services'.[280] Force is defined in the legislation as 'force, threats or any form of coercion' or 'any form of deception'.[281] These terms remain very broad. The Home Office subsequently has set out non-legislative definitions which arguably make the offence even more untenable:

- force should be given its ordinary meaning and includes physical force;
- threats include physical and psychological threats, such as threats to report to police or immigration authorities; to restrict access to children or family; to withdraw accommodation or financial support; to withdraw love/affection; to take action that would make the second person feel guilty or responsible; to restrict freedom of movement; to tell family or friends about their involvement in prostitution; or to harm their family;
- coercion includes situations that involve dominating or unequal relationships where influence is used over the person, or their vulnerabilities are exploited, including: young age; physical or mental incapacity, illness or disability; drug/alcohol dependency; history of abuse; economic disadvantage, social status or social exclusion; or immigration status;
- deception includes deception into providing the sexual services, the identity of the person receiving the sexual services; or as to the terms of its provision.[282]

These are set out to demonstrate the vast range of scenarios that could fall within the remit of this offence, allowing almost any unequal power relationship to constitute 'force, threats or any form of coercion or deception'. This extensive range of scenarios has not been tested in the

[280] Home Office, *Provisions in the Policing and Crime Act 2009 that Relate to Prostitution*, Home Office Circular 006/2010 (2010), [11].
[281] Sexual Offences Act 2003, s 53A (3).
[282] Home Office, (n 280), [18] – [22].

courts and so they are not part of the law. That being said, the Home Office definitions suggest that this offence has been envisioned as a catch-all that would cover as many potential scenarios as possible.

The second key issue with this offence is the strict liability element. This was included due to the difficulties of achieving convictions if it had to be shown that the purchaser knew or ought to have known that the sex worker was subject to force.[283] However, the lack of mens rea requirement means that purchasers can be punished even when there is no way of knowing that the sex worker is subject to force.[284] This is particularly problematic given the breadth of the definitions, so, in effect, every person who purchases sex may be open to prosecution under s 14. This reflects one of the key aims of this provision that is to alter the behaviour of sex work clients by deterring them from purchasing sex at all through fear of this risk. In this way, s 14 reflects the ways that criminal law can be used to manage and manipulate behaviour through systems of governance.[285] Moreover, the crime is committed as soon as the payment or promise of payment is made, so if a customer suspects that the sex worker was subject to coercion or force *after* payment or promise of payment has been made, and chooses not to continue with the transaction, the crime has already been committed.

In Sarah Kingston and Terry Thomas' study in 2014, s 14 had not been used by 81% of police forces across England and Wales, 'which in itself questions the need for the new strict liability offence'.[286] As such, the 'protection' afforded to the potential victims of forced prostitution by s 14 appears to be minimal, supporting Anna Carline's assertion that the

[283] J Scoular and A Carline, (n 102), 608
[284] S Kingston and T Thomas, 'The Police, Sex Work, and Section14 of the Policing and Crime Act 2009' (2014) 53 (3) *Howard Journal of Criminal Justice* 255, 260.
[285] J Simon, (n 42), 4.
[286] S Kingston and T Thomas, (n 284), 262.

provision is more about morality than protection.[287] As Carline and Jane Scoular have noted, 'as opposed to focusing on the crimes committed, the law has collapsed harm, disease and anti-social behaviour with the activity of purchasing sex, which in and of itself becomes a problematic identity'.[288]As such, this could worsen the stigma of sex work, both for clients and workers. Moreover, as Teela Sanders and Rosie Campbell argue, the risk of crime to sex workers could be increased by this offence.[289] For instance, clients may be deterred from reporting suspected exploitation because of the fear of being arrested themselves, and, like in Sweden, sex work might get pushed to margins to avoid punishment, thus putting sex workers in increased danger of harm due to their increasing invisibility.[290] This suggests the benefit to the 'forced prostitute' is minimal, while any incursion into the lives of the 'offender', in this case both the sex purchaser and the 'voluntary' sex worker, including increased stigma or risk of violence, can be justified to the public.[291]

3.3.5 Policing and Trust

The approach taken to policing sex work more generally can be significant. One effect can be sex workers' willingness to report crimes, although this is also affected by other factors, such as migration status, and drug use, which may lead to fears about criminal and immigration laws. Comparing data of crimes reported to NUM and those reported to the police, Alex Feis-Bryce noted a disparity in the proportion reported to the police depending on the enforcement

[287] A Carline, 'Critical Perspectives on the Policing and Crime Act 2009: An Unethical Approach to the Regulation of Prostitution?' (2010) 10 (2) *Contemporary Issues in Law* 77; A Carline, 'Of Frames, Cons and Affects: Butlerian Perspectives on the Responses to Trafficking for the Purposes of Sexual Exploitation' (2012) 20 (3) *Feminist Legal Studies* 207.
[288] J Scoular and A Carline, (n 102), 613.
[289] T Sanders and R Campbell, (n 193).
[290] J Levy and P Jakobssen, 'Sweden's abolitionist discourse and law: Effects on the Dynamics of Swedish Sex Work and on the Lives of Swedish Sex Workers (2014) 14 (5) *Criminology and Criminal Justice* 593, 598.
[291] J Simon, (n 42), 196.

approach taken.[292] Lancashire police, as mentioned above, changed their approach to policing to be consistently focused on safeguarding sex workers rather than enforcing the law. In doing so, the proportion of sex workers who reported to the police when they were a victim of a crime increased from 17% to 95% in two years.[293] Conversely, in Nottingham, where policing is enforcement-focused, reporting is low. Of 62 incidents reported to NUM in 2012 (including four rapes, four attempted rapes, nine sexual assaults, and 32 violent attacks), only two sex workers reported to the police.[294] This suggests that when sex workers expect unsympathetic treatment and, therefore, do not wish to identify themselves as sex workers at the risk of potential criminal consequences or increased surveillance, they are less willing to report.[295]

Connelly et al's study found that independent indoor sex workers were the least likely to report crimes they faced to the police, potentially because they are less visible to the police and wish to remain that way.[296] Sex workers working in indoor premises may also be more reluctant to report to the police because of the risk that they will face brothel keeping charges if they alert police to their work.[297] Kinnell suggests that this increases the risk of violence, as violent customers, fake customers, and the public may be encouraged to commit violence in the knowledge that they probably will not be reported.[298] Brooks-Gordon also suggests that indoor premises might be seen as 'soft targets' because of the low likelihood of reporting.[299] The police's practice after a crime is reported can also have a significant impact on the trust between police and sex workers, and the risks sex workers will choose to face rather than report. For example, police are able to seize and freeze assets when that money is 'the proceeds of

[292] A Feis-Bryce, (n 107), 30.
[293] ibid, 30.
[294] ibid, 31.
[295] B Brooks-Gordon, *The Price of Sex: Prostitution, Policy and Society* (Devon: Willan, 2006),202.
[296] L Connelly, D Kamerāde, and T Sanders, (n 265), 18.
[297] ibid, 17.
[298] H Kinnell, (n 185), 142.
[299] B Brooks-Gordon, (n 295).

crime',[300] for instance if it is earnings in a brothel. When this occurs, sex workers' trust in the police is likely to reduce. As such, policing strategies that are based on enforcement or heavy controls of sex work can increase the risk of violence and poor working conditions and reduce sex workers' willingness to manage these risks by reporting to the police.

3.4 Conclusion

In this chapter, I have performed a close examination of the law relating to sex work and how it mitigates or exacerbates the problems faced by sex workers as delineated in the previous chapter. I began this chapter by tracing the development of the law on prostitution in England and Wales from the 19th century onwards. I highlighted how the law has been framed by and frames particular concerns around prostitution that are oft repeated. I noted that prostitution in the Vagrancy Act 1824 focused on the nuisance and deviancy of sex work, before concerns around public health and disease became the driver of the law in the later 19th century in the Contagious Diseases Acts. Following this, fear of 'white slavery' and social purity informed the provisions created to protect women from the exploitation of prostitution in the Criminal Amendment Act 1885. The Wolfenden Report, which is the basis for much of the current law on prostitution, marked a return to constructing prostitution as nuisance and something to be managed out of public areas. More recently, concerns about slavery and exploitation have returned, shifting the blame for prostitution onto clients, and pushing towards more punitive laws to 'tackle the demand' for sex work. In following these developments, this section highlighted the cyclical nature of understandings about sex work, and how to regulate it.

[300] Proceeds of Crime Act 2002, 6 and 47C.

The next section of this chapter considered the extent to which the law and its enforcement respond to or exacerbate the problems of sex work. In doing this, I examined both the legal framework and how it is implemented, noting the interrelated nature of law and enforcement but recognising the variance in policing approaches across the jurisdiction. I began by considering the laws on soliciting, loitering and kerb crawling, the laws that relate to street prostitution. While recognising the significantly reduced level of street sex work, particularly since the Covid-19 lockdowns, I noted that for those who continue to sell sex on the street, who are usually multiply marginalised, the law continues to have profound effects. I argued that the constructions of sex work that inform the law on loitering and soliciting reinforce the stigma faced by sex workers. Moreover, the law on soliciting and loitering is very broadly defined, providing significant powers for police to spatially separate these sex workers from the rest of society. The enforcement of these laws varies, with some police forces taking a more punitive approach than others. I argue that crackdowns and zero tolerance approaches push sex workers into more remote areas, breaking up peer networks, and reducing sex workers' capacity to manage risks of violence and crime. Policing approaches vary temporally and spatially, and, therefore, sex workers face uncertainty in how the laws will be implemented. Because the uncertainty and its effects stem from the breadth of the laws, I argue in this chapter that the laws on soliciting and loitering and kerb crawling should be repealed, which is considered further in Chapter 7. This would also respond to concerns that the alternative disposal, Engagement and Support Orders increase stigma and reduce engagement with support services. I argue, however, repealing sex work specific laws would not alone be sufficient to respond to the problems of street sex work, as police also employ civil orders to spatially manage sex work, and so changes to policing approaches more generally are also required, as discussed in Chapter 8.

The second set of laws I considered in this chapter relate to indoor sex work: brothel keeping and causing/inciting/controlling prostitution for gain. I note that these laws have been framed as ways to reduce exploitation in indoor sex work, but that they increase the likelihood of sex workers facing risk of violence or poor working conditions. These provisions have been very widely defined, meaning that, if sex workers work together or with another person, they risk breaking the law. As such, they impact those who sell sex in person indoors, whether they advertise online or work in more traditional structures. Working alone increases sex workers' vulnerability to crime, so this combination of laws result in sex workers choosing between working safely or working legally. This chapter also demonstrated that the breadth of these laws can impact sex workers' private lives beyond their sex work. I argue that the law on brothels should be reformed to allow at least two sex workers to work together, the law on controlling prostitution for gain should be repealed or reformed to create a narrower interpretation of control, and causing/inciting prostitution for gain should be repealed or reformed to avoid the exacerbation of risks of violence and poor working conditions. The ways in which the Human Rights Act 1998 could be used to support these reforms is discussed in Chapters 7 and 8 of this thesis.

This chapter then considered the recently adopted offence of paying for sexual services from a prostitute subject to force. The breadth of scenarios that could be covered by this offence, I argue, makes it over-inclusive and unworkable. The strict liability element may deter clients from reporting when they suspect coercive practices for fear of being arrested. This law, it is argued, provides little benefit to victims of force, coercion, etc, but worsens the risks faced by other sex workers and should therefore be repealed or reformed to remove the strict liability element and define force more narrowly. Finally, I considered policing approaches and how punitive approaches can deter many sex workers from reporting crimes and reduce the trust sex

workers have in the police. This lack of trust is worsened where there is combined fear of immigration laws and criminal laws, so migrant sex workers are even less likely to report crimes to the police. Therefore, policing needs to be considered alongside the law in any reform effort.

The suggestions made here provide a floor rather than a ceiling for reforms. Reframing sex work as work could trigger a more holistic shift in the regulation of sex work. Changing the laws that exacerbate the problems faced by sex workers, however, should be a key focus of reform efforts. Alternative forms of approaching sex work need to be considered to determine if they can more successfully minimise the problems of sex work. In the next chapter, I examine the benefits and limitations of a labour-based approach to sex work. This chapter analyses the benefits and limits of this approach, considering a labour rights approach as an offshoot of a human rights approach, allowing for later consideration of what a broader human rights approach can do to respond to the problems faced by sex workers that a labour-based approach would not.

Chapter 4

REGULATING SEX WORK AS WORK: THE BENEFITS AND LIMITS OF A LABOUR LAW APPROACH TO SEX WORK

4.1 Introduction

The sex worker rights movement has argued for many years that understanding and regulating sex work as work is the best way to improve the working lives and safety of sex workers and recognise the human rights of sex workers. This, it has been argued, is important for a number of reasons, in particular because thinking of sex work in this way: reflects and respects the agency of sex workers; recognises the multitude of sex worker experiences; moves away from the conflation of sex workers' work with their identity; and reflects the economic nature of the sex industry and decisions to sell sex. The current regulation of prostitution through criminal law also reduces sex workers' capacity to negotiate the working dynamics of the industry due to the possibility of prosecution and sex workers' lack of legal status as workers and the corollary protections of labour rights. Alongside this, state reticence to legitimise commercial sex through more active regulation of conditions within the market has permitted the growth of unregulated sex markets that are open to coercion,[1] and place sex workers at heightened risk of exploitative conditions.[2]

In this chapter, I explore what a labour-based approach to sex work could look like, and the benefits and limits of such an approach in tackling the problems of sex work. As discussed in Chapter 2, the ways that sex workers organise their work are various. With the increased

[1] A Goldman, 'Cultural and Economic Perspectives Concerning Protection of Workers' Social Dignity' in R Blanpain (ed), Labour Law, Human Right and Social Justice (Kluwer Law International: The Hague, 2001).
[2] R Hensman, 'Defending Workers' Rights in Subcontracted Workplaces' in A Hales and J Wills (eds), Threads of Labour: Garment Industry Supply Chains from the Workers' Perspective (Blackwell: Oxford, 2005).

reliance on internet advertising, only a small minority of sex workers in England and Wales have what could be considered any sort of employment relationship. This would predominantly apply to those who work in managed brothels, massage parlours, or saunas, where a third party has some control over their working conditions. As demonstrated in this chapter, most sex workers (including those working on the street or indoors and independently advertising) would more accurately be considered as independent or self-employed, meaning that there is no person or company against which to claim labour rights. The focus of UK labour law on employment relationships, therefore, significantly reduces the impact that labour rights in the current climate would have on most sex workers' lives, and on reducing the problems of sex work set out in Chapter 2. Recognising sex work as labour does, however, necessitate a shift in the way that sex work has been regulated through criminal law in England and Wales. Allowing sex workers to navigate the sex industry without fear of prosecution could, it will be shown, help to improve working conditions for sex workers and reduce the stigma and risk of violence and crime faced by sex workers.

A labour-based approach does not sit in opposition to a human rights-based approach,[3] which is explored in the next four chapters; rather it will be considered in conjunction with human rights. Labour rights are often framed as a subset of human rights,[4] but human rights go beyond the working relationships and conditions of work to consider the sex worker and their interactions with the state more broadly. This chapter, therefore, takes a step towards answering the question what a human rights- (and, particularly, HRA-) based approach can do, by

[3] The relationship between labour rights and human rights is interesting. It is argued by many that labour rights are human rights. See: K Kolben, 'Labor Rights as Human Rights' (2010) 50 (2) *Virginia Journal of International Law* 449; J Fudge, 'The New Discourse of Labour Rights: From Social to Fundamental Rights?' (2007) 29 *Comparative Labor Law and Policy Journal* 29. Moreover, a number of labour rights are included in the Universal Declaration of Human Rights 1948: Article 23 on the right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment, and the right to equal pay for equal work; Article 24 on the right to reasonable limitation of working hours. However, labour rights have had less political recognition than human rights.

[4] V Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 (2) *European Labour Law Journal* 151.

addressing the limits of labour law alone. I argue that labour rights, whether under the current labour law or through a sector-specific approach, can only go so far in addressing the stigma, risk and problematic working conditions faced by sex workers, before considering the extent to which human rights can fill the lacuna left.

In the first section of this chapter, I consider the conditions under which sex work can be recognised and regulated as a form of labour. In this section it is argued that, like other forms of work, there are cases where the conditions of labour are so problematic that to leave them solely in the hands of labour law would be dangerous and neglectful,[5] and may breach the state's international obligations towards its citizens.[6] Acknowledging that some sex workers face extreme exploitation and violence and responding to those cases more directly, however, does not necessitate refusing other sex workers benefits which would uphold their safety and rights. Reaching beyond a binary dichotomy between forced and voluntary sex work, this section draws on the International Labour Organisation's (ILO) standards of Unacceptable Forms of Work and Decent Work to provide a more nuanced account of the factors that should be considered. I argue that age, control, coercion and working conditions should all be considered to draw the distinction between unacceptable and acceptable forms of sex work, and particularly that the criminal law is needed to continue to protect children and people subjected to forced labour.

I then examine the applicability of current labour law and rights to sex work, arguing that this is significantly limited by the organisation of sex work. Labour law in England and Wales differentiates between stratifications of employment relationships, meaning that

[5] ILO, *Area of Critical Importance: Protecting Workers from Unacceptable Forms of Work* (Geneva: ILO, 2015).
[6] *Siliadin v France* [2005] ECHR 545.

'employees', 'workers' and self-employed contractors have unequal access to labour rights and protections. Drawing on the law around employment relationships, even sex workers who do work in managed spaces rather than independently, are often legally 'contractors for services' rather than 'workers' or 'employees'.[7] As Deirdre McCann states, the current focus of labour law on the standard employment relationship has 'inhibited labour law from reaching certain elements of the constituency it would optimally protect, economically dependent workers, by excluding from its coverage workers who do not work according to this model'.[8] That is, people in some of the most precarious work, whether in the sex industry or otherwise, do not fall within the categories that offer the most protections. Yet, like self-employment or independent trade in other industries, the fact that someone is not in an employment relationship does not mean they do not work. There are some very limited state protections available to self-employed people, as we saw with the support given to self-employed workers during the Covid-19 lockdown.[9] This section will explore labour law stratifications and current statutory protections around working conditions available in labour law and their potential to be used by sex workers, and the limits of these, including who might benefit from them. It will argue that, because of the varied organisation of sex work, the type of protections afforded to 'workers', such as minimum pay and working time protections, may offer little benefit for sex workers even when they are in a working relationship with a third party.

[7] *Cotswold Developments Construction Ltd v Williams* (2006) IRLR 181 EAT – the difference between workers (performing labour) and self-employed contractors (providing services) was a distinction between someone who is recruited by the principal to work for the principal as an integral part of the business operation and someone who actively markets his services as an independent person to the world in general.
[8] D McCann, *Regulating Flexible Work* (Oxford: Oxford University Press, 2008), 30.
[9] This was available under certain conditions, including that the self-employed worker had traded for at least two years and submitted tax assessments in that period. For more details, see: HMRC, 'Claim a grant through the coronavirus (COVID-19) Self-employment Income Support Scheme', 26 March 2020, available at: https://webarchive.nationalarchives.gov.uk/ukgwa/20200327133327/https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme (last accessed 16 May 2022).

Finally, I will draw on examples from jurisdictions that have employed a labour-based approach to evaluate the potential impacts of these approaches to the problems of sex work, as delineated in Chapter 2. No approach has created a system where sex workers are fully empowered in the face of poor working conditions or are able to work without fear of violence and without stigma or marginalisation. What is apparent, however, is that moving away from a focus on criminal law can provide a legal framework wherein sex workers can work with *less* risk of violence and crime, allowing sex workers opportunities to navigate the industry without fear of prosecution, and providing some rights to challenge problematic working conditions.[10] For example, reforms in New Zealand that remove their criminal laws relating to soliciting, the keeping of brothels and escort agencies,[11] allow for most sex workers[12] to legally work on the streets and indoors collectively, thus reducing reliance on third parties. Such an approach is not a 'silver bullet' for sex workers, as that would require there to 'be one singular problem, rather than a matrix of oppressions that act together'. [13] Power dynamics such as capitalism, gender, poverty, and race, and laws relating to migration and borders, continue to have a constituting effect on sex workers' lives and works. Overall, this chapter argues that approaches to sex work as labour can provide some benefits to some sex workers in relation to the minimisation of the problems set out in this thesis, and their capacity to manage them, but is limited by the heterogeneous organisation of the sex industry.

[10] M Rekart, 'Sex Work Harm Reduction' (2005) 366 *The Lancet* 2123; K Blankenship and S Koester 'Criminal Law, Policing Policy, and HIV Risk in Female Street Sex Workers and Injection Drug Users' (2002) 30 *Journal of Law and Medical Ethics* 548; L Armstrong, 'Screening clients in a street-based sex industry: Insights into the experiences of New Zealand sex workers' (2014) 47 (2) *Australian and New Zealand Journal of Criminology* 207.

[11] New Zealand Prostitution Reform Act 2003 (PRA).

[12] The protections in the Prostitution Reform Act are not extended to anyone with a temporary or resident visa, and visas will not be granted on the basis that someone will work in the commercial sex industry, as per PRA 2003, s 19.

[13] J Mac and M Smith, *Revolting Prostitutes: The Fight for Sex Workers' Rights* (London: Verso, 2018), 190.

4.2 Conditions of Acceptable Labour

One of the problems set out in Chapter 2 was the problematic organisation and conditions of some sex work. Many sex workers do not rely on a third party in their working lives, instead communicating with clients through the internet or, less commonly, on the street. Where a third party is involved, however, there are some situations where the work is highly controlled, exploited, or even forced. Respecting that most sex workers have agency and recognising them as workers does not require ignorance of those who are subject to unacceptable working conditions within the sex industry. It is often sex workers who are the most marginalised through extreme poverty, structural inequalities, migrant status, and multiple forms of discrimination who suffer the greatest exclusions from acceptable working conditions.[14] In order to regulate sex work in a way that does not further marginalise these sex workers, there must remain working standards below which we do not regard conditions of work to be acceptable. As Prabha Kotiswaran states, we must ask the question in relation to sex work 'whether certain conditions of labor should be permissible at all.'[15] The approach of drawing a line is not unique to sex work. Standards of acceptability have been applied to work for decades; these are the basis for much domestic labour and employment law and are the subject of numerous international conventions and declarations. In this section, I draw on international standards around acceptable conditions of labour to distinguish between acceptable and unacceptable labour conditions.

Attempts have been made nationally and internationally to delineate between acceptable and unacceptable labour conditions. The International Labour Organisation (ILO),

[14] J Mac and M Smith, ibid, 70; M Kenny, D Blustein, E Gutowski, T Meerkins, 'Combatting marginalization and fostering critical consciousness for decent work' (2018*) Interventions in Career Design and Education* 55.
[15] P Kotiswaran, *Dangerous Sex, Invisible Labor: Sex Work and the Law in India* (Princeton: Princeton University Press, 2011), 27.

in its Declaration on Fundamental Principles and Rights at Work, sets out core universal principles and rights falling into four categories: freedom from forced labour; freedom from child labour; freedom from discrimination at work; freedom to form and join a union, and to bargain collectively.[16] As Gary Fields notes, 'jobs in which these core labour standards are not respected cannot be regarded as decent. In fact, they can be characterized as indecent work: work in conditions so odious or harmful that it would be better for people not to work at all than to work in such damaging conditions'.[17] As such, we cannot accept work that falls below these standards. Part of labour law's remit is to secure conditions above these standards, but also when the standards are not met, it is often more appropriate for this to fall within the remit of criminal law – for example, the criminal law on forced labour.

The ILO notes that its Fundamental Principles and Rights are universal rights that should apply to all workers,[18] and the UK has ratified all eight conventions that put these principles into effect.[19] These principles can provide an important framework for setting labour standards, as the UK is bound by the conventions, meaning that all workers in the UK should be subject to the protections set out therein. The ILO has previously argued for the recognition of the sex industry and for focus to be placed on 'improving working conditions and social protection, and on ensuring that [sex workers] are entitled to the same labour rights and benefits

[16] ILO, Declaration on Fundamental Principles and Rights at Work of 18 June 1998.
[17] G Fields, 'Decent Work and Development Policies' (2003) 142 *International Labour Review* 239, 242.
[18] ILO, (n 16), 2.
[19] ILO, Convention concerning Freedom of Association and Protection of the Right to Organize, ILO Convention No. 87 of 9 July 1948; ILO, Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, ILO Convention No. 98 of 1 July 1949; ILO, Convention concerning Equal Remuneration, ILO Convention No. 100 of 29 June 1951; ILO, Convention concerning the Abolition of Forced Labour, ILO Convention No. 105 of 5 June 1957; ILO, Convention concerning Discrimination in Respect of Employment and Occupation, ILO Convention No.111 of 25 June 1958 ; ILO, Convention concerning Minimum Age for Admission to Employment, ILO Convention No. 138 of 26 June 1973; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, ILO Convention No. 182 of 17 June 1999.

as other workers'.[20] More recently, the ILO has also explicitly incorporated sex workers into international labour standards in its Recommendation Concerning HIV and AIDS and the World of Work,[21] and states that sex workers were implicitly included within the category 'all workers working under all forms or arrangements, and at all workplaces, including…persons in any employment or occupation.'[22] As such, ILO protections can and should be extended to sex workers.[23]

The ILO has gone further than just setting out protections from the very worst forms of exploitation to instead aim for the proliferation of 'Decent Work'.[24] What is required by this agenda is not just putting people into work, but rather, creating jobs of acceptable quality.[25] The ILO describes decent work as 'opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity'.[26] Decent work encompasses, inter alia: creating sustainable environments in which individuals can develop skills; health and safety conditions; the provision of social security; policies in relation to wages, hours, and working conditions; and the promotion of the fundamental rights set out above.[27]

[20] L Lean Lim, *The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia* (Geneva: ILO, 1998), 212
[21] ILO, *Recommendation concerning HIV and AIDS and the World of Work, 2010* (No. 200) (Geneva: ILO, 2010).
[22] ibid. See also C Overs and B Loff, 'Toward a Legal Framework that Promotes and Protects Sex Workers' Health and Human Rights' (2013) *Health and Human Rights Journal*, available at: http://www.hhrjournal.org/2013/10/03/toward-a-legal-framework-that-promotes-and-protects-sex-workers-health-and-human-rights/ (last accessed 1 June 2019); ILO, *Reaching Out to Sex Workers and Their Clients*, available at: http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@ilo_aids/documents/genericdocument/wcms_185717.pdf (last accessed 1 June 2019).
[23] See also, M García, 'The ILO and the Oldest Non-profession' in U Bosma and K Hofmeester (eds), *The Lifework of a Labor Historian: Essays in Honor of Marcel van der Linden* (Leiden: Brill, 2018).
[24] Put in place by the ILO Declaration on Social Justice for a Fair Globalization of 10 June 2008. See also, S Lee and D McCann (eds), *Regulating for Decent Work: New Directions for Labour Market Regulation* (Geneva: ILO, 2011).
[25] J Howe, 'The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation, and Decent Work', in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford: OUP, 2011), 298.
[26] ILO, *Decent Work: Report of the Director General, International Labour Conference* 87th Session, (Geneva: ILO,1999).
[27] ibid, 10.

Given that there are several indicators of decent work,[28] 'decent work is not a single entity or point; rather, it is a frontier'.[29] This recognises for example, that 'the level of pay and working conditions considered to be decent differs across countries', but also holds that 'the principle that as many persons as possible should have decent pay and working conditions is a universally accepted concept'.[30] The ILO, through the Decent Work Agenda, has extended labour policy beyond both the formal labour market and the conventional employment relationship, calling for the improvement of conditions of labour, whether organised or not, wherever it may occur and whether in the formal or informal economy.[31] Therefore, the Decent Work Agenda can still be useful when considering sex work, which largely takes place in the informal economy.

The parameters set out by the Decent Work Agenda can be used to delineate between working conditions that are and are not acceptable in sex work. In fact, a particular focus of the Decent Work Agenda is the reduction of unacceptable forms of work. Unacceptable Forms of Work (UFW) is defined as: 'conditions that deny fundamental principles and rights at work, put at risk the lives, health, freedom, human dignity and security of workers or keep households in conditions of poverty'.[32] This can be considered a 'normative floor' for working relations.[33] The ILO also recognises that vulnerability to UFW is heightened in historically disadvantaged groups, such as women, young workers, recent migrants, ethnic minorities, and people with disabilities,[34] which reflects the pattern of vulnerable people working in the most precarious

[28] R Anker, I Chernyshov, P Egger, F Mehran and J Ritter, *Measuring Decent Work with Statistical Indicators* (Geneva: ILO, 2002).
[29] G Fields, (n 17), 246.
[30] R Anker et al, (n 28), 3.
[31] D McCann and J Fudge, 'Unacceptable forms of work: A multidimensional model' (2017) 156 (2) *International Labour Review* 147, 152.
[32] ILO, *The Director-General's Programme and Budget proposals for 2014–15, Report II (Supplement), International Labour Conference, 102nd Session* (Geneva: ILO, 2013), 49.
[33] D McCann and J Fudge, (n 31), 150.
[34] D McCann and J Fudge, *Unacceptable Forms of Work (UFW): A Global and Comparative Study* (Geneva: ILO, 2015), 4.

markets of sex work, as discussed in Chapter 2. The ILO sets out twelve substantive dimensions of UFW: forced labour; health and safety; income; security; working time; representation and voice mechanisms; child labour; social protection; equality, human rights and dignity; legal protection; family and community life; and work organisation.[35] Strategic focus on a few of these dimensions has been used by the ILO in different contexts to challenge unacceptable forms of work. For example, 'zero hours' contracts in the UK have been challenged on the basis that they do not promote acceptable levels of income, security and working time.[36] Deirdre McCann and Judy Fudge argue that in order to meet the demands of the UFW model, specific rights may be needed for zero hours workers; including the prohibition of casual work in vulnerable arenas, notice of schedules and overtime; incentives for continuous hours; compensation for short or cancelled call out periods; and in-shift periods counted as working time.[37] This example highlights a number of considerations that are relevant if UFW standards are used for the purposes of regulating sex work. First, not all dimensions must be below standard for work to be considered unacceptable; secondly, the UFW framework can be used as a basis for regulating work outside of the conventional employment relationship; and thirdly, that to tackle UFW, sector-specific labour legislation may be required. Examples of sector-specific labour legislation are discussed later in this chapter to evaluate to what extent they address the problems of sex work as set out in Chapter 2.

The recognition that some work is simply unacceptable can be utilised as a framework to set the standards of work for sex workers. Where the fundamental principles of UFW are not met, this is unacceptable and may require more direct intervention through criminal law (for example, in relation to child prostitution or forced labour), but in other cases, labour rights and

[35] ibid, 7.
[36] D McCann, and J Fudge, 'A Strategic Approach to Regulating Unacceptable Forms of Work.' (2019) 465 (2) *Journal of Law and Society* 271, 295.
[37] ibid, 296.

labour law may be used to improve the standards to make it 'decent work'. In the following subsections, I explore some of the conditions that should be taken into consideration when deciding whether sex work is acceptable. Like the ILO, I take a strategic approach to this endeavour, focusing on particularly relevant UFW dimensions, rather than all twelve. The conditions discussed below are age (child labour), coercion (forced labour), control, and general working conditions (work organisation, income, health and safety, working time).

4.2.1 Age

The first condition to consider is age, as child labour is one of the key dimensions of unacceptable work. The terminology around child involvement in commercial sex, like that relating to sex work, is loaded. Although a number of international conventions refer to 'child prostitution',[38] the broader term 'child exploitation' (CSE) has more recently been preferred by the UN,[39] the Council of Europe,[40] and within England and Wales.[41] The term CSE reflects a distinction between adult sex work and child involvement in the industry, whereby children are considered to be victims of exploitation rather than agents.[42]

Often entry into CSE is coupled with experiences of social deprivation or abuse in the children's lives.[43] As Jo Phoenix notes, empirical research shows that there is a clear

[38] Convention on the Rights of the Child (CRC) General Assembly resolution 44/25 of 20 November 1989, Article 34 (b); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, General Assembly resolution A/RES/54/243 of 25 May 2000, Article 1; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, ILO Convention No. 182 of 17 June 1999.
[39] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, General Assembly resolution A/RES/54/243 of 25 May 2000, Article 3.
[40] Council of Europe, *Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse*, 12 July 2007, CETS 201.
[41] Serious Crime Act 2005, s 68.
[42] Department of Education, *National Action Plan on CSE* (London: DfE, 2011).
[43] T Sanders, *Sex Work: A Risky Business* (Devon: Willan, 2005), 19.

correlation between 'neighbourhood decline, poor education and problems in school, running away, homelessness, social isolation, sexual abuse, growing up in or leaving Local Authority Care, disrupted family lives and young people's involvement in prostitution'.[44] She argues that for many young people, prostitution becomes a survival strategy, to improve their lives, or simply to provide money to live.[45] Homelessness is also a factor: the 'aspects of vulnerability that [homeless youths] share are poverty, separation from parental care and exposure to life on the street with its attendant opportunities for learning alternative means for survival.'[46] Even though, like adult sex work, CSE often occurs due to economic reasons, and often out of desperation, the provision of labour rights and protections is insufficient as a response. Different considerations must apply to children[47] who are selling sex, no matter the conditions under which they are working.

There are also international obligations to tackle CSE. The 1989 UN Convention on the Rights of the Child, Article 1, defines 'child' as 'every human being below the age of 18 years unless, under law applicable to the child, majority is attained earlier'.[48] While this differs from the ordinary age of sexual consent in the UK, which is 16, 18 is used as a cut off in a range of laws relating to sexual activity,[49] recognising that children are not as able to consent as adults and that the younger they are the more susceptible to abuse they are. Although some contend that this age differentiation is a form of paternalism that does not respect children's sexual

[44] J Phoenix, 'In the Name of Protection: Youth Prostitution Policy Reforms in England and Wales' (2002) 22 *Critical Social Policy* 353, 361.
[45] ibid.
[46] L Cusick, A Martin, and T May, *Vulnerability and Involvement in Drug Use and Sex Work*, Home Office Research Study 268 (London: Home Office, 2003), 4.
[47] For reasons discussed below, the definition of a child is a person under 18.
[48] Convention on the Rights of the Child (CRC) General Assembly resolution 44/25 of 20 November 1989, Article 1. This is also reflected in domestic law under the Children Act 1989 s1, which requires courts to give a child's welfare paramount importance in decisions, with child being defined as anyone under the age of 18.
[49] Sexual Offences Act 2003, ss5-26.

autonomy,[50] in the context of commercial sex, there are compelling reasons for distinguishing between adult sex workers and children selling sex. This mirrors other protections given where children may be particularly vulnerable to exploitation from adults. While it has been argued in this thesis that adult sex workers can have agency and, therefore, may be able to negotiate the structural limitations on free consent, children are more vulnerable to the structures and vested interests in the sex sector, and, in certain contexts, are much more likely to be victims of control and other conditions of confinement.[51] Moreover, the UK is party to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Article 1 of which requires the prohibition of child prostitution.[52]

The protection of children involved in CSE has also been considered paramount in responses to child labour. The ILO has two conventions on child labour – the ILO Convention No 182 on the Worst Forms of Child Labour 1999 and the ILO Convention No 138 on the Minimum Age for Admission to Employment and Work 1973. In the Convention on the Worst Forms of Child Labour, the ILO recognises that 'child labour is to a great extent caused by poverty and that the long-term solution lies in sustained economic growth leading to social progress, in particular poverty alleviation and universal education'.[53] In the Convention on the Minimum Age for Admission to Employment and Work, Article 3 states: 'the minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall

[50] For discussion of the arguments around childhood sexual autonomy, see: M Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (London: Palgrave, 2005), Chapter 1; S Jackson, *Childhood and Sexuality* (Oxford: Blackwell, 1982); J O'Connell Davidson, *Children in the Global Sex Trade* (Cambridge: Polity Press, 2005).
[51] L Lean Lim, 'Whither the sex sector? Some policy considerations' in L Lean Lim (ed), *The Sex Sector* (Geneva: ILO, 1998), 212.
[52] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, General Assembly resolution A/RES/54/243 of 25 May 2000, Article 1.
[53] Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, ILO Convention No. 182 of 17 June 1999.

not be less than 18 years'.[54] The Convention on the Worst Forms of Child Labour, which defines 'a child' as a person under the age of 18, sets out 'the use, procuring or offering of a child for prostitution' as one of the worst forms of child labour.[55] Combining these two Articles, then, it is clear that ILO standards set an age limit on what can be considered acceptable in sex work, the minimum age being 18.

Given that these ILO and UN Conventions are ratified by the UK, regulating sex work as a form of labour in England and Wales must be confined to people over 18. Purchasing sexual services from a person under the age of 18 must continue to be a criminal offence,[56] and aiding, abetting, counselling or procuring the purchase of sexual services from someone under 18 (eg. by allowing them to work in a brothel) must also continue to attract criminal liability.[57] There must be something said about policy relating to youth prostitution in England and Wales. While having sex with a child under the age of 16 is illegal,[58] and purchasing sex from a child under the age of 18 is illegal,[59] the age of criminal responsibility in England and Wales is 10.[60] A child could be guilty, therefore, of one of the offences related to sex work, while also being too young to legally consent to sex. This has recently been addressed in the Serious Crime Act 2015, which amends the Street Offences Act, s1 to apply only to persons over the age of 18.[61] This does not, however, remove the possibility of children being convicted of one of the other offences, for instance brothel keeping. The decision to not foreclose the possibility of conviction for children under other sex work related offences highlights this problematic approach, and suggests that social policy needs to be developed to deal with youth

[54] ILO, Convention concerning Minimum Age for Admission to Employment, ILO Convention No. 138 of 26 June 1973, Article 3.
[55] ibid.
[56] Sexual Offences Act 2003, s 47
[57] Accessories and Abettors Act 1861, s 8.
[58] Sexual Offences Act 2003, s 9.
[59] Sexual Offences Act 2003, s 47.
[60] Children and Young Persons Act 1933, s 50.
[61] Serious Crime Act 2015, s 68 (7).

prostitution.[62] In line with the recognition that child prostitution should not be considered to be acceptable work and international obligations towards children, children should not be at risk of prosecution and the offence of purchasing sex from a child under the age of 18 (and secondary liability for such an offence) should remain in place.

4.2.2 Force and Coercion

Forced labour is another key dimension of unacceptable labour that must be considered when delineating acceptable forms of sex work. Forced labour in the sex industry is linked to the problems of violence and conditions of work as set out in Chapter 2 and may fall within criminal laws on both forced labour and sexual offences.[63] The focus on force and coercion in relation to sex work in England and Wales has largely been linked to trafficking offences.[64] Internationally, coercion or force remains one of the issues in assessing whether someone has been trafficked, under the Palermo Protocol.[65] For trafficking to legally exist, there are three elements which must be fulfilled: the act (or recruitment, transportation); the means to enforce the act (threat, use of force); and the outcome (exploitation). This can be compared to the definition of smuggling – seen as voluntary – which states that smuggling is 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'.[66] As Rutvica Andrijasevic notes, the two definitions (smuggling and trafficking) thus rely on a

[62] Howard League for Penal Reform, *Out of Place: The Policing and Criminalisation of Sexually Exploited Girls and Young Women* (London: Howard League, 2012). Discussion of what this would look like is beyond the scope of this thesis.
[63] Causing someone to engage in non-consensual sexual activity is already an offence under Sexual Offences Act 2003, s 4. If someone is forced into selling sex and their consent is not, therefore, given, the person undertaking the force would be liable under this offence.
[64] See Modern Slavery Act 2015, s 2.
[65] UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, General Assembly resolution 55/25 of 15 November 2000, Article 3.
[66] ibid.

neat separation between involuntary and non-consensual (ie. trafficking) and voluntary and consensual (ie. smuggling) processes of migration.[67] The significance of the trafficking debate can be seen in the ever-growing government focus on 'victims of trafficking' (VoTs) and exploitation within the sex industry.[68] Not only does this not cover 'local' sex workers' working conditions, but the most significant issue appears to be whether the person has been moved at some stage into sex work. Under the law of England and Wales, exploitation and force is assumed if the movement is into the sex industry,[69] while in other industries, force, threat or deception must be proven,[70] reflecting the position that sex work is inherently exploitative.[71]

Concern over forced or coerced labour and exploitation in the sex industry does not need to be linked intrinsically to voluntariness at the point of entry or to travel. Instead, we can use the framework of forced labour to challenge particular working conditions in the sex industry. By prioritising a distinction, based on foreknowledge, 'the law neither empowers most migrant prostitutes by protecting their rights as workers, nor offers assistance to the majority of abused sex workers who may be interested in leaving the trade'.[72] That is, a person may be voluntarily involved in the sex industry and yet the conditions under which they work may be coerced or unfree. As Laura Agustín puts it, '"knowing beforehand" that one will sell sex may be a poor measure of potential exploitation and unhappiness, because it is difficult, if not impossible, to know what working conditions will feel like in future jobs (a problem not

[67] R Andrijasevic, *Migration, Agency and Citizenship in Sex Trafficking* (London: Palgrave Macmillan, 2010), 7.
[68] Home Office, *Tackling the Demand for Prostitution: A Review* (London: Home Office, 2008), 6.
[69] Sexual Offences Act 2003, ss57-59A
[70] See Modern Slavery Act 2015, ss 2-3 and Schedule 1; Asylum and Immigration (Treatment of Claimants) Act 2004, s 4.
[71] V Munro, 'An Unholy Trinity? Non-Consent, Coercion and Exploitation in Contemporary Legal Responses to Sexual Violence in England & Wales' (2010) 63 (1) *Current Legal Problems* 45, 64.
[72] W Chapkis, 'Soft Glove, Punishing Fist: The Trafficking Victims Protection Act of 2000', in E Bernstein and L Schaffner (eds), *Regulating Sex* (New York: Routledge, 2005), 58.

unique to sexual occupations)'.[73] Evidence suggests that many sex workers (migrant or otherwise) know they are going to be working in the sex industry and agree to do so, but are lied to about the conditions, for instance about the conditions of their labour or the amount of debt they have to repay.[74] Within the UFW framework, indicators of forced labour go beyond deception to include a range of working situations, thus allowing for a fuller consideration of coercion.[75]

The ILO Convention 29 Concerning Forced or Compulsory Labour 1930 and the ILO Convention 105 Concerning the Abolition of Forced Labour 1957 both require states that ratify them (which includes the UK) to suppress and not to make use of forced or compulsory labour.[76] Forced labour is defined as 'all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[77] The ILO has argued that there must be a distinction between forced labour and other poor work conditions and situations in which there is a pure economic need to work.[78] Where people sell sex due to poverty or economic necessity, then, this would not usually be considered forced labour. Instead, it highlights that regulation of acceptable forms of labour must be situated in the context of broader understanding of the need for stronger social support, better pay and working conditions across all industries. The ILO, however, recognises that this distinction between interpersonal force and economic need is difficult and that there is a continuum that includes both forced labour and other forms of abuse and exploitation.[79]

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[73] L Agustín, 'Migrants in the Mistress's House: Other Voices in the "Trafficking" Debate' (2005) 12 (1) *Social Politics* 96, 102.
[74] J Doezema, 'Loose Women or Lost Women: The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) *Gender Issues* 23, 32-3.
[75] D McCann and J Fudge, (n 31), 169.
[76] ILO, Convention concerning Forced or Compulsory Labour, ILO Convention No. 29 of 28 June 1930, Art 1; ILO, Convention concerning the Abolition of Forced Labour, ILO Convention No. 105 of 5 June 1957, Art 1.
[77] ILO, Convention concerning Forced or Compulsory Labour, ILO Convention No. 29 of 28 June 1930, Art 2.
[78] B Andrees, *Forced Labour and Human Trafficking: A Handbook for Labour Inspectors* (Geneva: ILO, 2008).
[79] ILO, *The Cost of Coercion: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Report I (B) (Geneva: ILO, 2009), 8.

England and Wales now has a stand-alone offence of forced labour under the Modern Slavery Act 2015 which creates an offence of 'slavery, servitude, forced or compulsory labour'.[80] The definitions of these offences are to be construed in line with Article 4 of the ECHR, which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour.[81] Although much of the Modern Slavery Act 2015 still relates to trafficking, this provision provides a wider scope to consider forced labour, taking a small step to decouple forced labour from trafficking.[82]

This is also reinforced in Article 4 of the European Convention on Human Rights (ECHR), which prohibits slavery, servitude, and forced or compulsory labour. As such, a human rights approach also requires acceptable working conditions. Given that the definition of these domestic offences is also linked with Article 4 ECHR, it is important to consider key judgments of the European Court of Human Rights (ECtHR) in relation to this Article, in particular the landmark ECtHR cases on forced and compulsory labour, *Siliadin v France*[83] and *Rantsev v Cyprus and Russia*.[84] In *Siliadin*, the applicant was a domestic worker who 'worked in [the 'employer's] house without respite for approximately fifteen hours per day, with no day off, for several years, without ever receiving wages or being sent to school, without identity papers and without her immigration status being regularised'.[85] The ECtHR held in this case that states have a positive obligation to identify victims of practices under Article 4 and offer an adequate criminal law to prosecute individuals who perpetrate these offences.[86] In making this decision, the Court drew on the definitions used by the ILO and noted the

[80] Modern Slavery Act, s 1.
[81] Modern Slavery Act, s 1(2).
[82] G Craig, 'The UK's modern slavery legislation: an early assessment of progress' (2017) 5(2) *Social Inclusion* 16, 20.
[83] *Siliadin v France* (n 6).
[84] *Rantsev v Cyprus and Russia* (Application no. 25965/04) (7 January 2010).
[85] *Siliadin v France* (n 6), [110].
[86] ibid, [148].

development of modern forms of forced labour compared to more traditional forms of ill-treatment at the time which Article 4 was written.[87] In *Rantsev,* this approach was explicitly extended to trafficking, with the Court stating 'Article 4 requires member States to put in place adequate measures regulating businesses often used as cover for human trafficking'.[88] The ECtHR in *Rantsev* extended the state's obligations to include preventing trafficking and protecting victims. Taken together then, these judgments highlight the human rights obligation on states to take measures to prosecute perpetrators of slavery, servitude and forced and compulsory labour, and to protect victims.[89] Similarly to the ILO, the ECtHR in *Tremblay v France* has held that work (including sex work) done out of economic need is not the same as forced labour (or forced prostitution).[90] The state's duties under Article 4 are considered in greater detail in Chapter 8.

The ILO's indicators can be useful to identify forced labour under the Modern Slavery Act to fulfil these international obligations. While recognising the difficulties involved in separating forced labour from other work, the ILO lays out a number of indicators to help identify it: abuse of vulnerability; deception; restriction of movement; isolation; physical and sexual violence; intimidation and threats; retention of identity documents; withholding of wages; debt bondage; abusive working and living conditions; and excessive overtime.[91] These are clearly wide categories. The ILO, however, uses examples to clarify this, such as: passports being taken; being unable to leave working premises; having no phone or method of communication with people outside; being threatened with deportation; unhealthy or degrading

[87] A Geddes, G Craig and S Scott, *Forced Labour in the UK* (Bristol: Joseph Rowntree Foundation Programme Paper, 2013), 22.
[88] *Rantsev v Cyprus and Russia* (n 84), [284].
[89] The extent of these obligations is discussed further in Chapter 8.
[90] *Tremblay v France* (Application no 37194/02) (Judgment 11 September 2007). This case is discussed further in Chapter 7.
[91] ILO, *ILO Indicators of Forced Labour* (Geneva: ILO, 2012), 3.

working conditions; not paying wages; or unclear debt conditions binding the worker to an employer.[92] If two or more of these conditions exist, this is a good indicator of forced labour. It is possible to state that sex work conditions must be above the line that is set out by these conventions to be acceptable. As such, even if criminal laws relating specifically to prostitution were removed or reformed, and sex work was officially recognised as a form of labour, those working in conditions that render their labour forced or compulsory would be able to seek protection under the law on forced labour or possibly sexual offences.

4.2.3 Control and Working Conditions

Protecting sex workers from unacceptable working conditions goes beyond tackling child labour and forced labour. As O'Connell Davidson notes, to define working conditions in such a narrow way fails to take into consideration the more mundane instances of management exploitation that happen in the sex industry and labour more widely.[93] As discussed in Chapter 2 of this thesis, the lack of regulation of sex work leaves sex workers open to the possibility of oppressive working conditions, where they work in a managed context.[94] In Teela Sanders' interviews with sex workers, 'occupational stress and strain was compounded by no sick pay or leave, no holidays, no regulated working conditions (for instance, no limits on the numbers of clients per day), and sometimes, exploitative management who expected women to work long shifts and frequent days'.[95] As noted, the rise of internet-facilitated sex work means the majority of sex workers work independently. There is no recourse to any rights for most of these workers. A minority of sex workers do officially declare themselves as self-employed

[92] ibid.
[93] J O'Connell Davidson, *Prostitution, Power and Freedom* (Cambridge: Polity Press, 1998), (n 15).
[94] T Sanders, 'Becoming an Ex-Sex Worker: Making Transitions out of a Deviant Career' (2007) 2 *Feminist Criminology* 74, 85
[95] ibid, 88.

and return tax assessments of their income (although often under the bracket of 'entertainment services), and so had some recourse to protection during the Covid-19 lockdown.[96] Yet these were exceptional circumstances, and even the most professionalised workers are subject to laws around where they can provide their services,[97] making the risks of violence greater. Concerns about working conditions are not confined to indoor sex work. In street sex work, where it remains, the concern around working conditions predominantly relates to violence and how the criminal law exacerbates this.[98]

It has been recognised by the ILO that decent work requires decent working time, which includes healthy working time.[99] As such, workers should not be required to work to the point 'when the length of work hours begins to adversely affect the health and safety of individuals, families, organizations and the public'.[100] Moreover, workers ought to have the 'ability to choose, or at least influence, their working hours in order to achieve decent working time'.[101] McCann and Fudge lay out indicators for unacceptable forms working time, including: excessive weekly hours; insufficient daily rest; unprotected night work (eg. no health assessments or capacity to transfer); less than three weeks of paid annual leave; lack of influence over hours; and insufficient rest breaks.[102] As noted, most sex workers do choose or at least have some control over their working hours, but this may still be relevant in circumstances where sex workers work in a managed premises, like a brothel or massage parlour.

[96] National Ugly Mugs, 'Written Evidence to Women and Equalities Committee's Consultation on Unequal impact? Coronavirus and the gendered economic impact' (July 2020), available at: https://committees.parliament.uk/writtenevidence/8610/pdf/ (last accessed 10 May 2022).
[97] Sexual Offences Act 1956, ss 33-36.
[98] T Sanders, (n 94), 85.
[99] ILO, *Decent Working Time: Balancing Workers' Needs with Business Requirements* (Geneva: ILO, 2007), 3.
[100] ibid.
[101] ibid, 16.
[102] D McCann and J Fudge, (n 31), 173.

Workers must also be adequately remunerated for their labour, in keeping with the 'income' indicator of acceptable work. The ILO Convention 131 on Minimum Wage Fixing 1970 states that the minimum wage paid must take 'into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups'.[103] McCann and Fudge state that inadequate or insecure payments (including unjustified deductions) are indicators of UFW in terms of income.[104] As UFW indicators are not tied to employment status (and therefore not just direct 'pay'), very high brothel or parlour fees or withholding of client's payments could fall within this dimension of UFW, if it leaves the sex worker with inadequate pay for their labour.

Another key issue for sex workers is control over their work and to whom they sell sex. This falls under the ILO's 'work organisation' indicator of acceptable labour, which includes 'control over the work process'.[105] It is important for sex workers to be able to decline customers or specific sex acts. The ability of sex workers to choose their clients and what acts they will perform, regardless of where they work, is important to their bodily autonomy and working conditions.[106] They must be able to decline or stop sex with clients when it is unwanted even if a fee has been paid, in line with the law on rape.[107] This is key when working in managed spaces – as noted in Chapter 2, even where sex workers are ostensibly allowed to reject customers in brothels, this can sometimes result in reduced shifts or being terminated. It is also difficult when sex workers are working independently, and choice is based on need – ie. whether they can afford to reject a client. This once again highlights a limit around labour

[103] ILO, Convention concerning Minimum Wage Fixing, with Special Reference to Developing Countries, ILO Convention No. 131 of 22 June 1970, Art 3.
[104] D McCann and J Fudge, (n 31), 173.
[105] ibid, 173.
[106] A Kontula, 'The Sex Worker and her Pleasure' (2008) 56 *Current Sociology* 605, 616.
[107] Sexual Offences Act 2003, s 1. S Day, 'What Counts as Rape? Physical Assault and Broken Contracts: Contrasting Views of Rape Among London Sex Workers', in P Harvey and P Gow (eds), *Sex and Violence: Issues in Representation and Experience* (London: Routledge, 2013), 172.

protections – choice needs to be meaningful and social structures of support are required for this to be the case. This does not, however, require that we place a heavier burden of 'choice' upon sex workers, or reject the idea that sex work is a form of labour – independent contractors in other fields may also be pushed by need to take problematic jobs; this does not negate their labour, but rather demonstrates the need for more social support.

Risk to health and wellbeing is an indicator of the Health and Safety dimension of UFW.[108] Therefore, sex workers should be in a position to be able to demand condom use and, again, clients who remove condoms without consent should be open to prosecution. Non-consensual removal or not using condoms (stealthing) has been held to be rape where consent has been given on the basis of condom use.[109] As such, enforced condom use could be drawn from the general criminal law on rape and/or a separate provision on condom use could be made.[110] In Teela Sanders and Rosie Campbell's study, the removal of condoms was 'considered a clear violation of the contractual agreement and was a violation of one of the important barriers sex workers used to distinguish sex as a commercial act from sex in a personal, loving relationship'.[111] While some sex workers offer 'bareback' services (services without condoms) for higher prices, sex workers must have the ability to decide these conditions. Risk to health and wellbeing also requires that sex workers must have adequate health and safety protections in their workplaces for the labour to be acceptable. This is particularly important when working in a managed premises. This includes need for rest times and condom use, and demonstrates the need for harm reduction and education projects beyond

[108] D McCann and J Fudge, (n 31), 173.
[109] *Assange v Swedish Prosecution Authority* [2011] EWHC 2849
[110] New Zealand has taken the latter approach, under Prostitution Reform Act 2003, s 7.
[111] T Sanders and R Campbell, 'Designing out Vulnerability, Building in Respect: Violence, Safety and Sex Work Policy' (2007) 58 (1) *British Journal of Sociology* 1, 8. Removal of condoms is a criminal offence that sex workers can report to the police in New Zealand under the Prostitution Reform Act 2003, s 9.

the law, to support sex workers more generally.[112] For some sex workers, removing criminal laws around consensual adult sex work and recognising sex work as a form of work not criminal deviance could potentially encourage them to make National Insurance contributions, which would in turn provide social security and a state pension if the sex worker was unable to work due to illness or retirement.[113]

Forced labour and child sexual exploitation are categories that fall clearly outside of appropriate labour and are already subject to criminal laws that would have to be kept even in a labour-based approach, in order to fulfil international obligations. The category of control and working conditions is more challenging as only certain activities (such as rape and condom removal) fall within the criminal law. Other indicators such as lack of breaks, unacceptable pay or working time could be responded to through law targeted at the elimination or improvement of unacceptable jobs.[114] The intricacy and plurality of working arrangements within sex work make it difficult to determine when and how to intervene, however, and when intervention may increase the risks faced by sex workers – for instance, intervention by state agents may lead to deportation of migrant sex workers. Labour law could be used to set standards of acceptable working hours, pay, working conditions in a similar way to the regulation of other work in England and Wales. Under current labour law, I argue in the next section, this would have limited value as labour law in England and Wales is based on narrow legal categories of working relations (employee, worker, independent contractor). An alternative approach could require sector-specific labour laws, similarly to those that have been suggested for domestic work and zero hours contracts.[115] While this is different from imposing sector-specific *criminal*

[112] ibid, 80.
[113] http://www.taxrelief4escorts.co.uk/2014/11/16/a-few-thoughts-about-national-insurance/ (last accessed 1 June 2019).
[114] D McCann and J Fudge, (n 31), 176.
[115] D McCann, and J Fudge, (n 36), 271

laws, this approach would have to be carefully considered so as not to reinforce the stigmatising separation of sex workers from other workers.

4.3 Labour Rights in England and Wales and Their Limits

Labour law seeks to gain fair treatment for workers, based on respect for them as people not things, and aims to create the proper balance between the interests of the parties.[116] Regulating sex work as a form of work and through a human rights-based approach would require provision of labour rights and the protection of workers through labour law to redress poor working conditions. As Ruth Ben Israel argues: 'the birth of a protective labour law discipline, the legal recognition of the worker's special status and what it stands for… are the first steps towards ensuring that work is not measured by its market value only'.[117] The benefits of recognising sex work as a form of work, however, could be economic and non-economic, direct in terms of potentially improving working conditions for sex workers in working relationships with a third party, and indirect, for instance by reducing stigma and risk of violence. These benefits, however, may be difficult to access even if sex workers were able to work in establishments or together legally, as labour rights in England and Wales have been largely framed around the normative employment relationship, which does not apply to most sex work. Another key issue, as noted, is that most sex workers do not work in a managed space, and so have nobody against whom to enforce such rights. In this section, I explore how labour legislation and collective action can be used to gain these benefits, arguing that current labour law in England and Wales is limited in the protection it can offer sex workers.

[116] H Collins, *Employment Law* (Oxford: Oxford University Press, 2010), 1.
[117] R Ben Israel, 'The Rise, Fall and Resurrection of Social Dignity', in R Blanpain (ed), *Labour Law, Human Right and Social Justice* (The Hague: Kluwer Law International, 2001), 2.

4.3.1 Defining the Labour Relationship

Even when sex workers are not working independently, the organisation of sex work entails relationships between workers and third parties that are many and varied, depending on the market and the workplace.[118] Labour legislation and the rights it provides also differentiates between different employment relationships. The labour and employment rights enjoyed by workers vary depending upon whether they are legally defined as employees, workers, or self-employed. Employment law is governed primarily by contract, and often employment relationships are built up informally, with the contract merely implied, or without a contract.[119] The differentiation between types of employment relationships and the rights afforded to them is based on the distinct expectations and varied levels of dependency between the worker and the employer/third party. The assumption is that 'law's protective provisions should cover the economically dependent; and that genuinely independent workers, who profit from their work and assume the risk of losses, are more appropriately protected… by commercial or competition law'.[120] This distinction is important for sex workers who, even if recognised as workers, often work as self-employed agents or as casual workers, so they may be unable to access the labour rights more traditional employees do under current employment law. Employment law also requires that the worker is working legally, so undocumented migrant workers would not be able to directly access these rights even if criminal laws on sex work were repealed and sex work was regulated through labour law.

The most protected category is the 'employee'. The Employment Rights Act 1996 (ERA) defines an employee as an individual who has entered into or works under a contract of

[118] J West and T Austrin, 'Markets and Politics: Public and Private Relations', in L Pettinger, J Parry, R Taylor and M Glucksmann (eds), *A New Sociology of Work?* (Oxford: Blackwell, 2005), 143.
[119] G Pitt, *Employment Law* (London: Sweet and Maxwell, 2009), 81.
[120] D McCann, (n 8), 32.

employment, which is defined as a contract of service or apprenticeship and can be express or implied.[121] In *Ready Mixed Concrete v Minister of Pensions and National Insurance*,[122] a multi-factor approach was taken to assess the criteria for being an employee. McKenna J held that the three conditions for an employment contract were: personal service in return for a payment; agreement to be under the employer's control to a sufficient degree; and that the conditions of the contract are consistent with it being a contract for service.[123] More recently, mutuality of obligations to do and be provided with work has been held to be the irreducible minimum of a contract of employment.[124] The courts have been willing to look beyond the label attached to the working relationship to the facts to decide whether there is an employment contract,[125] highlighting 'disguised employment'.[126]

In deciding whether a sex worker could be an employee for the purposes of employment law, the facts of their employment are paramount. This is important as most sex workers, regardless of the conditions of their employment, tend to be designated as 'self-employed'.[127] For example, workers in managed brothels are usually labelled as contractors who pay a fee to work a shift, rather than being paid directly by the brothel. To gain the rights offered to employees, sex workers would have to be sufficiently under the employer's control and have a mutuality of obligations. The test for control is one that could cause specific problems for sex workers – in sex work, as noted above, there are reasons for requiring that the sex worker has

[121] Employment Rights Act 1996, s230 (1) and (2).
[122] (1968) 2 QB 467.
[123] G Pitt, (n 119), 84.
[124] *Carmichael v National Power Plc* [1999] ICR 1226; *Stevedoring Haulage Services Ltd v Fuller* [2001] IRLR 627; *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471; *Cotswolds Development Construction Ltd v Williams* [2006] IRLR 181 EAT.
[125] *McMeecham v Secretary of State for Employment* [1997] IRLR 353; *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 3 All ER 817.
[126] D McCann, (n 8), 33.
[127] T Sanders and K Hardy, *Flexible Workers: Labour, Regulation and the Political Economy of the Stripping Industry* (London: Routledge, 2014), 72.

a greater degree of control over her work and what specific acts they will perform.[128] Any excessive degree of control which does not respect this may actually have the effect of making the employment relationship one which should not be desirable or acceptable. Most rights relating to work have traditionally been afforded to 'employees' and have been linked to a period of service. This includes compensation for unfair dismissal,[129] redundancy payments,[130] maternity,[131] parental[132] and paternal leave.[133] Therefore, under current employment law, these rights are not provided to people outside of the normative employment framework, and it is unlikely that most sex workers would be able to claim them.

Although lap dancing is beyond the scope of this thesis, a case relating to lap dancing can help us to clarify the law on who is an 'employee'. In *Stringfellow Restaurants Ltd v Quashie*,[134] Nadine Quashie, a dancer, sought to rely on rights to unfair dismissal by arguing that the levels of control over her work constituted a contract for employment. Quashie pointed to the fact she had to work a minimum of three nights a week, follow a strict dress code, was prevented from working elsewhere, told how much she could charge, ordered to attended weekly meetings, and had to abide by a strict code of conduct for which she could be fined if rules were not kept.[135] Despite this high level of control, the Court of Appeal held that Quashie was not an employee because she was not paid wages (she only received money from clients, minus deductions) and there was no *mutuality* of obligations, because, while she had to work on the nights she was rostered, the club did not have to provide *paid* work for her.[136] Moreover,

[128] K Cruz, 'Unmanageable Work, (Un)liveable Lives: The UK Sex Industry, Labour Rights and the Welfare State' (2013) 22 (4) *Social and Legal Studies* 1, 10.
[129] Employment Rights Act 1996, s 94.
[130] ibid, s 105.
[131] ibid, s 71
[132] ibid, s 76.
[133] ibid, s 80A.
[134] *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735.
[135] T Sanders and K Hardy, (n 127), 73
[136] *Stringfellow Restaurants Ltd v Quashie*,(n 136), [54].

the court held that that she had taken on a degree of financial risk, provided her own equipment, had no sick pay or benefits, and so must be considered to be self-employed. Katie Cruz argues that it is therefore unlikely that most sex workers in other areas of sex work, including managed brothels and massage parlours, would reach the status of 'employee'.[137] Quashie's working relationship reflects the way that many sex workers work with third parties – that they receive money from the clients (minus brothel or massage parlour deductions or fees) rather than directly from the employer. Independent sex workers who work without third party involvement have no working relationship to draw upon at all. As such, it would be exceptional for a sex worker to fall under s230 of the ERA and have recourse to the rights given to employees.

If a person providing a service in exchange for money is not an employee, it does not necessarily follow that that person is self-employed (a category of service providers with recourse to very few legal rights). There is also the category of 'worker' which spans these two camps. It is possible that some sex workers working in managed spaces could fall within this category. Across the board, companies and employers are increasingly using flexible workers rather than employing individuals permanently because they are required to provide fewer benefits to workers than they are to employees. The ERA defines a worker as a person who has entered into:

> (a) a contract of employment, or
>
> (b) any other contract …whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of

[137] K Cruz, (n 128), 11.

> the contract that of a client or customer of any profession or business undertaking carried on by the individual.[138]

This category may contain home workers, seasonal workers, casual workers, etc. The flexibility of the market has seen an increase in the precarity of work, meaning that workers increasingly do not have recourse to the rights and stable contracts that employees do.[139] Those categorised as workers, do, however, have some minimum protections.[140] In order to be a 'worker' for the purposes of employment law, there must be a degree of mutual obligation between the parties, although less of one than is required for employees.[141] It was held in *Cotswold Developments Construction Ltd v Williams*[142] that the difference between workers and self-employed contractors was a distinction between someone who actively markets his services as an independent person to the world in general and someone who is recruited by the principal to work for the principal as an integral part of the business operation.[143]

More recently, in *Uber v Aslam,*[144] the Supreme Court focused on the degree of control the employer has over the worker. Uber drivers claimed that they were workers and so should be entitled to paid leave, minimum wage and other protections afforded to 'workers'. Uber claimed that its drivers were self-employed and Uber acted as an agent only. The Supreme Court held that Uber drivers could be considered workers for the purpose of labour law because: Uber sets the rate of pay for drivers; contract terms are imposed on drivers; Uber constrains drivers' capacity to reject customers; Uber exercises control over the way in which drivers

[138] Employment Rights Act 1996, s 230(3).
[139] H Collins, K Ewing and A McColgan, *Labour Law: Text and Materials* (Oxford: Hart, 2005), 87
[140] S Deakin, 'Does "Personal Employment Contract" Provide a Basis for the Reunification of Employment Law?' (2007) 36 *Industrial Law Journal* 68, 78.
[141] *Nethermere v Gardiner* (1984) ICR 612.
[142] *Cotswold Developments Construction Ltd v Williams* (2006) IRLR 181 EAT
[143] G Pitt, (n 119), 96.
[144] [2018] EWCA Civ 2748.

deliver their services; and Uber restricts the capacity of drivers to communicate with clients outside of the service.[145] Uber also had the sole discretion whether to make a full or partial refund in response to a claim.[146] Any driver who failed to maintain a required average customer rating on the app would be subject to a series of warnings and then be terminated.[147] Taking these factors together, it was held that drivers provide a 'tightly defined and controlled' service to customers, designed to 'provide a standardised service to passengers', where drivers are unable 'to offer a distinctive service to customers or set their own prices', and therefore were in a position of subordination and dependency to Uber.[148] This was a significant decision in its interpretation of what a worker can be. To benefit from this decision, and the protections afforded to workers, sex workers would have to show a similar level of control. It is common in managed brothels for the prices to be set by management and set rules around how services might be provided (e.g. in relation to condom use). Some brothels also have rules around contacting clients outside of the service, and as noted in Chapter 2, they might be terminated for failing to follow rules or satisfy customers. Whether or not a sex worker would fall within this definition, however, would depend on highly varied conditions of work, so it might not be readily apparent whether the protections afforded to workers could be claimed by a specific sex worker in a managed space.

It is possible, however, that some indoor sex workers may fall within this category of 'workers' – although the services are rendered to a third party, there are still often obligations between the establishment owner and the sex worker which would fulfil the requirements of the worker definition. In particular, sex workers may be required to personally perform the

[145] ibid, [94]-[99].
[146] ibid, [94].
[147] ibid, [99].
[148] ibid, [101].

work,[149] rather than being able to send a replacement. This was held in *Redrow Homes (Yorkshire) Ltd v Wright*[150] to distinguish workers from self-employed contractors. However, unless brothels were legal, a further obstacle would arise, as it has been held that a contract for service must exist for a person to be considered to be a worker;[151] any such contract between a brothel owner and a sex worker would not currently be enforceable as brothel keeping is illegal. A first step to affording any such protection to sex workers then would be to reform or repeal the law on brothels.

Most sex workers, whether working independently or in managed spaces, are likely to be 'self-employed'. In terms of self-employment, in *Ransom v Higgs*, Lord Reid stated 'the Income Tax Acts have never defined trade or trading farther than to provide that trade includes every trade, manufacture, adventure or concern in the nature of trade'.[152] In *Inland Revenue and Customs v Aken,* which referred to income tax liability of sex workers, the court held that sex work was a trade in the ordinary meaning of the word, despite the contracts being unenforceable and the trade being 'immoral'.[153] There are very few labour rights given to self-employed contractors, so those who are unable to demonstrate 'worker status' are likely to remain largely unprotected by current labour law in England and Wales. Official recognition of this as a 'trade' and a subsequent move away from criminal law could allow more sex workers to work legally together, more safely and in better conditions, and manage risks of violence and crime.

[149] Employment Rights Act 1996, s 230 (5).
[150] [2004] EWCA Civ 469, [8].
[151] *W v Essex County Council* [2000] 2 WLR 601
[152] [1974] 1 WLR 1594, 1600.
[153] [1990] 1 WLR 1374, 1383.

For those sex workers who are able to reach 'worker' status, it is important that there have been some limited attempts to give protections to workers in non-standard employment relationships in recent years.[154] There are some protections that have extended coverage to include 'workers' as defined above.[155] These include minimum wage, working time and working conditions. Each will now be examined in turn to determine how beneficial they would be to those sex workers.

4.3.1.1 Pay

The first protection to be considered is 'pay'. The UK Government introduced a statutory minimum wage in 1999 under the National Minimum Wage Act 1998 (NMWA). This followed two years of consultation where it had become clear that a large number of low-paid workers had only weak and patchy protection from collective bargaining.[156] The NMWA, s1 (1) states that 'a person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage'. Qualifying persons are workers who are working or ordinarily work in the UK and are over compulsory school age.[157] In 2016, the National Minimum Wage Regulations 2016 created the 'National Living Wage'[158] which is a higher minimum wage that is payable to workers aged 23 or over. Both the national minimum wage and the national living wage are set annually by the Secretary of State, and, at the time of writing, £8.91 for workers aged 23 or over; £8.36 for workers aged 21-22, £6.56 for workers aged between 18-20; and

[154] L Vosko, 'Precarious Employment and the Problem of SER-Centrism in Regulating for Decent Work', in S Lee and D McCann (eds), *Regulating for Decent Work: New Directions in Labour Marker Regulation* (Geneva: ILO, 2011), 60.
[155] D McCann, (n 8), 43.
[156] D Grimshaw, 'United Kingdom: Developing a Progressive Minimum Wage in a Liberal Market Economy', in D Vaughan-Whitehead (ed), *The Minimum Wage in the Enlarged EU* (Cheltenham: Edward Elgar, 2010), 473.
[157] National Minimum Wage Act s 1(2).
[158] The National Minimum Wage (Amendment) Regulations 2016, s 3

£4.62 for workers under the age of 18.[159] The main limit on the minimum wage is that it applies to those who are employed 'legally'.[160] Therefore, sex workers would need to show that they are a 'worker', but also that they are working legally, which could be difficult. If they are working, but not involved in the management of a brothel, then they are not personally breaking any laws, but currently, their employers would be. So, to ensure that both sides of the working relationship were legal, the laws relating to controlling prostitution for gain and brothel keeping must be repealed or reformed.

Even if criminal laws around sex work were repealed, the NMWA would be of limited benefit to most sex workers. Sex workers who work independently, such as many street sex workers and the increasing number working through the internet, tend to set their own rates and their own working hours without a third party taking a cut of their takings.[161] Furthermore, because they are not answerable to any third party in terms of prices they charge, they are in a position to vary their prices – some can enter into negotiations with clients, and may be skilled at obtaining the maximum payment possible for a transaction, adding extras if the client looks nervous or naïve.[162] Conversely, others may be limited in their ability to negotiate due to drug addictions or other factors, such as inexperience, fewer clients because of marginalised identities, or desperation because of poverty. Where sex workers do work for a third party, it is often, as noted previously, on the basis that the sex worker pays the manager a fee or a cut of their earnings. Therefore, even if it was possible to ascertain worker status under the tests set out above, they are not provided a 'wage' as such, and so it would be unlikely that setting a minimum would be beneficial at all.

[159] National Minimum Wage Rates, available at: https://www.gov.uk/government/publications/the-national-minimum-wage-in-2021 (last accessed 1 June 2021).
[160] D Grimshaw, (n 156), 474.
[161] J O'Connell Davidson, (n 93), 62.
[162] ibid.

The minimum wage was intended as a floor for payments, but in many sectors of the economy, it has become not a floor for payment, but the standard rate.[163] In fact, many unions opposed the creation of the mandatory minimum wage for this reason, arguing that collective bargaining was preferential in terms of gaining higher wages.[164] While ensuring that the sex worker has a base rate of pay (even after deductions from the manager) at the end of each working day would be better than ending the day with very little pay or indebted to the brothel or parlour, a minimum wage may, in many cases, leave the sex worker in a worse position financially than they would otherwise be. Furthermore, many sex workers enter the sex industry precisely because the alternative is minimum wage work or living on the benefit system, and as such would not feel that a minimum wage industry would be of much benefit to them. Although it is clearly important to ensure that workers are paid for their services and paid fairly, it is unlikely that a mandatory minimum wage would ensure better wage structures for sex workers.

4.3.1.2 Working Time

Workers are also protected by rules around working time. Working time combines a number of pieces of legislation, some only applicable to employees, some applicable to all workers, but none available to independent contractors, and thus the majority of sex workers. The main one of these is the Working Time Regulations 1998. The Working Time Directive[165] was implemented by the UK in a similar way to the National Minimum Wage – that is, the Working

[163] D Grimshaw, (n 156), 485.
[164] ibid, 492.
[165] EC Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 Concerning Certain Aspects of the Organisation of Working Time OJ L 299/09.

Time Regulations apply to 'adult workers' who have reached the age of 18.[166] It should be noted that as the UK has exited the EU, the Working Time Regulations may be repealed or reformed, although there have been no publicised plans to do so. The Working Time Regulations state that a maximum weekly working time shall not exceed 48 hours for each seven days,[167] and all workers should have a 24 hour continuous rest period once every seven days.[168] Night workers – those who work at all between the hours of 11pm and 6am – cannot work more than eight hours in a 24 hour period.[169] These limits are seen as a health and safety matter – to protect workers from the dangers associated with exhaustion, but also from 'the dangers of repetitive and monotonous work'.[170] Despite these restrictions, there are many exceptions to the rule – domestic workers in private households,[171] workers with unmeasured working time,[172] shift workers,[173] along with other special cases[174] are not covered by all of the limits. Moreover, a worker may agree with his or her employer to opt out of the working time limit.[175]

As noted, most sex workers work independently, making their own hours and setting their own rates. These would not be protected by the provisions of the Working Time Regulations. The rights found in these regulations might prove useful, however, as a normative tool to delineate what can be expected of sex workers working with third parties. Although many sex workers work on an 'as and when' basis,[176] there might be pressure on sex workers to work long hours or see a greater number of clients than they want to, for fear of losing their

[166] Working Time Regulations 1998, s2 (1).
[167] Working Time Regulations 1998, s 4 (1).
[168] ibid, s 11.
[169] ibid, s 6 (1).
[170] A C L Davies, *Perspectives on Labour Law* (Cambridge: Cambridge University Press, 2009), 106.
[171] Working Time Regulations 1998, s 19.
[172] ibid, s 20
[173] ibid, s 22
[174] ibid, s 21.
[175] ibid, s 4.
[176] J O'Connell Davidson, (n 93), 22.

position within the establishment, or facing economic penalties.[177] This level of control might make them more likely to be 'workers' since the *Uber v Aslam* decision, but is not necessarily desirable. Time pressure also has strong links to the pay structure – if the sex worker is coming to the end of a day in debt to the employer, or with very little earnings, they may be inclined to carry on working to make up that difference where possible.

If a sex worker could show they are a 'worker', the Working Time Regulations would provide a legal limit to how much a sex worker could work in one day, or one week, if enforced. Moreover, if classified as a worker, a sex worker could claim holiday pay.[178] This clearly would create a base level of protection for the sex worker. It could be the case, however, as in other industries, that there is a lot of pressure for the worker to opt out of the right, in order to provide flexibility to the employer.[179] In a market where the worker may already be vulnerable to poor management practice, there is obvious potential for an employer to avail themselves of this loophole. Moreover, although the legislation protects workers against detriment [180] or dismissal[181] for asserting their rights, 'it may be difficult to ensure that consent [to opt out] is genuine in practice'.[182]

4.3.1.3 Working Conditions

Apart from rights related to pay and working hours, sex workers are likely to have further claims they would like to make against third parties, when working with them, in order to have more control over their work. In sex work within a managed relationship, the employer has a

[177] ibid, 22.
[178] K Cruz, (n 128), 11.
[179] A C L Davies, (n 170), 107.
[180] Employment Rights Act 1996, s 45A
[181] ibid, s 101A.
[182] A C L Davies, (n 170), 107.

clear economic interest in maximising the number of clients each worker sees.[183] If a sex worker refuses to see as many clients, or specific clients, their future capacity to work there could be at risk.[184] Moreover, if the sex worker does not 'satisfy' their client – potentially because of refusal to perform a certain act – they could face some sort of retribution, financial or otherwise, from their employer. Health and safety laws[185] and anti-discrimination/equality laws,[186] while purportedly aimed at 'employees' have been extended to workers, so working conditions can be challenged by sex workers, if they are able to be categorised as workers. The Health and Safety at Work Act 1974 requires the employer to ensure the health and safety and welfare at work of all its workers, including, as far as possible, a working environment without risks to health.[187] Issues relating to control, health, and anti-discrimination, may be as, if not more, significant to sex workers than pay or time issues. Therefore, while current labour laws may not be particularly beneficial for sex workers in terms of pay and time, if brothel laws were reformed or repealed, some working conditions might be improved.

4.3.2 Unionisation and Collective Bargaining

An alternative way that sex workers could potentially benefit from labour law would be through unionisation and collective bargaining. The intention of collective bargaining is to harness the collective power of all workers to make the employer pay attention to demands in a way that they may not if presented with the individual demands of one worker.[188] To do so, trade unions

[183] J O'Connell Davidson, (n 93), 20.
[184] ibid, 20.
[185] Health and Safety at Work Act 1974, s 2.
[186] Equality Act 2010, s 39.
[187] Health and Safety at Work Act 1974, s 2.
[188] G Pitt, (n 119), 141.

group together workers in order to bargain with employers about terms and conditions of employment.[189]

One significant challenge to their efficacy is that collective bargaining agreements are not directly enforceable[190] – that is, a worker is not able to rely on the terms of a collective agreement if those terms are breached. For the worker to rely on the terms of the collective agreement, they must be incorporated into the worker's contract.[191] This can be done expressly, where the contract refers to the collective agreement,[192] or impliedly, for instance where the facts indicate that the employer and the worker have consistently acted as though the agreement was part of the contract.[193] These types of agreement are plainly of little use where there is no third party arrangement at all.

For collective bargaining to take effect, the employer must recognise the trade union for that purpose. The Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) Schedule 1A states that a union can obtain automatic recognition if 50% of the workers in a particular bargaining unit are members of the union.[194] It can also gain recognition if a majority of those voting and at least 40% of those eligible to vote have supported recognition in a secret ballot.[195] The statutory scheme only applies to employers who have at least 21 workers.[196] Other situations remain under 'voluntary recognition'. Even if sex work is recognised as work and sex workers unionise, it is likely that the majority of massage parlours and brothels will have fewer than 21 workers (and reformed legislation may even limit the number to below this).

[189] A C L Davies, (n 170), 176.
[190] G Pitt, (n 119), 144.
[191] G Pitt, (n 119), 148.
[192] *National Coal Board v Galley* [1958] 1 WLR 16.
[193] *Alexander v Standard Telephone and Cables (No. 2)* [1991] IRLR 286.
[194] Schedule 1A, [22].
[195] ibid, [23]-[29].
[196] G Pitt, (n 119), 153.

Trade union laws would therefore apply to a minority of a minority. Otherwise, it would be up to the good will of the employer to recognise the union and up to the sex workers to ensure that they were unionising. For the purposes of sex work, this can be a serious limitation as all brothel, massage parlour or sauna workers in a region would have to put pressure on managers to accept union or collective bargaining tools. Given that employers would not have significant trouble in finding alternative workers, this may be unlikely to have much power.

Under TULRCA, a union may only refuse admission to someone on one of the four grounds: that the applicant does not satisfy an enforceable membership requirement; that they do not come from within the geographical area covered by the union; that they no longer work for the relevant employer (in a company specific union); or for misconduct.[197] Given the current precarious legal position of sex workers, unions can and already do refuse membership based on either the ground of not satisfying an enforceable membership requirement (being a recognised, legal worker) or for misconduct (breaking the law). As such, it seems likely that access to unions would be less difficult if sex work was regulated as a form of work.

There has already been a move for sex workers to join unions as well as creating their own collectives. The International Union of Sex Workers was set up in 2000 as a result of a number of sex worker events.[198] The IUSW, a group of sex workers who are aiming to have sex work established as legitimate work, refers to itself as a union as it is an association of workers in a particular industry.[199] Its main campaign is to lobby for decriminalisation and labour rights.[200] Gaining recognition for themselves as a union has been a priority for IUSW,

[197] Trade Union and Labour Relations (Consolidation) Act 1992, s 174.
[198] G Gall, *An Agency of Their Own: Sex Worker Union Organising* (Hants: Zero Books, 2012), 36.
[199] A Lopes, 'Sex Workers in the Labour Movement', in R Campbell and M O'Neill (eds), *Sex Work Now* (Devon: Willan, 2006), 266.
[200] International Union of Sex Workers, available at: http://www.iusw.org/iusw-history/ (last accessed 1 June 2019)

and since 2001, it has been fighting to gain Trades Union Congress (TUC) recognition.[201] As well as refusing to recognise the IUSW, in 2017, TUC rejected a motion to support sex work being decriminalised and regulated through labour protections, arguing that such a move would only benefit pimps and brothel owners.[202] In 2001, the IUSW approached the GMB, a general trade union, for help with unionisation; the GMB committed to establishing a London-based branch to represent sex workers, and in 2002 allowed the affiliation of the IUSW with the GMB.[203] Members of the union enjoy all the same benefits as other union members – including free legal advice and legal representation (which is highly beneficial given the difficult legal position of sex workers); training and development opportunities; free and confidential advice on employment rights.[204] By 2006, nearly 2,000 sex workers were GMB members.[205] The adult entertainment branch was suspended for a short time in 2008 over concerns about allowing management into the union,[206] and even after this, there have been disputes over leadership styles within the union.[207] As such, although many sex workers remain members and draw on the benefits offered by the union, much sex worker organisation for rights has taken place outside of the GMB.[208]

One of the most problematic barriers for unionisation of sex workers is recruitment – despite confidentiality assurances by the GMB, many sex workers are concerned about anonymity and would rather not join for that reason; and other sex workers do not identify as

[201] A Lopes, (n 199), 275.
[202] L Buchan, 'TUC leaders reject call to decriminalise prostitution', *The Independent*, 13 September 2017, available at: https://www.independent.co.uk/news/uk/politics/tuc-leaders-prostitution-decriminalise-reject-call-trade-union-conference-sex-workers-a7944561.html (last accessed 23 September 2019).
[203] A Lopes, (n 199), 276.
[204] ibid, 282.
[205] G Gall, (n 198), 37.
[206] G Gall, *Sex Worker Unionization: Global Developments, Challenges and Possibilities* (Basingstoke: Palgrave Macmillan, 2016), 126.
[207] ibid, 127.
[208] A Lopes and J Webber, 'Organising sex workers in the UK: what's in it for trade unions?' (2013), available at: https://www2.uwe.ac.uk/faculties/BBS/BUS/Research/CESR/July_2013_Lopes_Webber.pdf (last accessed 1 September 2019).

sex workers or would rather consider their time in the sex industry to be brief and therefore consider union membership to be unnecessary.[209] More still will simply be unaware that the union exists, or be unable to access it due to other barriers in their lives. Apart from the benefits I have noted which flow directly from union membership – legal advice, training, etc. - collective bargaining could be used to some extent to improve work organisation. The potential for collective bargaining to make a significant impact is severely limited by recruitment problems, voluntary recognition of unions, and the availability of other sex workers to take jobs if employers choose not to recognise the union or collective bargaining. Involvement may be improved by removal of criminal barriers but this would not deal with the other structural limitations.

In this section, I have demonstrated that labour law in its current form is significantly limited in its capacity to respond to the potentially problematic working conditions faced by sex workers. Most sex workers do not work with third party involvement, and many who do would be legally defined as self-employed. Without the status of employee or worker, it is difficult to access the protections of labour law, and those protections within labour law that do apply to workers, such as minimum wage or working time are unlikely to fit with the diverse organisational practices of sex work. Moreover, many sex workers will not wish to be regulated by the state at all, whether as workers or otherwise, while others may be unable to because of their precarious immigration status. Because of the way that sex work has been regulated by the state in the past, there are deep levels of mistrust of the state amongst sex workers. Many would rather work informally and set up smaller peer networks as protection, rather than relying on police or state-provided rights. As such, current labour law could offer few benefits to sex workers even if criminal laws relating to sex work were changed in line with the

[209] A Lopes, (n 199), 286.

suggestions made in Chapter 3. The next section considers alternative labour approaches, drawing on research from jurisdictions that have moved towards recognising sex work as work. While many of the problems in relation to work organisation remain, there is some evidence that removing criminal sanctions allows sex workers to work communally, thus improving their working conditions, and, indirectly, reduce risk of crime and violence, and, to a lesser extent, stigma.

4.4 An Alternative Labour Approach and its Effects

Returning to the ILO's Decent Work Agenda, it is apparent that sector-specific labour laws might be more appropriate for responding to the issues faced by certain workers. The ILO Resolution Concerning Decent Work and the Informal Economy 2002[210] states that policies and programmes 'should focus on bringing marginalized workers and economic units into the economic and social mainstream, thereby reducing their vulnerability and exclusion'.[211] One of the aims of recognising sex work as work, therefore, is to bring it into the mainstream and afford sex workers labour rights and protections as workers. The state has an important role to play in bringing sex work into the regulated market and reducing the exploitation involved in sex work. Yet, as shown in the previous section, current labour law in the UK has limited potential to do so. In this section I consider alternative approaches to labour whereby sector-specific regulations could be created. Drawing on research from jurisdictions that regulate sex work as a form of work, I consider the ways that this can be implemented and the varied effects of doing so.

[210] ILO, Resolution Concerning Decent Work and the Informal Economy of 20 June 2002.
[211] Ibid, no. 25.

In New Zealand, the Prostitution Reform Act 2003 (PRA) removed offences relating to soliciting, keeping brothels and escorting from its criminal law.[212] This approach has often been referred to as decriminalisation as it removes criminal laws against voluntary adult sex work, but notably, it remains an offence to induce or compel someone into sex work,[213] to buy sex from somebody under the age of 18,[214] and to assist a person under 18 in providing commercial sexual services.[215] The offence of inducing and compelling someone into sex work is narrower than the English offence of inciting or causing, in that it requires a threat or a promise to improperly use authority, commit an offence, or make an accusation or disclosure. This offence specifically includes threats to disclose immigration status, thus reducing the possibility of third parties threatening deportation in order to coerce someone into sex work. These offences keep forced labour and child labour within the remit of the criminal law, in line with international principles set out above. There are also restrictions on advertising commercial sexual services on radio, television, cinemas and in the print media.[216]

Under the New Zealand law, sex workers are permitted to run small owner-operated brothels. These are defined as brothels 'at which no more than four sex workers work', and 'where each of those sex workers retains control over his or her individual earnings'.[217] This means that sex workers are legally able to run their own premises, working together for safety, setting their own working conditions. This, as discussed below, has improved working conditions for most sex workers, and reduced violence. Where brothels are operated by a director who has control over the conditions of the sex work, or the brothel has more than four

[212] Prostitution Reform Act 2003, s 48-49 and Sch 1, Part 1.
[213] ibid, s 16
[214] ibid, s 22.
[215] ibid, s 20.
[216] ibid, s 11.
[217] ibid, s 4(1).

people working in it, it is classed as a sex work business.[218] Sex workers are given a set of employment rights as part of the PRA,[219] to empower them in their working relations where they work with a third party at a sex work business. Operators of sex work businesses have a set of obligations to promote safer sex practices, including: taking all reasonable steps to ensure condoms are used; taking all reasonable steps to give health information to sex workers and clients; display health information prominently; not imply that taking an STI test means that the sex worker is not infected, or not likely to be infected with an STI; take all other reasonable steps to minimise the risk of STIs.[220] Sex workers are also considered to be workers for the purposes of the Health and Safety Act 2015, which requires business owners to, inter alia, eliminate or minimise 'risks to health and safety, so far as is reasonably practicable'.[221] Thus sex work businesses must promote good health and safety work conditions, and are subject to inspections to ensure compliance.[222] If a sex worker is working from home, and that home is used as a sex work business, an inspector can only enter if they have consent of the occupier or a warrant.[223] These provisions prioritise the health of sex workers and clients are at the forefront of the law. The PRA even states that the purpose of the law is to decriminalise prostitution and create a framework to, inter alia, safeguard the human rights of sex workers and protect them from exploition, and promote the welfare and occupational health and safety of sex workers.[224] While the provisions and the language used are clearly indicative of a shift towards seeing sex work as work, certain provisions, such as those around preventing STIs, have been criticised for promoting stigmatising discourses of sex workers being 'dirty'.[225]

[218] ibid, s 5.
[219] New Zealand Department of Labour, *Minimum Employment Rights and Obligations* (Wellington: Department of Labour, 2011).
[220] Prostitution Reform Act 2003, s 8.
[221] Health and Safety Act 2015, s 30 (1).
[222] Prostitution Reform Act 2003, s 26.
[223] ibid, s 27.
[224] ibid, s 3.
[225] G Abel, C Healy, C Bennachie, and A Reed, 'The Prostitution Reform Act', in G Abel, L Fitzgerald, C Healy and A Taylor (eds), *Taking the Crime Out of Sex Work: New Zealand Sex Workers' Fight for Decriminalisation* (Bristol: Policy Press, 2010), 78.

Alongside these employment rights against sex work business operators, the PRA 2003 also contains rights against clients. For instance, contracts for services between sex workers and their clients are valid, so they can be enforced where clients try to avoid payment.[226] Sex workers are also able to enforce condom use through the law.[227] Sex workers have the right to refuse clients or withdraw consent from a transaction, regardless of anything in the contract for services.[228] Agreements to provide sexual services do not constitute consent for the purposes of criminal law, so if consent is withdrawn and a client continues, then this would fall under ordinary sexual offences law.[229] These rights promote an understanding of the sex worker as empowered to make choices about their work, and sex workers' capacity to manage risky clients, who know that prosecution is possible.

Evaluations of sex work in New Zealand have been, on the whole, positive. Despite fears from some quarters, there has been no reported increase in sex work since the PRA.[230] Moreover, New Zealand has kept its Tier 1 ranking in its TIP report on trafficking.[231] This is the highest ranking available, leading the Ministry of Justice to claim that this demonstrates that this legal reform has not led to an increase in trafficking.[232] UNAIDS argues that a decriminalised approach to sex work, such as that demonstrated in New Zealand, creates the

[226] Prostitution Reform Act 2003, s 7.
[227] ibid, s 9.
[228] ibid, s 17.
[229] ibid, s 17 (2).
[230] G Abel, L Fitzgerald and C Brunton, 'The Impact of Decriminalisation on the Number of Sex Workers in New Zealand' (2009) 38 (3) *Journal of Social Policy* 515.
[231] The Trafficking in Persons (TIP) Report is the U.S. Government's tool to engage foreign governments on human trafficking and comprehensively reflect the state of trafficking in each country. Available at: http://www.state.gov/j/tip/rls/tiprpt/ (last accessed 1 June 2015).
[232] http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/13-trafficking (last accessed 1 June 2015).

best conditions in which to identify and tackle trafficking, as well as referring trafficked victims to the appropriate support services.[233]

The PRA brought sex workers under the New Zealand Health and Safety in Employment Act 2002, meaning that sex workers are able to assert their rights with clients and managers.[234] Although this may not be used extensively, there have been cases where employment rights have been asserted successfully. For instance, in *DML v Montgomery and M & T Enterprises Ltd*,[235] a sex worker successfully sued her employer, a sex business operator, for sexual harassment by the use of language of a sexual nature. In this case, the plaintiff was awarded $25,000 in damages for the humiliation, loss of dignity and injury to feelings inflicted by her employer. Importantly, the court held that:

> Sex workers are as much entitled to protection from sexual harassment as those working in other occupations. The fact that a person is a sex worker is not a licence for sexual harassment, especially by the manager or employer at the brothel. Sex workers have the same human rights as other workers.[236]

This highlights an official shift away from stigmatising 'other'ing of sex workers. A report by Gillian Abel et al found that of around 700 sex workers interviewed, 92% felt that they had employment rights, 93.8% felt that they had health and safety rights, and 95.9% felt that they

[233] UNAIDS, *Guidance Note on HIV and Sex Work* (Geneva: UNAIDS, 2012), 12.
[234] New Zealand Ministry of Justice, *Report of the Prostitution Law Reform Committee on the Operation of the Prostitution Reform Act* (2003), available at: http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf (last accessed 1 June 2015).
[235] [2014] NZHRRT 6.
[236] ibid, [12].

had legal rights under the PRA.[237] This demonstrates an improvement in working conditions since the legal change. Notably, the law is silent on issues of pay, reflecting the reality that most sex workers are paid directly by clients; yet this does little to ensure decent pay, a condition of acceptable labour as described in this chapter.

Rights to enforce condom used have had the effect of lowering HIV rates in New Zealand since the PRA.[238] This could also be due to increase in access to health services, which has also been found to have increased due to less fear of exposure.[239] In relation to violence, findings in research undertaken since the decriminalisation have been largely (but not universally) positive. Lynzi Armstrong's research found that there is still violence from passers-by, amongst sex workers, and from clients.[240] Respondents to Armstrong's study, however, described several risk management approaches, and suggested that decriminalisation has made screening clients easier.[241] Moreover, some sex workers feel that they can more easily approach the police to report any incidents, while others feel that police presence deters custom and therefore is not as positive a protection as it ought to be.[242] Some sex workers felt that they were more comfortable standing on the streets to work, rather than working indoors, although others suggested that by 'removing the thrill' of illegitimacy, clients were less interested and there had been a steady decline in client numbers, making it harder to make money.[243] While acts of verbal abuse still happened, sex workers reported feeling more vindicated in resisting

[237] G Abel, L Fitzgerald and C Brunton, *The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers: Report to the Prostitution Law Review Committee* (Christchurch: Department of Public Health and General Practice, 2007), 139.
[238] G Abel et al, ibid, 134; C Healy, 'HIV and the Decriminalisation of Sex Work in New Zealand' (2006) 11 (2/3) *Canadian HIV/AIDS Policy and Law Review* 73.
[239] C Harcourt et al, 'The Decriminalisation of Sex Work is Associated with Better Coverage of Health Promotion Programs for Sex Workers' (2010) 34 (5) *Australian and New Zealand Journal of Public Health* 482.
[240] L Armstrong, *Managing risks of violence in decriminalised street-based sex work: a feminist (sex worker rights) perspective* (unpublished PhD thesis, Victoria University of Wellington, 2011), 77-79.
[241] ibid, 113.
[242] L Armstrong, (n 10), 44.
[243] ibid, 45.

these stigmatising acts.[244] Therefore, it appears that the removal of particular criminal offences, and increased police protection offer better conditions to resist violence and stigma, even though they are unable to eliminate them. This decriminalised approach, evidence suggests, has been largely successful in reducing the problems faced by sex workers. Sex workers are less likely to face exploitative or poor working conditions as they can work together legally, and any sex work business is subject to rules set out in the PRA. All workers in third party operated sex work businesses are protected by employment and health and safety laws. There has also been a reduction in violence, and, to a lesser extent, stigma since the law change. This showcases a sector-specific approach that could be a valuable model for England and Wales.

An alternative approach to sector-specific regulation is often referred to as 'legalisation'. A number of jurisdictions, for instance, Germany,[245] the Netherlands,[246] parts of Australia,[247] Nevada,[248] have created systems of legal regulation based on making sex work legal under specific (varied) conditions, while continuing to use criminal laws against sex work outside of these conditions. While considered by some to be a liberal form of governance,[249] the realities in most of these industries demonstrate the same picture – a proliferation of controls on sex work, a limited uptake of legal sex work, and thus the creation of a two tier system of sex work. As such, these laws have been less successful in tackling stigma, violence, and poor working

[244] ibid, 47.
[245] Act Regulating the Legal Situation of Prostitutes (Prostitution Act) 2002
[246] On 1 October 2000, Articles 250bis and 432 were removed from the Criminal Code thus lifting the ban on brothels and pimping.
[247] In Australian Capital Territory and New South Wales, sex work is decriminalised by the ACT Prostitution Act 1992 and The Disorderly Houses (Amendment) Act 1995 respectively. In Victoria, Queensland and The Northern Territories, some sex work is licensed under the Prostitution Control Act 1994, Queensland Prostitution Act 1999 and Northern Territory Prostitution Regulation Act 1992 respectively. For more detailed explanation of the different regimes in Australia, see T Crofts and T Summerfield, 'The Licensing of Sex Work in Australia and New Zealand' (2006) 13 *Murdoch Electronic Journal of Law* 269.
[248] Nevada has allowed legal brothels in some rural counties since 1971. See B Brents and K Hausbeck, 'Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy' (2005) 20 (3) *Journal of Interpersonal Violence* 270.
[249] J Outshoorn, 'Voluntary and Forced Prostitution: The 'Realistic' Approach of the Netherlands', in J Outshoorn (ed), *The Politics of Prostitution: Women's Movements, Democratic States and the Globalisation of Sex Commerce* (Cambridge: CUP, 2004), 185.

conditions. As Jane Scoular argues, while the states' role appears to recede, there is actually a wider range of control mechanisms and forms of professional intervention that may be even more pervasive than the previous systems.[250] The range of control mechanisms, unsurprisingly, varies according to the rules of the legal system under which sex work is legalised. As Ronald Weitzer notes, examples of controls include:

> licensing of businesses, registration of workers, geographical restrictions (such as zoning in designated red-light districts or prohibitions near schools, churches, etc.), health requirements (e.g. mandatory condom use, periodic HIV and STD tests), age restrictions, and other rules for workers, managers, and clients.[251]

These approaches to regulating sex work can bring some benefits to some sex workers, where they work within the legal rules. First, one of the clearest benefits to sex workers is that when they work in legal brothels or in legal toleration zones, they are no longer illegal actors, so they can work in this sector without fear of arrest.[252] Removal of the illegality of sex work also means that these sex workers can advertise openly without resorting to euphemism. As such, there are fewer doubts about what services are on offer and clearer negotiations, reducing the fear of customer violence when they do not get what they wanted, and customers' concerns about being 'ripped off'.[253] Some also report that they can report violence or exploitation to the police without fear of arrest, though this is often still limited by lack of trust in the police. In Queensland, one of the aims of the legislation reform was to reduce police corruption and

[250] J Scoular, 'What's Law Got to Do With It? How and Why Law Matters in the Regulation of Sex Work' (2010) 37 (1) *Journal of Law and Society* 12, 31
[251] R Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (New York: New York University Press, 2013), 77.
[252] B Sullivan, 'When (Some) Prostitution is Legal: The Impact of Law Reform on Sex Work in Australia' (2010) 37 (1) *Journal of Law and Society* 85, 93.
[253] R Weitzer, (n 251), 84.

control of the industry, so improved police relations ought to be a significant benefit.[254] As Barbara Sullivan notes, because there are still controls over sex work, there have been instances of police continuing to harass workers or attempting to entrap them into working outside of these controls.[255] Rachel Wotton notes similar issues in New South Wales, where reports have included 'officers swearing at the women, not responding to reports of rape and assault, verbal threats of arrest and intimidation, as well as 'punishing' a person voicing their rights by locking them up'.[256]

Another potential benefit of legalisation approaches is that some sex workers may be less vulnerable to violence. As Barbara Brents and Kathryn Hausbeck note in their research of Nevada brothels, safety and protection from violence was the primary reason most sex workers chose to work in the legal brothels rather than in any other venues.[257] In their study, only one in over 40 sex workers interviewed in brothels across Nevada reported any personal experience with violence in the brothels.[258] This is reflected in Sullivan's research in legal brothels in Australia; brothel workers were less vulnerable to violence, including sexual assault, 'because of a number of proven safety measures including the presence of other staff, increased possibilities for screening clients (in reception areas), and the provision of alarms'.[259] Common safety mechanisms found in legal brothels are 'panic buttons, regular STI checks, safe guidelines for the negotiation process, control of customer behaviour and good relations with the police, all safety mechanisms that together contributed towards obtaining a working

[254] B Sullivan, (n 252), 90.
[255] ibid, 102.
[256] R Wotton, 'The Relationship Between Street-Based Sex Workers and the Police in the Effectiveness of HIV Prevention Strategies' (2005) 8 *Research for Sex Work* 11, 12.
[257] B Brents and K Hausbeck, (n 248), 282.
[258] ibid, 287.
[259] B Sullivan, (n 252), 93.

license'.[260] Moreover, occupational health and safety is promoted in legal brothels by providing adequate lighting, private rest areas for workers, and prophylactics.[261]

In Germany, law reform allowed trade unions to come up with a model employment contract for sex workers and operators of sex work businesses, in the attempt to promote sex workers' employment rights.[262] However, in the Netherlands, even those sex workers who have rights against their managers regularly opt not to assert them, tending instead to change employers.[263] This is in part because of the continued stigma attached to sex work, making it unappealing for sex workers to go to court to enforce their rights.[264]

Across all of these jurisdictions, there is a proliferation of control experienced by sex workers. In the Netherlands, the state lifted the ban on brothels, recognised sex work, and delegated the regulation of the sex industry to local authorities.[265] There are, however, further controls on sex work and exploitative conditions still exist. Municipalities have control over the granting of licenses and thus the number of legal brothels and sex workers has generally been limited.[266] Licensing decision making, Jane Scoular argues, operates to reaffirm the dividing lines between legitimate and illegitimate forms of commercial sex.[267] Moreover, there are often bans on where sex work can be performed. For instance, in Germany, sex can be banned or limited to certain hours of the day under a by-law in an entire municipality if the

[260] B Brents and K Hausbeck, 'Inside Nevada's Brothel Industry', in R Weitzer (ed), *Sex for Sale: Prostitution, Pornography and the Sex Industry* (London: Routledge, 2000), 227.
[261] B Sullivan, (n 252), 93.
[262] B Kavemann, H Rabe and C Fischer, *The Act Regulating the Legal Situation of Prostitutes – Implementation, Impact, Current Developments: Findings of a Study on the Impact of the German Prostitution Act* (Berlin, SoFFI K.-Berlin, 2007), 9.
[263] R Weitzer, (n 251), 197.
[264] ibid, 197.
[265] J Outshoorn, 'Policy Change in Prostitution in the Netherlands: From Legalisation to Strict Control' (2012) 9 *Sex Research and Social Policy* 233, 233.
[266] G Abel and L Fitzgerald, 'Introduction', in G Abel, L Fitzgerald, C Healy and A Taylor (eds), *Taking the Crime out of Sex Work: New Zealand Sex Workers' Fight for Decriminalisation* (Bristol: Polity Press, 2010), 6.
[267] J Scoular, (n 250), 31

municipality has up to 50,000 inhabitants or, if it has more than 20,000 inhabitants, in part of the municipality.[268] Sex work is also banned in city centres, which would be the most lucrative areas. The exceptions are usually typical red-light districts, but these are usually competitive areas meaning business can be harder to come by and sex workers often rely on pimps to garner business.[269]

Furthermore, it is often expensive for businesses to gain a license, so the market is skewed towards larger businesses and more corporatised forms of sex work. As Scoular notes, 'the majority of sex workers lack the financial resources to set up on their own and would in any case resist a formalized employer/employee relationship, preferring an independent contractor status'.[270] In Nevada, the law gives the businesses significant control over the sex workers' lives and mobility. For instance, contracts might require sex workers 'to work for a number of weeks (usually three) with one week off. During the week off, the worker is expected to either stay in the house or leave town'.[271] In one brothel in Brents and Hausbecks' study, the sex workers had to be back at the brothel by 5pm and their families were not allowed to live in the community.[272] This type of control is clearly a significant constraint on the workers' rights and could well fall within the framework of Unacceptable Forms of Work.

As such, the majority of sex workers in legalised jurisdictions work outside of the legal sector, meaning that they do not benefit from any of the protections and are still subject to criminal laws. Research in Australia shows that because of the increased controls, many sex workers choose to work illegally, with only a small percentage of sex work presently being

[268] B Kavemann et al, (n 262), 4.
[269] ibid, 8
[270] J Scoular, (n 250), 21.
[271] B Brents and K Hausbeck, (n 260), 231.
[272] ibid, 231.

conducted in licensed brothels, estimated at 10%.[273] This, thus, creates a two-tier system wherein 'illegal workers are vulnerable to exploitation and violence, and are less visible to health and social workers'.[274] Moreover, the distinctions between regulation of sex work and the regulation of other work suggest that sex work is still highly stigmatised and sex workers still separated from communities. As Phoenix puts it, 'in an effort to provide a symbolic message that sex work is work like any other, the implementation of special measures or regulations for sex workers serves to increase the distinction between sex workers and other low-paid, casual and exploited workers.'[275]

This examination of other jurisdictions demonstrates that introducing sector-specific labour law while still continuing to criminalise sex workers who work in other ways does not reduce the problems of sex work for most sex workers. Where laws allow sex work in only very limited circumstances, conditions may actually serve to increase controls over sex work, and thus have negative effects on sex workers' working conditions, while doing little to reduce the stigma of sex work. Across so called legalised systems, two tiered systems emerge meaning that sex workers who choose not to or are unable to work in legal brothels may face worse working conditions or higher risks of violence and crime than they did before the reform.

New Zealand, however, demonstrates that sector-specific law can be positive if brought in alongside a removal of criminal laws around adult prostitution. Analysis of New Zealand's law shows that creating laws largely focused on providing enforceable rights against business owners and clients, while allowing sex workers to work together legally, can create a context where sex workers feel more empowered and protected by the law. Stigma is also improved,

[273] B Sullivan, (n 252), 91.
[274] G Abel and L Fitzgerald, (n 266), 6.
[275] J Phoenix, 'Frameworks of Understanding', in J Phoenix (ed), *Regulating Sex for Sale* (Bristol: Policy Press, 2009), 18.

although not eliminated by this system. This reflects concerns that no change in law can fundamentally change attitudes to sex work. The New Zealand approach of removing the criminal law from voluntary adult sexual transactions goes the furthest of the currently available models to this end. As such, I argue that any shift towards reform should begin by repealing and reforming the criminal law, but that labour rights against managers and rights against clients are also key to protecting and empowering sex workers like they are for other workers.

4.5 Conclusion

In this chapter, I have examined the benefits and limits of a labour-based approach, recognising that there is not only one such approach. As such, this chapter examined a range of ways that labour law can be used to respond to the problems of sex work – stigma, risk of violence, and working conditions. Due to the nature of labour law, working conditions is the problem that is most apparent in my analysis, although this chapter has considered how a shift to a labour-based approach might also indirectly reduce the risk of violence and stigma faced by sex workers. Sex work is varied, and the ways in which it is organised multiple. As such, many of the laws around labour apply only to some sex workers and not others. A particular hurdle that has been considered in this chapter is that the majority of sex workers now work independently, through the internet (and a much smaller number in street sex work), while a minority work with third parties in managed brothels, massage parlours, and saunas. As such, for many, there is nobody against whom to claim labour rights. As noted, this does not signal that sex work is not work – many people engage in work on an independent or self-employed basis – but rather that traditional labour law is not designed to address these circumstances. Moving away from

the criminal law to recognising sex work as work can, however, provide benefits for most sex workers.

This chapter began by attempting the difficult task of delineating the conditions under which sex work can be considered acceptable and appropriate labour. It was argued that there are conditions of labour that are so problematic that they cannot be regulated through labour law alone. This first section drew on the ILO's Decent Work Agenda, and particularly its twelve dimensions of Unacceptable Forms of Labour to set minimum standards below which more direct regulation through criminal law is necessary. Particularly, where the person selling sex is under 18, or subject to forced labour, then criminal laws must continue to be used to protect that person, in line with the UK's international obligations. To determine what forced labour is, I moved away from definitions that are focused on voluntariness at the point of entry or travel, to instead consider the actual working conditions. This approach allows for fuller consideration of force and coercion. ILO indicators and ECtHR case law were analysed to delineate situations of forced labour – for example, passports being taken; being unable to leave working premises; having no phone or method of communication with people outside; being threatened with deportation; unhealthy or degrading working conditions; not paying wages; or unclear debt conditions binding the worker to an employer. It was noted, that following ILO and ECtHR precedent, the force of economic necessity or poverty does not fall within definitions of forced labour, but rather indicates a broader need for social support provisions. Beyond age and forced labour, I also considered UFW in relation to other elements of work, such as pay, control, and working time. The appropriate response to these is more challenging, with some, like condom removal or rape clearly being criminal, while others such as pay and working time more appropriately remaining within labour law. The plurality of working arrangements and conditions within sex work make it difficult to apply industry wide standards,

but the Decent Work Agenda also demonstrates that sector-specific legislation can be used to respond to particular issues in different sectors.

The following section of this chapter considered the extent to which current labour law in the UK could be used to improve the working conditions of sex workers, particularly in relation to pay, working time, control over which clients to see, and health and safety conditions. This analysis demonstrated that simply placing sex work into the current framework of employment law in the UK is very limited in its potential to respond to poor working conditions. This is because labour rights are largely dependent on the categorisation of labour relationships, with most rights restricted to employees or workers. Most sex workers do not work with a third party, and those who do are unlikely to meet the requirements to be defined as an employee, or even the lesser category of worker. A very few sex workers may fall within this latter category; while the Supreme Court decision in *Uber v Aslam* offered a broader interpretation of worker, the level of control required to be a worker might still only be apparent in a small percentage of cases. It is argued that many sex workers will still be categorised as self-employed, following the approach taken by the Court of Appeal in *Quashie*. As such, many sex workers will be ineligible for labour rights given to 'workers', and their capacity to improve the working conditions of sex workers is therefore restricted. Moreover, the rights themselves – particularly minimum wage and working time protections – are unlikely to be beneficial to many sex workers due to the organisation of sex work. Finally, this section considered the benefits of collective bargaining and found that weak legal position of unions, along with lower levels of recruitment of sex workers, the risk of being 'outed', and the ease with which alternative workers could be found, means that collective bargaining offers limited possibilities of improving working conditions. Overall, the current labour law in England and Wales is

restrictively focused on normative employment relationships, and in its current form offers little capacity to respond to the problems of sex work.

Moving away from the current law labour law, this chapter finally considered sector-specific labour laws for sex workers. This section considered how labour law has been employed in some jurisdictions, including New Zealand, where there is minimal involvement of the criminal law, and Germany, the Netherlands, parts of Australia, and Nevada, where sex work is permitted under some highly controlled conditions, but otherwise remains within the remit of the criminal law. While none provides a panacea for the problems of sex work, I argue that the Prostitution Reform Act of New Zealand provides the best example of how a sector-specific labour approach could work, providing a range of rights that can be enforced against managers and clients. Research suggests that sex workers feel more empowered under this model, and that risk of violence and crime against sex workers and, to a lesser extent, stigma is lowered. Models of legalisation, however, largely increase state control over some sex workers, while many sex workers remain outside of protections, and so do little to respond to the problems of sex work for those. The New Zealand model is not a silver bullet for the problems facing sex work but could provide a model for consideration in England and Wales, although any legislative change would need to be considered in the specific cultural context.

In the following chapters, I consider the extent to which a human rights approach, alongside the labour approach considered here, could address the problems of sex work, as set out in Chapter 2. The next chapter considers the importance of human rights for sex workers more generally, before the following three consider the HRA specifically as a potential tool for reform.

Chapter 5

HUMAN RIGHTS AND THEIR IMPORTANCE FOR SEX WORKERS

5.1 Introduction

It is difficult to overemphasise the role that human rights have played in legal and political discourse over the last half century. They have proliferated into new areas of law and society and have become a means of 'driving progress for the future'.[1] Before examining the Human Rights Act (HRA) specifically in Chapters 6, 7 and 8, this chapter asks what use is the human rights framework more broadly for assisting sex workers and the sex workers' rights movement to make gains through the legal system and manoeuvre past systems and policies that deny, hamper, and endanger their inclusion and access to justice. When considering the benefits and limitations of human rights, there are complex questions of what rights are, what purpose they serve, and in what ways they can be used by sex workers, individually and as a group. In addressing these questions, this chapter moves us closer to understanding the overarching question of this thesis around the extent to which the HRA can be beneficial to sex workers in reducing the problems set out in Chapter 2.

Given the various experiences of sex workers, the question may be asked whether sex workers are sufficiently organised or cohesive as a group to engage with human rights in the legal arena. Yet, human rights have been a part of the sex workers' rights movement for many years, with the framework and language of rights being adopted across many jurisdictions and internationally to challenge oppressive laws and fight for social justice. While many sex

[1] K McNeilly, 'Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change' (2019) 28 (6) *Social and Legal Studies* 817, 818.

workers may be unable or unwilling to engage with legal rights personally, this does not mean that they cannot be represented in rights discussions. Advocating is often done by organised grassroots sex worker-led campaigning groups and collectives, such as the English Collective of Prostitutes (ECP)[2] and Sex Worker Advocacy and Resistance Movement (SWARM).[3] These types of groups, which can be seen across the world, often have large and diverse memberships, including sex workers from all parts of the sex industry and with a range of experiences. ECP, for example, has a national network, as well as sister organisations in Thailand[4] and the US.[5] It was established in 1975, so has a long history of campaigning nationally for sex workers' rights, including responding to consultations and hosting events in Parliament, as well as supporting individuals in court cases.[6] The leadership of the organisation represents their diverse members, particularly where they are unable or unwilling to be publicly identified as sex workers. Moreover, charities and non-governmental organisations, such as National Ugly Mugs (NUM), which are not necessarily sex worker-led, can also support claims to rights. NUM employs sex workers with a range of lived experience to undertake research with broad communities of sex workers and uses that research to lobby for sex workers' rights, while also supporting individual sex workers through any engagement with the justice system.

As discussed below, bringing a legal human rights case through courts does require an individual to be the claimant, and so is dependent on an individual publicly engaging with human rights, which is more accessible for some sex workers than others. That individual can, however, be supported, legally, financially, and emotionally, by collectives and charities. This

[2] English Collective of Prostitutes, available at: https://prostitutescollective.net/ (last accessed 1 May 2022).
[3] Sex Worker Advocacy Resistance Movement, available at: https://www.swarmcollective.org/ (last accessed 1 May 2022).
[4] Empower Foundation, available at http://www.empowerfoundation.org/ (last accessed 1 May 2022)
[5] US PROS Collective, available at: https://uspros.net/ (last accessed 1 May 2022).
[6] ECP, Legal Cases, available at: https://prostitutescollective.net/legal-cases/ (last accessed 1 May 2022)

was seen in the *Bedford v Canada* case,[7] explored at 5.3.1.1, where three sex workers were the plaintiffs, but twenty two organisations acted as interveners either in support of the plaintiff or the state. Moreover, bringing a human rights case, I will demonstrate, is not the only way to engage with human rights. Other rights approaches do not require sex workers to be 'out' publicly. The rise of the internet has also enabled a greater range of people to engage with the sex workers' rights movement, to drawn on and give community support. A recent example in the broader sex work community is a legal challenge to a decision in Edinburgh to ban strip clubs; members of United Sex Workers, a sex worker and stripper-led branch of the United Voices of the World union, is bringing the case and crowdfunded nearly £20,000 for legal fees in less than a week to bring the case.[8] While this applies to strippers rather than sex workers who only sell direct sexual services, it is indicative of the way sex workers can and do support each other in legal cases. As such, engaging with human rights in the ways discussed in this chapter does not require that every sex worker is personally able to be out or legally knowledgeable, and so rights are not necessarily unattainable on this basis.

This chapter begins by considering the bases of human rights. There is no consensus on the origins of human rights, and a complete exploration of this philosophical debate is beyond the limits of this thesis. Drawing particularly on Ronald Dworkin's approach to human rights based in equality across the political community, I argue that rights can be important because they denote personhood, equality and inclusion. This, I argue, is significant for sex workers who, as seen in Chapters 2 and 3, have been excluded symbolically and physically from society through discourse, policy and criminal law.

[7] 2013 SCC 72, [2013] 3 SCR 1101.
[8] USW, 'Urgent: Save Our Strip Clubs, Save Our Jobs', available at: https://www.gofundme.com/f/urgent-save-our-strip-clubs-our-workplaces?utm_campaign=p_cp+share-sheet&utm_medium=copy_link_all&utm_source=customer (last accessed 15 June 2022).

The second section of this chapter examines the functions of human rights, considering how they might be operationalised by sex workers and in what contexts. I consider their functions as protections from interference by the state and other citizens; as entitlements; and as a linguistic tool. I argue that rights can be, have been, and are used in a number of ways by sex workers: to challenge the laws relating to sex work; to claim entitlements from the state; and to reframe the narratives around sex workers to position them as human rights bearers. To make this argument, I draw not only on human rights theory, but on practical examples from other jurisdictions and human rights movements, to provide a more contextualised and concrete understanding of these functions of human rights. Through this analysis, I demonstrate that each different approach to using rights has benefits and disadvantages in different arenas – for instance, broader discussions of human rights, drawing on moral rights, international human rights, domestic legal rights and the discourse of rights, might be appropriate in lobbying Parliament or in general campaigning. On the other hand, court cases rely specifically on enforceable legal rights, so broader approaches would be inappropriate and largely unhelpful.

Finally, I examine critiques that have been made generally of rights, and the applicability of these critiques to discussions of sex workers rights. This analysis considers the limitations of the rights framework, both legally and discursively, as a tool of reform for sex workers. I consider criticisms that rights are indeterminate and illegitimate, individualistic, too narrow, and conflicting. While these arguments have been made against human rights in general, there has been little engagement with these criticisms in relation to the sex workers' rights movement.[9] Rather, as Scoular notes, for sex workers, 'the legacy of criminalisation, which remains a pressing and dominant issue for most, means that rights, which are in their

[9] J Scoular, *The Subject of Prostitution: Sex Work, Law and Social Theory* (Abingdon: Routledge, 2015), 99.

infancy, have tended to be uncritically embraced by this marginalised constituency'.[10] As such, this section performs an important task by addressing these concerns in the context of sex workers' rights, to provide a critical evaluation of the limitations of this framework for sex workers. This chapter argues that while human rights are a limited tool for addressing the problems of sex work, they are already being used by competing campaigns, so to abandon them would be politically difficult. Moreover, I argue that the potential benefits of a human rights approach outweigh the limitations, and therefore, it offers an important and pragmatic approach to the issues of sex work.

5.2 The Basis of Human Rights

In this section I examine the basis of human rights, ultimately arguing that they are drawn from equal political and human status. Despite their widespread usage, there is no philosophical consensus about what constitutes a human right, and what functions they perform. The very existence of rights beyond law has been a ground for debate.[11] When considering the importance of human rights for sex workers, engaging with these debates around the basis of rights has two purposes: first, it highlights the implications of a claim to rights for individual sex workers, in terms of agency, humanity, and equality; and secondly, it gives space to reflect on the significance of enforceable legal rights, such as those under the HRA, as opposed to abstract claims to rights.

[10] ibid.
[11] J Bentham, 'Anarchical Fallacies' (1816), reprinted in J Bowring (ed), *The Works of Jeremy Bentham Vol. 2* (Edinburgh: William Tait, 1843).

5.2.1 Moral Rights

The concept of human rights has developed over many hundreds of years. Prior to the late eighteenth century, the predominant version of rights was 'natural rights', which were strongly linked to natural law – the theory that there exists a law determined by nature rather than by the government.[12] Thomas Aquinas argued that humans know natural law because it is promulgated by God.[13] This conception of natural law and natural rights asserts that laws and rights can exist whether or not they are found in a legal document. During the Enlightenment, arguments about the basis of rights shifted from theology and instead, were linked to personhood and rationality.[14] Immanuel Kant argued that humans have rights by virtue of their humanity – that being a human capable of rational thought, we have dignity, and this is the basis for protection from infringement of one's freedom.[15] Such an approach to rights posits that they are based not on a particular law or legal instrument but on a moral basis that transcends the law.

The notion of rights beyond law has been challenged by legal positivists. Joseph Raz, for example, argues that source-based law is necessary to 'provide publicly ascertainable standards by which members of society are held to be bound so that they cannot excuse non-conformity by challenging the justifications of the standard.'[16] Jeremy Bentham famously asserted that 'natural rights is simple nonsense: natural and imprescriptible rights rhetorical nonsense, – nonsense upon stilts'.[17] By this, he meant that they were devoid of any meaning at

[12] T Aquinas, (1849) *Summa Theologica, translated by the Fathers of the English Dominican Province* (Raleigh: Hayes Barton Press, 1947), Q94 Art 4; J Locke, *Two Treatise of Government* (1690) (Reprinted in London: C Baldwin, 1824).
[13] T Aquinas, ibid, Q90 Art 3.
[14] I Kant, *The Metaphysics of Morals* (1797) (Translation by M Gregor, Cambridge: Cambridge University Press, 1991); J S Mill, *On Liberty* (London: Longmans, Green, Reader and Rye, 1869).
[15] I Kant, ibid.
[16] J Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 52.
[17] J Bentham, (n 11), 501.

all[18] – they simply do not exist. He argued that just wishing that moral rights exist does not make it so.[19] Bentham rejected theological grounds for rights; he argued that any theories of morality based on God's will must be rejected because 'God does not... either speak or write to us', and that people pretend otherwise by 'observing what is our own pleasure, and pronouncing it to be his'.[20] Theological bases for rights, Bentham argued, are flawed and simply disguise the real reasons for creating laws because even 'natural' or 'moral' rights are created by humans, [21] and as such, they should have no higher status than any other laws.

If rights were accepted as man-made only, as Bentham argued they should be, then future generations would be able to repeal them if appropriate. In line with his utilitarian thinking, he disagreed with the notion that there can be rights which a government may not violate if it is in the average interests of the people to do so:

> there is no right which ought not to be maintained so long as it is upon the whole advantageous to the society that it is maintained, so there is no right which, when the abolition of it is advantageous to society, should not be abolished.[22]

He argued that laws and rights should only be created to support the 'greatest happiness for the greatest number'.[23] The idea that rights based on individual interests should not be curtailed on the basis of general welfare is therefore rejected by Bentham.

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[18] J Waldron, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987), 35.
[19] J Bentham, (n 11), 501.
[20] J Bentham, 'Principles of Morals and Legislation' (1781), reprinted in J Bowring (ed), *The Works of Jeremy Bentham Vol 1* (Edinburgh: William Tait, 1843), 11.
[21] J Bentham, (n 11), 501.
[22] J Bentham, (n 11), 501.
[23] J Bentham, (n 20), 272.

Bentham's argument goes to the heart of the debate between utilitarian and deontological approaches to government. Deontological liberalism, based in Kant's work, argues that because society is composed of a plurality of individuals, each with his or her own interests, it is best arranged by a government that does not itself presuppose any perception of what is good, but protects the individual's ability to choose their own perception of what is good.[24] In contrast, utilitarianism would promote one conception of good on the basis that it promotes the greatest happiness of the greatest number. John Stuart Mill, however, suggests that rights can actually promote utilitarian aims,[25] and as such, the two need not be in tension. Yet, as Michael Sandel argues, 'where utility is the determining ground... there must in principle be cases where the general welfare overrides justice rather than secures it'.[26] This, I argue in this chapter, is the case where communitarian concerns are upheld at the expense of marginalised groups and individuals.

The problem with the utilitarian approach is that it creates a 'society where some [a]re coerced by the values of others'.[27] Ronald Dworkin argues that because the bulk of the law is based on the majority's view of the common good, the institution of rights is therefore 'crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected'.[28] That is, the promotion of the greatest happiness for the greatest number can prevail until the collective goal is insufficient justification for imposing some particularly significant loss or injury upon an individual.[29] It is then that justice would require a right to be upheld in the face of the collective interest, in order to ensure that the individual in question is not treated as a means to other people's ends.

[24] M Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), 1.
[25] J S Mill, (n 14), 8.
[26] M Sandel, (n 24), 4.
[27] ibid, 5.
[28] R Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 205.
[29] ibid, xi.

Dworkin's theory of rights is based not on any theological underpinnings but on the idea of political equality. Each person has rights 'not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice'.[30] This theory argues that if a government is to be legitimate, it must not make laws which fail to acknowledge that each individual is of equal status and deserves equal concern.[31] This builds upon Kant's personhood concept[32] – equality is based on our equal human status.[33] There are, however, distinctions between the personhood and equality ground. Kant's personhood argument rests on the idea that there is something inherently special about humanity, as the 'ultimate purpose of nature on earth'.[34] Dworkin, on the other hand, focuses more on the political aspect of rights and humanity – as humanity has developed into a political community, then each person should be treated as equally a part of that community, and given equal respect from governments. On this basis, a person – or specifically, for current purposes, a sex worker – can challenge a law on the basis that it treats them as a means, and not a full and equal member of society. Dworkin considers equality to be the essence of liberalism. Under this approach, a government must demonstrate equal respect for its citizens to avoid being tyrannical. [35] To treat individuals as other than full members of this community is 'profoundly unjust'.[36]

In *At the Heart of Freedom*, Drucilla Cornell also uses the concept of equality to support her claims to rights:

[30] ibid, 182.
[31] R Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Massachusetts: Harvard University Press, 2000), 2.
[32] I Kant, (n 14), 63.
[33] J Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 40.
[34] I Kant, *Critique of Reason* (1790) (Translation by W S Pluhar, Indianapolis: Hackett, 1987), 317.
[35] R Dworkin, (n 31), 1.
[36] R Dworkin, (n 28), 198.

> Equal intrinsic value is not a metaphysical proposition, but an aspect of the politically conceived free person... none of us should be legally reduced to our place in a social hierarchy; if so reduced, we are not politically recognized as free.[37]

If each of us is considered equal under this conception, then we should each have the freedom to live as we wish, without any other person telling us how to do so, so long as we do not interfere with others' freedoms.[38] Cornell does not rely on a fixed conception of personhood upon which to base her call for rights, preferring to see 'becoming a person' as a project in which we all take part.[39] As she puts it, 'a person is not something "there" on this understanding, but a possibility, an aspiration which, because it is that, can never be fulfilled once and for all'.[40] Therefore, for Cornell, we each need an equivalent chance to take part in the project, and it is this which must be protected.[41] As Cornell articulates this, 'hierarchical gradations of any of us as unworthy of personhood violate the postulation of each one of us as an equal person called for by a democratic and modern legal system'.[42]

James Griffin, conversely, argues that equality can be addressed in other elements of justice without necessarily invoking human rights.[43] Following Dworkin's argument, however, equality requires rights because rights hold a very specific value in politics – 'if someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so'.[44] Equality requires that a government may not rely on 'the claim that certain forms of life are inherently more valuable than others'.[45] Dworkin's theory

[37] D Cornell, *At the Heart of Freedom* (Princeton: Princeton University Press, 1998), 19.
[38] ibid, 21.
[39] D Cornell, *The Imaginary Domain* (New York: Routledge, 1995), 4.
[40] ibid, 5.
[41] ibid, 5.
[42] ibid, 10.
[43] J Griffin, (n 33), 41.
[44] R Dworkin, (n 28), 269.
[45] ibid, 274.

of rights responds to the failings of utilitarianism to protect individual's equality – 'it allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect'.[46] For groups like sex workers, who I have argued have been constructed by law and policy as outside of society, there is importance in asserting equal membership of both humanity and the political community. As Iris Marion Young argues, 'calls for inclusion arise from experiences of exclusion – from basic rights, from opportunities to participate, from the hegemonic terms of debate'.[47] Rights provide a narrative that positions sex workers within the citizenry rather than as outsiders, offering an alternative to constructions focused on deviance, nuisance, or victimhood.

5.2.2 Enforceability

The argument that there is a distinction between what is and what ought to be (known as Hume's Law[48]) was originally put forward by David Hume to argue that one cannot make moral or normative conclusions from non-moral, prescriptive premises.[49] Onora O'Neill draws on Hume's Law, arguing that if a right cannot be enforced, it matters not that it ought to exist; the reality is that the right does not exist.[50] One way in which a right would be meaningless would be when the rights-holders do not know from whom they can claim the right. She argues that unless obligation-bearers are identifiable by rights-holders, 'claims to have rights amount only to rhetoric: nothing can be claimed, waived or enforced if it is indeterminate where the claim should be lodged, for whom it may be waived, and on whom it should be enforced'.[51]

[46] ibid, 277.
[47] I Young, *Inclusion and Democracy* (Oxford: OUP, 2000), 6.
[48] A C MacIntyre, 'Hume on "Is" and "Ought"' (1959) 68 *Philosophical Review* 451, 451.
[49] ibid, 452.
[50] O O'Neill, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996), 129.
[51] ibid, 129.

The right becomes simply an empty vessel. However, she does note that where universal rights are matched by corresponding universal obligations, then the obligation-bearer is recognisable.[52] That is, if everyone owes everyone else the same right, then it is clear that each of us can claim that right from one another.

For this purpose, O'Neill makes the distinction between liberty rights and rights that require positive action. She argues that liberty rights can be universal if they have a 'corresponding obligation held by all others'[53] which 'do[es] not need institutional structures to be claimable and waivable'.[54] Contrastingly, she argues that the lack of a recognisable obligation-bearer is particularly problematic for rights which require positive obligations, for instance rights to goods, services or welfare. Unlike liberty rights, positive rights would demand corresponding obligations that cannot be discharged by all, if only because agents are embodied, hence spatially and temporally dispersed, so not all of them have access to one another that universal 'positive' intervention would demand.[55] Therefore, we cannot say that every person owes every other person an obligation to provide some positive action because we will never meet most of the people to whom we would owe this obligation.

Perhaps more importantly, O'Neill argues, 'nobody would know what their obligations were; or for whom they ought to provide what or when they should act, and at how much cost to themselves'.[56] Therefore, in order to claim rights which require positive action, we must allocate rights, and have a 'system of assigning agents to recipients' by which 'the counterpart obligations are 'distributed''.[57] This system is usually some restricted form of arrangement,

[52] ibid, 129.
[53] ibid, 129.
[54] ibid, 131.
[55] ibid, 130.
[56] ibid, 134.
[57] ibid, 131.

whereby citizens of a state, or a certain community, will owe each other such a right.[58] The institutionalisation of the right is also necessary to define the meaning of the right for potential obligation-bearers.

Beyond the problem of knowing from whom the right-holder may claim a right, O'Neill argues that both liberty and 'positive' rights require institutional structures to enforce the obligation. If the right is solely moral, then there are no mechanisms to recompense the right-holder or ensure that the violator must perform their obligation. She argues that even fundamental liberty rights, such as the right not to be tortured, 'cannot be implemented without a legal system and institutional structures for supervising police, courts and penal institutions.'[59] Again, however, she notes a difference between liberty rights and those requiring 'positive' action: when a liberty right is infringed, there are determinate others who are the violators; when rights to welfare, goods and services are not met, and no institutions for distribution or allocation are in place, it is not clear who the violators are.[60] Despite the distinction, she is clear in her argument that without enforcement mechanisms, moral rights are 'at best a premature rhetoric of rights [which] may have political point and impact'[61] but 'at worst a premature rhetoric of rights can inflate expectations while masking a lack of claimable entitlements'.[62] That is, not only are they meaningless, they also mask the real situation.

While it is undeniable that the institutionalisation of rights is desirable in order to ease claims and the enforceability of rights, I argue it is not essential for their existence. As John Tasioulas notes:

[58] ibid, 131.
[59] ibid, 131.
[60] ibid, 132.
[61] ibid, 133.
[62] ibid, 133.

> rights must have a tolerably determinate content independently of any subsequent institutional specification they might receive. If they did not, there would be no warrant for treating them as human rights in the first place.[63]

Further, Tasioulas responds that the distinction between liberty rights and rights requiring positive action is problematic, as most rights have 'counterpart duties of both sorts'.[64] This means that we can know more about our 'positive' obligations than O'Neill gives us credit for.[65] Tasioulas argues that instead of writing off the moral element of rights, understanding the moral reasons why an obligation is imposed will 'create the broader context of understanding and support that is essential to the genuine enforceability of rights'.[66] He suggests that those who focus on the institutionalisation of rights are viewing them too superficially, rather than understanding them as the ethical issue that they are.[67] This ethical understanding, rather than one so tied to the institutions enforcing the rights, allows for different implementation in different systems – that is, the country could design the implementation to fit the social context, rather than using a Western form of institutionalisation (which is often criticised by non-Western countries).[68] Rights then, are universal in substance but not necessarily in how they are implemented.

The lack of enforceability does not refute the existence of moral rights for a number of reasons. First, even when human rights are legally enacted there is often no actual power, or in fact motivation, to enforce them.[69] This is a major issue even in the debates surrounding legal

[63] J Tasioulas, 'The Moral Reality of Human Rights', in T Pogge (ed), *Freedom from Poverty as a Human Right: who owes what to the very poor?* (Oxford: Oxford University Press, 2007), 76.
[64] ibid, 90.
[65] ibid, 91.
[66] ibid, 84.
[67] ibid, 88.
[68] ibid, 88.
[69] ibid, 84.

rights – Raz argues that there are 'legal rights and duties which cannot be enforced and violation of which does not give rise to action for penalties or remedies'.[70] Moreover, legal rights may be, as Matthew Kramer puts it, inoperable,[71] but because they are legally enacted, their very existence is not denied. To try to do this would seem strange.[72] Yet this argument is used to deny the existence of moral rights. While, as I go on to demonstrate, enforceability is of practical significance, to deny that a person can be a right-holder because they are unable to enforce their right is to describe them as thoroughly powerless or disempowered.[73] O'Neill's argument also ignores the importance of the language of rights in and of itself. As Williams notes, 'the vocabulary of rights speaks to an establishment that values the guise of stability, and from whom social change for the better must come'.[74] That is, the rhetoric of rights, rather than always signalling the end of the struggle, can be used to affirm the struggle for recognition from both the state and other members of society.

Secondly, the legal enactment of a human right may be pointless when it is the state which has become the main infringer of the human right.[75] That is, when the state violates the rights of its citizens, it seems obtuse to put the enforcement of those rights solely into the hands of the state. Tasioulas used the example of the right to rebel against a tyrannical government.[76] One of the major functions of rights is to protect the citizen from the state's encroachment on his or her freedom; if the state is the only enforcer, even a legal right offers no real protection. Therefore, the only protection would come from an acceptance that rights go beyond the

[70] J Raz, 'Legal Rights' (1984) 4 *Oxford Journal of Legal Studies* 1, 3.
[71] M Kramer, 'On the Nature of Legal Rights' (2000) 59 (3) *Cambridge Law Journal* 473, 484.
[72] ibid, 487.
[73] ibid, 480.
[74] P Williams, *The Alchemy of Race and Rights* (Cambridge, Massachusetts: Harvard University Press, 1991), 149.
[75] J Tasioulas, (n 63), 86.
[76] ibid, 86.

positive law and legal system, and that their infringement allows for some recourse or action beyond a call for legal enforcement.

While moral and legal rights can exist independently, the translation of moral rights into legal rights is a regular phenomenon in modern times, with many positive consequences, including making them more easily enforceable. On the international stage in 1948, the United Nations proclaimed its Universal Declaration of Human Rights (UDHR),[77] propelling the concept of human rights into the contemporary political arena.[78] Since then, there have been a number of international and regional instruments created, including, significantly for my purposes,[79] the European Convention on Human Rights (ECHR) in 1950.[80] These documents play an important role in implementing human rights, making them more determinate 'by making or reflecting an authoritative choice from among alternative eligible specifications of human rights norms'.[81] They do not replace, and therefore make redundant, the moral rights – for one thing, even truly international instruments, like the International Covenant on Civil and Political Rights (ICCPR) are not universally accepted.[82] Others, like the UDHR, may not be legally binding.[83] Nevertheless, the UDHR and subsequent documents have propelled human rights into the global sphere, increasing the potential for bringing international political pressure to bear on countries that persist in violating their citizens' human rights.[84] That is, human rights violations can be challenged politically even when it is not possible to address them through legal rights.

[77] Universal Declaration of Human Rights 1948, General Assembly Resolution 217 A(III) of 10 December 1948.
[78] M Freeman, *Human Rights* (Cambridge: Polity Press, 2002), 32.
[79] As the following three chapters focus on the HRA and ECHR jurisprudence.
[80] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.
[81] J Tasioulas, (n 63), 75.
[82] International Covenant on Civil and Political Rights (ICCPR) General Assembly resolution 2200A (XXI) of 16 December 1966. Only 173 countries are state parties to the ICCPR.
[83] J Tasioulas, (n 63), 75.
[84] J Waldron (n 18), 155.

As HLA Hart argues, we speak of 'moral rights mainly when advocating their incorporation in a legal system'.[85] When the rights are translated into law, the reason we have the right remains moral, but the consequence of having the right is political and legal.[86] The right then creates a bridge between the moral and the legal.[87] Dworkin refers to moral rights as 'background rights' – those which 'provide a justification for political decisions by society in the abstract'.[88] The translation of moral rights into legal ones can be done both by Parliament and by the courts, or through ratification of international conventions. One example domestically is the recognition of same-sex relationships. The right of same-sex couples to live as they wish, and not be '"graded" as unworthy of personhood, or at least as a lesser form of being',[89] is based in the rights of equal respect and liberty, but it was not until the Civil Partnership Act 2004[90] that this was translated into a legal right to have their relationships officially recognised. The translation of moral rights into legal rights often provides institutional support in the way of policing, courts, and penalties for infringement, and as such makes enforceability easier for the right-holder. Moreover, the duties which are correlative to the right are more easily known to the obligation-bearer, so that they may more effectively act in a way which is compliant to the right, without necessitating the interference of enforcement mechanisms.

For individual sex workers, sex work collectives and campaigning groups, enforceability might be significant in decisions about how to frame a rights claim. Even if the existence of rights is accepted regardless of enforceability, it remains true that enforceability is important in realising the protections or entitlements encompassed in the right. Sex workers

[85] H L A Hart, 'Are There Natural Rights?' (1955) 64 (2) *Philosophical Review* 175, 177.
[86] R West, *Re-Imagining Justice* (Aldershot: Ashgate, 2003), 72.
[87] ibid.
[88] R Dworkin, (n 28), 93.
[89] D Cornell, (n 39), 10.
[90] And later the Marriage (Same Sex Couples) Act 2013.

and sex workers' rights groups, in making a claim to rights, might then consider which rights are most easily enforceable. Many of the arguments around sex workers' rights have been framed around social or economic rights, such as the right to health or the right to work.[91] These rights often more clearly fit the primary concerns of sex workers as workers and the conceptualisation of sex work as work.[92] Economic and social rights, however, require affirmative state action in order to make them effective, are less justiciable, and therefore have been described as more political in nature than legal.[93] No explicitly economic and social rights are directly enforceable in domestic courts.[94] Some claimants have made attempts to bring social and economic cases under the HRA, usually framing these under the Article 8 right to private life, and Article 14 freedom from discrimination in the enjoyment of Convention rights.[95] These have been more successful where they asking the court to stop an action relating to withdrawing social rights,[96] than where they claim a positive duty for the state to make a provision, for example, by providing a home[97] or housing benefit.[98] On the whole, the courts have been reluctant to make determinations over how public resources should be allocated, preferring to leave this to government bodies.[99] This reflects O'Neill's argument that rights that make claims to resources are more difficult to define, discharge, and enforce.[100]

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[91] M Decker et al, 'Human Rights Violations against Sex Workers: Burden and Effect on HIV' (2015) 385 (9963) *The Lancet* 186; C Overs and K Hawkins, 'Can Rights Stop the Wrongs? Exploring the Connection between Framings of Sex Workers' Rights and Reproductive Health' (2011) 11 (Suppl 3) *BMC International Health and Human Rights* S6.
[92] B Hernandez-Truyol and J Larson, 'Sexual Labor and Human Rights' (2006) 37 *Columbia Human Rights Law Review* 391.
[93] ibid, 409.
[94] M Amos, 'The Second Division in Human Rights Adjudication: Social Rights Claims under the Human Rights Act 1998' (2015) 15 (3) *Human Rights Law Review* 549.
[95] There have been a number of claims brought in recent years under the HRA to protect social rights. These have been subject to a higher test of review and have been far less likely to succeed in courts – *Wandsworth LBC v Michalak* [2002] EWCA Civ 271; *Kay v Lambeth LBC* [2006] UKHL 10; *R (SG) v Secretary of State for Work and Pensions* [2014] EWCA Civ 156.
[96] *R v Brent, Kensington & Chelsea and Westminster Mental Health NHS Trust* [2002] EWHC (Admin) 181.
[97] *Wandsworth LBC v Michalak* [2002] EWCA Civ 271.
[98] *R (Painter) v Carmarthenshire CC Housing Benefit Review Board* [2001] EWHC (Admin) 308.
[99] M Amos, (n 94), 552.
[100] O'Neill (n 50), 129.

As an alternative, sex workers and sex workers' rights organisations could choose to frame their claims in terms of civil and political rights. Doing so would allow sex workers in England and Wales to draw on the HRA, which creates a range of obligations upon the state in relation to the ECHR.[101] Yet, their concerns may have to be manipulated to fit a framework which can mean that claims 'push up against the boundaries of conventional interpretations of human rights'.[102] The legal framework is often at odds with grounded understandings of the issues, as sex workers' claims are based on understandings of justice rather than on 'sophisticated technical knowledge of international human rights conventions and laws'.[103]. In making claims using legal rights, therefore, they may be able to address only some of their concerns, such as protecting sex workers from laws or practices that violate their rights, rather than more broadly asserting claims to socio-economic rights, redistribution, and resources (which can be done in ways such as lobbying Parliament, where rights claims do not need to be directly enforceable). Moreover, the complexities of sex workers' lived experiences may be flattened to fit the civil and political framework. The sex workers' rights movement has already drawn on both civil and political, and social and economic rights in setting out their rights demands. For instance, the World Charter for Prostitutes' Rights includes freedom of speech, travel, marriage, motherhood (civil and political rights), but also the right to work, travel, unemployment insurance, health insurance, and housing (economic and social rights).[104] This shows that one set of rights does not have to be chosen at the expense of the other, but the way that these are operationalised may be different. The next section of this chapter considers the different functions of rights, to consider how human rights could be used by sex workers.

[101] This is explained further in Chapter 6.
[102] C Overs and K Hawkins, (n 91).
[103] ibid.
[104] International Committee for Prostitutes' Rights (ICPR), *World Charter for Prostitutes' Rights,* Amsterdam 1985, reprinted in G Pheterson, (ed), *A Vindication of the Rights of Whores* (Washington: Seal Press, 1989).

5.3 The Functions of Human Rights

Alongside the discussion of the bases of rights and their enforceability, there runs much discussion about what functions rights perform, and as such, why they are beneficial. This is important as a human rights approach to sex work will be able to make use of these functions. I will argue in this section that rights perform three key functions: (1) to provide protections to individuals; (2) to entitle individuals to make claims from the state and other citizens; and (3) to act as a linguistic tool when negotiating relationships with other citizens and the state. The value of each to the sex workers' rights movement and sex workers individually will be considered.

5.3.1 Rights as Protections

One of the traditional functions of rights is to protect individuals from both state interference, in the form of an abuse of political power,[105] and from interference from other citizens. John Rawls argues, in *The Law of Peoples*, that human rights limit a government's power over its citizens.[106] Rawls argues that the political (moral) force of these rights 'extends to all societies, and they are binding on all peoples and societies, including outlaw states'.[107] The creation of international rights instruments allows individuals to challenge state action which interferes with the rights protected within these documents. This is one of the main instances where it is important to recognise that moral rights exist outside of the legal documents – these instruments are not universally binding so it is the moral rights behind them which often provide the basis for challenges to state practices. As Costas Douzinas recognises:

[105] M Freeman, (n 78), 61.
[106] J Rawls, *The Law of Peoples* (Cambridge, Massachusetts: Harvard University Press, 2002), 79.
[107] ibid, 81.

> A theory of human rights which places all trust in government, international institutions, judges and other centres of public or private power, including the inchoate values of a society, defies their *raison d'être*, which was precisely to defend people from those institutions and powers.[108]

Beyond protecting people from the gravest of infringements, rights can provide protection from decisions which would be unjustifiably onerous on a certain group or individual. As Robin West notes, it 'is the individual's freedom to assert his will in whatever ways he individually or idiosyncratically desires, unimpeded by noxious community and communitarian constraints, that is protected by rights'.[109] Dworkin argues that 'individual rights are political trumps held by individuals'.[110] That is, a 'right against the Government must be a right to do something even when the majority thinks it would be wrong to do it.'[111] Individual citizens and groups are protected against decisions the majority wants to make, in the common interest, where that decision would infringe their rights.[112] Therefore, where the individual's interest is so important that to infringe it would violate his status as an equal member of the political community, it must be protected against policy which would undermine or violate it.

This function protects the values of both equality and liberty.[113] Basic rights such as 'freedom of expression, of political participation, of occupational choice, the freedom to establish a family by mutual agreement with a participation of one's choice'[114] could all be

[108] C Douzinas, *The End of Human Rights* (Oxford: Hart, 2000), 13.
[109] R West, (n 86), 6.
[110] R Dworkin, (n 28), 205.
[111] ibid, 194.
[112] ibid, 133.
[113] I Kant, (n 14); J Locke, (n 12); *US Declaration of Independence* (1776), as reprinted in C Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Bibliolife, 2008); I Berlin, 'Two Concepts of Liberty', in N Warburton, *Philosophy Basic Readings* (Abingdon: Routledge, 1999).
[114] J Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 246.

derived from these core values. Moreover, both negative and positive liberty can be protected by this function. Isaiah Berlin defines negative liberty as 'warding off interference',[115] because:

> To threaten a man with persecution unless he submits to a life in which he exercises no choices of his goals… is to sin against the truth that he is a man, a being with a life of his own to live.[116]

Griffin suggests that therefore we must 'start with the broadest liberty possible and impose the burden of argument on anyone who wants to restrict it.'[117] Protecting a person's negative liberty therefore means that any interference must be justified in relation to that right.

Much of the law around sex work is based on a normative conception of the good life, that nobody would choose to be a sex worker. Sex workers, are thereby constructed as deviants or alternatively victims through criminal law and political discourse, leaving little room for the possibility of agential decision to work in sex work. Moreover, laws have been framed particularly around protecting communities from nuisance, and challenging exploitation, with little attention paid to the way that these laws onerously interfere with sex workers' lives. As such, using Berlin's definition, sex workers are threatened with persecution when they fail to submit to these communitarian laws. In this way, the state treats these sex workers as less than equal members of society, whose interests are less valued than those of the rest of society. As Dworkin states, rights can be a way to protect individual or group interests which do not fit with the interests of the majority – 'a right to do something even when the majority thinks it would be wrong to do it.'[118] This is particularly significant where the groups claiming the rights

[115] I Berlin, (n 113), 237.
[116] ibid, 237.
[117] J Griffin, (n 33), 172.
[118] R Dworkin, (n 28), 194.

are largely ignored or vilified by the public or the government – for example, prisoners' rights or sex workers' rights. This kind of rights claim pertains directly to the sex work debate where the goals of creating safe working environments or upholding sex workers' rights are often treated by governments as secondary to 'protecting communities'.[119]

Positive liberty, as opposed to simply protecting from state interference, is about a person being 'his own master', for 'his life and decisions to depend on [him]self, not on external forces of whatever kind'.[120] Rights, then, require not only that the state itself respects the individuals' agency to make decisions about their conception of a good life, but that it enforces and creates the conditions in which the rights are protected.[121] As Jeremy Waldron argues, 'the fact that the government itself does not persecute [a person] does not mean his rights are being adequately taken care of'.[122] This can be seen in positive obligations that flow from human rights. For instance, the right to life requires not only that the state does not take the individual's life, but that it creates conditions whereby the taking of his or her life would be both prevented to the extent that is possible, and punished if and when it happened. Examples of this type of obligation are discussed in Chapter 8. This function of rights requires not only protection for sex workers from the state, but also the ability to call on the state to ensure protection from interference with their rights by other citizens. Laws around sex work, as discussed in Chapter 3, do not ensure such protection but rather make such protection more difficult to access. Therefore, rights could function as a way to challenge both direct interference from the state and the state's neglect in protecting sex workers from interference by other citizens. An

[119] Home Office, *Paying the Price: A Consultation Paper on Prostitution* (London: Home Office, 2004), Chapter 7.
[120] I Berlin, (n 113), 239.
[121] J Waldron, (n 18), 157.
[122] ibid, 157.

argument based on rights as protections framed the case of *Bedford v Canada,*[123] and as such, can be considered as an example of this protective function.

5.3.1.1 *Bedford v Canada*: Lessons from Canada

In Canada, three current and former sex workers brought a legal challenge against the laws relating to sex work, arguing that they infringed sex workers' rights under the Canadian Charter of Fundamental Rights by making them choose between working legally and working safely. As sex workers in England and Wales too have to make this choice,[124] this case is important for providing lessons to sex workers in this jurisdiction. The three plaintiffs in this case reflect the diversity of sex workers who may be able to make a claim using human rights, and as previously noted, the case was supported by many sex worker rights organisation and non-governmental organisations. 25,000 pages of evidence was also submitted. The plaintiffs, between them, had experience of working in street sex work, massage parlours, independent escorting, brothels, and domination services. They had varied backgrounds – Terri Jean Bedford had been subject to childhood abuse and is a racialised black woman, Amy Lebovitch came from a stable background and attended university before beginning to sell sex, and Valerie Scott, the oldest of the plaintiffs had worked on the streets during the HIV/AIDS epidemic. Both Scott and Lebovitch are involved in activism with the Sex Work Professionals of Canada group.

The Supreme Court of Canada held that sex workers' Section 7 right to liberty and security of the person and Section 2(b) right to freedom of expression under the Canadian

[123] 2013 SCC 72, [2013] 3 SCR 1101
[124] As argued in Chapter 3 of this thesis.

Charter of Fundamental Rights and Freedoms were violated by a number of laws surrounding sex work, not in accordance with the fundamental principles of justice. This case led to the (stayed) repeal of laws prohibiting the keeping of a common bawdy-house,[125] living wholly or partly on the avails of prostitution of another person,[126] and communicating in a public place for the purposes of prostitution.[127]

The trial judge at the Ontario Superior Court, Himel J, drew on the personal evidence of the applicants, the evidence of affidavits and experts, and documentary evidence in the form of studies, reports of expert panels, and Parliamentary records.[128] She accepted two factual statements: that 'working in-call is the safest way to sell sex';[129] and that 'the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence'.[130] The Supreme Court afforded deference to Himel J's finding of facts,[131] and held that the laws imposed '*dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks.'[132] Applying a 'sufficient causal connection' standard,[133] the Supreme Court held that 'it makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks.'[134] Moreover, the sex workers' choice in selling sex did not negate the law's role in causing harm.[135] In doing so, Himel J both

[125] *Criminal Code*, RSC 1985, c C-146, s210.
[126] *Criminal Code*, RSC 1985, c C-146, s212(1)(j).
[127] *Criminal Code*, RSC 1985, c C-146, s213(1)(c).
[128] *Bedford v Canada* [2010] ONSC 4264.
[129] ibid, [361].
[130] ibid, [362].
[131] *Bedford v Canada* 2013 SCC 72, [2013] 3 SCR 1101, [56].
[132] ibid, [60].
[133] Which requires a 'sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]' – ibid, [75].
[134] ibid, [89].
[135] ibid, [85].

upheld sex workers' negative liberty in choosing their own conception of the good life without state interference, as defined by Berlin, and also recognised the way the state failed to create conditions in which their rights were protected.

The argument was accepted that even though the state was not directly perpetrating violence against sex workers, it was unconstitutionally infringing their rights by making it harder or illegal to manage risk due to fear of arrest. Risk management tactics that the law discouraged sex workers from using included: working together or with a maid; working in-call in a regular indoor location; and taking time to screen clients. As I argued in Chapter 3 of this thesis, a similar situation is apparent in the England and Wales context. That is, the law discourages sex workers working together or with a third person, and street sex workers are pushed into more risky environs. Parallels between the two jurisdictions can clearly be made. The arguments and findings in the *Bedford* case can be informative for the purposes of this thesis. This is particularly important because of the similarities between the pre-*Bedford* Canadian law and the current law in England and Wales. That is, the communication law can be compared to the English law on soliciting; the bawdy house law to the English law on brothels; and the living on the avails of prostitution law to the English controlling prostitution for gain law.

It is, however, worth noting some key differences in the law. Firstly, unlike the English law on brothels, which creates a loophole whereby it is legal for a sex worker to work alone from their own home, no such loophole existed in Canada where 'bawdy house' included the sex worker's own home.[136] Secondly, the 'living on the avails of prostitution'[137] offence is

[136] *Criminal Code,* RSC 1985, c C-146, s210
[137] *Criminal Code,* RSC 1985, c C-146, s212(1)(j).

more alike to the old English law of living on immoral earnings,[138] which was targeted at anyone 'kept' by sex workers, without specific reference to exploitation, rather than 'controlling prostitution for gain'.[139] As noted in Chapter 3, however, since *R v Massey,*[140] the controlling prostitution for gain offence has been significantly broadened and can impact a range of relationships. Bedford can, however, offer important insights into both how a rights claim might be framed, but more importantly the benefits and limitations of doing so. I return to *Bedford* as an example later in this chapter (at 5.3.3 and 5.4.3). For the purposes of this section, however, *Bedford* demonstrates the ways that human rights *could* be used to protect sex workers from interference from both the state and other citizens.

5.3.2 Rights as Entitlements

Rights are more than just the protection and freedom to be left alone; they can also be a form of entitlement, through which to make claims on the state. The ability of individuals to be in charge of their own life is seriously threatened when they are unable to support themselves in terms of health, education, or nutrition. As Martha Nussbaum argues, 'people who have to fight for the most basic things are precluded by that struggle from exercising their agency in other more fulfilling and socially fruitful ways'.[141] Berlin agrees, stating that freedom for one person is very different to freedom for another, and that the offer of freedom 'to men who are half-naked, illiterate, underfed and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in freedom'.[142] Therefore,

[138] Sexual Offences Act 1956, s 30. This was broadly construed to include many people who could be drawing some benefit from a sex worker's income, including business associates. See, for example: *R v Bell* [1978] Crim LR 233; *R v Stewart* (1986) 83 Cr App R 327; *R v Howard* (1992) 94 Cr App R 89.
[139] Sexual Offences Act 2003, s 53.
[140] [2007] EWCA Crim 2664
[141] M Nussbaum, *Sex and Social Justice* (New York: Oxford University Press, 1999), 20.
[142] I Berlin, (n 113), 234.

without some entitlements to fulfil their basic needs, the right to liberty is nothing but an empty right. Nussbaum, therefore, argues that society owes to people 'a basic level of support for nutrition, health, shelter, education, and physical safety'.[143]

One response to this line of argument may be 'why does this element of justice require the protection of rights'? It might seem that it could be fulfilled just as easily by declaring basic human needs that society must support. Williams argues that framing what an individual requires from society in the language of needs makes them easily ignored. She referred to the movement of the black community to gain recognition for their needs, arguing that 'blacks have been describing their needs for generations' but that it was a 'dismal failure as political activity' because it was never 'treated by white institutions as the statement of a political priority'.[144] On the other hand, rights can be empowering, demonstrating a respect for the dignity of the person who is making the claim.[145] Moreover, if, as Dworkin argues, rights are trumps, they are able to stand against a cost-benefit analysis which might allow the needs of a few to be '"traded off" against the interests of the greater number'.[146]

A criticism of this type of right would be that it strains the resources of the state, and therefore interferes with the liberty of individuals to dispose of their property as they wish.[147] It is arguable, however, that if the exercise of some people's liberty depends on the misery of others, then this is unjust and immoral.[148] Further, if one of the main goals of rights is to stop the majority imposing its will over the individual, then the idea of the strong imposing its will over the weak in the name of liberty must be counterproductive. As such, liberty can be

[143] M Nussbaum, (n 141), 20.
[144] P Williams, (n 74), 151.
[145] M Nussbaum, (n 141), 20.
[146] J Waldron, (n 18), 157.
[147] For example, through taxation. ibid, 163.
[148] I Berlin, (n 113), 235.

understood as being, at times, at odds with the right to equality and resources. In the face of this conflict, Dworkin argued that equality is actually the most fundamental of the core rights.[149] He claims that this is based on each person's equal intrinsic value,[150] asking:

> Can it really be more important that the liberty of some people be protected, to improve the lives those people lead, than that other people, who are already worse off, have the various resources and other opportunities that *they* need to lead decent lives?[151]

Instead of accepting a general right to liberty, Dworkin argues that 'individual rights to distinct liberties must be recognised only when the fundamental right to treatment as an equal can be shown to require these rights'.[152] This, therefore, is not to reject liberty, but rather to place liberty as a derivative right which would promote equal respect and concern. This right does not require every person to be treated exactly the same, to receive the same distribution of some burden or benefit, but rather that when resources are distributed, or when decisions are made, each person is given equal respect and concern in that decision.[153] Sex workers could use this function of rights, then, to make claims from the state in terms of services, housing, and welfare protections more generally.[154] Understanding rights in this way allows us to think about the structural reasons why many people make the decision to sell sex, such as poverty and capitalism. The English Collective of Prostitutes has argued that policies of austerity have had a significant impact on increasing the number of people, particularly mothers, choosing to engage with sex work.[155] As such, rights as entitlements could be used to challenge the

[149] R Dworkin, (n 28), 272.
[150] D Cornell, (n 39), 59.
[151] R Dworkin, 'What is Equality? Part 3: The Place of Liberty' (1988) 73 *Iowa Law Review* 1, 2.
[152] R Dworkin, (n 28), 274.
[153] ibid, 227.
[154] International Committee for Prostitutes' Rights (ICPR), (n 104).
[155] English Collective of Prostitutes, *Facts about Sex Work*, available at: http://prostitutescollective.net/wp-content/uploads/2017/07/Facts-About-Sex-Work.pdf (last accessed 20 September 2019).

conditions in which sex work takes place, insofar as limited economic and social protections could be argued to reduce sex workers' control over their work. The benefits of this approach are dependent on the method used to claim these rights – outside of court, there is more flexibility to base claims on a range of rights instruments. It will be argued in Chapter 6, however, that even in these arenas, being able to draw on specific legal rights is still beneficial.

5.3.3 Rights as a Linguistic Tool

Where a group, such as sex workers, has been ignored, devalued or persecuted, rights demands are not only important because of the content of those rights, but because the term 'rights' itself can be a symbol that the members of the group are being recognised as human and deserving of dignity and protection. As Williams puts it:

> For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others that elevates one's status from human body to social being.[156]

That is, rights give a voice to those who have historically been silenced.[157] Carol Smart also argues that the rights discourse acknowledges 'historic uses of power to exclude, deny and silence – and commits itself to enabling suppressed points of view to be heard, to make covert conflict overt'.[158] Moreover, the language of rights allows the right-holder to make a claim without being 'a seeker of charity, but a person with dignity demanding a just outcome according to widely accepted criteria of fairness'.[159]

[156] P Williams, (n 74), 153.
[157] ibid, 160.
[158] C Smart, *Feminism and the Power of Law* (London: Routledge, 1989), 143.
[159] ibid, 152.

Williams further argues that framing claims in the language of rights can be very effective politically, as exemplified by the movement for rights for the black community in the USA.[160] The rhetoric of rights grants individuals the equality to participate in the process of community debate[161] when structurally they are less powerful than the authorities.[162] When campaigning for a change in the law, drawing on moral rights or putting a claim into the language of rights can be an important step to make the claim 'popular'. Duncan Kennedy argues that this is because rights arguments 'restate the interests of the group as characteristics of all people'.[163] Kennedy used the example of a gay person's interest in the legalisation of homosexuality, which could be restated as the right to sexual autonomy, in order to make it an interest which all people would be able to claim.[164] Doing so makes the claims more understandable and accessible to the majority who will not necessarily be directly affected by a change in the law. As such, using the language of rights takes an important step to right a social wrong, and to move towards the recognition of the right legally.[165]

Finally, rights help to order social relations between individuals. As Martha Minow notes, 'efforts to create and give meaning to norms, through a language of rights often and importantly occur outside formal legal institutions such as courts'.[166] That is, they provide a framework within which people understand how to interact with each other. This can happen because they know what legal obligations they owe to whom, but it is particularly important when the right has not been, or is yet to be, translated into a legal framework. Minow argues

[160] P Williams, (n 74), 151.
[161] M Minow, 'Interpreting Rights: An Essay for Robert Cover' (1986-1987) 96 *Yale Law Journal* 1860, 1877.
[162] ibid, 1879.
[163] D Kennedy, 'The Critique of Rights', in W Brown and J Halley (eds), *Left Legalism/Left Critique* (Durham: Duke University Press, 2002), 188.
[164] ibid, 188.
[165] C Smart, (n 158), 143.
[166] M Minow, (n 161), 1877.

that '"rights" can give rise to "rights consciousness" so that individuals and groups may imagine and act in light of rights that have not been formally recognized or enforced.'[167] If a claim of rights has been rejected by the state, this 'rights-consciousness' can be indicative of continued support in the quest for legal rights.

Taking a rights approach to sex work, therefore, can be seen as part of a pragmatic and practical strategy to respond to the various ways in which the state has marginalised sex workers.[168] Given that even the most powerful sex workers' voices are so rarely acknowledged during political discussions about the legal response to sex work, rights claims are a way of sex workers making their voices heard in a language that demands recognition. For instance, under the HRA, the test of locus standi[169] states that the claimant in a judicial challenge must be a 'victim' of the unlawful act as under Article 34 of the ECHR.[170] That is, the claimant must be a person directly affected by the act or omission at issue,[171] or who may be directly affected by an act of omission in the future.[172] The requirement that the applicant be a potential 'victim' of the violation creates a way of sex workers' voices themselves being heard, to use rights to speak for themselves. This does not require them to be entirely independent in their claim – as discussed, support can be provided by organisations.

Rights claims can, therefore, be a way for sex workers and sex workers' rights organisations to participate in conversations about the legal response to sex work. Rights have become the language of the establishment, of political priority, and are used by political figures

[167] ibid, 1867.
[168] Rights can be seen as part of a pragmatic feminist strategy. See: K Engle, 'International Human Rights and Feminisms: When Discourses Keep Meeting', in D Buss and A Manji (eds), *International Law: Modern Feminist Approaches* (Oxford: Hart, 2005); S Merry, *Human Rights and Gender Violence* (Chicago: University of Chicago Press, 2006).
[169] Human Rights Act 1998, s7.
[170] Human Rights Act 1998, s7(6).
[171] *Corigliano v Italy* A/57 (1983) 5 EHRR 334.
[172] *Bowman v UK* A/874 (1998) 26 EHRR 1.

when they seek to persuade, inspire, explain, or justify in public settings – 'legality, to a great extent, has become the touchstone for legitimacy'.[173] They provide the language to gain access to previously denied 'institutions that form part of civil society… necessary for equal citizenship'.[174] Making a claim to rights, then, could allow these sex workers admittance into the establishment, to assert that their interests require as much consideration and protection as those of any other citizen, and thus to elevate themselves symbolically from second class citizenship. In fact, after the Supreme Court of Canada decision in *Bedford v Canada*, Valerie Scott, one of the plaintiffs, thanked the court, saying 'I would like to thank the Supreme Court of Canada for declaring sex workers to be persons. This is the first time in Canadian history that sex workers are truly persons, we are truly citizens of this country.'[175] Moreover, while individuals bring the case, the results of the case can affect policy, law and practice more broadly, therefore impacting more than the specific sex workers involved in the claim.

While offering a range of ways to interact with the state and recognition of sex workers as part of the political community, rights are not a perfect tool. Rights have been the subject of criticism by lawyers, but this criticism has not been considered to any great degree in relation to sex workers. Jane Scoular, however, states it is important to 'exercise critical caution' in the use of rights.[176] The next section considers some of the critiques of rights and how these might create limitations on the value of rights for sex workers. It is argued, however, that we should not throw the baby out with the bathwater, because the 'recognition and positive gains that

[173] M Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), 3.
[174] J Spinner, *The Boundaries of Citizenship: Race, Ethnicity and Nationality in the Liberal State* (Baltimore: Johns Hopkins University Press, 1994), 40.
[175] 'Top Court Strikes Down Canada's 'Overly Broad' Anti-Prostitution Laws', *CTV News*, 20 December 2013, available at: https://www.ctvnews.ca/canada/top-court-strikes-down-canada-s-overly-broad-anti-prostitution-laws-1.1601790 (last accessed 1 July 2019).
[176] J Scoular, (n 9), 99.

rights discourse delivers will inevitably overshadow any of the possible negative consequences'.[177]

5.4 Critiques and Limitations of Human Rights

This section will examine some of the most frequently proffered critiques of rights – that they are indeterminate and illegitimate; individualistic; too narrow; and conflicting – and will argue that despite these critiques, rights are still a valuable tool for sex workers.

5.4.1 Rights Expansion is Illegitimate

Costas Douzinas argues that as human rights 'keep transferring their claims to new domains, fields of activity and types of (legal) subjectivity, they construct ceaselessly new meanings and values, and they bestow dignity and protection to novel subjects, situations and people.'[178] This move to create rights in new arenas and for different groups, however, has been challenged for creating rights which are indeterminate and illegitimate. Focusing on legal rights, Richard Morgan calls those who promote the proliferation of rights the 'rights industry'[179] and argues that they have 'manipulated, redefined, and expanded' rights with 'little understanding or sympathy for the traditions and ideas on which this body of law is properly based.'[180] He claims that the creation of new rights has little to do with rights' philosophical history and more to do with achieving social and political goals through 'flimsy social and philosophical arguments'.[181] In other words, a number of rights which have been accepted by the law do not

[177] ibid.
[178] C Douzinas, (n 108), 343.
[179] R Morgan, *Disabling America: The "Rights Industry" in Our Time* (New York: Basic Books, 1984), 3.
[180] ibid, 3.
[181] ibid, 4.

protect a 'desire or interest which is constitutive of "humanity"',[182] but rather 'all individual desires can be turned into rights'.[183]

This expansion is seen as problematic where the right is in conflict with the collective interest, other individual interests, or creates an obligation on other people because, following this argument, these rights have been created without 'legitimate authority'.[184] Steven De Lue argues that we have a political obligation to respect the state's authority to make and then enforce laws and policies, and that where citizens have no sense of obligation to the state, and no respect for the laws then they may feel there is no need to obey the laws they do not accept.[185] Consequently, if it is true that people consider the ever-expanding rights discourse as being without legitimate authority, they will be less likely to behave in a way which is consistent with the newly created rights. Rights then, may be devalued by their own abundance.

Another potential result of this 'illegitimate' expansion of rights is that the state appears to be encroaching further into aspects of citizens' public and private life.[186] Lawrence Friedman argues that society is having a 'litigation explosion'.[187] An increase in laws, and more specifically legal rights, he suggests, has led to an increase in the number of cases brought to courts.[188] Apart from Friedman's contention that many of the issues which have become the subject of litigation should not be dealt with by the courts, he expresses concern that the law is infiltrating a greater number of areas of life, so that 'no area of life is completely beyond the potential reach of law'.[189] He argues that the increased potential to be sued has created a

[182] C Douzinas, (n 108), 11.
[183] ibid, 11.
[184] M Minow, (n 161), 1864.
[185] S De Lue, *Political Obligation in a Liberal State* (Albany: State University of New York Press, 1989), 1.
[186] L Friedman, *Total Justice* (New York: Russell Sage Foundation, 1985), 3.
[187] ibid, 15.
[188] ibid, 15.
[189] ibid, 22.

resentment of the law, which is considered too ubiquitous and too pervasive.[190] From this perspective, it could be argued that rather than protecting citizens from the state, the discourse of rights has in fact increased state involvement in the lives of citizens.

Rights claims could also be seen as exacerbating conflict between those claiming them and the general public, in our case sex workers and non sex workers. Jane Wright argues, for example, that public perception of the HRA increasingly sees it as a 'criminals' charter that frustrates the Government's attempts to deal with serious crime, including terrorism.'[191] This has led to calls for and Conservative promises to repeal the HRA, as discussed further in Chapter 6. Therefore, rights claims might have the effect of further excluding sex workers, putting them in conflict with the rest of society. As discussed in Chapters 2 and 3, however, there is already a breakdown in the relationship between sex workers and government and between sex workers and non sex workers.

We should not be hasty to abandon the move for greater legal recognition of rights, especially when so many groups and individuals have not yet had their rights recognised by the law. As Williams put it 'the Olympus of rights discourse may be an appropriate height from which those on the resourced end of inequality, those already rights-empowered, may wish to jump'.[192] To deny this rights recognition to disempowered groups because rights have 'gone too far' seems like the ultimate denial. She further argues that, 'in discarding rights altogether, one discards a symbol too deeply enmeshed in the psyche of the oppressed to lose without trauma and much resistance'.[193] The expansion of legal rights obviously may have the effect

[190] ibid, 22.
[191] J Wright, 'Interpreting section 2 of the Human Rights Act 1998: towards an indigenous jurisprudence of human rights' (2009) *Public Law* 595, 595.
[192] P Williams, (n 74), 153.
[193] ibid, 165.

of conferring rights upon individuals or groups who seem less than worthy of rights to some people. The fact that some 'unworthy' recipients may receive legal rights does not justify the wholesale rejection of rights, which in fact must apply to everyone regardless of their perceived worth. This would unjustly punish other potential rights-holders. It could also be argued that when new legal rights are first conferred, they may seem illegitimate because we see the new rights-bearers as things rather than humans.[194]

Asserting rights will not necessarily create resentment in the majority of non sex workers. As Malia Malik notes, 'asserting minority interests in litigation can be a focal point for involving both the relevant minority and the majority as well as acting as a catalyst for a wider political movement'.[195] This can also be the case for marginalised groups like sex workers. That is, both rights claims and rights discourse can be a way of drawing the attention of the wider community to the ways in which sex workers' rights are violated, and might even mobilise non sex workers in support of sex worker rights. Claiming rights has in the past been a catalyst for changing attitudes towards minority or marginalised groups – for instance, with regard to civil rights for black people in the US, the gay rights movement, and disability rights. Rights and the law can, therefore, have a ripple effect on acceptance and inclusion of marginalised populations. Even if rights claims fail, or while they are in the process of being claimed, the language of rights can give rise to 'rights consciousness' so that individuals and groups may imagine and act in light of rights that have not been formally recognized or enforced.'[196]

[194] ibid, 160.
[195] M Malik, 'Minority Protection and Human Rights', in T Campbell, K D Ewing, and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001), 291.
[196] M Minow, (n 161), 1867.

5.4.2 Rights are Indeterminate and Conflicting

A further criticism of the growth of rights is that rights are indeterminate. Frances Olsen argues that when making a decision about a situation, 'rights analysis does not help us as an analytic tool because it is indeterminate'.[197] Griffin agrees, noting that there are very few criteria for determining when the term 'human right' is used correctly and when incorrectly.[198] Griffin mainly refers to moral rights when making this argument, particularly those which are based on 'human standing' or 'human nature', because there is disagreement about both the moral nature of the claim and the element of the human status upon which these claims are based, leaving the concept of a human right 'unusually thin'.[199] However, he argues, the problem of indeterminacy also extends to human rights instruments.[200]

Even when moral rights are translated into legal rights, there remains the problem of determining exactly what constitutes an infringement of those rights. Most of the international human rights documents have related courts and bodies to help interpret the rights. Douzinas argues that the evolving boundaries and necessary interpretation mean that it may be difficult for states to know when they are in violation of the rights until they have already done so. As he put it:

> Human rights as a principle of popular politics express the indeterminacy and openness of society and politics… their indeterminacy means that the boundaries of society are

[197] F Olsen, 'Statutory Rape: A Feminist Critique of Rights Analysis' (1984) 63 (3) *Texas Law Review* 387, 412.
[198] J Griffin, (n 33), 14.
[199] ibid, 17.
[200] ibid, 17.

always contested and never coincide fully with whatever crystallisations power and legal entitlement impose.[201]

The indeterminacy of society is therefore reflected in the indeterminacy of rights.

In part because of this indeterminacy, rights are often placed in competition with each other. If rights are considered 'trumps' over policy arguments, they must prevail unless they are matched by a competing argument of principle or rights.[202] Therefore, asserting rights leads to conflict – rights claims can be countered by a resort to competing rights.[203] This is particularly pertinent to the discussion of sex work, where it has been argued both that women should be protected from prostitution and, by a different side of the debate that sex workers have the right to choose what to do with their bodies without state interference. These claims were both made, for example, in *Bedford v Canada*. Olsen argues that conflict makes rights internally incoherent or inconsistent.[204] Moreover, not only are different rights potentially conflicting, but the very nature of a rights claim means that 'the right your opponent is asserting will often be defined in such a way that you can appeal to the very same right on the other side'.[205] This problem means that it can be difficult to determine if there has been a rights violation – in upholding or respecting one rights claim, a decision maker may well be violating a number of others.

Kennedy argues that because claims to rights can be countered effectively by other claims to rights, judicial or legislative decisions to recognise certain rights often involve

[201] C Douzinas, (n 108), 375.
[202] R Dworkin, (n 28), 96.
[203] C Smart, (n 158), 145.
[204] F Olsen (n 197), 387.
[205] D Kennedy, (n 163), 198.

balancing tests which are 'indistinguishable from the open-ended policy discourse it was supposed to let us avoid'.[206] Therefore, despite the supposed objectivity of rights, when balancing conflicting rights claims, 'it is implausible that it is the rights themselves, rather than the "subjective" or "political" commitments of the judges that are deciding the outcome.'[207] When balancing the rights, non-rights arguments, such as the degree of harm that will flow from either outcome, are taken into account.[208] As such, it is argued that rights become a mask for policy decisions, and the reverence in which we hold rights makes the decision more difficult to challenge than if it was an ordinary policy decision.

Mark Tushnet suggests that the indeterminacy of rights allows them to be only temporarily advantageous in political struggles.[209] Once rights are brought out of the abstract and linked with potential far-reaching consequences, it is impossible to see their boundaries.[210] Their indeterminacy, therefore, allows the parties claiming or denying the right to manipulate the facts relating to the right and its potential consequences to fit their agendas[211] – and more importantly allows the decision maker to accept whichever account suits his or her prejudices. As Kennedy puts it, 'whatever a right "is", is a function of the open-ended general procedure of legal argument'.[212] Therefore, their indeterminacy means that we cannot know whether a claim of rights will do anything.[213] This is particularly important with sex work, which is the subject of so much divisive debate, and where the same realities are understood in such divergent ways. As Scoular argues, sex workers' rights not only have to confront the state but also must face 'a dominant feminist discourse that has struggled to accommodate the voices

[206] ibid, 197.
[207] ibid, 198.
[208] ibid, 210.
[209] M Tushnet, 'An Essay on Rights' (1984) *Texas Law Review* 1363, 1371.
[210] ibid, 1372.
[211] ibid, 1373.
[212] D Kennedy, (n 163), 195.
[213] M Tushnet, (n 209), 1384.

and experiences of sex workers'.[214]An alternative account of human rights posits that sex work is in itself a human rights violation. Therefore, decision makers, whether in the courts or Parliament, have to decide between competing claims to rights in relation to sex work, to determine which they find more compelling.

The indeterminacy of rights does not necessarily mean that they are useless. Rather, it might mean that rights can develop to include previously marginalised groups. Griffin suggests that one option would be to reject the term 'human right' altogether.[215] However, he argues that in so doing we would be saying the same thing in a more circuitous way.[216] This, he argues, would lose many of the advantages of the word 'rights' – that they provide the centrepiece for popular movements, and empower individuals.[217] Instead of rejecting the term rights altogether, which would be too difficult given its global usage, Griffin argues that we should endeavour to influence, develop and complete the term.[218] Pragmatically for sex workers, to reject rights would be to offer up the terms of the debate to those arguing from the competing perspective.

Williams suggests that it is not the assertion of rights which is problematic, but rather the failure of rights commitment.[219] Instead of providing legal rights and considering that to be the final step, society, and particularly the state, should ensure that they are upheld, valued and defined so that they are not so indeterminate. Minow argues that the indeterminacy problem can be overcome if, instead of conceptualising rights as finished products, we understand them as 'a particular vocabulary implying roles and relationships within communities and institutions, this approach suggests how rights can be something – without being fixed, and can

[214] J Scoular, (n 9),102.
[215] J Griffin, (n 33), 18.
[216] ibid, 18.
[217] ibid, 19.
[218] ibid, 19.
[219] P Williams, (n 74), 159.

change – without losing their legitimacy'.[220] Rights discourse can be understood as a linguistic tool to articulate standards for judging conduct and treating people, and as such, its indeterminacy allows the relationships to be in constant evolution.[221] The creation of rights for those who were historically silenced allows them to participate in this dialogue. To abandon rather than reform this language is not of benefit to society.[222]

Minow also argues that conflict existed before rights discourse was used, and that rights simply translate the conflict.[223] In response to Kennedy's claim that rights become a mask for policy decisions, claiming rights through courts may provide some distance from policy. While it is certainly not argued that judges do not have a perspective or prejudice, the judge's unelected position may offer a certain level of insulation from the political majority, and the judge is therefore in a better position than most to evaluate the argument.[224] The judicial decisions should be made from principle rather than policy.[225] Taking the ECHR as an example, judges at the European Court of Human Rights and the domestic courts must follow established principles of interpretation, such as the principle of proportionality, subsidiarity, necessity, and non-discrimination.[226] This provides safeguards against judicial policy making. While other interests may be brought into play to contextualise the rights, this is to understand how much weight each right should be given, because rights do not exist in a vacuum. To understand how fundamental they are to the individual's personhood or equality, there must be some knowledge of the consequences or of how strong the claim is. However, it remains that it is the rights which are being weighed. Arguments of principle can only be countered with arguments of

[220] M Minow, (n 161), 1892.
[221] ibid, 1886.
[222] R West, (n 86), 88.
[223] M Minow, (n 161), 1871.
[224] R Dworkin, (n 28), 85.
[225] ibid, 115.
[226] S Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?' (2010) 3 *UCL Human Rights Review* 1.

principle; to choose not to use rights claims effectively surrenders to the opposition. This is particularly pertinent when the group who is making the claim, like sex workers, has yet to have their rights accepted – their claims still need to be represented in the face of counter claims.

5.4.3 Rights are Individualistic

A further criticism of rights is that they are individualistic. This raises the question whether individual claims to rights can change social structures or government approaches beyond the claim. While legal rights may be created to deal with a social wrong, Carol Smart argues that they are always 'focused on the individual who must prove that her rights have been violated'.[227] As such, rights render us 'unduly – and inhumanely – atomized'.[228] The critique that rights, both moral and legal, are individualistic focuses on two main elements, that: (1) rights construct us as individuals; and (2) that the competitive nature of rights results in social disharmony.

The first of these critiques is that rights, both moral and legal, construct and reinforce 'a notion that every individual is autonomous and disconnected from others, instead of connected in important ways and to society in general'.[229] This is to ignore the 'social' nature of man – that we are a product of our society – or, as Sandel puts it, 'there is no point of exemption, no transcendental subject capable of standing outside society or outside experience'.[230] Elizabeth Frazer and Nicola Lacey argue that the 'desire to transcend bodily being is (in western culture) a peculiarly masculine desire'.[231] Features of women's lives give

[227] C Smart, (n 158), 145.
[228] R West, (n 86), 79.
[229] M Minow, (n 161), 1864-5.
[230] M Sandel, (n 24), 11.
[231] E Frazer and N Lacey, *The Politics of Community* (Hertfordshire: Harvester Wheatsheaf, 1993), 54.

them disproportionate responsibility for others, meaning that they are more socially linked to others, and less likely to desire social disassociation.[232] Because humans are interdependent and interactive, to begin a political theory based on a pre-social individual is inappropriate.[233] Instead, Frazer and Lacey argued, political theory should 'start out instead from a full recognition of the embodied and socially situated nature of human life'.[234]

The rights framework, however, does not have to be a rejection of societal influence on individuals. In response to this criticism, Nussbaum argues that liberalism's individualism is not egoism or promoting self-sufficiency.[235] Rather, she argues, liberalism stresses something experientially true – that the separateness of persons is a basic fact of life.[236] In her words:

> Liberalism responds sharply to the basic fact that each person has a course from birth to death that is not precisely the same as that of any other person; that each person is one and not more than one, that each feels pain in his or her own body, and the food given to A does not arrive in B's body.[237]

Liberalism, as such, does not reject the importance of community or family, but recognises that each family or community is made up of individuals who never merge; no matter how strongly they care for one other.[238] Rejecting the concern that to construct individuals in such a way is very male, Nussbaum's feminist account argues that the individualist understanding of human nature is important because too often women have been treated not as ends themselves, but

[232] ibid, 54.
[233] ibid, 57.
[234] ibid, 60.
[235] M Nussbaum, (n 141), 62.
[236] ibid, 62.
[237] ibid, 62.
[238] ibid, 63.

rather as the means to other peoples' ends – 'reproducers and caregivers rather than as sources of agency and worth in their own right'.[239]

Another element of this critique is that the granting of rights itself promotes social disharmony. The very form of rights presupposes that the potential for conflict between individuals in society 'will always be so great that each person needs some coercively maintained guarantee that the acts of others will not imperil the pursuit and fulfilment of her interests'.[240] In 'On the Jewish Question', Karl Marx responds to the emergence of the concept of 'rights of man' arguing that they are the rights of 'man separated from society',[241] 'namely an individual withdrawn behind his private interests and whims and separated from the community'.[242] One such right, the right to property, he refers to as 'the right to selfishness',[243] associated with capitalism. This 'bourgeois' individualism 'undermines community by picturing people as separated owners of their respective bundles of rights'.[244] In this vein, the political focus on rights provides little focus on obligations of helping each other out or other solidaristic values.[245] As such, he argues that instead of helping one another, rights have left us focused on how to protect ourselves from each other.

As Dworkin claims, however, 'collective goals encourage trade-offs of benefits and burdens within a community in order to produce some overall benefit for the community as a whole'.[246] The possession of rights does not necessarily make people selfish. On the contrary, altruism and support can be promoted even when individual rights are claimed. Without rights,

[239] ibid, 63.
[240] J Waldron, (n 18) 126.
[241] K Marx, 'On the Jewish Question' (1843) reprinted in J Waldron (ed), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London, Methuen, 1987), 145.
[242] ibid, 147.
[243] ibid, 146.
[244] F Olsen, (n 197), 393.
[245] R West, (n 86), 82.
[246] R Dworkin, (n 28), 91.

it is possible that the individual would be taken care of, but rights can help to provide a framework designed to guarantee this. Moreover, it is not necessarily the case that rights require individuals to focus solely on themselves. Minow argues that the very nature of rights is that they manage social relationships between individuals, drawing reference to others and to their interconnection.[247] Autonomy need not be a precondition for an individual's exercise of rights: 'the only precondition is that the community is willing to allow the individual to make claims and to participate in the shifting of boundaries'.[248] In fact, when an individual or a group makes a rights claim, they are implicitly agreeing to listen to the community's response, thus investing themselves in the community.[249]

Rights claims in courts, and specifically for the purposes of this thesis, judicial challenges under the HRA as discussed in Chapters 7 and 8, relate to how *individuals*' rights have been infringed by legislation or an action of a public authority. Because rights claims turn on the facts of the case, it is possible that courts might find that the rights of an individual have been violated under a certain set of facts, but, when faced by a slightly different set of facts, there might not be a violation found.[250] While a rights claim, therefore, could address violations of one person's rights, it may concurrently exacerbate another's exclusion if their factual situation is not analogous. Alternatively, a successful claim could lead to a change of policy, law or practice, producing broader impacts. As such, the effects of rights litigation are unpredictable, so the extent to which they can address exclusion and other structural concerns faced by sex workers is dependent on the case in question.

[247] M Minow, (n 161), 1888.
[248] ibid, 1885.
[249] ibid, 1874.
[250] K Ewing and J Tham, 'The Continuing Futility of the Human Rights Act (2008) *Public Law* 668, 688.

Bringing a rights claim through courts also remains an expensive and time-consuming activity, and there is no guarantee that a rights claim would succeed, potentially draining resources that could be used for more community-based efforts, and leading to no direct benefit for sex workers. We can look to Canada as an example of how individual rights claims do not necessarily bring success for sex workers. The sex worker plaintiffs won their case in *Bedford v Canada* to have three provisions of the criminal law relating to sex work struck down for violating their rights under the Canadian Charter of Fundamental Rights and Freedoms.[251] However, within a year, the federal government passed the Protection of Communities and Exploited Persons Act 2014. This criminalised the purchase of sexual services,[252] alongside provisions against soliciting in certain areas, [253] advertising, [254] making a gain from prostitution,[255] and procurement of prostitution.[256] This Act, based on understandings of sex work as exploitation, creates a more repressive legal situation for sex workers than there was previously, meaning that they are not currently better off than before *Bedford*.[257]

While a rights claim is focused on individual facts, the result might be a change in the law relating to sex work, which would have a wider effect on sex workers not just those making the specific claim. *If* a rights claim triggers a reform in the law which promotes the safety of sex workers, this can be a method of dealing with the violence and exclusion of sex workers. While this has not been the case in Canada, this does not mean that a rights claim would necessarily lead to a move to the 'Nordic model' in England and Wales. Moreover, as has been discussed previously, this model is already being campaigned for and debated in England and

[251] (2013) SCC 72, [2013] 3 SCR 1101.
[252] Now s286.1 of the Canadian Criminal Code.
[253] S213 of the Canadian Criminal Code.
[254] S286.4 Canadian Criminal Code.
[255] S286.2 Canadian Criminal Code.
[256] S286.3 Canadian Criminal Code.
[257] A Campbell, 'Sex Work's Governance: Stuff and Nuisance' (2015) 23 *Feminist Legal Studies* 27.

Wales,[258] so to not challenge it might be simply to admit defeat. Moreover, it is worth noting, that while disappointing for sex workers, the Protection of Communities and Exploited Persons Act 2014 (PCEPA) does not signal an end for the sex workers' rights struggle in Canada, as PCEPA has been challenged and is still being challenged by sex workers.[259]

In a criminal law case, NS was charged with offences relating to his sale of someone else's sexual services: gaining material benefit from someone else's sexual services (s 286.2), procuring a person to offer or provide sexual services (286.3), and advertising sexual services (s286.4). At trial he successfully challenged these provisions at the Ontario Superior Court, not on the basis that the Charter was engaged on the facts of his case, but that it could be unconstitutional in other hypothetical circumstances.[260] The trial judge found that these provisions did infringe the rights to security of the potential person under s 7 of the Charter, because they were overbroad and grossly disproportionate to the PCEPA's purpose to 'immunise from prosecution any individual sex worker who performs sex work, and to allow the assistance of third parties in limited circumstances, while making all other aspects of commercial sex work illegal'.[261] This decision was overturned by the Ontario Court of Appeal, on the basis that the trial judge had erred in their definition of the purpose of the impugned provisions, and therefore in the conclusion that the provisions were overly broad or disproportionate.[262] Instead, he argued, the purpose was 'to reduce the demand for prostitution with a view to discouraging entry into it', 'to prohibit the promotion of the prostitution of others', and 'to mitigate some of the dangers associated with the continued, unlawful provision

[258] Diana Johnson brought a Private Members Bill to criminalise the purchase of sexual services to the House of Commons. This passed its first reading but has yet to have a second reading. See Sexual Exploitation Bill 2021, available at: https://bills.parliament.uk/bills/2813 (last accessed 1 May 2022).
[259] J Clamen, 'Reflections on Participation in the Making and Unmaking of Prostitution Law', conference paper, presented at *Sex Work and Human Rights: Lessons from Canada for the UK* (Durham University, 2014).
[260] *R v NS* (2021) ONSC 1628.
[261] ibid, [52].
[262] *R v NS* (2022) ONCA 160.

of sexual services'.[263] The Court of Appeal set aside the acquittal and ordered a new trial. This decision reinforced the Canadian Parliament's approach to sex work, but this does not mean a separate case will not come to a different conclusion.

In fact, there is a separate case ongoing. The Canadian Alliance for Sex Work Law Reform, an alliance of 25 sex worker rights groups across Canada, along with individual applicants have filed a Charter challenge, seeking to strike down laws against impeding traffic (s213.1), public communication (s 213.1.1), materially benefiting (s 286.2), purchasing sexual services (s 286.1), recruiting (s 286.3) and advertising (s 286.4).[264] This case, unlike *R v NS*, is a proactive case, based on grassroots activism and lived experience, and challenges a broader set of provisions. It also, like *Bedford*, will have a wide range of intervenors on both sides. Alongside this case, the Canadian Alliance for Sex Work Law Reform has also been one of a number of groups giving evidence to the Canadian Standing Committee on Justice and Human Rights review of PCEPA[265] While it is unclear what the outcome of either the Charter challenge or the review will be, it is apparent that individual sex workers and sex worker organisations have not moved away from using human rights to challenge laws around sex work, despite setbacks.

[263] ibid, [59].
[264] *Canadian Alliance for Sex Work Law Reform et al v Attorney General of Canada* Court File No. CV-21-00659594-0000; see also Canadian Alliance for Sex Work Law Reform, 'Sex Worker Human Rights Groups Launch Constitutional Challenge', 30 March 2021, available at: https://sexworklawreform.com/sex-worker-human-rights-groups-launch-constitutional-challenge/ (last accessed 3 May 2022).
[265] Standing Committee on Justice and Human Rights, *Review of the Protection of Communities and Exploited Persons Act* (22 November 2021 – present), available at: https://www.ourcommons.ca/Committees/en/JUST/StudyActivity?studyActivityId=11490221 (last accessed 16 June 2022).

5.4.4 Rights are Too Narrow and Promote the State as Sovereign

One of the relevant questions in this thesis is whether using rights, either legally or discursively, can bring about change in governmental approaches to sex work that would in turn reduce the problems of sex work. This question leads to the argument that rights are too narrow to affect 'structural inequalities'.[266] Structural inequality denotes the inferior status of a category of people in relation to other categories of people.[267] It does not mean just the formal or legal aspects of their lives, but to all aspects of lives, such as division of labour in the home,[268] or educational opportunities. Lacey and Frazer argue that 'a theory which takes abstract individuals as its basic unit is ill-equipped to focus constructively and critically on social institutions and relations, such as gender, class or race.'[269] As Elizabeth Kingdom puts it in relation to women:

> the history of women's struggles for formal legal rights shows that even where women's legal position has been improved there has been no corresponding, and certainly no automatic improvement in their social and economic position.[270]

While rights can be claimed by anyone regardless of their class, gender or race, this formal equality does not necessarily redress the inherent inequalities therein.

It is not clear, however, that it would be better not to even have formal equality. As Williams notes, to reject rights and to instead focus on more informal schemes will not lead to

[266] C Smart, (n 158), 140.
[267] A Ahmad Dani and A de Hahn, *Inclusive States: Social Policy and Structural Inequalities* (Washington DC: The World Bank, 2008), 13.
[268] ibid, 13.
[269] E Frazer and N Lacey, (n 231), 54.
[270] E Kingdom, *What's Wrong With Rights?* (Edinburgh: Edinburgh University Press, 1991), 47.

a better outcome.[271] Certainly, it is better to be formally recognised as equal, as many groups still are not. While formal rights do not go far enough to deal with structural inequalities, the language of rights can bring the inequalities to the attention of the state and the public. Many rights movements, such as the Women's Rights movement, gained much from formal equality before it was able to move onto attempting to address more substantive inequalities. Smart notes, 'the fact that history has shown that women's oppression is not simply a matter of equal rights under the law should not blind us to the importance of those early struggles.'[272] The granting of formal rights can, therefore, be a step towards tackling structural inequalities.

A further argument put forward by critics, however, is that rights not only do not redress structural inequalities, but they may do harm to reformist movements. As Smart argues, rights can oversimplify power relations, and the acquisition of rights gives the impression that a power difference has been resolved.[273] Therefore, when formal rights are gained, it often slows the momentum for tackling the underlying causes of inequalities. One example is that many people consider the formal equality of women in the UK to mean that 'we are equal now' and as such, feminism is redundant. However, the abandonment of rights would go some way to rendering the rights critique a self-fulfilling prophecy.[274] That is, rather than rejecting rights as being useless, and thus rendering them useless, the task should be to reform rights and rights talk to deal with more structural issues.[275] Or perhaps we must be more overt in acknowledging that rights are only one step of the programme, and allow rights claims to flag up areas which need attention and better policies as well as formal rights.

[271] P Williams, (n 74), 158-9.
[272] C Smart, (n 158), 139.
[273] ibid, 144.
[274] R West, (n 86), 89.
[275] ibid, 89.

Linked closely with this is a criticism put forward by Douzinas that rights create a false promise of individual sovereignty while continuing to promote the law as sovereign. Moral rights were the 'first public acknowledgement of the sovereignty of the subject'[276], based on the promotion of autonomy and self-determination. When attempting to have moral rights translated into legal rights, or when making claims under legal rights, we are promoting the state as the sovereign, as it is the state which has the power to give or withhold rights.[277] Douzinas argues that human rights have thus been transformed from a discourse of rebellion into one of state legitimacy, diplomacy, and legal claims.[278] While the creation of human rights instruments and legal rights has allowed rights to gain more determinacy, offered them the dignity of law, and made them more easily enforceable,[279] it has also moved the struggle from the streets into the courtroom. Olsen submits that when gains are made, it should be acknowledged that these are done through concrete struggles, not through rights analysis.[280] Not only this, but it is the state which is given the power to decide whether an individual is worthy of personhood for the purpose of rights recognition – which is particularly volatile because legal subjectivity can be 'given and taken away and there is no guarantee that the "natural" and the legal human will coincide'.[281]

While it is true that rights are used as a legal tool, and as such, place emphasis on the state and its legal system, many rights movements make great gains beyond the law. As noted above, rights claims, even when they are rejected by the state, may still lead to rights-consciousness more widely. As Sally Merry argues, 'the rights framework does not displace other frameworks but adds a new dimension to the way that individuals think about their

[276] C Douzinas, (n 108), 17.
[277] C Smart, (n 158), 12.
[278] C Douzinas, (n 108), 7.
[279] ibid, 9.
[280] F Olsen, (n 197), 401.
[281] C Douzinas, (n 108), 373.

problems', meaning that they can help grassroots movements by providing 'a radically different frame for thinking about the relations of power and inequality in society'.[282] Popular support gained throughout rights movements can change attitudes, which may be just as important for the movement, and can lead to a legal acceptance of rights at a future date. International treaties, moreover, although not universally binding, offer some protection from over-authoritarian states. For instance, in the UK, if the state infringes the rights of citizens, or refuses to accept them, there is a further channel provided by the ECHR. Beyond a fear of reproach, it is in the state's interests to act in accordance with rights and liberties, because to act with excessive coercion or in an overly authoritative manner is likely to lead to citizens feeling resentment and a lack of obligation to the state, which could result in individuals breaking the law or public displays of protest.[283] The movement from the streets to the courts is not necessarily a sign of 'giving up' but rather making use of the instruments available.

In light of this critique, it could be argued that in making the claim to rights, sex workers and sex workers' rights organisations might be using the language of power where really they do not have any power.[284] Because of the history of state control, many sex workers, therefore, may be reluctant to engage with the state at all – and particularly in a language that has been co-opted by 'the establishment' – because they fear further state encroachment into their lives, with many preferring to try to work under the radar of the state and be left alone. However, as noted in Chapter 3 of this thesis, the law has already encroached into most sex workers' lives, particularly through official rhetoric and law relating to protection from sexual exploitation. The refusal to engage with the state would, therefore, allow this to continue unchallenged. Currently, sex workers are almost completely excluded from any negotiation of the relationship

[282] S Merry, (n 168), 180.
[283] S De Lue, (n 185), 66.
[284] P Williams, *The Rooster's Egg: On the Persistence of Prejudice* (Cambridge, Massachusetts: Harvard University Press, 1995), 149.

between the state and themselves, with the state holding all of the power. Rights give sex workers a method of renegotiating this, bringing them into dialogue with the state, and attempting to give them a more equal footing in the conflict. The concern that the majority might exploit their power to oppress minorities is dealt with, to an extent by the imposition of limitations on the power of legislative bodies, partly through rights.[285]

Moreover, rights may be a tool to challenge the laws and policing practices that do encroach into their private lives (as I will explore in Chapters 7 and 8), allowing some sex workers to assert their own agency and ability to make their own life decisions. The courts, while clearly part of the 'establishment', can be used to challenge and limit the otherwise unimpeded power of the government, while lobbying parliament and the executive with rights claims makes sex workers' interests more difficult to ignore. Claiming rights does not make them a perfect tool but does bring sex workers' rights to the attention of the government.[286]

5.5 Conclusion

This chapter has considered the importance of human rights for sex workers in legal and political arenas. While recognising that sex workers' ability to individually engage with human rights and under what circumstances depends on both individual characteristics and external structural marginalisations, it was noted that the sex workers' rights movement has been actively engaged with rights domestically and globally for nearly fifty years. Rights challenges and lobbying, therefore, are not reliant on individuals, but are usually developed through grassroots activism and support offered to individual sex workers. When examining how rights

[285] M Loughlin, 'Rights, Democracy and Law', in T Campbell, K D Ewing, and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001), 42.
[286] P Williams, (n 74), 159.

might be operationalised against individual policing decisions in Chapter 8, as opposed to challenging whole laws, it is accepted that some sex workers may not have access to support from the sex workers' rights movement. Community engagement has been facilitated by the internet, and groups like the ECP and SWARM, and charities like NUM support wide and diverse communities. As such, use of human rights is not as far out of reach of individual sex workers as might be assumed.

This chapter also considered whether sex workers and the sex workers' rights movement should use human rights, in what ways they can be used, and what are the benefits and disadvantages of doing so. This chapter began by considering the bases of human rights. Drawing on theoretical debates about the origins of human rights, this chapter argued that the best conceptualisation of rights is Dworkin's approach wherein human rights are based on equality across the political community. This approach also provides for the existence of moral rights beyond those set out in law, but does not rely on metaphysical beliefs or even a belief in the distinct importance of humanity to make this claim. Rather theory posits that as humanity has developed into a political community, rights are the recognition that each person is given equal respect within that community. This chapter argues that this has particular importance for groups, such as sex workers, that have in many ways been excluded from equal political membership. Rights, as the language of political community, can challenge this stigma and exclusion and allow sex workers to assert their membership and equal status in the citizenry. While arguing that rights can and do exist outside of enforceable legal documents, the rest of this section considered the practical value of enforceability for ensuring respect and recognition of rights. Enforceability might be a pragmatic consideration in how sex workers and sex workers' rights organisations frame their claims and may vary depending on the type of claim made. Court claims are reliant on enforceable legal rights, and so narratives of peoples' lived

experiences are flattened to fit within the parameters of these. Alternative approaches, such as lobbying or discourse, allow for a broader range of rights to be drawn on. As such, human rights strategy can be method and venue-specific.

In the second section of this chapter, I considered the functions of rights and the ways that they can be used by sex workers. I argued that rights can be used as protections from the state and other individuals, promoting both negative and positive forms of liberty and respecting the agency of sex workers. An example of this use of rights is in the *Bedford v Canada* case, where sex workers successfully challenged criminal laws under the Canadian Charter. Although the subsequent legislation, PCEPA, resulted in more restrictive laws on sex work in Canada, this challenge and the forthcoming challenge to PCEPA demonstrate the value to sex workers of legal rights claims. While a less easily enforceable strategy, rights can be used to claim entitlements from the state. Given the economic nature of sex work, I argue that this approach could be used to challenge the underlying structures that have an organising effect on the sex industry and serve to marginalise sex workers (or, in fact, add to their other marginalisations). Such an approach can recognise the multiple and varied needs of sex workers, as rights as entitlement does not require every person to be treated in exactly the same way, but rather that decisions around distribution are based on equal respect and rights. Finally, I argued that, particularly for historically disempowered groups, rights can be an important linguistic tool with which to navigate relationships and make demands. Each of these functions can be important to the issue of sex work – for example, sex workers may claim that they should be protected from state infringement of their agency; they could claim an entitlement to protection or welfare support; and they could use the language of rights to gain participation in the terms of the debate. Taking a rights approach to sex work can be part of a pragmatic strategy to respond to marginalisation, exclusion, and the problems set out in Chapter 2.

The final section of this chapter considered the critiques of rights that have been made generally, drawing them into new territory to consider how far these critiques apply to sex workers' rights. I considered whether: rights expansion is illegitimate; rights are indeterminate and conflicting; rights are individualistic; and rights are too narrow and promote the State as sovereign. This discussion provided the space to consider the extent to which these critiques highlight the limitations of human rights for sex workers. Firstly, I considered whether backlash to the expansion of rights can mean that sex workers' claims to rights may be drawing on a once popular but now derided framework, seen as illegitimately protecting groups such as terrorists and criminals. I argued that rights remain a significant part of the political psyche and that arguments to stop their expansion tend to be made by people whose rights are already recognised. Rights can bring the issues faced by minority groups, like LGBT people, or marginalised populations, like sex workers, into the consciousness of the wider population, and have been an effective tool in other emancipatory movements. This does not 'create' new illegitimate rights, but highlights groups whose rights have been denied.

Secondly, I considered the impact of the indeterminate and conflicting nature of rights. This subsection examined arguments that decision makers often have to make decisions between competing rights claims, and as such rights can be a smokescreen for political decision making. The competitive nature of rights is clear in the case of sex work, where conflicting accounts of the relationship between sex work and rights have been a divisive issue for feminists for decades. That does not mean, however, that there is no value in rights – even where decisions are based on interpretation and balancing of rights, when this is done in courts, it is based on established principles, and so there are some safeguards against judicial policy making. Legislators and policy makers also balance competing rights claims. To turn away

from rights, however, would be to cede the terms of the debate to arguments that sex work is in itself a violation of rights. Pragmatically then, I argue that it would be counter-productive to reject rights on the basis of competition.

The next critique examined was that rights are individualistic and therefore are unable to deal with the structural issues faced by sex workers. I noted the way that rights claims under the HRA particularly require individual accounts of rights violations, and that, as such, sex workers whose lived experiences differ from these facts may not fit with the claims made. Nevertheless, I argued that individual claims can result in structural changes, for example, through reforms of law or policing practices. While the underlying power dynamics that organise sex work would not be eliminated by recognition of rights, they can be one weapon in a wider arsenal against these problems. Rights claims do not signify the end point in a campaign, but can, I argued, be understood as part of an ongoing struggle to have these rights upheld and respected. Drawing again on the Canadian context, I highlighted the ongoing challenges to PCEPA and how these demonstrate the continued relevance of human rights to sex workers.

Finally, I questioned whether rights, rather than challenging state power, reinforce it by promoting the State as sovereign. While it is accepted that using legal structures and institutions does accept formal rules, this does not mean that gains cannot be made outside of legal institutions, 'on the streets' as well. Sex workers are already excluded from the terms of debate, and the criminal law already encroaches on their lives in a multitude of ways, so I argue that reticence to engage with the state will allow the status quo to continue.

My overall argument has been that rights remain an important social, political and legal tool, and one which we should endeavour to rehabilitate rather than reject. On a pragmatic level, using rights is a 'tactical decision to play by the rules of the only game recognised by those in charge'.[287] While focused on the individual, they can be used to challenge laws and policies, and so have broader impacts. Rights can give a voice to those individuals and groups that have historically been silenced, even when their rights have not been formally recognised, and can be a catalyst for social change. Despite criticisms of rights, and their acknowledged limitations, they can be an effective framework from which to approach the issue of sex work and the potential benefits of this approach outweigh the possible negative effects.

Having made the argument that rights can be important for sex workers, in the next three chapters I consider how the HRA specifically can be used by sex workers. This analysis answers the question of how the HRA can be used to reform the law in relation to sex work. The next chapter introduces the framework of the HRA and the obligations enshrined therein to provide an account of the procedural basis for the substantive analysis that follows.

[287] M Minow, (n 161), 1875.

Chapter 6

INTRODUCTION TO THE HUMAN RIGHTS ACT 1998

6.1 Introduction

Although the discourse of rights is ubiquitous in debates around sex work in England and Wales, there has been little analysis of how sex workers might make claims to these human rights through legal institutions, such as courts or by lobbying Parliament. In this short chapter, I consider the mechanisms available for human rights claims under the HRA, to frame the arguments made in Chapters 7 and 8 about specific violations of the ECHR. This chapter begins with an introduction to the HRA and its constitutional status. The chapter then goes on to explain the obligations that the HRA places on Parliament, the courts, and public bodies. In doing so, this chapter sets out the procedural elements of the HRA before the substantive human rights arguments are explored in the following chapters. This chapter, therefore, provides an understanding of the framework through which any substantive challenges can be made, while highlighting the constitutional weakness of the HRA and its limitations for challenging human rights violations.

6.2 The Human Rights Act 1998

Although the UK is a signatory to a number of international human rights treaties upon which human rights arguments and claims could be based,[1] the ECHR is the only human rights

[1] The UK has ratified 7 of the core international human rights treaties: International Covenant on Civil and Political Rights (ICCPR) General Assembly resolution 2200A (XXI) of 16 December 1966 (ratified by the UK in 1976); International Covenant on Economic, Social and Cultural Rights (ICESCR) General Assembly resolution 2200A (XXI) of 16 December 1966 (ratified by the UK in 1976); Convention on the Elimination of All Forms of Racial Discrimination (CERD) General Assembly resolution 2106 (XX) of 21 December 1965 (ratified by the UK in 1969); Convention on the Elimination of All Forms of Discrimination Against Women

instrument that has been directly incorporated into domestic law. The UK has been bound to respect the ECHR since it was ratified in 1953, but its significance for individuals has increased since its incorporation in the HRA whereby the rights enshrined became directly enforceable before domestic courts. Prior to the HRA, the capacity for judicial oversight was very restricted. The focus of judicial review was on the illegality, procedural impropriety, or 'reasonableness'[2] of the decisions of public bodies, rather than whether decisions were 'proportionate' or 'necessary', and there was little scope for reviewing primary legislation.[3] As noted by the European Court of Human Rights (ECtHR) in *Smith and Grady v UK,* the threshold for the reasonable test was 'placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued'.[4]

Individuals (as well as companies and non-governmental organisations) could take cases to the ECtHR in Strasbourg to claim that they were victims of human rights violations.[5] In order to be admissible, the applicant must show that all domestic remedies have been exhausted, that the case has been brought within six months of the final decision in the domestic system, that it does not concern a matter that is substantially the same as one that has already been examined by the Court, that the complaint is not manifestly ill-founded or an abuse of the

(CEDAW) General Assembly resolution 34/180 of 18 December 1979 (ratified by the UK in 1986); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) General Assembly resolution 39/46 of 10 December 1984 (signed by UK in 1988); Convention on the Rights of the Child (CRC) General Assembly resolution 44/25 of 20 November 1989 (ratified by the UK in 1991); and the Conventions on the Rights of Persons with Disabilities (CRPD) General Assembly resolution 61/106 of 13 December 2006 (ratified by the UK in 2009).

[2] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[3] F Klug, 'The Human Rights Act: Origins and Intentions', in N Kang-Riou, J Milner and S Nayak (eds), *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Abingdon: Routledge, 2012).

[4] *Smith and Grady v UK* (2000) 29 EHRR 493, [138].

[5] Under Article 34. The first case to find a breach by the UK was *Golder v UK* (1975) 1 EHRR 524.

right of application, and that the applicant has suffered a significant disadvantage.[6] This option remains open even since the HRA, but taking cases to the ECtHR is very costly[7] and it takes a long time to get a remedy,[8] so people can be deterred from doing so.

The passage of the HRA was the culmination of decades of debate over whether to create a Bill of Rights for the UK.[9] While various model bills were produced by campaigners,[10] by the mid-1990s, most advocates for a bill of rights agreed that the easiest way to produce such a bill would be to incorporate the terms of the ECHR, to which the UK was already bound. This would, it was hoped, 'stifle the insidious and damaging belief that it is necessary to go abroad to obtain justice'.[11] In the New Labour White Paper, *Rights Brought Home,* it was stated: '[o]ur aim is a straightforward one. It is to make more directly accessible the rights which the British people already enjoy under the Constitution'.[12] A further aim of the Act spoke to an increased culture of awareness of rights in all decision making by public authorities, so that 'every public authority will know that its behaviour, its structure, its conclusions and its executive actions will be subject to this culture'.[13]

[6] ECHR, Article 35, as amended by Council of Europe, *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System of the Convention* 13 May 2004, CETS 194, Article 12.
[7] The Government estimated that prior to the HRA, it cost on average £30,000 and took up to 5 years to bring a case to the ECtHR after the exhaustion of domestic remedies – Home Office, *Rights Brought Home* (London: Home Office, 1997) Cm 3782, [1.14].
[8] More than 70,000 cases are pending as of 31 October 2021 – European Court of Human Rights, *Pending Applications Allocated to a Judicial Formation*, available at: https://www.echr.coe.int/Documents/Stats_pending_month_2021_BIL.PDF (last accessed 1 November 2021).
[9] K Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 (1) *Modern Law Review* 79, 79.
[10] F Klug, (n 3), 34.
[11] A King, *The British Constitution* (Oxford: OUP, 2007), 130.
[12] Home Office, (n 7), [1.19]. This is discussed further in I Leigh and R Masterman, *Making Rights Real* (Oxford: Hart, 2008)
[13] Lord Irvine, Hansard, HL vol 582 col 1308, quoted in F Klug, (n 3), 36.

6.2.1 The Constitutional Status of the HRA

The debate leading up to the passage of the Act was particularly focused on preserving the principle of Parliamentary sovereignty as a keystone of the UK's unwritten constitution, while balancing this with concerns around judicial capacity to protect individual rights.[14] A V Dicey's authoritative statement on the principle of Parliamentary sovereignty states that Parliament has 'the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament'.[15] This was reiterated in *Rights Brought Home*, which stated: 'Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes'.[16] This led to a 'compromise situation',[17] giving the HRA an interesting constitutional status as compared to the Bills of Rights of other jurisdictions.

First, the HRA is an Act of Parliament with no exceptional status. That is, rather than enshrine the ECHR rights in a way that makes it difficult or impossible for later generations to abolish them,[18] Parliament is able to repeal the HRA with a majority of votes, as with any other Act of Parliament. This is particularly pertinent in the recent political climate. David Cameron's Conservative Government was elected in 2015 on a manifesto that included a promise to repeal the HRA and replace it with a British Bill of Rights.[19] This promise reflected criticism from a number of, particularly right-wing, commentators and MPs that the HRA is a

[14] J Griffith, *The Politics of the Judiciary* (London: Fontana, 1997); Lord Lester, 'Fundamental Rights' [1994] *Public Law* 70; Lord Lester, 'First Steps Towards a Constitutional Bill of Rights' (1997) 2 EHRLR 124.
[15] A Dicey, *Introduction to the Study of the Law of the Constitution* (1885; 10th edn, London: MacMillan, 1959), 39.
[16] Home Office, (n 7), [2.16].
[17] D Feldman, 'The Human Rights Act 1998 and Constitutional Principles' (1999) 19 *Legal Studies* 165, 169.
[18] D Vick, 'The Human Rights Act and the British Constitution' (2002) 37 *Texas International Law Journal* 329, 330.
[19] Conservatives, *Conservative Party Manifesto 2015* (London, Conservatives, 2015), 58.

threat to public safety due to its protection of the rights of 'criminals and terrorists'.[20] This has been accompanied, Merris Amos argues, by a lack of public respect for the HRA, especially in comparison to, for example, the US Constitution or the South African Bill of Rights.[21] After the 2015 election, however there was a proliferation of pro-HRA campaigns, highlighting the positive role of the HRA,[22] as well as academic work noting the legal implications of repealing the HRA.[23] In response to the backlash, Cameron announced a delay to his plans to repeal the HRA in 2015.[24] In May's 2017 Conservative manifesto, it was stated that 'we will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes'.[25] In October 2021, however, Dominic Raab, the Justice Secretary, brought the issue back, pledging that the HRA will be repealed before the next General Election.[26] The Ministry of Justice opened a three month consultation in December 2021 on proposals to replace the Human Rights Act with a 'Modern Bill of Rights'.[27] The proposals did not include withdrawal from the ECHR, and the proposed draft clauses in the consultation gave options around a new procedural framework to, inter alia, reform the separation of powers between courts and Parliament, and

[20] M Amos, 'Problems with the Human Rights Act and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72 (6) *Modern Law Review* 883, 884; see also R Hamlin, '"Foreign Criminals," the Human Rights Act, and the New Constitutional Politics of the United Kingdom' (2016) 4(2) *Journal of Law and Courts* 437.
[21] M Amos, ibid, 888. For debate on this point, see A Wagner, '"A Bad Name in the Public Square": Does it Matter What People Think about Human Rights?' (2016) 21 (1) *Judicial Review* 58.
[22] For example, Liberty, *Save our Human Rights Act,* available at: https://www.liberty-human-rights.org.uk/campaigning/save-our-human-rights-act (last accessed 1 June 2019).
[23] K Dzehtsiarou, T Lock, P Johnson, F de Londras, A Greene, E Bates, 'The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights', available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605487 (last accessed 1 June 2015); A O'Donoghue and B Warwick, 'Constitutionally Questioned: UK Debates, International Law, and Northern Ireland' (2015) 66 (1) *Northern Ireland Legal Quarterly* 93.
[24] See P Wintour, 'Cameron set to delay plans to scrap Human Rights Act' *The Guardian* 27 May 2015, available at: http://www.theguardian.com/law/2015/may/27/david-cameron-delay-scrap-human-rights-act-queen-speech (last accessed 1 June 2019).
[25] Conservatives, *Forward Together: Our Plan for a Stronger Britain and a Prosperous Future. The Conservative and Unionist Party Manifesto 2017* (London: Conservatives, 2017), 37.
[26] M Fouzder, 'HRA Reform in this Parliament, Raab Promises Party Faithful' *Law Society Gazette* 5 October 2021, available at: https://www.lawgazette.co.uk/law/hra-reform-in-this-parliament-raab-promises-party-faithful/5110042.article (last accessed 1 November 2021).
[27] Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Right. A Consultation to Reform the Human Rights Act 1998* CP 588 (London: Ministry of Justice, 2021).

in particular reform the authority of the courts and their reliance on Strasbourg jurisprudence.[28] After a short extension, the consultation closed on the 19th April 2022. Thus far, the Government has not published or responded to the consultation responses. As such, while the repeal and replace legislative plan for the HRA has not yet been acted upon, the potential impermanence of the HRA and its complicated status in the public's view should, however, remain in sight for any potential campaigns surrounding sex work and human rights.

Secondly, in line with the principle of Parliamentary Sovereignty, Parliament continues to be able to, 'if it chooses, legislate contrary to fundamental principles of human rights'.[29] Although the HRA creates an obligation to make a 'Declaration of Compatibility' with the ECHR of any Bill entering Parliament (discussed below at 6.3),[30] this is not legally binding. Moreover, while the judiciary are given a wider range of duties and powers of review of legislation and actions by public authorities under the HRA (discussed below at 6.4), the courts have no power to strike down primary legislation, unlike under Bills of Rights in some other jurisdictions, such as the USA[31] and India.[32] As such, Parliament retains the capacity for 'legislative dissent from judicial rulings'.[33] Mark Tushnet labels this form of rights bill as 'weak-form' in contrast to 'strong-form review' whereby 'judicial interpretations of the Constitution are final and unrevisable by ordinary legislative majorities'.[34] This is significant when considering comparative power of constitutional courts to uphold sex workers' rights –

[28] ibid.
[29] *R v Secretary of State for the Home Department, ex parte Simms and O'Brien* [1999] UKHL 33, [2000] 2 AC 115, 131.
[30] Human Rights Act 1998, s 19.
[31] *Marbury v Madison* (1803) 5 US 137.
[32] J Black-Branch, 'Parliamentary Supremacy or Political Expediency? The Constitutional Position of the Human Rights Act under British Law' (2002) 23 (1) *Statute Law Review* 59, 65.
[33] A Kavanagh, 'What's so Weak about "Weak-Form Review"? The Case of the UK Human Rights Act 1998' (2015) 13 (4*) International Journal of Constitutional Law* 1008, 1009.
[34] M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2009), 33.

unlike the Supreme Court of Canada in *Bedford v Canada,*[35] the judiciary in the UK would not be able to strike down laws relating to sex work.

What is clear from the structure and design of the HRA is that it is not simply a method for the judiciary to keep the legislature in check, but rather is premised on the idea that rights go beyond just the judiciary and that there is no simple choice between legislative and judicial models of human rights protection. The scheme of the Act 'envisages that both Parliament and the courts should have a role in ensuring that law, policy and practice respect, protect and fulfil human rights'.[36] The efficacy of using rights in courts and when lobbying Parliament depends on the type of claim being made – as Alison Young argues:

> the judiciary is better able to determine decisions about rights where there is a need to ensure that these decisions can be reconciled with existing texts and legal precedents and the legislature is better able to determine "watershed" issues--where a fresh decision is required, without being constrained to a possible interpretation of an earlier text or legal decision.[37]

In order to understand the scope of human rights protections under the HRA then, and the potential routes for sex workers to make human rights claims, the following sections of this chapter consider the duties of Parliament, the judiciary and public bodies in turn.

[35] 2013 SCC 72, [2013] 3 SCR 1101.
[36] M Hunt, 'The Impact of the Human Rights Act on the Legislature: A Diminution of Democracy or a New Voice for Parliament?' (2010) *European Human Rights Law Review* 601, 602.
[37] A Young, 'Is Dialogue Working under the Human Rights Act 1998?' (2011) *Public Law* 773, 775.

6.3 Parliament under the HRA

Parliament, as noted, is not under a duty to act compatibly with the ECHR. In fact, it is specifically exempt from the s 6 general duty on public bodies.[38] That being said, the HRA has created a procedure by which human rights are examined at the legislative stage. Section 19 of the HRA provides that, when presenting a Bill for the second reading in either House of Parliament, the Minister in charge of the Bill must either: make a statement that, in their view, the provisions of the Bill are compatible with the ECHR (a Statement of Compatibility);[39] or make a statement that they are unable to make a Statement of Compatibility but that the Government nevertheless wishes to proceed with the Bill.[40] Janet Hiebert argues that the requirement to consider compatibility:

> triggers efforts, in the early stages of a bill's development, to identify possible conflicts with rights, consider alternative means to accomplish legislative objectives in a manner more compatible with Convention rights, or reach a judgment about whether the proposed legislative goal and means are justified.[41]

In reality, Ministers nearly always provide a statement of compatibility.[42] There is also no obligation for ministers to provide reasons for their statement, but there is a growing custom whereby the Government 'provides a Memorandum outlining its reasons for its views on compatibility'.[43] In relation to these statements, Lord Hope opined in *R v A* that 'such

[38] Human Rights Act 1998, s 6 (3).
[39] ibid, s 19 (1) (a).
[40] ibid, s 19 (1) (b).
[41] J Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' (2006) 4 (1) *International Journal of Constitutional Law* 1, 12.
[42] A Kavanagh, (n 33), 1015. Kavanagh notes that when the Government did not make a statement of compatibility, in the Communications Bill 2003, the Supreme Court subsequently found it compatible with the ECHR.
[43] ibid, 1015.

statements were merely expressions of opinion by the Minister. They were not binding on the courts, nor did they have any persuasive authority'.[44]

To improve the scrutiny of Bills and support this pre-legislative human rights protection, the Joint Committee on Human Rights (JCHR) furnishes each House with information and advice.[45] The JCHR is a parliamentary committee established in 2001, that comprises of twelve members, six from the House of Commons and six from the House of Lords. Although not its only role, the JCHR has made scrutiny of primary legislation its first priority.[46] The JCHR has frequently written to Ministers with doubts about compatibility, asking for written statements with further information about the reasons for and potential consequences of legislation, in order to determine proportionality.[47] If the Minister's response fails to satisfy the JCHR, it can report this to Parliament, which then chooses how to proceed.[48] The JCHR also now expresses its own views about compatibility rather than merely attempting to predict what courts might say about the compatibility of a measure.[49] Despite the influence of some of its reports 'in a few instances leading to small, but significant, changes in the final shape of legislation',[50] - such as was the case in the Counter-Terrorism Bill 2008, where the JCHR's recommendations led to a reduction in days suspected terrorists could be detained without charge[51] - the Government frequently rejects JCHR recommendations.[52] Moreover, while the Government may accept the JCHR's position that a bill interferes with a human right, it may argue that this

[44] *R v A* [2001] UKHL 25; see also D Nicol, 'Are Convention Rights a No-Go Zone for Parliament?' (2002) *Public Law* 438, 446.
[45] D Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (2002) *Public Law* 323, 324.
[46] J Hiebert, (n 41), 18.
[47] ibid, 19.
[48] ibid, 20.
[49] M Hunt, (n 36), 603.
[50] F Klug and K Starmer, 'Standing Back from the Human Rights Act: how effective is it five years on? (2005) *Public Law* 716, 718.
[51] M Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 (1) *Australian Journal of Political Science* 41, 53.
[52] D McKeown, 'The Human Rights Act and Anti-terrorism in the UK: One Great Leap Forward by Parliament, but are the Courts Able to Slow the Steady Retreat that has Followed? (2010) *Public Law* 110, 130.

is justifiable because it pursues a legitimate aim and is a proportionate response to a pressing social need.[53] David Feldman, who was the Legal Adviser to the JCHR states that, overall, the Government is 'happy to accept the Committee's views when they supported their own, but did not give way on any issue where there was disagreement'.[54]

An example of this can be seen when legislative changes relating to sex work in the Policing and Crime Act 2009 (PCA) were passed despite reservations from the JCHR about their ECHR compatibility. The JCHR reported concerns[55] that, where someone had failed to attend a meeting under an attendance order under PCA s 17,[56] they could be subject to detention for a period of 72 hours,[57] and that they might eventually be imprisoned for their failure to comply with the order.[58] The JCHR also noted their disappointment that their concerns were not implemented in the Bill before it passed,[59] stating that the measures in the Bill 'run the real risk of making those engaged in prostitution even more vulnerable'.[60] Moreover, the JCHR argued that the Government had not sufficiently supported or evidenced the need for a strict liability offence under s 14 of the PCA,[61] noting not only that the strict liability element makes it difficult for clients to regulate their conduct,[62] but also that it had the potential 'to put women into more exploitative or unsafe positions'.[63] The fact that the Bill was nevertheless passed despite the committee's recommendations demonstrates that Parliament remains sovereign

[53] J Hiebert, (n 41), 20.
[54] D Feldman, (n 45), 345.
[55] Joint Committee on Human Rights, Legislative Scrutiny: Government Replies Twenty–Third Report of Session 2007–08, 26 June 2008, HL Paper 126/HC 755, 53.
[56] Policing and Crime Act 2009, s 17.
[57] ibid, Schedule 1, Part 4, s 9 (2).
[58] ibid, Schedule 1, Part 2, s 4 (2).
[59] Joint Committee on Human Rights, Legislative Scrutiny: Policing and Crime Bill, 18 December 2009, available at https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/68/6804.htm (last accessed 19 September 2019), [1.18].
[60] ibid, [1.19].
[61] ibid, [1.28].
[62] ibid, [1.35].
[63] ibid, [1.35].

under the HRA and is not bound by the JCHR any more than it is by other parliamentary committees.

6.3.1 Using Parliament to Protect Sex Workers' Rights

Despite the limited role of Parliament under the HRA, Parliament and the executive could still be significant in any campaign for sex workers' human rights. David Feldman recognises 'the growing trend towards public consultation and particularly publishing Bills in draft for consultation before finalising them and introducing them to Parliament', and that this 'increases the possibility of making influential contributions on the protection of human rights.'[64] As such, arguments using rights enshrined under the ECHR may be more likely to have an effect at the early stages of the legislative process, before bills are even drafted or before they enter Parliament. Academic groups such as the Sex Work Research Hub, charities such as National Ugly Mugs, and sex worker groups such as the English Collective of Prostitutes often respond to consultations to highlight the implications of potential and current laws on sex workers.[65] While individual sex workers may engage with consultations on legislative proposals, this is less likely and will be dependent on individual capabilities and circumstances – as noted in Chapter 2, some sex workers are highly educated and politically and legally savvy, while others are significantly less so. Sex workers' rights groups and charities like NUM consult their memberships, however, and draw on sex worker-led research to inform consultation responses, thus enabling some inclusion of various sex worker voices. It is difficult to know how far

[64] D Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 *Statute Law Review* 91, 107.

[65] See, for example, National Ugly Mugs (UKNSWP) submission of written evidence to the Home Affairs Select Committee's Prostitution Inquiry, available at: https://uknswp.org/um/uploads/National-Ugly-Mugs-HASC-response.pdf (last accessed 19 September 2019); Sex Work Research Hub, APPG pop-up brothels: response from the Sex Work Research Hub, available at: http://eprints.bbk.ac.uk/20807/ (last accessed 19 September 2019); English Collective of Prostitutes, Response from English Collective of Prostitutes to the Criminalisation of the Purchase of Sex (Scotland) Bill (2), available at: http://prostitutescollective.net/wp-content/uploads/2012/12/Scotland-consultation-response.pdf (last accessed 19 September 2019).

responses to consultations affect policy, as they are often balanced against other responses and the Government's own agenda.

Lobbying Parliament is theoretically an efficient and important way of protecting human rights. Parliament is seen as best placed to balance the collective interests of society with the rights of individuals. Because there is persistent and inevitable conflict both over what rights are and how they should apply in particular circumstances, there are both institutional and democratic reasons for preferring that these decisions are made by the legislature.[66]

Thus far, however, the mere symbolism and political power of rights has not been sufficient to persuade the Government of the merits of the sex work argument, especially when they are offered an alternative call to rights that fits more with their established approach to understanding and responding to sex work.[67] Most lobbying from the sex workers' rights movement, however, uses the language of rights but does not assess how the claims might fall into the already established legal rights enshrined in the ECHR. As George Letsas notes, people whose 'human rights' interests could have been better served by a different legislative policy may feel that their legal rights have been violated and feel entitled to compensation, but this is not necessarily the case.[68] By using the rights under the ECHR, sex workers and sex workers' rights organisations may be more able to demonstrate which of their rights have been engaged and also that the Government is under an obligation not to violate that right. In order to ensure the optimum efficacy of such a rights claim, they would need to provide 'a critique that identifies a particular provision as engaging a specified human right, and explains why the

[66] M Hunt, (n 36), 602.
[67] A Carline, 'Criminal Justice, Extreme Pornography and Prostitution: Protecting Women or Promoting Morality?' (2011) 14 (3) *Sexualities* 312.
[68] G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), 25.

provision is unlikely to be compatible with the right (either generally or in particular cases) in light of any case-law on the subject'.[69] This, David Feldman argues, 'is more likely to influence … than a broad-brush appeal to values inherent in human rights or a particular right'.[70] The potential violations of sex workers' rights under the ECHR are analysed in depth in Chapters 7 and 8 of this thesis.

6.4 The Judiciary and the HRA

The HRA also created a set of obligations on the UK courts in order to increase enjoyment of the rights enshrined in the ECHR. Nearly all rights under the ECHR can now be relied upon in domestic courts, with the exception of the right to remedy under Article 13. The courts now have a greater remit to challenge executive decisions and legislation 'whose effect is to unnecessarily undermine individual rights'.[71] The role of the judiciary is 'to provide a correcting function, drawing attention to the fact that the decisions of the legislature have transgressed long-standing principles'.[72] The courts, therefore, are a forum wherein sex workers, with the support of sex workers rights organisations and non-governmental organisations may be able to challenge legislation on the basis of ECHR rights violations (as discussed in Chapters 7). The duties on the judiciary can be summarised as follows: (1) legislation 'must be read and given effect in a way that is compatible with Convention rights in so far as it is possible to do so'(the interpretative obligation);[73] (2) the duty to 'take into account' any opinion or decision of the European Commission on Human Rights (abolished in 1998), decisions of the Committee of Ministers and any judgment, decision, declaration or

[69] D Feldman, (n 64), 112.
[70] ibid.
[71] D McKeown, (n 52), 131.
[72] A Young, (n 37), 775.
[73] Human Rights Act 1998, s 3.

advisory opinion of the ECtHR;[74] and the capacity to issue a 'declaration of compatibility' if it is not possible to interpret legislation in a way that is compatible with ECHR rights.[75] The following subsections will consider each of these duties. The courts are also able to consider ECHR rights in any legal proceedings (including criminal cases or judicial review proceedings) where a complainant claims that their ECHR rights have been violated by a public authority, as discussed in section 6.5. This means that if a sex worker is arrested under sex work legislation or is subject to court proceedings for a civil order, they or their lawyer could draw on ECHR rights. Again, this could be supported by organisations. In all legal proceedings, the courts must follow their three duties.[76]

6.4.1 The Interpretative Obligation (s 3)

Prior to the HRA, courts were only able to directly rely on the ECHR in certain limited circumstances; for instance, where there was uncertainty in the legislation or common law, it was read in line with the ECHR.[77] This was reiterated in *R v Secretary of State for the Home Department, ex parte Brind*, where Lord Bridge held:

> 'the Convention is not part of the domestic law, that the courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it. But it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the

[74] ibid, s 2(1).
[75] ibid, s 4.
[76] ibid, ss 7-8.
[77] A King, (n 11), 129.

courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it.'[78]

This principle was referred to as 'the principle of legality' by Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms,*[79] reflecting the assumption that Parliament must itself confront its wording and any consequent political cost. Even if courts felt legislation violated human rights under the ECHR, if it was clear and unambiguous, the courts still had to apply it.

Under s 3 of the HRA, courts now have a duty to read legislation in a way which is compatible with Convention rights, as far as it is possible to do so.[80] In *Rights Brought Home,* this interpretative obligation was said to 'go far beyond the present rule… the courts will be required to interpret legislation so as to uphold Convention rights unless the legislation itself is clearly so incompatible with the Convention that it is impossible to do so.'[81] This goes beyond orthodox statutory interpretation, which starts with the position that judges should find and give effect to the intention of Parliament. This did not necessarily require a strict or literal interpretation of the statutes; Lord Denning offered a purposive approach in *Nothman v London Borough of Barnet,* where he stated interpretation should 'promote the general legislative purpose' of the provision, especially when a strict interpretation would give rise to an 'absurd or unjust situation'.[82] In a key case on statutory interpretation, *Pepper (HM Inspector of Taxes) v Hart,*[83] it was held that where legislation is ambiguous, the courts can take account of statements made by Ministers during the passage of the bill, as reported in Hansard to discern

[78] [1991] UKHL 4, [1991] 1 AC 696, 747.
[79] [2000] 2 AC 115, 131.
[80] Human Rights Act 1998, s 3 (1).
[81] Home Office, (n 7), [2.7]
[82] [1978] 1 WLR 220, 228.
[83] [1993] AC 593.

their intention. The approach in s 3, in contrast, obliges courts to interpret legislation in an ECHR-compliant way even when legislation and Parliament's intention is unambiguous and clear, as far as it is possible to do so. Lord Hope opined in *R v A* that this was a power of interpretation, however, and did not 'entitle the judges to act as legislators'.[84]

The line between interpreting and legislating has been a focus in a number of cases, and the subject of significant political and academic commentary,[85] a thorough discussion of which is beyond the scope of this thesis. It is worth noting, however, some of the key judicial statements in relation to the interpretative obligation. In one of the leading cases on this issue, *Ghaidan v Godin-Mendoza*,[86] the House of Lords was tasked with determining whether the term 'surviving spouse' under the Rent Act 1977[87] could include a person living 'as his or her wife or husband'. The ECHR rights being considered were the Article 14 right to freedom from discrimination in the enjoyment of rights alongside the Article 8 right to private and family life. The majority held it was possible to do so, in order to make the legislation compatible with the ECHR. Lord Nicholls stated that 'section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear'[88] and that s 3 'allows language to be interpreted restrictively or expansively'.[89] However, Lord Nicholls argued that any interpretation must 'go with the grain of the legislation'.[90] Parliamentary intention remains important insofar as interpretation that imposes a 'meaning which departs substantially from a fundamental feature

[84] *R v A* [2002] 1 AC 45, [108].
[85] For examples, see A Young, 'Judicial Sovereignty and the Human Rights Act 1998' (2002) 61 Cambridge Law Journal 53; R Edwards, 'Reading Down Legislation Under the Human Rights Act' (2000) 20 *Legal Studies* 353; G Phillipson, '(Mis)-Reading Section 3 of the Human Rights Act' (2003) 119 *Law Quarterly Review* 183; C Gearty, 'Revisiting Section 3 of the Human Rights Act' (2003) 119 *Law Quarterly Review* 551; A Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24(2) *Oxford Journal of Legal Studies* 259.
[86] [2004] UKHL 30.
[87] Schedule 1, Para 2 (1).
[88] [2004] UKHL 30, [30].
[89] ibid, [32].
[90] ibid, [33].

of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment'.[91] Therefore, courts must strike a balance to ensure interpretation remains in line with the fundamentals of the legislation.

6.4.2 Declarations of Incompatibility (s 4)

If it is not possible to interpret the law to be compatible with the ECHR without changing Parliament's intention, the higher courts may conclude that the provision is incompatible with the ECHR, making a declaration of incompatibility under s 4 of the HRA.[92] A declaration of incompatibility, as noted above, has no effect on the validity, continuing operation and enforcement of the legislation in respect of which it is made.[93] Moreover, s 4(6) of the HRA clearly states that any declaration of incompatibility is 'not binding on the parties to the proceedings in which it is made'. As such, declarations of incompatibility fail to provide immediate or tangible remedies to the claimants even where their rights are breached.

Lord Steyn has described s 4 declarations as a 'measure of last resort',[94] with the interpretative obligation being the remedy of first choice to preserve Parliamentary supremacy. One of the most significant cases in which a declaration of incompatibility was issued was the *Belmarsh* case.[95] In this case, the House of Lords held by a majority that s 23 of the Anti-Terrorism, Crime and Security Act 2001, which allowed for indefinite detention without charge of suspected international terrorists, was incompatible with Article 5 ECHR right to liberty. Because s 4 declarations are not binding, the Home Secretary was not required to release the

[91] *Re S (Children) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [40].
[92] Human Rights Act 1998, s4. This must be done if it is the only appropriate relief - *R (on the application of Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 838.
[93] Human Rights Act 1998, s 4 (6).
[94] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [39].
[95] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

prisoners.[96] Charles Clarke, the then Home Secretary stated that they would remain detained until Parliament decided 'whether and how we should amend the law'.[97] This case was momentous as it showed that the courts were willing to exercise their obligations even in an area of political significance, although Lord Bingham did note that 'the more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision.'[98]

The ECtHR has questioned whether a declaration of incompatibility is an effective domestic remedy. The case of *Burden v UK*[99] related to liability for inheritance tax between two sisters who had jointly owned property and had lived together all their lives. While the survivor of a married couple or a civilly partnered couple would be exempt from liability on the death of their spouse, the surviving sister would be required to pay inheritance tax on the dead sister's share of the property. They complained that this violated their rights under Article 14 in conjunction with the right to peaceful enjoyment of his possessions under Article 1 of Protocol 1. The UK Government submitted that the applicants were required to pursue a domestic remedy if it is 'effective and capable of providing redress for the complaint'.[100] In this case, since neither applicant had yet suffered any liability, the most that a domestic court could award would be a declaration of incompatibility. The Grand Chamber rejected the Government's objection, noting that on many occasions a s 4 declaration cannot be regarded as an effective remedy because it is not binding on the parties and cannot form the basis of

[96] They later took their case to the ECtHR – *A and others v UK* (Application no 3455/05) (Judgment 19 February 2009). The appellants who remained detained were released on 11 March 2005 and made subject to non-derogating control orders under the Prevention of Terrorism Act 2005.
[97] Charles Clarke, Oral Statement to the House of Commons, 26 January 2005, quoted in A Le Sueur et al, (n 6), 797.
[98] *A and others v Secretary of State for the Home Department* [2004] UKHL 56, [42].
[99] [2008] ECHR 356
[100] ibid, [37].

monetary compensation.[101] Therefore, even if a declaration of incompatibility is given, this does not exclude the applicants from seeking redress at the ECtHR.

A relatively deferential approach is apparent in the more recent case of *R (Nicklinson) v Ministry of Justice.*[102] In this case, a paralysed man who wished to end his life, but was physically unable to do so, applied for a declaration that it would be legal for a doctor to assist his suicide, or that the present ban on assisted suicide is incompatible with the Article 8 ECHR right to private and family life. The Supreme Court unanimously accepted that the law preventing assisted suicide did engage Article 8 but falls within the UK's margin of appreciation. In response to the question around the declaration of incompatibility, five of the seven judges held that the court did have the constitutional authority to make a declaration of incompatibility in relation to the general prohibition on assisted suicide. Only two judges of seven (Lady Hale and Lord Kerr) would have made a declaration of incompatibility, however. The majority stated that it was more appropriate for Parliament to assess this issue. The Supreme Court Justices made some key statements that have significance to the judicial approach to the HRA. Lord Neuberger, while noting that it was open to the court to consider a declaration of incompatibility, concluded that it would be 'institutionally inappropriate' to issue a s 4 Declaration at that particular time.[103] Relying on the fact that issuing a declaration was discretionary, Lord Neuberger's objection seemed to be more 'temporal than substantial'.[104] His reasoning relied on the sensitive nature of the issue, the consideration needed to amend the law on this issue, that Parliament was already considering it, and that a declaration would significantly depart from previous case law on the issue of assisted

[101] ibid, [40].
[102] [2014] UKSC 38.
[103] ibid, [9].
[104] E Wicks, 'The Supreme Court judgment in Nicklinson: one step forward on assisted dying; two steps back on human rights' (2014) 23 (1) *Medical Law Review* 144, 147.

suicide.[105] This is important, because it suggests that, if assisted suicide is not dealt with, a declaration of incompatibility may be forthcoming in a future case.[106] In reality, such an approach could have been taken with a declaration of incompatibility; as Lady Hale notes, after a s 4 declaration, 'Parliament is then free to cure that incompatibility… or do nothing'.[107] Deference to Parliament is particularly apparent in Lord Sumption's judgment where he opined:

> Such choices are inherently legislative in nature. The decision cannot fail to be strongly influenced by the decision-makers' personal opinions about the moral case for assisted suicide. This is entirely appropriate if the decision-makers are those who represent the community at large. It is not appropriate for professional judges.[108]

Elizabeth Wicks suggests that it could be that the majority choosing not to make a s 4 declaration of incompatibility in *Nicklinson* demonstrates a more deferential Supreme Court reflecting on the ongoing debate about the future of the HRA.[109]

While non-binding and not a source of direct remedy for claimants, a declaration of incompatibility does formally draw the attention of the executive and Parliament to the breach of the Convention and may provoke a decision as to whether the law should be changed.[110] The Government may choose to do nothing at all, can ask Parliament to repeal the provision through an Act of Parliament, can add a provision to an existing bill, or can amend and replace the

[105] ibid, 146.
[106] A Mullock, 'The Supreme Court decision in Nicklinson: Human rights, criminal wrongs and the dilemma of death' (2015) *Journal of Professional Negligence* 18, 23.
[107] E Wicks, (n 104), 154.
[108] [2014] UKSC 38, [231]. Lord Sumption defended his Nicklinson decision and criticised the HRA in his Reith lectures in 2019: Lord Sumption, *Trials of the State: Law and the Decline of Politics* (London: Profile, 2019), Chapter 3.
[109] E Wicks, (n 104), 156.
[110] J Coppel, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (Chichester: John Wiley and Sons, 1999), 49; I Leigh and R Masterman, (n 12), 7-8.

provision by way of a remedial order under s 10 of the HRA.[111] The JCHR scrutinises any remedial orders and gives guidance as to when they may be appropriate.[112] It is unlikely that the Government will choose not to respond to the declaration, as the case is likely to be taken to the ECtHR (as in the *Belmarsh* case). Anthony Bradley, therefore, calls s 4 declarations a 'wound to Parliament's handiwork that is likely to prove fatal, even though life support for it must be switched off by the Government or Parliament, not by the courts.'[113] In some cases, however, there is a significant delay between a decision and whatever remedy the Government chooses.[114]

6.4.3 The Duty to 'Take into Account' Convention Case Law (s 2)

Section 2 of the HRA creates a duty for courts to 'take into account' any opinion or decision of the European Commission on Human Rights (abolished in 1998), decisions of the Committee of Ministers and any judgment, decision, declaration or advisory opinion of the ECtHR 'whenever made or given, so far as, in the opinion of the Court or tribunal, it is relevant to the proceedings in which that question has arisen'.[115] It should be made clear, however, that this does not mean that UK courts are bound by Strasbourg jurisprudence. In fact, Lord Neuberger stated in a unanimous judgment of nine Supreme Court justices in *Pinnock v Manchester City Council*[116] that

[111] J King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' in H Hooper, M Hunt and P Yowell (eds.) *Parliaments and Human Rights* (London: Hart Publishing, 2015), 169.
[112] Joint Committee on Human Rights, *Making of Remedial Orders*, 2001–02, HL 58, HC 473.
[113] A Bradley, 'The Sovereignty of Parliament: Form or Substance?' in J Jowell and D Oliver (eds), *The Changing Constitution* (Oxford: OUP, 2011), 65.
[114] *Smith v Scott* [2007] CSIH 9.
[115] Human Rights Act s2 (1).
[116] [2010] UKSC 41.

> This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law.[117]

He does go on to clarify, however, that where 'there is a clear and constant line of decision whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law' that 'it would be wrong for the court not to follow that line'.[118]

In saying this, Lord Neuberger reconsiders Lord Bingham's statement in *R (on the application of Ullah) v Special Adjudicator* that s 2 required UK courts 'to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[119] This is also referred to as the 'mirror principle' and has been reiterated in subsequent cases.[120] That is, if the rights conferred by domestic courts are less than those given by the ECtHR, the court will be acting incompatibly with the ECHR.[121] Moreover, if the court chooses not to follow Strasbourg jurisprudence, 'without good reason, the dissatisfied litigant has a right to go to Strasbourg where existing jurisprudence is likely to be followed'.[122]

What of the potential for the UK courts to confer *more* protection than the ECtHR? The mirror principle, in its most conservative interpretation, holds the potential to limit the exercise

[117] ibid, [48].
[118] ibid, [48].
[119] [2004] UKHL 26, [20].
[120] *Secretary of State for the Home Department v AF* [2009] UKHL 28, [98]; *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26, [106].
[121] [2004] UKHL 26, [20]. This is discussed more fully in R Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" under the Human Rights Act' [2005] *International and Comparative Law Quarterly* 907.
[122] *R v Secretary of State for the Home Department, ex parte Amin* [2004] 1 AC 653, [44].

of judicial discretion to depart from Strasbourg jurisprudence.[123] Helen Fenwick and Roger Masterman argue that the mirror principle demonstrates an 'early tendency to treat the Strasbourg jurisprudence as effectively determinative of disputes in the ECHR context arising in domestic spheres'.[124] This approach was supported by Lord Brown in *R (Al Skeini) v Secretary of State for Defence* where he stated that Lord Bingham's statement in *Ullah* could just as well have ended 'no less, certainly no more'.[125] Lord Brown's concern was that if a Convention right were construed too widely, it would have the effect of turning it from a Convention right into a free-standing right of the court's own creation.[126] The limiting capacity of the mirror principle has also been supported by Lord Rodger in *Secretary of State for the Home Department v AF*, where he stated 'Strasbourg has spoken, the case is closed'.[127] This marks a variation to how the HRA was envisioned in *Rights Brought Home*, as 'a distinctively British contribution to the development of the jurisprudence of human rights in Europe'.[128]

This strict interpretation of the mirror principle, however, has lost some traction over more recent years, with a growing number of exceptions. One important case that departed from ECtHR jurisprudence was *Re P and others*,[129] a Northern Irish case on delegated legislation that would prohibit adoption by unmarried heterosexual couples. This was held to be incompatible with the Article 8 ECHR right to family life and the Article 14 right to non-discrimination. In this case, Strasbourg had not ruled that discriminating on the basis of marital

[123] R Masterman, 'Deconstructing the Mirror Principle' in R Masterman and I Leigh, *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford: Oxford University Press, 2013), 112.
[124] H Fenwick and R Masterman, 'The Conservative Project to 'Break the Link between British Courts and Strasbourg' Rhetoric or Reality?' (2017) 80 (6) *Modern Law Review* 1111, 1114.
[125] [2007] UKHL 26, [106].
[126] *R v Ambrose* [2011] UKSC 43, [19], [86].
[127] [2009] UKHL 28, [98].
[128] Home Office, (n 7), [1.14].
[129] [2008] UKHL 38.

status was a violation of Article 14,[130] but Lord Walker looked at Strasbourg jurisprudence on same sex adoption to suggest that Strasbourg would probably find a violation if it heard this case.[131] In *R v Horncastle*,[132] on hearsay evidence, the Supreme Court departed from Strasbourg jurisprudence, with Lord Phillips stating:

> there will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process… it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course.[133]

The court has also provided exceptions where there is no clear and constant line of decision. In the case of *R (on the application of Hicks and others) v Commissioner of Police for the Metropolis*,[134] the Supreme Court stated that in relation to arbitrary detention, 'Strasbourg case law on the point is not clear and settled', and that 'while this court must take into account the Strasbourg case law, in the final analysis it has a judicial choice to make'.[135] Therefore, in situations like sex work, where there is no clear, settled approach in Strasbourg jurisprudence, the courts can come to their own determination of the merits of the rights claims.

It is therefore no longer the case that *Ullah* is unquestioningly accepted.[136] To some degree, UK courts are no longer stopped from 'going where Strasbourg has not yet gone'.[137] For the purposes of this thesis, this is a significant shift, given that there have been no ECtHR

[130] A Greene, 'Through the Looking Glass? Irish and UK Approaches to Strasbourg Jurisprudence' (2016) 55(1) *Irish Jurist* 112, 118.
[131] [2008] UKHL 38, [65].
[132] [2009] UKSC 14.
[133] ibid, [11].
[134] [2017] UKSC 9.
[135] ibid, [32].
[136] H Fenwick and R Masterman, (n 124), 1119.
[137] *R v Ambrose* [2011] UKSC 43, [126].

cases directly answering the question on how sex work should be regulated to ensure protection of sex workers' rights. The UK courts would have scope to consider this issue, all the while 'taking into account' other Strasbourg jurisprudence.

6.5 Public Bodies and the HRA

Section 6 is the key enforcement provision of the HRA; this section makes it unlawful for public authorities to act incompatibly with ECHR rights, unless primary legislation forces them to do so.[138] While human rights obligations are traditionally imposed on the state, in the UK, there is no legal entity of 'the State', so instead the HRA imposes duties on bodies that can be brought under the 'umbrella of the state', that is public authorities.[139] Public authorities include core public bodies for which the state is wholly responsible, such as government departments, the police and local authorities,[140] whose functions all fall within the remit of the HRA.[141] A core public authority must act compatibly with the ECHR 'in everything it does'.[142] For the purposes of this thesis, and particularly Chapter 8 which considers police action, these are the most important public authorities.

The courts are also public authorities,[143] and are under a duty to give effect to the convention rights when developing the common law. There are some areas of common law, such as the tort of breach of confidence,[144] that have been developed by the courts to enshrine the content of ECHR rights, and as such are applicable to individuals or private bodies. In this

[138] Human Rights Act s 6 (1) - (2).
[139] A Le Sueur et al, *Public Law* (Oxford: OUP, 2010), 764.
[140] *Aston Cantlow PCC v Wallbank* [2003] UKHL 37, [7]. There are also hybrid public bodies, but discussion of these is beyond the scope of this thesis.
[141] N Bamforth, 'The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies' (1999) 58 (1) *Cambridge Law Journal* 159, 159.
[142] *Aston v Cantlow* [2003] UKHL 37, [7].
[143] Human Rights Act 1998, s 6 (3) (a)
[144] *Campbell v MGN Ltd* [2004] UKHL 22.

way, the courts have to a degree created an indirect 'horizontal effect', whereby the ECHR rights do not apply between private persons, but rather can be applied to the existing law, which in turn is used between two private persons.[145] This horizontal effect cannot create a new cause of action between two private actors, as only a public authority can be sued for breaching an ECHR right; however, existing causes of action can be adapted.[146] As such, a sex worker could not bring a specific HRA claim against a client or employee, but ECHR rights could be considered in courts if an existing action, such as a breach of employment law, or a criminal offence, were to be litigated.

Through the HRA, a failure to comply with the ECHR can form the basis for legal action against the public authority before any tribunal or court, under s 7 (1). In order to bring a s 7(1) action to the court, the claimant must show that they are a 'victim of the unlawful act'.[147] A person is only considered to be a victim if they are directly affected by the violation, and this can include simply being at risk of arrest, even if not prosecuted.[148] If the court accepts that a violation has occurred, the HRA provides that the court may grant 'any such relief or remedy, or make such an order within its powers as it considers just and appropriate'.[149] This can include any remedy available for judicial review, such as quashing orders, prohibiting orders, mandating orders, and injunctions.[150] Courts can also make an order to pay damages or compensation if it is necessary to afford just satisfaction to the person in whose favour it is made.[151] Damages are generally not given in cases where there have been no financial losses.[152] Even when no damages are awarded, however, this approach to challenging public authorities'

[145] G Phillipson and A Williams, 'Horizontal effect and the constitutional constraint.' (2011) 74 (6) *The Modern Law Review* 878, 879.
[146] *Wainwright v Home Office* [2003] UKHL 53.
[147] Human Rights Act 7 (1) (b).
[148] *Dudgeon v UK* (1981) 4 EHRR 149.
[149] Human Rights Act 1998, s 8 (1).
[150] Senior Courts Act 1981, s 31.
[151] Human Rights Act 1998, s 8 (3)
[152] A Le Sueur et al, (n 139), 769.

actions can provide a more immediate remedy to the claimant than a challenge to legislation, as the court is empowered to order the public authority to stop the violation. In creating the new cause of action and remedies under s 6 and s 7, the HRA has allowed for some development rights conscientiousness beyond the courts and into a much wider sphere of public life. An example of this can be drawn from research into policing that highlights how police have to justify, document and audit their decision making to ensure compatibility with the ECHR.[153] How far this has embedded regard human rights concerns into policing, rather than consciousness that they exist, is analysed further in Chapter 8.

6.6 Conclusion

This chapter has provided an introduction to the HRA, the role of Parliament, and the duties upon the courts that it creates. The HRA has brought human rights more firmly into the legal culture of the UK; asking Parliament to consider human rights implications before the passage of legislation, and by enabling individuals to rely on ECHR rights in domestic courts, UK human rights discourse has been significantly transformed. Moreover, judges are compelled to engage in some of the more sensitive and controversial issues through considering the human rights implications in law and public body decisions.[154] As such, the HRA allows for the possibility of sex workers using human rights in the domestic arena, potentially lobbying Parliament or bringing a claim through the UK courts. This marks an important shift from the pre-HRA environment where the only real recourse for human rights violations was to take a case to the ECtHR.

[153] K Bullock and P Johnson, 'The Impact of the Human Rights Act 1998 on Policing in England and Wales (2012) 52 *British Journal of Criminology* 630, 631.
[154] A Le Sueur et al, (n 139), 812.

This chapter began by examining the constitutional status of the HRA. Unlike other jurisdictions' Bills of Rights, the HRA is an Act of Parliament with no exceptional status. Parliament remains sovereign within the HRA and can create legislation that is incompatible with the ECHR. While the JCHR furnishes Parliament with its views on the ECHR compatibility of new legislation, this can be rejected or ignored by Parliament. Moreover, as an ordinary Act of Parliament, the HRA can be repealed by Parliament with a simple majority. The current Government plans to do this and replace the HRA with a 'Modern Bill of Rights'. A consultation on these proposals has recently been completed and it is likely to be on the legislative agenda within the current Parliament. As such, while sex workers could use the HRA and ECHR rights to lobby Parliament or respond to consultations on sex work laws, this is a difficult time to draw on the Human Rights Act.

The following section set out the obligations of courts under the HRA, clarifying their three duties: the interpretative duty (s 3); the capacity to issue declarations of incompatibility (s 4), and the duty to take into account Strasbourg jurisprudence. Courts can consider ECHR rights in any legal proceedings, which provides a range of avenues for sex workers to assert their rights in court. In all of their duties, where there is no Strasbourg jurisprudence to follow, the courts have been particularly reluctant to depart from Parliament when it comes to balancing rights.[155] There have been suggestions that courts have been particularly deferential to Parliament in the current political climate. This 'judicial deference' demonstrates 'that they recognise that, in certain areas, the Government or Parliament are better placed to make judgments because of the knowledge and experience available to them.' [156] Continued

[155] J Wright, 'Interpreting section 2 of the Human Rights Act 1998: towards an indigenous jurisprudence of human rights' (2009) *Public Law* 595, 595. This is particularly the case where there are strong policy issues at stake: *R (Prolife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [76].
[156] Lord Irvine of Laing, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' (2003) *Public Law* 308, 314.

deference to Parliament is certainly something to consider for any potential challenge to the laws relating to sex work. The courts may even prefer to focus on common law rights to avoid relying on an unpopular legal instrument. Moreover, with the influence of the alternative abolitionist argument that sex work is in itself a human rights violation,[157] the court is able to decide whether to accept either of these arguments and reject the other, or to accept both and balance them against one another.

The final section of this chapter examined the duty under s 6 of the HRA on public bodies to act compatibly with ECHR rights. Failure to comply with the ECHR can also form the basis for legal action against the local authority under s 7 of the HRA. This means that actions against a sex worker by public authorities, such as the police, are subject to judicial scrutiny to determine if they violate the sex workers' rights. The impact of these two sections is explored further in Chapter 8.

The following two chapters of this thesis consider the substance of any potential human rights claim, both in relation to the law around sex work (Chapter 7) and the actions of the police as a public body in enforcing this and other laws (Chapter 8). These three chapters, taken together, then, produce knowledge on the specific potential impact that the HRA could have on the reform of the law relating to sex work in England and Wales.

[157] Discussed in Chapters 1 and 7.

Chapter 7

CHALLENGING THE LAWS RELATING TO SEX WORK USING THE HUMAN RIGHTS ACT 1998

7.1 Introduction

Over the last few decades, the debate around sex work and human rights has increased significantly, in activism, academia, domestic law, and international documents.[1] The Government in England and Wales, through its own publications and its responses to various Parliamentary committee reports, has demonstrated a clear inclination towards the position that sex work is inherently exploitative and necessarily infringes the rights of all those involved, rather than claims that rights are needed to make sex work safer.[2] There has been scant discussion of the impact of sex work laws on sex workers' human rights by the Government in these documents or beyond. The position that sex work *is* violence and exploitation, therefore, is 'winning' the policy debate in England and Wales, in part at least because it is more politically expedient to be seen to be addressing the issue of human trafficking and exploitation (by 'tackling the demand') than to challenge 'structures that violate sex workers' human rights'.[3] Despite this somewhat unreceptive audience, many sex workers and sex workers' rights organisations have continued to campaign for their rights and continue to put faith in the transformative potential of human rights law and discourse. There has been little analysis, however, of how this draws on specific rights in the domestic context.

[1] See Chapter 1 for a further examination of this.
[2] APPG, *Shifting the Burden: Inquiry to assess the operation of the current legal settlement on prostitution in England and Wales* (London: APPG, 2014).
[3] J Doezema, 'Forced to Choose: Beyond the Voluntary v Forced Prostitution Dichotomy', in K Kempadoo and J Doezema (eds), *Global Sex Workers: Rights, Resistance and Redefinition* (London: Routledge, 1998), 42.

This chapter seeks to address this lacuna and provide an in depth analyse of some potential HRA challenge to laws relating to sex work in England and Wales. This thesis has argued that the problems faced by sex workers, as defined in Chapter 2 as stigma, risk of violence and crime, and problematic working conditions, are exacerbated by the laws relating to sex work in England and Wales. As such, these laws ought to be reformed or repealed to better enable sex workers to employ risk management strategies, to reduce stigma, and to empower sex workers to work in better working conditions. This would be an important first step to moving towards an alternative labour based, and more broadly human rights-based approach to sex work. In this chapter, I examine the ways in which the HRA can be used to support the reform and/or repeal of these problematic laws.

Having explained the procedural elements of the HRA in the Chapter 6, in this chapter I focus on the substance of such claims. This chapter begins by considering Strasbourg jurisprudence in relation to sex work, in line with the UK judiciary's HRA s 2 duty to take into account Strasbourg jurisprudence. This analysis is provided to demonstrate that there is no clear and constant line of decision. As explained in Chapter 6, the domestic courts have demonstrated willingness to balance competing claims and go beyond Strasbourg jurisprudence, when the case law is not 'clear and settled'.[4] This analysis will demonstrate that the ECtHR has been reticent to take a position on the regulation of sex work generally, noting a lack of European consensus on this topic.[5] Although there has been little case law relating directing to sex work under the ECHR, some direction can be found in the few cases that do touch on it, and this will be referred to in both this chapter and Chapter 8. This section also considers the doctrine of margin of appreciation, which has been employed in Strasbourg jurisprudence to allow

[4] *R (on the application of Hicks and others) v Commissioner of Police for the Metropolis* [2017] UKSC 9.
[5] *Tremblay v France* (Application no 37194/02) (Judgment 11 September 2007).

discretion to member states in the way that they fulfil their obligations under the ECHR. The margin of appreciation is often employed when, as with sex work, there is no European consensus. It is therefore important to understand its use when moving on to examine specific potential ECHR violations to highlight the scope for developing a domestic human rights approach to the issue of sex work and ECHR rights.

The chapter then considers specific potential violations of sex workers rights under the ECHR. The potential challenges relate to: the keeping of a brothel,[6] soliciting and loitering,[7] laws prohibiting third party involvement under 'controlling prostitution for gain' [8] and 'causing/inciting prostitution for gain'[9] under the Article 8 right to a private and family life; soliciting and loitering under the Article 10 right to freedom of expression;[10] and all of these offences under the Article 14 of the ECHR prohibition of discrimination in the enjoyment of the rights and freedoms of the ECHR. I argue that all four of these offences create unjustified interferences with sex workers' rights under Article 8. I, however, find that it is unlikely that any interference under Article 10 and Article 14 would pass the respective tests on proportionality to demonstrate that they violate sex workers' rights. Article 8 is, therefore, the strongest route for challenging these laws.[11]

There are other laws not analysed here that can exacerbate stigma, violence and poor working conditions for various sex workers, as argued in Chapter 3. One of these is the provision creating Engagement and Support Orders (ESOs),[12] which I argued were a form of

[6] Sexual Offences Act 1956, s 33.
[7] Street Offences Act 1959, s 1.
[8] Sexual Offences Act 2003, s53.
[9] ibid, s 52.
[10] Street Offences Act 1959, s 1.
[11] Although the strength of this challenge depends on the openness, and powers, of courts and Parliament to move away from the current legislation, as discussed in Chapter 6.
[12] Policing and Crime Act 2009, s 17.

forced welfarism that could detrimentally impact street sex workers' relationships with outreach projects and reinforce the 'other'ing of this particularly marginalised group of sex workers. ESOs are, however, an alternative disposal for convictions for soliciting and loitering, and so the more direct issue is the criminal offence. If soliciting and loitering were successfully challenged, this would have a knock-on effect on ESOs. I also demonstrated that the laws on kerb-crawling[13] and paying for sex from a prostitute subject to force[14] create impediments to sex workers' ability to work safely. These laws, however, target clients and, unlike the laws discussed in this chapter, could not be used to prosecute sex workers or those employed to keep the sex worker safe. As such, a claim would need significant focus on the human rights of clients, rather than sex workers. This thesis is focused on sex workers' human rights, and as such, such a challenge is beyond the scope of this thesis.

7.2. Sex Work at the European Court of Human Rights

Determining the extent to which domestic courts will have to follow or take account of Strasbourg jurisprudence under s 2 of the HRA requires an analysis of ECtHR case law. While there have been no cases at the ECtHR that directly address the issue of sex work (or prostitution), whether prostitution is itself a violation of ECHR rights or whether laws regulating prostitution violate ECHR rights, a number of cases have considered issues related to sex work, or specifically to *forced* prostitution.[15] In *Tremblay v France,* the ECtHR has held that prostitution is incompatible with Article 3 of the ECHR (freedom from torture and inhuman or degrading treatment) where it is coerced.[16] It has also held that the *exploitation of*

[13] Sexual Offences Act 2003, s 51A.
[14] Sexual Offences Act 2003, s 53A.
[15] *Tremblay v France* (n 5); *Khelili v Switzerland* (2011) ECHR 195; *BS v Spain* (Application no 47159/08) (Judgment 24 July 2012); *SM v Croatia* (2020) ECHR 193
[16] *Tremblay v France* (n 5), [25].

prostitution and forced prostitution fall within the scope of Article 4 (freedom from slavery and forced labour), particularly as a form of 'forced or compulsory labour', irrespective of whether this is done in a trafficking context or otherwise.[17] Moreover, the that Member States have an obligation to both prohibit forced prostitution[18] and must take reasonable steps to investigate claims of forced prostitution, using thorough, objective and impartial analysis, as a form of deterrence.[19]

In determining whether prostitution is forced, the ECtHR has made a distinction between physical and psychological force, and more indirect economic pressures. In *SM v Croatia*, the applicant had made a complaint that her Article 4 rights to freedom from forced and compulsory labour had been violated when domestic authorities had failed to apply effectively criminal law mechanisms concerning her allegations of forced prostitution.[20] She had complained to the police that she had been physically and psychologically forced into prostitution for a period of a year. Her boyfriend, a former policeman, had given her a mobile telephone to use to contact clients; had driven her to meet the clients; had forced her to give sexual services; and physically punished her if she refused to do so. He assaulted her every couple of days. After she left him, he threatened her and her family. It was held that these circumstances amounted to forced prostitution.[21] The Court held violence was not the only way to force prostitution, and that his dominant position over her, and that use of force, threats, and other forms of coercion were prima facie evidence of forced prostitution.[22]

[17] *SM v Croatia* (n 15), [300].
[18] ibid, [307].
[19] ibid, [316]. This obligation is considered in more depth in Chapter 8.
[20] ibid, [3].
[21] ibid, [332].
[22] ibid, [331].

Conversely, in *Tremblay v France,*[23] the applicant had applied to a social-security scheme to be registered as a self-employed decorator to enable her to leave sex work. She submitted that the agency's refusal of her application and request for her to pay 40,000 euros in social security contributions had left her with no choice but to continue in prostitution, which amounted to 'inhuman and degrading treatment' under Article 3. The ECtHR held that, while forced prostitution was incompatible with Article 3, this situation did not amount to forced prostitution. The applicant was not required by the agency to continue to work as a prostitute and there was no evidence that she was unable to pay social security contributions by any other means. On the same basis, it was held that there was no forced or compulsory labour under Article 4. As such, the ECtHR has not taken the position that sex work is always forced or equated economic pressures with coercion.

In addressing these cases, the ECtHR has made it clear that they are not willing to take a position on 'other forms of prostitution'[24] – ie. where not forced or coerced. In *Tremblay*, the ECtHR stated, *obiter*, that there was no European consensus about how sex work should be viewed from the perspective of Article 3 and chose not to take a position on this.[25] This was reiterated in *SM v Croatia.*[26] Further, the Court stated that 'the terms "exploitation of the prostitution of others" and "other forms of sexual exploitation" are not defined[27] in international instruments such as the Palermo Protocol.[28] They noted that this is a deliberate choice in order for these instruments to remain without prejudice to how States Parties deal with prostitution in their domestic law'.[29] The concurring opinion of Judge Vilanova went

[23] *Tremblay v France* (n 5).
[24] ibid.
[25] (37194/02) Comment (2008) EHRLR 135, 135.
[26] *SM v Croatia,* (n 15), [299].
[27] *SM v Croatia* (n 15) [116].
[28] UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, General Assembly resolution 55/25 of 15 November 2000.
[29] *SM v Croatia* (n 15), [116].

further and explicitly stated that Article 4 did not apply to 'prostitution entered into with free, informed and express consent'.[30] There is recognition here that legislation and policies relating to sex work vary across Europe, but there is a distinction to be made between forced and other prostitution. As such, there is no explicit ECtHR ruling for the UK courts to follow when considering the impact of sex work laws on sex workers' human rights.

The ECtHR has, further, made two judgments about state treatment of sex work that might be of relevance to the HRA analysis in this chapter and the next. In *Khelili v Switzerland,*[31] the applicant was a French national living in Geneva. In 1993, the police had found her carrying calling cards and entered her name into their records as a prostitute, despite her insistence that she had never been one. She had found in 2003 and again in 2006, when dealing with the police for other matters that this entry was still on her police files. She argued that this made her day-to-day life matters more problematic as the information would be communicated to her employers and that this breached her Article 8 rights (right to private and family life). The Court held that Khelili had considerable interest in having the word 'prostitute' removed from her files and that the keeping of this record was not justified or necessary in a democratic society, as there was no sufficient link between the word 'prostitute' and the later proceedings to keep it on record. The Court did not note whether the term 'prostitute' was accurate or not, instead stating that the continued record of prostitution could damage her reputation. The Court, in coming to this decision, recognised the stigma attached to sex work, in noting that such a designation could be harmful to her reputation.[32] This highlights the importance of privacy for sex workers, suggesting that long-term registration, and perhaps other forms of 'outing', is incompatible with sex workers' human rights. Moreover, it

[30] ibid, [7].
[31] *Khelili v Switzerland* (n 15).
[32] BB Uygun, 'Databases and Criminal Procedures in Switzerland and Turkey with Regard to European Council's Standards' (2017) 5 (2) *Journal of Penal Law & Criminology* 89, 97.

demonstrates that if the state wishes to limit the Convention rights of sex workers, they must have convincing and sufficiently relevant reasons to do so, as with other citizens.[33]

In *BS v Spain,*[34] a black, African sex worker was working in Spain when on two occasions, two police officers asked her to show her identity papers. On the second occasion, the police office hit her thigh and wrists with his baton while making racist comments about her prostitution. She alleged that this violated her Article 3 right to freedom from inhuman and degrading treatment, in conjunction with her Article 14 right to freedom from discrimination because the white sex workers did not face the same abuse. The Court rejected arguments from Spain that the measures were part of an anti-trafficking programme in the area, holding that this does not justify treatment contrary to Article 3. The Court held that both her Article 3 and 14 rights had been violated because they had failed to take into account her 'particular vulnerability inherent in her position as an African woman *working as a prostitute*' *(emphasis mine).*[35] Notably, the Court did not only rely on her race or nationality in its finding that her Article 14 right had been violated, instead taking an intersectional approach,[36] by recognising multiple grounds of discrimination – explicitly gender and race. The wording used by the Court, emphasised above, could suggest the characteristic of being a sex worker might be understood as increasing vulnerability, when taken with other forms of discrimination. This decision is also important for the implications it may have on police practice towards sex workers,[37] and because anti-trafficking initiatives were insufficient bases for infringing sex workers' rights.[38]

[33] A similar case has been decided recently in the UK Court of Appeal, where criminal records for sex work offences committed many years previously were held to infringe the Article 8 rights of the applicant who no longer worked in sex work - *R (A and others) v Secretary of State for the Home Department* [2018] EWHC 407 (Admin).
[34] *BS v Spain* (n 15).
[35] ibid, [62].
[36] M La Barbera and M Cruells López, 'Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: *B. S. v. Spain*' (2019) *Law & Society Review* 1.
[37] Considered further in Chapter 8.
[38] Although it should be noted that Article 3 is not a qualified right.

Although this claim relied upon an absolute right, Article 3, within which there is no scope for justification, it could represent a need for a more refined balance and proportionality test where the state seeks to infringe any rights for the purpose of anti-trafficking initiatives. Therefore, while there has been no explicit decision on sex work regulation, *BS v Spain* and *Khelili v Switzerland* highlight that regulation or suppression of sex work or trafficking does not provide a carte blanche justification for interferences with sex workers' rights.

7.2.1 Margin of Appreciation

A further issue of importance when considering a challenge to the law is the margin of appreciation. The term 'margin of appreciation' has been used to describe the discretion that Member States have in relation to the manner in which they implement the ECHR rights, and in certain conditions, their interpretation of the scope of the rights, allowing them to take 'into account their own particular national circumstances and conditions'.[39] The applications in both *Tremblay* and *SM v Croatia* related to absolute rights (Articles 3 and 4) – those where there are no circumstances where interference can be justified[40] – so the margin of appreciation was not utilised in either decision. The decision not to take a position on sex work per se, reflects a similar principle, however, in that it allows the state to choose how to regulate sex work. As the doctrine does apply to ECHR Articles considered in this chapter (Articles 8 and 10), the significance of the margin of appreciation for interpretation of rights will be explained.

[39] Y Arai-Takahashi, *Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia 2002), 2
[40] S Palmer, 'A Wrong Turning: Article 3 ECHR and Proportionality' (2016) 65 (2) *Cambridge Law Journal* 438.

The margin of appreciation has been described as the 'space for manoeuvre'[41] that the Court grants to states in fulfilling their obligations under the ECHR. In *Handyside v UK*, the ECtHR articulated that the margin of appreciation recognises that because:

> of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the nature of the restriction of rights that may be necessary in a democratic society.[42]

The margin of appreciation tends to be used in this way in relation to qualified rights (Articles 8-11),[43] because states' interferences with these rights may be justified when they are made in accordance with the law, and are necessary in a democratic society in order to protect a range of public interests set out within the Articles.[44] The margin of appreciation does not give unfettered discretion to States, but rather the ECtHR uses it as a mechanism to determine the extent to which it will engage with the State's justifications for its decisions.[45] The breadth of the margin is determined by the seriousness of the interference that the State is attempting to justify.[46] The more serious the interference, the narrower the margin of appreciation that is afforded to States, and the greater scrutiny the ECtHR will undertake of the State's justifications.

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[41] Council of Europe, *The Margin of Appreciation*, available at: https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp (last accessed 1 July 2019).
[42] *Handyside v UK* (Application no 5943/72) (Judgment 7 December 1976), [48]
[43] A qualified right is one that may be interfered with in order to protect the rights of others or the wider public interest – Council of Europe, *Some Definitions*, available at: https://www.coe.int/en/web/echr-toolkit/definitions (last accessed 1 July 2019).
[44] Article 8 (2); Article 9 (2); Article 10 (2); Article 11 (2).
[45] P Johnson, *Homosexuality and the European Court of Human Rights* (Abingdon: Routledge, 2013), 70.
[46] *Dudgeon v the United Kingdom* (1981) 4 EHRR 149.

The margin of appreciation is also applicable to the scope of rights in certain circumstances, and the subject matter of a claims, even when those rights are not qualified rights. In the case of *Vo v France*,[47] the determination of when life begins for the purpose of the Article 2 right to life was held to come within State's margin of appreciation. The reasons for this decision were that there was no European consensus over whether unborn foetuses had a right to life, and there was 'no European consensus on the scientific and legal definition of the beginning of life'.[48] The margin of appreciation can also relate to the specific subject matter. It was held by Lord Kerr in *In the Matter of an Application by Gaughran for Judicial Review* that a margin of appreciation is accorded because 'Strasbourg acknowledges that the issue in question can be answered in a variety of Convention-compatible ways, tailored to the local circumstances'.[49] This approach was taken in *R (Nicklinson) v Ministry of Justice*[50] where it was unanimously held that assisted suicide was within the UK's margin of appreciation and so it was for the Supreme Court judges to decide on the matter., rather than being tied to Strasbourg jurisdprudence. With politically divisive issues, European consensus has been a key consideration in finding a violation of human rights, as it makes it difficult to argue that interferences with human rights are 'necessary in a democratic society'.[51] Where there is an emerging consensus, the ECtHR may still find a violation,[52] but it is less likely to do so.[53]

In *A, B, C v Ireland*,[54] the ECtHR summarised the principles to be followed in the application of the margin of appreciation. Firstly, where 'a particularly important facet of an

[47] [2004] ECHR 326.
[48] ibid, [82].
[49] [2015] UKSC 29, [101].
[50] [2014] UKSC 38.
[51] *Norris v UK* (1991) 13 EHRR 186.
[52] As with transsexual gender recognition in *Goodwin v UK* (Application no 28957/95) (Judgment 11 July 2002), [84].
[53] This approach was taken in relation to same sex marriage in *Schalk and Kopf v Austria* (Application no 30141/04) (Judgement 24 June 2010), *Hämäläinen v Finland* (Application no 37359/09) (Judgment, 16 July 2014); and *Chapin and Charpentier v France* (Application no 40183/07) (Judgment 9 June 2016).
[54] [2010] ECHR 2032.

individual's existence or identity is at stake, the margin allowed to the State will normally be restricted'.[55] Secondly, where there is no European consensus 'either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider'.[56] In that case, it was held that abortion inevitably raised 'sensitive moral or ethical issues', but there was a consensus among European states to take a broader approach to abortion than that given in Ireland at the time, so it was held that Ireland had exceeded its margin of appreciation. Returning to sex work and its regulation, this also likely to raise moral and ethical issues, but we have seen that there is no European consensus, so the margin of appreciation given to the Government is likely to be wide, following these principles.

The significance of the margin of appreciation for the purposes of a challenge to sex workers' rights depends on the arena in which they are challenged. Because the margin of appreciation is a tool of the ECtHR, it is not applied in domestic courts. A similar approach, however, has been taken by domestic courts when reviewing cases in the UK. In *R (Pearson, Martinez and Hirst) v Secretary of State for the Home Department,* a case about prisoners' voting rights, Lord Justice Kennedy held that, where Parliament's position falls within 'a broad spectrum of approaches among democratic societies', then it is 'plainly a matter for Parliament not for the courts'.[57] Therefore, courts are unlikely to accept a challenge to a statute without a clear mandate in Strasbourg jurisprudence,[58] making this a much more difficult task for sex workers. This approach is also based on what the domestic courts consider the relevant expertise of the institutions. In *In the Matter of an Application by the NIHRC for Judicial Review,* which related to abortion provision in Northern Ireland, Lord Kerr stated that:

[55] ibid, [232].
[56] ibid.
[57] [2001] EWHC Admin 239, [41].
[58] *R* (*Animal Defenders) v Secretary for State for Culture, Media and Sport* [2008] UKHL 15, [53].

> there may be a case for the courts to defer to the decision of one of the other organs of the state either because of what is sometimes described as 'institutional competence' or, relatedly because it is considered that that decisionmaker is more fully equipped to take a decision than is the court. [59]

Other cases have established that what is relevant is the expertise of the decision-maker to carry out an assessment of the proportionality of an interference. In *R (on the application of Lord Carlile of Berriew QC v Secretary of State for the Home Department* ,[60] the Supreme Court deferred to the Government on the issue of national security, with Lady Hale stating 'the Government has much greater expertise in assessing risks to national security or the safety of people for whom we are responsible'.[61] A similar approach was taken in *Kay v Lambeth London Borough Council*, where it was held that Parliament was the 'person with responsibility for a given subject matter and access to special sources of knowledge and advice'.[62] Where the subject matter is considered within the margin of appreciation, or where it requires weighing up complex and considerations, and the courts believe Parliament or the Government has particular expertise to do so, the courts are likely be largely deferential to Parliament. This is not to say that they will never disagree with Parliament, however, as explained in Chapter 6. Alan Greene argues that, in relation to Articles 8-11, 'where a case is within the margin of appreciation, courts are merely doing what the margin of appreciation requires if they go beyond Strasbourg'.[63] This is, however, an important limitation in the likelihood of a court

[59] [2018] UKSC 27., [291].
[60] [2014] UKSC 60
[61] ibid, [105].
[62] [2006] UKHL 10, [16].
[63] A Greene, 'Through the Looking Glass: Irish and UK Approaches to Strasbourg Jurisprudence' (2016) 55 *Irish Jurist* 118.

challenge to strike down the impugned laws in this chapter, as it is likely that a court would find that Parliament had particular expertise in balancing the competing 'needs of communities' and sex workers' rights.

It is still, however, worth considering the claims that could be made using the HRA as these arguments could be made in a multitude of forums, as discussed in Chapters 5 and 6, and so deference to Parliament and/or a wide margin of appreciation need not be fatal to these arguments. The following section analyses whether laws on keeping, managing or assisting in managing of a brothel, soliciting and loitering, 'controlling prostitution for gain' and 'causing/inciting prostitution for gain' violate the rights of sex workers under Article 8 right to respect for private and family life.

7.3 An Article 8 Challenge

The ECtHR held in *Engel v Netherlands* that, as a general rule, 'the Convention leaves States free to designate as criminal an act or omission not constituting the normal exercise of one of the rights it protects'.[64] There are limitations to the State's freedom to do so – in particular, the State may not make criminal 'conduct which constitutes an unjustified interference with the right to privacy, the right to freedom of expression, the right to peaceful assembly and association, or the right to peaceful enjoyment of possessions'.[65] In this section, I consider whether of the following laws could be considered to be an unjustified interference with the right to private and family life under Article 8 of the ECHR: the keeping, managing or assisting

[64] (Application no 5100/71) (Judgment of 8 July 1976), [81].
[65] B Emmerson, A Ashworth, A MacDonald, A Choo and M Summers, *Human Rights and Criminal Justice* (London: Sweet and Maxwell, 2012), 745.

in managing of a brothel,[66] soliciting and loitering,[67] 'controlling prostitution for gain'[68] and 'causing/inciting prostitution for gain'.[69] These offences are examined in detail in Chapter 3.

Although this section's explanation of Article 8 will cover all of these provisions, the application of Article 8 to these laws will be done individually, to determine in turn whether each of them violates sex workers' Article 8 rights when they are subject to these laws. There are three steps involved in an Article 8 claim: firstly, whether the case involves an Article 8 right; secondly, whether it has been infringed; and thirdly, whether the infringement is justified under Article 8(2). Each of these steps will now be examined.

7.3.1 Is Article 8 Engaged?

Article 8 (1) protects every person's 'right to respect for his private and family life, his home and his correspondence'. While none of these terms is self-explanatory, Strasbourg jurisprudence 'has avoided laying down general understandings of what each item covers',[70] preferring instead to determine whether Article 8(1) applies to the facts of each specific case. The ECtHR has not provided an exhaustive list as to what subject matter might fall within the limits of Article 8(1),[71] but we can consider both domestic and ECHR case law to understand how the right has been interpreted. David Harris et al have argued that there has been a generous approach taken to the definition of the interests protected,[72] while the UK Court of Appeal has

[66] Sexual Offences Act 1956, s 33-33A.
[67] Street Offences Act 1959, s 1.
[68] Sexual Offences Act 2003, s 53.
[69] ibid, s 52.
[70] D Harris, M O'Boyle, E Bates and C Buckley, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009), 361.
[71] H Gomez-Arostegui, 'Defining Private Life Under the European Convention on Human Rights by Referring to Reasonable Expectations' (2005) *California Western International Law Journal* 153, 154.
[72] D Harris et al, (n 70), 361.

also held that the threshold of engagement of Article 8(1) is not especially high.[73] In *R (Countryside Alliance) v Attorney General,* Lady Hale expressed a preference for taking a 'broad view of the scope of the right'[74] and then requiring the state to justify its interference under Article 8(2).Therefore, this section will argue that these laws engage Article 8.

The ECtHR and domestic courts have taken a very broad and flexible understanding of the situations that engage Article 8.[75] Under Article 8, 'private life' has been understood as including but extending beyond a right to be left alone and not have one's private information disclosed.[76] ECtHR and domestic case law has interpreted it to include personal autonomy, dignity, physical and psychological integrity and the right to develop relationships. That is, the right to 'choose certain intimate aspects of one's life, free of government regulation'.[77] In *Countryside Alliance,* Lord Brown held that 'Article 8's protection is recognised to extend to a right to identity and to personal development and … the notion of personal autonomy. It encompasses almost any aspect of a person's sexuality and a good deal else that is clearly personal'.[78] This reflects the ECtHR's decision in *Niemietz v Germany,* where it was held that:

> it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.[79]

[73] *VW (Uganda) v Secretary of State* [2009] EWCA Civ 5, [22].
[74] [2007] UKHL 52, [121].
[75] P Johnson, (n 45), 94.
[76] *X v Iceland* (1976) DR 86.
[77] M Janis, R Kay and A Bradley, *European Human Rights Law: Text and Materials* (Oxford: Oxford University Press, 2008), 426.
[78] *R (on the application of Countryside Alliance) v Attorney General* [2007] UKHL 52, [139].
[79] *Niemietz v Germany* (1992) 16 EHRR 97, [29].

The freedom to establish and develop relationships is especially important for sex workers whose relationships, working, and living arrangements are subject to particular scrutiny under three of the offences considered (not soliciting).[80] As shown in Chapter 3, the wide definition of brothel means that family homes can be criminal, with associated risks of losing children if they live in the premises designated a brothel, even if they are never there are the time that sex is sold.[81] Moreover, as discussed in Chapter 3, the laws on keeping brothels and the law on controlling prostitution for gain, since *R v Massey*,[82] mean that when sex workers work with another person, somebody is a risk of criminal liability.

In the case of *Pretty v UK*, it was held that Article 8 includes a 'principle of personal autonomy',[83] meaning that a person should be able to make decisions about their lives (and, in that case, death) without unjustified interference by the state. This was also accepted in *Nicklinson*, where the Supreme Court unanimously agreed that assisted suicide, and the decision to end one's own life engages Article 8(1).[84] Lord Sumption stated:

> There are some moral values… which are nevertheless accepted because they are fundamental to our humanity and to our respect for our own king. The principle of autonomy is one of these values.[85]

[80] The extent of which is discussed in Chapter 3.
[81] Children and Young Persons Act 1933, s 3
[82] [2007] EWCA Crim 2664
[83] *Pretty v UK* 2002-II; 35 EHRR 1, [74].
[84] *Nicklinson*, (n 50), [159].
[85] ibid, [208].

Sex workers' rights campaigns have been framed around understandings of sex work as work, but to engage Article 8, the 'sex' of sex work may need to be emphasised. This reflects the concern raised in Chapter 5, about the framing of rights claims. While some sex workers may not consider sex work to be sex in the same way that they would have sex in personal, non-commercial, relationships, as discussed in Chapter 2, the sexual element of the activity is not removed as a whole because of this framing and, therefore provides one way to engage Article 8. Sex work, therefore, might engage with the concept of personal autonomy - in order for autonomy to be respected, a person will need to have, for example, control over their own body, sexual identity and sex life.[86] The House of Lords held in *Pearce v Mayfield* that 'sexual behaviour is undoubtedly an aspect of private life, indeed a most intimate and important aspect of private life. Any interference by the state can only be justified under Article 8(2)'.[87] It was further held in *Stubing v Germany* that, because sexual life is 'a most intimate aspect of private life', 'there must exist particularly serious reasons' for the state to interfere with it.[88] In that case, which related to a conviction for entering into an adult incestuous relationship, it was held that Germany corresponded to a pressing social need and was necessary in a democratic society. This exemplifies that, while many behaviours may engage Article 8, as we will see, this does not necessitate a violation.

To respect personal autonomy, the state must, absent serious reasons, allow the person to be the arbiter in decisions about their sex life. The ECtHR has included within the remit of Article 8 voluntary and consensual sexual activities (which I have argued in Chapters 2 and 4, encompasses much of sex work, and which the court has distinguished from forced

[86] *Dudgeon v UK* (n 46); *Norris v Ireland* (n 21); *Stubing v Germany* (App No 43547/08) [2012] ECHR 656, [55]. See also: J Marshall, *Personal Freedom Through Human Rights Law?: Autonomy, Identity and Integrity Under the European Convention on Human Rights* (Leiden: Martinus Nijhoff, 2008), 55.
[87] *Pearce v Mayfield School* [2002] ICR 198, [15].
[88] *Stubing v Germany* (n 86), [59].

prostitution[89]) even where there are varying moral views on the specific activities in question.[90] There have been cases where behaviour that has a sexual element has not engaged Article 8. In the case of *Sutherland v Her Majesty's Advocate,*[91] the Supreme Court held that criminal evidence against the appellant that had been gathered by members of the public acting as 'paedophile hunters' was not an interference with Article 8. The Court held that the communication between Sutherland and the decoy who he believed to be a child was not worthy of respect for the purposes of Article 8 and that he had no reasonable expectation of privacy in relation to communications between himself and the 'child'.[92] The communication in question, the court held was 'criminal in nature' and could be directly damaging to a child, if a child had received it.[93]

While the Court has suggested that 'regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as 'necessary in a democratic society'[94] it has rejected blanket bans on forms of consensual sexual activity.[95] In the domestic case of *R v G*, where sexual activities occurred in private, but included the commission of criminal offences,[96] issues of Article 8 were still considered by the majority of the House of Lords, indicating how far Article 8 extends.[97] Therefore, even though many of the acts involved in sex work might be criminal offences under the current legislation (because, for example, they take place in a 'brothel' or a third party is involved in the direction of the activities), this does not necessarily remove them from the remit of Article 8. Nor should it, as

[89] *Tremblay v France* (n 5).
[90]For example, homosexuality in *Dudgeon v UK* (n 46), and incest in *Stubing v Germany* (n 86).
[91] [2020] UKSC 32
[92] ibid, [31].
[93] ibid, [41].
[94]*Dudgeon v UK* (n 46), [49]; *Sutherland v UK* [1998] EHRLR 117; *Smith v Grady* (1999) 29 EHRR 493.
[95] D Feldman, 'The Developing Scope of Article 8 of the European Convention on Human Rights' (1997) *European Human Rights Law Review* 265, 267.
[96] *R v G* [2008] UKHL 37.
[97] R Buxton, 'Private Life and the English judges' (2009) *Oxford Journal of Legal Studies* 413, 422.

otherwise the state would be able to limit any sexual activity by making it illegal, regardless of the rights of the individuals involved. It is more likely that sex work, where done voluntarily, would be more closely analogous to homosexual activity than the activity in *Sutherland.*

The next question to address is whether the commercial nature of the sex work transaction changes the nature of the act from being a part of sexual life so as to remove it from the realm of Article 8. 'Private life' has not been interpreted by the Court in a reductive way to limit the protection to the home or the personal realm. In *Niemietz v Germany,* it was held that there is

> no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.[98]

This was reiterated in *Tekle v Secretary of State for the Home Department*[99] where it was held that employment helps to build social relationships and offers the means to communicate with other human beings, so could engage Article 8. Moreover, in *Sidabras and Dziautas v Lithuania,* the ECtHR held that private life 'secures a sphere within which he or she can freely pursue the development and fulfilment of his personality',[100] and by banning the applicant's access to employment, this affected his 'ability to develop relationships with the outside world to a very significant degree',[101] 'with obvious repercussions on the enjoyment of private life'.[102] As such, Virginia Mantouvalou argues that Article 8 may in fact include a right to

[98] *Niemietz v Germany* (n 79), [29].
[99] [2008] EWHC 3064
[100] *Sidabras and Dziautas v Lithuania* (2004) 42 EHRR 104, [43].
[101] ibid, [48].
[102] ibid, [48].

work,[103] although this is not a right to a particular job or type of work.[104] Within this widened conceptualisation of 'private life', which appears to include business relationships and commercial endeavours, coupled with the fact that the court has recognised that sexual life is 'a most intimate part of private life',[105] the commercial aspect of sex work would not preclude it from engaging Article 8 protection.

That sexual activity can engage Article 8 even when it is commercial has been explicitly accepted by the High Court in *Mosley v News Group Newspapers Ltd,* where it was held that 'one is usually on safe ground in concluding that anyone indulging in sexual activity is entitled to a degree of privacy especially if it is on private property and between consenting adults (*paid or unpaid*)' (my emphasis).[106] Further, it was held that 'people's sex lives are to be regarded as essentially their own business provided at least that the participants are genuinely consenting adults and there is no question of exploiting the young and vulnerable'.[107] This final exception echoes the approach taken in Chapter 4 (and earlier in this chapter) that child sexual exploitation and forced sexual labour should not be considered in the same way as other forms of sex work. Moreover, it highlights the distinction between behaviour that could engage with Article 8 and behaviour that constitutes child sexual offences, like the behaviour in *Sutherland*. Where sex work is voluntary, as I have argued most is, then this would ordinarily engage Article 8.

Where the activity takes place, however, may affect the protection available using Article 8. In the ECtHR case of *Von Hannover v Germany,*[108] it was held that even when the private

[103] V Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151, 161.
[104] *Airey v Ireland* (1980) 2 EHRR 305, [26].
[105] *Dudgeon v UK* (n 46), [52].
[106] [2008] EWHC 1777, [98].
[107] ibid, [100].
[108] *Von Hannover v Germany* (2004) 43 EHRR 1.

activity took place in a public place, in this case taking photographs of a Royal out with their family, it may still involve a breach of Article 8. The Court held there is 'a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life'.[109] There are, therefore, reasons for thinking that a public element, perhaps even a significant public element, will not *necessarily* exclude the personal autonomy limb of Article 8.[110] Lady Hale held in the *Countryside Alliance* case that Article 8 protects 'the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people'.[111] Yet, even this extended notion of Article 8 cannot cover all self-development or relationship-based activities that occur in public. For instance, in that same case, it was held by a majority that foxhunting was not protected by Article 8 as it is 'a very public activity, carried out in daylight with considerable colour and noise, often attracting the attention of onlookers attracted by the spectacle. No analogy can be drawn with the very personal and private concerns at issue'.[112] While fox-hunting and sex work raise very different concerns, it is clear that the physical spatiality of an activity and how much attention an activity attracts still matters when discussing Article 8.

This spatial element of private life has been considered in other cases. In *ADT v UK*, a case about homosexual activity captured on video tape, the decision about whether the activities engaged Article 8 turned on whether the tapes would ever make it into the public realm, thus demonstrating that the public/private distinction is important.[113] Moreover, in the Court of Appeal case, *X v Y*, it was held that sex in a public toilet could not engage Article 8,[114]

[109] ibid. [95].
[110] R Buxton, (n 97), 421.
[111] *R (on the application of Countryside Alliance)* v *Attorney General* (n 78), [116].
[112] *ibid*, [15].
[113] *ADT v UK* (Application no 35765/97) (Judgment 31 July 2000), [25].
[114] *X v Y* (2004) EWCA 662.

because a public element might stop sexual activities from being considered to be 'private life'. In *Mosley*, the court held that where a public figure had been involved in group sex with sex workers while dressed as a Nazi, he could have a reasonable expectation of privacy due to him being on private property.[115] Therefore, the venue in which sex work takes place is key. As noted in Chapter 2, the vast majority of sex work takes place indoors; where street markets still exist, the sex itself is usually done in a building or car away from the public space.

So, can the four offences challenged here be considered 'private' in order to engage Article 8? Controlling, causing and inciting prostitution for gain relate more specifically to the relationships between sex workers and third parties, which are private (even if commercial), and are unlikely to have a notable public element. Whether brothel keeping is considered private may depend on the extent to which the brothel is 'public'. A brothel is defined in case law as a premises where two or more people sell sex, regardless of whether they do so at the same time, so the law covers a range of contexts.[116] Many brothels would not be recognisable as such from the outside, while others may have indicators that signify that sex work takes place there. Even if people knew sex work was taking place, following *Mosley*, it appears that this would still be considered sufficiently private to engage Article 8. For the purposes of the suggested challenge to brothel keeping, controlling for gain and inciting and causing for gain, where the sex work takes place is not, however prohibitive, as the argument raised is that these offences limit sex workers' capacity to work together or with others indoors without undue interference from the law.[117]

[115] *Mosley v News Group Newspapers Ltd*, (n 106), [109].
[116] *Gorman v Standen, Palace Clarke v Standen* (1964) 48 Cr App R 30
[117] Although controlling for gain and inciting or causing for gain are not spatially limited offences.

With regards to soliciting and loitering, the public nature of the transaction *could* affect its engagement with Article 8. The soliciting and loitering offences, however, relate not to sexual activity but to the prelude to sexual activity – that is the offering of sexual services or the sex worker merely being in public. These offences relate to a very small minority of sex work. Soliciting and loitering have been left undefined, while public place has been widely interpreted[118] leaving sex workers open to being arrested for being in a street or public place if a police officer suspects she is there 'for the purposes of offering services as a prostitute'.[119] With regards to the sexual activity itself, sex workers will often pick up a client and then move from the street to a more secluded space, including cars or hotels. Moreover, having sex in a public place already falls under separate offences.[120] The issue in relation to soliciting and loitering, therefore, is whether the act of soliciting or loitering in a public space, the prelude to the sexual activity, could be considered a part of private life. In the case of *GYH v Persons Unknown*,[121] it was held that communications about sexual activity, even when commercial, can fall under Article 8. Given that soliciting is essentially communication negotiating sex, it is likely that this will also engage Article 8.

The effects of these laws in exacerbating risks of crime and violence could be an alternative way of bringing them within the remit of Article 8, without focusing entirely on the sexual activity or ceding ground because of any public element. Article 8 has been developed to include a concept of dignity as part of human freedom.[122] Moreover, physical integrity, which is principally protected under Article 3 of the ECHR (the right to freedom from torture, inhuman and degrading treatment), has been related to dignity, meaning that degrading

[118] *Glynn v Symonds* [1952] 2 All ER 47
[119] Street Offences Act 1959, s 1(4)(b).
[120] Public Order Act 1986, s 5; Sexual Offences Act 2003, s 66.
[121] [2017] EWHC 3360
[122] *Goodwin v UK* (n 52), [90].

treatment or punishment that constitutes an assault on the victim's dignity may sometimes also violate Article 8.[123] The level of adverse effect on personal integrity required to engage and violate Article 8 is a lower threshold than the threshold for Article 3, so 'treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity'.[124] As such, actions by the state which affect an individual's personal autonomy, physical and psychological integrity or dignity might engage Article 8. It was also accepted in *Costello-Roberts v United Kingdom*[125] that seriously adverse effects on physical and moral integrity may sometimes violate Article 8. Feldman argues that this interpretation demands that we treat the person holistically as morally worthy of respect, organising the state and society in ways which respect people's moral worth by taking account of their need for security.[126] As such, it can be argued that, in order to protect a sex worker's right to consensual sexual activity, and also to security of the person, laws that exacerbate the risks of violence and crime faced by sex workers can and do engage Article 8. This, as I have argued in Chapter 3, would include all four of the offences set out here, as they together have the effect of pushing sex workers to work alone and in less surveyed areas, increasing the risk of violence.

Drawing on the breadth of the interpretation of Article 8, it is likely that all four offences covered will engage Article 8. Keeping a brothel, controlling prostitution for gain, and causing and inciting prostitution for gain relate to sexual life as well as the capacity to develop and maintain personal and commercial relationships. All three of these offences and soliciting and loitering could engage Article 8 because they have the effect of increasing the likelihood of

[123] *YF v Turkey* [2003] ECHR 391.
[124] *Bensaid v UK* (2001) ECHR 82. The severity of treatment required to meet the threshold of Article 3 is discussed in more detail in Chapter 8.
[125] *Costello-Roberts v UK* (1993) 19 EHRR 112, [36].
[126] D Feldman, (n 95), 270.

violence and crimes against sex workers, which engages the concept of dignity under Article 8.

7.3.2 Is Article 8 Interfered With?

The next question that needs to be answered is there has been an interference with Article 8. Not every action that engages Article 8 interests will constitute an interference with Article 8.[127] It is generally accepted in ECtHR case law, however, that where a criminal law engages with Article 8, there will be a prima facie interference with that right.[128] In *ADT v UK,* it was held that the 'mere existence of legislation prohibiting male homosexual conduct in private may continuously and directly affect a person's private life'.[129] This is the case even when the law is not enforced. In *Norris v Ireland*, it was held that:

> One of the main purposes of penal legislation is to deter the proscribed behaviour, and citizens are deemed to conduct themselves, or modify their behaviour, in such a way as not to contravene the criminal law. It cannot be said, therefore, that the applicant runs no risk of prosecution or that he can wholly ignore the legislation in question.[130]

This reflects the reality of sex work, where sex workers use self-disciplining techniques and order their practices around fear of arrest and prosecution. An applicant need not have been arrested or prosecuted under these laws for them to be an interference with their Article 8 rights.[131] This is significant for the purposes of this challenge because, as discussed in Chapter

[127] D Harris et al, (n 70), 381.
[128] *Norris v Ireland,* (n 86).
[129] *ADT v UK* (n 113), [23].
[130] *Norris v Ireland* (n 86), [36].
[131] *Dudgeon v UK,* (n 46), 119.

3, enforcement practices vary between police forces. It does not matter, therefore, what the policing strategy is, as the criminal law itself creates the interference.

As described in more detail in Chapter 3, each of the impugned laws make it harder for sex workers to engage in risk management strategies that help them to manage risks of crime and violence. In particular, the soliciting law, it was argued forces street sex workers, who are already some of the most marginalised workers, into less surveilled areas and reduce the time that can be spent screening client, thus increasing the risks of violence. For indoor sex workers, the combination of the brothel laws and the control offences, I have argued, combine to create a situation where the only legal way to sell sex is alone out of a flat that is owned by the sex worker. This means anyone selling sex indoors either chooses to: work in a managed brothel, where they may be subject to poor working conditions or management exploitation; work alone and increase the risk of violence and crime; or work with another person, either cooperatively or by employing that person, and risk being criminally liable. As such, all four laws infringe sex workers' rights under Article 8 if they engage Article 8, which I argue they do.

7.3.3 Is the Interference Justified Under Article 8(2)?

Article 8 is a qualified right under the ECHR. This means that, under some circumstances, an interference is permitted. This is often the central question in determinations of Article 8 – that is, whether the interference is proportionate to one of the legitimate aims set out in Article 8 (2). Therefore, even though the laws relating to brothel keeping, soliciting controlling for gain and causing/inciting for gain are likely to constitute an interference with sex workers' rights under Article 8, this does not mean that the sex workers' rights have been violated. The State can argue that its infringement was justified under Article 8 (2), which states:

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

This allows national authorities to assess whether a pressing social need to interfere with Article 8 exists, as 'regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual'.[132] The fairness of such a balance is not necessarily imperative - it is clear that Article 8 (2) allows States not only to balance *every person's* personal freedoms against the collective interest but sometimes just the personal freedoms of one group against the collective interest.[133] Therefore, where a law only infringes the rights of sex workers, it may be justified against greater needs of the community. Whether it is in fact justified requires further examination.

To determine if an interference is justified, three questions must be answered:

- Was the interference conducted in accordance with the law?
- Does the interference have a legitimate aim?
- Is the interference necessary in a democratic society?

[132] *Sheffield and Horsham v UK* (1998) 27 EHRR 163, [51].
[133] D McKeown, 'The Human Rights Act and Anti-terrorism in the UK: One Great Leap Forward by Parliament, but are the Courts Able to Slow the Steady Retreat that has Followed? (2010) *Public Law* 110, 137.

I will explain each of these criteria in turn before applying them to the laws that are the focus of this challenge. Often the facts of the case only raise one of these questions as the others are established quickly and without challenge, such as in *Pretty v UK* where the only question was of the necessity of the interference.[134] However, in order to fully critique the likely impact of an HRA challenge on these particular provisions, I will examine each of these requirements in turn, applying them to the four offences challenged.

7.3.3.1 Accordance with the Law

The first requirement for the State is to demonstrate that their interference was in 'accordance with the law' - that is, there must exist a 'specific legal rule or regime which authorizes the interfering act it seeks to justify'.[135] It must have a basis in domestic law, be accessible and be foreseeable.[136] In *Sunday Times v UK,* the ECtHR set out a clear test to determine if an interference is in accordance with the law:

> First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct[137]

In order to satisfy the first test – 'that the citizen is able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case' - the law must be clear,

[134] *Pretty v UK* (n 83), [69].
[135] *Groppera Radio AG v Switzerland* (1990) 12 EHRR 321, [65].
[136] *Kafkaris v Cyprus* (Application no 21906/04) (Judgment 12 February 2008), [40].
[137] *Sunday Times v United Kingdom* (1979) 2 EHRR 245, [49].

foreseeable, and adequately accessible.[138] This is nearly always satisfied when the interference comes from primary legislation. Moreover, where this primary legislation has been developed by the courts, the ECtHR has held that it 'will not question the national courts' interpretation of domestic law unless there has been a flagrant non-observance or arbitrariness of the said provisions'.[139]

The law, however, not only needs to exist but must also be sufficiently clear and precise in order to provide adequate protection from arbitrary interferences with an individual's rights.[140] The clarity requirement generally applies to situations where an interference is not based on the existence of legislation, but powers that are drawn from legislation, and they are then used to interfere with a person's rights.[141] Uncertainty of provisions can mean that law is not sufficiently precise to demonstrate accordance with the law. It has been held that this requires that the laws are framed with 'absolute precision'[142] in order to ensure that it is clear when one's actions are prohibited by the law, and that they can order their behaviour accordingly.[143] The law may be determined as sufficiently clear if 'the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[144] Moreover, using a 'thin ice' approach,[145] where there is a *risk* that a criminal sanction might occur, this may be sufficient to satisfy the requirement that law is foreseeable.[146]

[138] *Silver v UK* (Application no. 5947/72) (Judgment 25 March 1983), [87].
[139] *Custers, Deveaux and Turkey v Denmark* (Application no 11843/03) (Judgment 3 May 2007), [84].
[140] *Khan v UK* (2000) EHRR 1016, [26]-[28].
[141] *Piechowicz v Poland* (Application no 20071/07) (Judgment 17 April 2012).
[142] *Muller v Switzerland* (1991) 13 EHRR 212, [29].
[143] *Lebois v Bulgaria* (Application no. 67482/14) (Judgment 19 October 2017), [66].
[144] *Kafkaris v Cyprus* (n 136), [140].
[145] 'Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he will fall in' - *Knuller v DPP* [1973] AC 435.
[146] *Custers, Deveaux and Turkey v Denmark* (n 108), [81]; C Murphy, 'The Principle of Legality in Criminal Law Under the ECHR' (2010) 2 *European Human Rights Law Review* 192.

Under the offence of brothel keeping, the meaning of brothel has been extensively defined, so that, while broad, it is clear that it covers any premises where two or more people sell sex,[147] whether or not they do so at the same time, [148] and whether or not the premises is let as separate rooms.[149] The uncertainty with this offence relates to the definition of 'managing, acting or assisting in the management' of the brothel. This is not defined in law, and, therefore, it is unclear whether, for example, a maid or receptionist who takes bookings, or payment, for example, would be liable under these provisions. As such, it may difficult for that person to order their behaviour according to the law. That being said, it is likely that these provisions would be considered to be in accordance with the law as the overall context of the law on sex work means that sex worker would be aware of a *risk* of prosecution, which would be sufficient.[150] In fact, sex workers often avoid working together or with a third party specifically to avoid criminality, so it is clear the risk of prosecution is acknowledged. While soliciting and loitering are undefined in legislation, and these offences have been interpreted widely, the meaning of soliciting and public place has been discussed in a number of cases,[151] so it is also likely that, with legal advice, it would be sufficiently clear when a person may be at risk of arrest or prosecution for the purposes of the legality requirement.

The controlling and causing/inciting for gain offences may have a stronger claim in this regard. In terms of controlling prostitution for gain and causing/inciting for gain, none of the terms 'controlling', 'causing' or 'inciting' is defined in the statute. The judgment in *Massey*[152] provided a (broad) definition for 'controlling', so it is unlikely that this would be insufficiently

[147] *Gorman v Standen, Palace Clarke v Standen* (n 116)
[148] *Stevens v Christy* (1987) 85 Cr App R 249, 251.
[149] *Donovan v Gavin* [1965] 2 QB 648, 649.
[150] *Coeme v Belgium* (Applications no 32492/96) (Judgment 22 June 2000), [150].
[151] *Behrendt v Burridge* [1977] 1 WLR 29; *Weisz v Monaghan* [1962] 1 WLR 262; *Smith v Hughes* [1960] 1 WLR 830.
[152] [2007] EWCA Crim 2664.

precise. ‘Causing’ and ‘inciting’ have, however, both been left open to interpretation by the legislation. The explanatory notes to the Act suggests it includes ‘those who, for gain, recruit others into prostitution, whether this be by the exercise of force or otherwise’.[153] This, as discussed in Chapter 3, is broad and covers a range of relationships where there is no coercion or force. It is unlikely, however, drawing on the ‘thin ice’ principle, to violate the requirement that the provision is in accordance with the law.

As such, all four provisions discussed are likely to be held to be in accordance with law, even though they are broadly or poorly defined. As such, we must consider the next criteria, that the law has a legitimate aim.

7.3.3.2 Legitimate Aim

Article 8 (2) sets out the legitimate aims that may justify an infringement of Article 8 rights: ‘the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’. Harris et al have argued that most of the grounds of interference are so wide that the state can usually make a plausible case that it did have a good reason for interfering with the right.[154] In determining what ground is likely to be used, we can return to the reasons set out in policy for the creation and continued existence of these laws. The grounds that are most likely to be referred to are public morals, prevention of crime and disorder, and rights of others. The rights of other are likely to relate to concerns that sex work is linked to exploitation and trafficking, as explained in Chapter 3.

[153] Sexual Offences Act 2003 Explanatory Notes, Commentary on s 52.
[154] D Harris et al, (n 70), 381.

Brothel keeping has a basis in both nuisance and the prevention of exploitation, in that it is the keeping and management roles that are punishable, but concerns about the nuisance caused by brothels to communities have also been noted.[155] As such, it is likely that the legitimate aims that would be brought up would be public morals, the prevention of crime and disorder, and the rights of others. Soliciting and loitering laws have a similar basis in nuisance and public morals. One of the ostensible aims of the law relating to sex work is to reduce the nuisance of sex work (prevention of crime and disorder) to the wider community and to remove the overt sexuality of sex work from the public domain (public morals).[156] There is also concern about both 'ordinary citizens' and children seeing the individuals and/or the activities,[157] particularly because of the fear that this 'could lead to a loss of innocence and untimely introduction to sexual matters'.[158] The aim of protecting children and the public from offensive material was accepted as being a legitimate aim under the protection of morals in *Handyside v UK*,[159] so it is likely that the aim of protecting children and the public from overt displays of sex work would also be accepted in relation to both soliciting and loitering, and brothel keeping.

Both the controlling and causing/inciting for gain offences, along with brothel keeping, are aimed at the reduction of exploitation. The Government has stated that 'those who sell sex are often the victims of serious violence and exploitation; they are often vulnerable to abuse, coercion or control by others'.[160] The purpose of these offences is purportedly to tackle

[155] Home Office, *A Coordinated Prostitution Strategy and a Summary of Responses to Paying the Price* (London: Home Office, 2006), 60.
[156] Home Office and Scottish Home Department, *Report of the Committee on Homosexual Offences and Prostitution* (London: HMSO, 1957), 9.
[157] M O'Neill and R Campbell, 'Street Sex Work and Local Communities: Creating Discursive Spaces for Genuine Consultation and Inclusion', in R Campbell and M O'Neill (eds), *Sex Work Now* (Devon: Willan, 2006), 49.
[158] ibid, 46.
[159] *Handyside v UK*, (n 42), [47].
[160] Home Office, (n 155), 2.

exploitation in sex work, focusing on third parties and those involved at the UK end of trafficking – as the Home Office states, 'the public policy requirement is that the law needs to deal with this exploitation, to establish very clearly that such exploitative behaviour is unacceptable and that those who undertake it should face serious penalties'.[161] As such, it is likely that challenging trafficking and exploitation in sex work would fulfil the requirement of finding a legitimate aim in the Article 8(1) infringement under 'the rights of others'. The risk of exploitation as a matter of rights of others was accepted by the Court in *Dudgeon*, where it affirmed the propriety of legislation against homosexual conduct insofar as necessary to protect against exploitation of vulnerable people – those 'young, weak in body or mind, inexperienced, or in a state of physical, official, or economic dependence'.[162] Such an approach has, however, been rejected in the more recent case of *Alekseyev v Russia*,[163] which related to a ban on gay pride events in Moscow. The ECtHR held in this case that 'there is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or "vulnerable adults"'[164] and that 'it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority'.[165] Therefore, any 'rights of others' claim would have to relate to an argument that these laws protect the rights of people being trafficked or forced into prostitution or nuisance to communities.

While it is possible that a deferential court would agree that these latter concerns mean that the Government has a legitimate aim with of these provisions, the interference must also

[161] Home Office, *Tackling the Demand for Prostitution: A Review* (London: Home Office, 2008), 111.
[162] *Dudgeon v UK* (n 46), [49].
[163] (Applications nos 4916/07, 25924/08 and 14599/09) (Judgment of 21 October 2010).
[164] Ibid, [86].
[165] Ibid, [81]

be necessary in a democratic society to meet that aim. I will argue in the next section that it is under *this* test that the interference with sex workers' Article 8 rights created by these four laws is unjustified.

7.3.3.3 Necessary in a Democratic Society

When arguing that these provisions are necessary in a democratic society in order to meet legitimate aims, the test that the State must fulfil is whether the 'interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued'.[166] The first test, whether there is a pressing social need, is linked to the legitimate aim. For example, it is likely that in the current instance, the pressing social need will be argued to be protection of others from the risk of exploitation, the need to protect communities from the nuisance or offence of sex work (premises), and the risk to public morals. Whether these are in fact pressing social needs must then be determined.

It has been held that 'necessary' does not 'have the flexibility of such expressions as "useful", "reasonable", or "desirable"'.[167] Rather, there must be a strong reason for making this interference. It is for the national authorities, however, to make the initial assessment of the pressing social need in each case.[168] As such, when making this determination, there will be a determination of the breadth of the margin of appreciation (with the caveats discussed above applied) in relation to the interference. That is, the more severe the interference, the narrower the margin of appreciation for states to determine what is a pressing social need. In *Dudgeon v UK*, it was held that the width of the margin would be determined by the nature of the sexual

[166] *Olsson v Sweden* (1988) 11 EHRR 259, [67].
[167] *Dudgeon v UK*, (n 46), [51].
[168] ibid, [52].

activities in question.[169] Homosexual sex was considered to be a 'most intimate part of life'. Where and how the acts take place may affect the margin of appreciation available. In *ADT v UK*, privacy was a key determinant; 'the absence of any public health considerations and the purely *private* nature of the behaviour' was key in creating a narrow margin of appreciation.[170] Conversely, in *Laskey, Jaggard and Brown v UK*,[171] the UK was given a wide margin of appreciation because of the activities involved were sadomasochistic sexual practices. In the case of sex work, it is unlikely that sex work will be considered to be comparable to homosexual sex in relation to the severity of interference. Firstly, as previously discussed, for the majority of sex workers, sex work is not a matter of sexuality but rather an economic endeavour. In criminalising sex work-related activities, the provisions do not therefore stop sex workers from engaging in personal sexual activities. Secondly, the sex work laws are not a blanket ban, so sex work can still take place, all be it in more risky contexts. Thirdly, some elements of sex work, namely soliciting, may not be considered 'purely private in nature'. As such, there is likely to be a significant level of deference to Parliament to determine whether there was a pressing social need to have these provisions in place.

When guidance is needed as to what is necessary in a democratic society, the ECtHR often searches for a common European standard among the State parties.[172] However, this is often likely to be inconclusive and the Court must make a judgment as to the point at which a change in the policy of the law has achieved sufficiently wide acceptance in European states to affect the meaning of the Convention. Even if there is no common European approach, if there is clear and uncontested evidence of an international trend, they can accept that a law infringes

[169] ibid.
[170] *ADT v UK*, (n 113), [38].
[171] *Laskey, Jaggard and Brown v UK* (Application no 21627/93) (Judgment 19 February 1997).
[172] D Harris et al, (n 70), 352.

a right.[173] However, as I have noted, the issue of sex work is one in which there is not a European-wide consensus and the ECtHR have given no direction on how to regulate sex work generally. Because of the lack of European consensus, the liminal public/private nature of activities covered by the offences, and broader concerns about exploitation and morals, it is likely that in the current case, the margin of appreciation will be broad.

A wide margin of appreciation does not mean that all arguments made by the state in relation to 'pressing social need' ought to be accepted. Given growing concerns about 'modern slavery'[174] and trafficking, both domestically and internationally, laws aiming to reduce exploitation and tackle the demand for trafficking (that is, causing, inciting and controlling prostitution for gain) may be considered to be responding to a pressing social need. Yet, there are already criminal laws directly targeting these practices, under the Sexual Offences Act 2003,[175] and the Modern Slavery Act 2015.[176] These cover a broad range of offences relating to trafficking and slavery, servitude and forced labour. As such, it can be argued that there is no pressing need for further broadly defined offences that specifically relate to third parties' involvement in sex work, as any exploitative relationships are already criminal.

Soliciting and loitering and brothel keeping on the other hand, in terms of their focus on nuisance, may not be so easily aligned with a pressing social need. It was held in *Dudgeon v UK* that 'although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone

[173] *Goodwin* (n 52).
[174] V Mantouvalou, 'Modern slavery: the UK response.' (2010) 39 (4) *Industrial Law Journal* 425.
[175] Sexual Offences Act 2003, ss 57 – 60C.
[176] Modern Slavery Act 2003, ss 1-4.

who are involved.'[177] Because of this, it was held that there was no 'pressing social need' to make such acts criminal, as there was 'no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public'.[178] Similarly, the basis for criminalising soliciting in particular was protection of the public from that which was 'offensive and injurious'.[179] Given the social mores of today, when sexuality is much more apparent in media and advertising, including in the public arena, it is unlikely that the mere presence of sex workers on a street is sufficiently offensive as to be considered a pressing social need. Nor is the potential nuisance sufficiently significant to constitute a pressing social need for a soliciting offence where there is already a general offence of breaching the peace, and civil orders for anti-social behaviour, as discussed in Chapter 8. Further, given that many working premises that fall within the category of brothel are unrecognisable as such by the majority of the public, it seems unlikely that the nuisance or offence to morals caused is such a pressing social need that a specific offence is required, and again, there are housing-related orders, discussed in Chapter 8, that could be used where nuisance *is* created. Therefore, it is not apparent that any of these separate sex work-specific laws address a pressing social need in society.

The second element of the 'necessary in a democratic society' test is that the interference is proportionate to the legitimate aim pursued. In determining whether an interference is proportionate, 'a fair balance must be struck between the rights of the individual and the interests of the community' including 'a careful assessment of the severity and consequences of [a possible interference with rights]'.[180] The domestic test for determining

[177] *Dudgeon v UK*, (n 46), [60].
[178] ibid.
[179] Home Office and Scottish Home Department, (n 156), 9.
[180] *R (H) v A City Council* [2011] EWCA Civ 403, [38].

proportionality was set out in *Bank Mellat v HM Treasury*[181] and requires consideration of the following four questions:

> a. whether its objective is sufficiently important to justify the limitation of a fundamental right;
>
> b. whether it is rationally connected to the objective;
>
> c. whether a less intrusive measure could have been used; and
>
> d. whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

Lord Reed in this case argued that this test provides a 'more analytical approach to legal reasoning characteristic of the common law' leading to 'a more clearly structured approach',[182] than the broader approach to proportionality offered in Strasbourg jurisprudence. While the courts are to determine whether a less intrusive measure could have been used, the courts are warned in this case not to 'substitute judicial opinions for legislative ones as to the place at which to draw a precise line especially if they are unaware of the relevant practicalities and indifferent to considerations of cost'.[183]

Each of the tests for proportionality will now be considered in turn in relation to the four offences considered. For brothel keeping, as discussed, the objective of the law is two-fold: to reduce nuisance to communities and to target exploitation of vulnerable sex workers from those managing brothels. In light of the Court's decisions around trafficking and

[181] [2014] AC 700, [20].
[182] ibid, [70].
[183] ibid, [75].

exploitation of prostitution,[184] as well as general concerns around modern slavery, it is likely that the legislative objective of protecting from exploitation would be held to be sufficiently important to justify limiting an Article 8 right. As discussed above, however, it is not clear that protecting communities from the nuisance of brothels would be considered sufficiently important to justify such an interference. The question of whether the brothel keeping provisions are rationally connected to the objectives comes next. These provisions, as explained in Chapter 3, are so widely interpreted that they can include premises where two sex workers work together with no management structure, and even where they do not work at the same time. It is not clear that in criminalising these circumstances, the law is responding to concerns of either exploitation or nuisance. That is, it is not apparent that prohibiting co-operative working arrangements can be rationally connected to reducing exploitation, or that allowing two sex workers to work together or even separately from the same premises would create more nuisance than one sex worker working from that premises (which is legal).

It is clear, furthermore, that a less intrusive measure could be used to respond to both the aims of reducing exploitation and reducing nuisance in relation to brothels. To respond to management exploitation, labour law could be used (although the court has no power to substitute legal models) or, drawing on the interpretative duty under s 3, a domestic court could interpret 'managing' focused on exploitative practices only to make it compatible with the ECHR. Moreover, 'brothel' could be more widely defined to allow for two or more sex workers to work cooperatively without risk of prosecution. Allowing a small number of sex workers to work together would also be unlikely to increase nuisance to communities significantly[185] and

[184] *SM v Croatia* (n 15)*; Rantsev v Cyprus and Russia* (Application no. 25965/04) (7 January 2010).
[185] We can draw on evidence from New Zealand where small brothels of under 4 people can exist without further business licences. There has been no evidence of increased nuisance to communities; any concern around nuisance emanated from the clients of street workers. New Zealand Government 'Report of the Law Review Committee on the Operation of the Prostitution Reform Act 2003' (Wellington, Ministry of Justice, 2008).

therefore this would respond to that aim, if it were considered to be a sufficiently important objective. With regards to the 'severity of the consequences' of these interferences, I have argued in Chapter 3 that the brothel keeping offence has the effect of forcing sex workers to choose between working legally and working together. In doing so, this law both reduces sex workers' capacity to employ risk management strategies and pushes sex workers to work in managed brothels and parlours where someone else takes on the risk of prosecution, but within which they are more likely to face poor working conditions. These consequences are of sufficient severity, I argue, that they outweigh the benefits to the community of keeping the brothel laws as they stand. As such, the interference with sex workers' Article 8 rights created by the brothel keeping laws is unjustified.

Moving then to the laws on soliciting and loitering, I have suggested that the offence that might be caused to the public is not sufficiently significant to be a 'pressing social need'. Similarly, I argue that this aim does not justify the limitation of sex workers' Article 8 rights. There does appear to be a rational connection between the law and the aim – that is, removing sex workers from the public sphere to limit the public's exposure to the 'offensive' visible elements of sex work. The consequences of these laws, however, are particularly significant, as the risk of violence and victimisation is particularly acute for street sex workers. This risk, I have explained, is exacerbated by laws which limit sex workers' ability to screen clients, work together in regular beats, and employ other risk-management strategies.[186] As such, the soliciting offence exacerbates the context in which sex workers are subjected to violence, outweighing by far the objective of avoiding nuisance and offence to the public at large. It is also clear, as discussed in Chapter 2, that the criminal records related to sex work offences like soliciting and loitering make it difficult for these sex workers to transition out of sex work;

[186] T Sanders, M O'Neill and J Pitcher, *Prostitution: Sex Work, Policy and Politics* (London: Sage, 2018).

they remain stigmatised as a criminal and a 'prostitute', which makes it difficult to find alternative employment. Moreover, there are already offences relating to breach of the peace and disorderly conduct, which could be used where sex workers are creating a disturbance to communities. Less intrusive measures could be used to meet this particular objective, in that non-sex work specific laws could be used, or laws could be implemented to prohibit sex work in (narrowly defined) specific areas, such as outside of schools. In doing so, a fairer and more proportionate balance could be struck. It is argued, therefore, that this provision is disproportionate and creates an unjustified interference with sex workers' Article 8 rights.

Finally, taking causing/inciting/controlling prostitution for gain together, the objective pursued, that of reducing exploitation and coercion into prostitution, is likely to be considered sufficiently important to justify an interference of Article 8. The key issue for these offences, then, is whether they do more than necessary to accomplish the objective and whether a fair balance has been struck in relation to the consequences of the legislation. As discussed in Chapter 3, these offences both cover situations which are not directly related to exploitation. Since *Massey*,[187] controlling for gain can include anyone who directs any aspect of sex work (including, as noted, receptionists and maids), and causing/inciting for gain can criminalise anybody who recruits another person into sex work with or without force (for instance, a brothel manager who employs a sex worker). Because these provisions cover a broad range of non-exploitative relationships, they go beyond what is necessary to protect from exploitation, even under the Government's definition of exploitation. In fact, as noted, forced and compulsory work and trafficking are already separate offences under the criminal law. Moreover, the consequences of these offences are that sex workers are unable to work legally with third parties without *risk* of prosecution, thus similarly to brothel keeping, they push sex workers to

[187] [2007] EWCA Crim 2664.

choose between reducing the risk of violence and crime, and even increased risk of serious harm and death,[188] and working legally. A fairer balance could be struck between the Article 8 rights of sex workers, and the aim of reducing exploitation, either by removing these offences entirely and relying on the specific offences of trafficking and modern slavery (this power is beyond the remit of the court), or interpreting 'control', 'cause' and 'incite' more narrowly to focus on coercion and force. Therefore, I argue, these two provisions constitute unjustified interferences with the rights of sex workers under Article 8.

This analysis, while showing that these laws violate Article 8, may not be accepted by courts or Parliament. Even if the court agreed with the analysis, they may still defer to Parliament to determine the balance struck, as stated by the House of Lords in *R v Director of Public Prosecutions, ex parte Kebilene*:

> In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognize that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body.[189]

If this claim were accepted, however, the court is likely to use the interpretative obligation under s 3 to interpret these provisions to be compatible with the ECHR rather than making a section 4 Declaration of Incompatibility. Because the unjustified interferences stem from judicial interpretation of the provisions, rather than the direct legislative wording, it would

[188] H Kinnell, 'Murder Made Easy: the final solution to prostitution?', in R Campbell and M O'Neill (eds), *Sex Work Now* (Devon: Willan, 2006).
[189] [2000] 2 AC 326, 384.

not be beyond the scope of s 3 to interpret these provisions compatibly with the ECHR. As such, they could interpret brothel keeping to allow two sex workers to work together, and more narrowly interpret the controlling and causing/inciting offences to allow the employment of maids, receptionists or security guards to manage risks relating to violence and crime, and thus minimise the interference with Article 8. Whether they could choose to do so depends on how deferential they are to Parliament, particularly given that sex work regulation is on the government's agenda. In the current political climate, as noted earlier, the Courts may be unwilling to interpret laws in a way that could be seen as judicial activism, and following Nicklinson, discussed earlier, might even hold that a declaration of incompatibility would be inappropriate given the subject matter and the greater expertise of Parliament.

If Parliament, on the other hand, accepted these claims, they would have greater scope to reform the laws in light of these arguments. The potential of these challenges to result in law reform therefore depends on the arena in which they take place, and very importantly, the breadth of margin appreciation, or general deference to Parliament that is given when performing the proportionality test.

7.4 Challenging Soliciting Under Article 10

There could also be a potential challenge to the soliciting law under the Article 10 right to freedom of expression. Soliciting is the communication, whether verbally or otherwise,[190] used to offer sexual services as a prostitute.[191] The law punishes sex workers for communicating to offer sexual services (the provision of which is not a crime) in public. This particularly affects

[190] *Behrendt v Burridge*, (n 151).
[191] Street Offences Act 1959, s 1.

sex workers known to police because of the Prostitutes' Caution, explained in Chapter 3. The number of sex workers who work on the street is increasingly small, so any such challenge would relate to a small minority of sex workers; however, they are often the most marginalised workers, and so protecting their rights is paramount. It is notable that the substance of the communication by the sex worker – that is the selling of sex - is not criminal so this provision can be distinguished from other 'speech' offences such as those related to criminal conspiracy.[192] Although I have argued that the soliciting and loitering provision interfere with sex workers' Article 8 rights, I will now consider whether the soliciting element may also constitute a violation of sex workers' Article 10 right to freedom of expression. Like Article 8, Article 10 as a qualified right involves the three steps of whether Article 10 is engaged, whether Article 10 is infringed, and whether the infringement is justified under Article 10 (2).

7.4.1 Is Article 10 Engaged?

Article 10 (1) of the ECHR states that: '[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. Freedom of expression has a high status as the 'lifeblood of democracy'.[193] The speech covered by Article 10 has been broadly constructed,[194] covering political expression, artistic expression and commercial expression. The first question to ask, when considering if Article 10 is engaged, is whether soliciting amounts to expression at all. The second is to ask what type of expression, as this has an impact on the weight given to speech when performing the proportionality test to determine if the interference is justified.

[192] Criminal Law Act 1977, s 1 (1).
[193] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, at 126.
[194] A Nicol, G Millar and A Sharland, *Media Law & Human Rights* (London: Blackstone Press, 2001), 166.

Freedom of expression under Article 10 has largely been focused on 'information' or 'ideas',[195] whether communicated orally[196] or in writing.[197] Soliciting could be argued to be expression in that it imparts to the client the information that the sex worker is available and interested in selling sexual services.[198] Whether it engages Article 10, however, depends on how restrictive or narrow a definition is used for 'expression'. In *Belfast City Council v Miss Behavin' Ltd*[199] the House of Lords did not determine whether Article 10 was engaged by a decision not to allow a sex shop to be licensed in Belfast. Lady Hale stated that 'if article 10 and article 1 of Protocol 1 are engaged *at all*, they operate at a very low level. The right to vend pornography is not the most important right of free expression in a democratic society'.[200] In making this statement, Lady Hale implied that some forms of communication may not be considered 'expression' for the purposes of engaging Article 10. It has been held by the ECtHR, however, that Article 10 does not apply solely to certain types of information or forms of expression.[201] There have been cases, however, where unpopular or pornographic material have been protected as expression. In the case of *O'Shea v MGN Ltd,*[202] a glamour model's photograph and advertisement on a pornographic website was a form of protected expression. Similarly, in *R v Perrin,*[203] the Court of Appeal held that a webpage showing people covered in faeces and performing sexual acts was protected expression. The threshold for what can be considered expression is not particularly high; in *Nederlandse Omroepprogramma Stichting v the Netherland*, utterances about preferred brand of snack were considered to be expression for the purposes of Article 10.[204] Soliciting could, for example, be analogised to advertising – that

[195] *Handyside v UK,* (n 42), [49].
[196] *Schopfer v Switzerland* (56/1997/840/1046) (Judgment 20 May 1998).
[197] *Handyside v UK,* (n 42).
[198] *Behrendt v Burridge,* (n 151).
[199] [2007] UKHL 19, [16].
[200] ibid, [16].
[201] *Markt Intern Verlag GMBH and Klaus Beermann v Germany* (1990) 12 EHRR 161, [26].
[202] [2001] EMLR 40.
[203] [2002] EWCA Crim 747.
[204] (Application no 16844/90) (Judgment 13 October 1993).

is, the sex worker is advertising herself and her services by communicating to the potential client. In *Casado Coca v Spain*,[205] although the ECtHR ultimately found that there had been no Article 10 violation, it clarified that Article 10 extends to advertising, and so advertising can be considered to engage Article 10. As such, it is highly likely that soliciting, as the verbal advertisement of sexual services would be expression for the purposes of Article 10.

Even if soliciting were accepted as expression, at most it could engage Article 10 under 'commercial expression', in that it involves speech intended to lead to a commercial provision of services. In *Casado Coca v Spain*, the ECtHR held that 'no distinction is made in Article 10 according to whether the type of aim pursued is profit-making or not'.[206] However, 'the level of protection must be less than that accorded to the expression of 'political' ideas, in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention [were] chiefly concerned'.[207] There is a hierarchy of types of expression created by the ECtHR's jurisprudence on Article 10 – political expression is considered the most important, followed by artistic expression; commercial expression is the least important for upholding democracy.[208] Expression that is 'indecent' may still engage Article 10. It was held in *Handyside v UK* that: 'freedom of expression...is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population'.[209] Selling pornography, however, has been considered to be 'low level' even within the category of commercial speech: 'pornography comes well below celebrity gossip in the hierarchy of speech which deserves the protection of the law'.[210] It can be presumed, therefore, that selling

[205] *Casado Coca v Spain* (1994) 18 EHRR 1, [35].
[206] ibid, [35].
[207] *X and Church of Scientology v Sweden* (Application no 7805/77) (Judgment 5 May 1979), [68].
[208] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457, 499.
[209] *Handyside v UK* (n 42), [49].
[210] *Belfast City Council v Miss Behavin' Ltd* (n 199), [38].

sexual services would be considered to be very low in the hierarchy or speech, even if it were to be considered expression for Article 10.

7.4.2 Is Article 10 Interfered with?

As with Article 8, a street sex worker's rights under Article 10 may be infringed by the 'chilling effect' of soliciting laws, and the risk of being arrested, rather than because they are enforced. As noted in the previous section, a criminal law is sufficient to be an infringement *if* Article 10 is engaged.[211] The negative effects of the soliciting law on sex workers have been discussed above.

7.4.3 Is the Infringement Justified under Article 10 (2)?

Article 10 is limited in a similar way to Article 8, meaning that if the infringement is held to be in accordance with the law, with a legitimate aim, and necessary in a democratic society, it is justified. Whether the provision is in accordance with the law and has a legitimate aim have been discussed in relation to Article 8 above. As such, I will focus on whether it is necessary in a democratic society to achieve a legitimate aim (in this case, protection of morals and prevention of crime and disorderly conduct). I have suggested above that protection of communities, while perhaps 'desirable', does not necessarily constitute a pressing social need for the purposes of this test. Yet, it is also unlikely that the speech involved in soliciting, even if it engages Article 10, will be afforded much weight. Moreover, the impact of the law on sex workers is not as weighty – that is, the consequences of the law are much more onerous in relation to dignity and autonomy, as per Article 8, than they are in relation to the sex workers'

[211] *Norris v UK,* (n 86).

freedom of expression. As such, the balance of consequences under the *Bank Mellatt* test is likely to fall in favour of the state in relation to Article 10.

7.5 Article 14 as an Additional Claim

The final claim that will be considered in this chapter relates to whether sex workers face discrimination in the enjoyment of their Convention rights under Article 14. Article 14 of the ECHR provides:

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

Article 14 is not a standalone anti-discrimination or equality right. It has been labelled a 'parasitic' right as it only prohibits discrimination in relation to the enjoyment of other rights under the ECHR.[212] A substantive stand-alone discrimination provision has been created in the 2005 Protocol no 12.[213] The UK, however, has not signed or ratified this Protocol so is not bound to its general prohibition of discrimination.[214] As such, this Protocol will not be considered in this thesis. Although not an independent right, Article 14 allows claimants to bring an additional complaint that a right has been interfered with in a discriminatory manner.

[212] S Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 (2) *Human Rights Law Review* 273, 273.
[213] Council of Europe, *Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000*, ETS 177.
[214] Council of Europe, *Chart of Signatures and Ratifications of Treaty 177*, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=QVB1UfAy (last accessed 1 July 2019).

It has been invoked frequently over the last decade, demonstrating an emerging focus on discrimination issues within the ECHR.[215] For the purposes of this chapter, I will consider whether either of the rights under Article 8 and 10 are denied to sex workers in a discriminatory way, in order to bolster a claim that the four impugned laws constitute a violation of sex workers' rights under the ECHR.

In determining whether there has in fact been discriminatory treatment of sex workers, it must first be asked if sex work can be a status for the purposes of Article 14. Article 14 provides a list of grounds on which discrimination will be prohibited: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth. The ECtHR held, however, in *Salgueiro da Silva Mouta v Portugal*[216] that the list is 'illustrative not exhaustive, as is shown by the words 'any grounds such as'. Additionally, the words 'any other status' suggest the possibility of expanding this list of grounds. This has been interpreted widely, allowing the ECHR to be a living instrument. Other statuses that have been held to engage Article 14 are sexual orientation,[217] disability,[218] and health status.[219] This extension of grounds has not been limited to those characteristics which are innate.[220] If we return to *BS v Spain,*[221] we can see that multiple characteristics can be considered together. Moreover, in that case, one such characteristic that was considered was 'working as a prostitute'. As such, there is precedent for considering sex work to be a particular ground for discrimination, as compared to other non-sex working workers or citizens. In the alternative, the ECtHR has also developed a doctrine of indirect discrimination, whereby 'a

[215] J Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights.' (2013) 13 (1) *Human Rights Law Review* 99, 100.
[216] (Application no 33290/96) (Judgment 21 December 1999).
[217] ibid.
[218] *Glor v Switzerland* (Application no 13444/04) (Judgment 30 April 2009).
[219] *Kiyutin v Russia* (Application no 2700/10) (Judgment 10 March 2011).
[220] ibid.
[221] (Application no 47159/08) (Judgment 24 July 2012).

difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group'.[222] In relation to sex work, given the significant gendered nature of the industry,[223] it could be argued that any provisions which have a differential effect on sex workers' enjoyment of their rights indirectly prejudices women. One of the key issues with this approach is that, as discussed in Chapter 2, sex workers are a heterogeneous group and so, to speak of them as one group for the purposes of an anti-discrimination claim loses sight of this variegation. It could be possible for whichever sex worker acts as the applicant if they were to bring a case to reflect on their own particular marginalisations and whether this falls within s 14. Doing so might, however, lead to an outcome that is only beneficial to a small section of the sex work community.

If discrimination is found, a violation of Article 14 may occur even when there has not been a breach of the substantive right.[224] It was held in *Belgian Linguistics case* that a breach of the substantive right was not necessary as long as the discrimination at issue 'touch[ed] the enjoyment' of a specific right or freedom.[225] Therefore, Article 14 can require equal access to rights even when the main Article does not require that right to be provided by the state. In *EB v France*, it was held that 'the State, which has gone beyond its obligations under Article 8 in creating such a right cannot, in the application of that right, take discriminatory measures within the meaning of Article 14'.[226] Article 14 can therefore be helpful if it is found that the four offences discussed in this chapter do not breach Articles 8 and 10; that is, if the enjoyment

[222] *DH v Czech Republic* (2007) 47 EHRR 3, [184].
[223] L Cusick, H Kinnell, B Brooks Gordon and R Campbell, 'Wild Guesses and Conflated Meanings? Estimating the Size of the Sex Worker Population in Britain (2009) 29 (4) Critical Social Policy 703; T Sanders, R Campbell, S Cunningham, J Pitcher and J Scoular, 'The Point of Counting: Mapping the Internet Based Sex Industry' (2018) 7 (5) Social Sciences 233.
[224] S Fredman, (n 212), 275.
[225] (Application no 1474/62) (Judgment 23 July 1968), [49].
[226] (Application no 43546/02) (Judgment 22 January 2008), [49].

of those rights is affected by discriminatory treatment, a violation could be found in this way. Sex workers, as discussed, are less able than non-sex working workers to establish and maintain working relationships free from state interference because of the laws relating to brothel keeping and inciting/causing/controlling prostitution for gain. Moreover, the law relating to soliciting and loitering discriminate against sex workers as compared to other citizens, in relation to being in public places. The consequences of these laws also place sex workers in a worse position as compared to other citizens in relation to being able to work safely. As such, it could be argued that the law treats sex workers in a worse way than other workers in relation to the rights protected in Article 8 particularly.

The second part of an Article 14 analysis requires a determination of whether the differential treatment is justified. Difference is only considered to be discrimination if there is no objective or reasonable justification for it.[227] Lady Hale stated in *Humphreys v The Commissioners for Her Majesty's Revenue and Customs*[228] that because Article 14 includes no 'legitimate aims' that must be satisfied, all that is needed for a state to justify different treatment is that the treatment is 'not manifestly without reasonable foundation'.[229] In relation to social issues, the legislature is given significant deference as primary decision maker, and courts are 'slow to substitute their own view for that of the legislature or executive'.[230] This is a much less stringent test than the proportionality test required by Articles 8 and 10 to justify an interference. Therefore, the justifications provided by the state in relation to the four offences discussed are likely to be considered reasonable, particularly in light of the contested

[227] *Belgian Linguistics case*, (n 225), [10].
[228] [2012] UKSC 18.
[229] ibid, [16]; see also *Stec v United Kingdom* (2006) 43 EHRR 1017.
[230] M Amos, 'The Second Division in Human Rights Adjudication: Social Rights Claims under the Human Rights Act 1998.' (2015) 15 (3) *Human Rights Law Review* 549.

approaches to sex work across Europe and globally. It is unlikely, therefore, that an Article 14 claim would be successful in relation to these offences.

7.6 Conclusion

In this chapter, I have considered the potential challenges that sex workers could bring under the HRA in relation to a number of sex work laws. I considered the offences of keeping a brothel, soliciting and loitering, controlling prostitution for gain, and causing and inciting prostitution for gain. These provisions were explored in Chapter 3 of this thesis, where I argued that the combination of these laws create a legal context whereby the only way to sell sex legally is to do so alone, indoors, without any third party involvement. As such, these laws exacerbate the risks of violence and crime faced by sex workers. I suggested that these laws ought to be repealed or reformed to reduce their impact on sex workers' capacity to employ risk management strategies and avoid poor working conditions. Moreover, in light of the arguments made in the earlier chapters, repealing or narrowly interpreting these provisions can also reduce the violence sex workers face. This chapter considered the extent that reform or repeal could be required by the HRA.

This chapter began with an exploration of the ECtHR's jurisprudence in relation to sex work. The ECtHR has been reluctant to take a position on the regulation of sex work but has marked a distinction between sex work per se and forced or coerced prostitution, with the latter being held to violate the rights to freedom from inhuman and degrading treatment under Article 3, and freedom from slavery, servitude and forced labour under Article 4. When determining the distinction between forced and 'other' prostitution, the ECtHR has distinguished between third party force, which was seen in *SM v Croatia* and economic necessity, as seen in *Tremblay*

v France. The courts have held that economic necessity is insufficient to fall within forced prostitution under Article 3 or forced labour under Article 4. More recently, the ECtHR has also accepted that sex workers are rights bearers whose rights must be upheld unless there is a strong justification for not doing so. In *BS v Spain,* the court recognised multiple ground of discrimination, and included 'working as a prostitute', in conjunction with BS's status as an African woman, to be a ground for discrimination in relation to Article 14. As such, there could be an argument made that working in prostitution be recognised as a grounds of discrimination for the purposes of Article 14.

The following section considered the law on the margin of appreciation. In relation to qualified rights, states are afforded a margin of appreciation to determine when interferences with rights may be justified. The width of the margin of appreciation depends on the type and seriousness of the interference involved. Moreover, the margin of appreciation can apply to the scope and content of rights. This can be seen in *Vo v France,* where the determination of when life begins was held to fall within states' margin of appreciation. The considerations that are taken into consideration to determine the breadth of the margin of appreciation were examined, and it was argued that because there is no European consensus on sex work, it is likely that the Government would have a wide margin of appreciation in relation to this issue. In the domestic sphere, a 'local margin of appreciation', which is more accurately considered a varied level of deference to Parliament and the Government, also exists. Again, the level of deference is dependent on the issue involved, but also the expertise of the Government in responding to said issue. With this in mind, alongside the current political climate, I argued that domestic courts are likely to defer to Parliament on the issue of the regulation of sex work, and whether interferences with sex workers' rights are justified.

The chapter then considered what challenges could be made under the HRA. I began by analysing whether four offences - soliciting and loitering; brothel keeping; controlling prostitution for gain; and causing/inciting prostitution for gain – violated sex workers' rights under Article 8 of the ECHR. Drawing on domestic and Strasbourg jurisprudence, I argued that all four provisions engage with and are interfered with under Article 8. While the Government have legitimate aims in these provisions, I argued that all four provisions are disproportionate to the aims pursued and so are unjustifiable interferences with Article 8 right to private life. I have also considered Article 10 in relation to soliciting and Article 14 in relation to all four offences but found that such challenges are unlikely to be successful, due to the limited weight given to commercial expression under Article 10, and the wide powers of justification under Article 14. I concluded that, because the Article 8 interferences stem from the way these legislative provisions have been interpreted by the courts rather than the statutory wording, it is possible to (re)interpret them in a way which is compatible with the ECHR. As such, it is unlikely that a Declaration of Incompatibility would be made under s 4 of the HRA. The efficacy of these HRA arguments depends significantly on the forum in which they are made. While I argue that the justifications put forth by the state for these offences are insufficient to outweigh the severe consequences of the interferences under Article 8, the State's arguments are likely to be treated with deference by the courts, due to the contested nature of sex work and the lack of clear guidance in Strasbourg jurisprudence on the issue. When lobbying Parliament or submitting responses to consultations, however, the robust and specific analysis offered here may provide a stronger argument in favour of reforming or repealing the impugned laws.

Even if the law were reformed on the basis of an HRA challenge, this is only the first step to moving towards a human-rights based approach to sex work. In the next and final substantive

chapter of this thesis, I consider the ways in which police actions towards sex workers might constitute a violation of sex workers' rights under the ECHR, and how sex workers rights against undue interference from the state under Article 8 can be balanced with the right to state protection from violations under Articles 3 and 4.

Chapter 8

HUMAN RIGHTS AND THE POLICING OF SEX WORK

8.1 Introduction

A holistic human rights approach requires consideration of the state's human rights obligations in its disparate interactions with sex workers. In this chapter, I focus on the human rights impacts of the policing of sex work. Police are on the front line in the state's regulation and facilitation of sex work,[1] meaning that police interactions with sex workers are key to a human rights approach. International research shows that police, in their interactions with sex workers, often commit direct human rights abuses against sex workers, including raping and beating sex workers.[2] Yet, even when there is no direct abuse, particular approaches to policing, for instance through heavy crackdowns and zero-tolerance enforcement, can have deleterious effects on sex workers' safety, as discussed in Chapter 3. Crackdowns on both soliciting and kerb-crawling lead to street sex workers moving to areas with less police surveillance, increasing the risk of violence against them.[3] Moreover, the use of condoms as evidence of sex work activity leads sex workers to avoid carrying them or keeping them in brothels, increasing their risk of sexually transmitted infections.[4] Zero tolerance approaches, and tactics such as seizing sex workers' assets as proceeds of crime,[5] also have the effect of reducing sex workers' trust in police, leading to reduced reporting of violence, poor working conditions and economic

[1] T Sanders and M Laing, 'Policing the Sex Industry: Tackling Exploitation, Facilitating Safety?', in T Sanders and M Laing (eds), *Policing the Sex Industry* (London: Routledge, 2018), 1.
[2] M Decker, A Crago, S Chu, S Sherman, M Seshu, K Buthelezi, M Dhaliwal and C Beyrer, 'Human Rights Violations Against Sex Workers: Burden and Effect on HIV' (2015) 385 *The Lancet* 186, 187.
[3] See Chapter 3.
[4] T Sanders and M Laing, (n 1), 7.
[5] Proceeds of Crime Act 2002, s 6.

exploitation.[6] The inconsistency of policing methods and the wide discretion enjoyed by both police forces and individual officers opens the doors for the law to be enforced in 'selective, uneven, discriminatory and sometimes corrupt ways'.[7]

Alongside the enforcement of sex work specific laws, police powers to regulate sex workers in a number of arenas, through, inter alia, civil orders relating to anti-social behaviour,[8] and closure powers,[9] have increased over the last two decades. As such, even if sex work-specific laws were reformed or repealed, police would still have powers to disperse and remove street sex workers from particular areas, or to close sex work establishments. A human rights-based approach to policing sex work, therefore, needs to reach beyond just sex work laws, and push for policing that starts from the position that sex workers are rights bearers with dignity, agency, and capacity to make choices about their lives, while being deserving of protection in work like any other worker. In this chapter, I examine how these powers and the way they are implemented might violate sex workers' human rights.

The diversity of policing approaches makes it impossible to make generalised claims about the police's human rights interferences with sex workers. Rather, specific police actions or omissions may result in human rights violations,[10] while broader policing approaches and strategies may fail to appropriately balance sex workers' individual human rights considerations against other priorities.[11] As public authorities under the HRA, when making

[6] L Connelly, D Kamerāde, and T Sanders, 'Violent and Nonviolent Crimes Against Sex Workers: The Influence of the Sex Market on Reporting Practices in the United Kingdom' (2018) *Journal of Interpersonal Violence* 1.
[7] K Bullock and P Johnson, 'The Impact of the Human Rights Act 1998 on Policing in England and Wales (2012) 52 *British Journal of Criminology* 630, 632.
[8] Anti-Social Behaviour, Crime and Policing Act 2014
[9] Sexual Offences Act 2003, Part 2A, as inserted by Policing and Crime Act 2009, s21 and Schedule 2.
[10] See, for example, *D v Commissioner of Police for the Metropolis* [2016] QB 161, and further J Conaghan, 'Investigating rape: human rights and police accountability' (2017) 37 (1) *Legal Studies* 54.
[11] K Bullock and P Johnson, (n 7), 641

decisions in their policing of sex work, and in response to crimes against sex workers, police must not only consider the requirements of policing-focused legislation, such as the Policing and Criminal Evidence Act 1984 (PACE), but also ensure that they are not infringing on sex workers' human rights or failing in their obligations towards sex workers. Rob Mawby and Alan Wright have argued that because individuals can bring cases against the police in domestic courts, the HRA is a 'powerful legal framework making the police accountable for their actions'.[12] Moreover, while deference to Parliamentary sovereignty is built into the HRA, there is no such deference to police required. Whether HRA obligations have a significant effect on everyday policing in reality is challenged by empirical research undertaken by Karen Bullock and Paul Johnson, who argue that 'the effect of legal rules is significantly determined by the 'police cultures' in which they operate and the 'working personalities' of the police officers who interpret and enforce them.'[13] As such, we cannot assume that simply having an obligation to act compatibly with the HRA results in human rights-based policing, and instead must push for consistent and embedded human rights-focused approaches.

This chapter considers a number of areas in which the HRA might impact the policing of sex work. Firstly, I begin in Section 2 by exploring the concept of police discretion, arguing that wide discretionary powers lead to potential human rights violations in the enforcement of sex work-specific laws and the use of other police powers. Section 3 considers direct instances of physical and sexual violence by police against sex workers, which will relatively rare, form the most egregious violations of sex workers' human rights under Article 3 right to freedom from torture, inhuman and degrading treatment. In Section 4, I analyse the use of civil orders, examining whether these orders can be challenged under the HRA on their own terms under

[12] R Mawby and A Wright, *Police Accountability in the United Kingdom* (Keele: Commonwealth Human Rights Initiative, 2005), 3.
[13] K Bullock and P Johnson, (n 7), 632.

Article 6 of the ECHR, before considering the Article 8 implications of the discretionary use of these powers against sex workers. I argue that while a successful Article 6 challenge to those powers may be difficult, there is certainly scope to challenge disproportionate terms in injunctions and CBOS, but this depends on the specific order. Section 5 then considers potential violations of sex workers' Article 8 rights when police conduct raids and closures of brothels, and how these should be balanced against the police's positive obligations to investigate and respond to concerns around forced labour, trafficking, or other forms of exploitation under Articles 3 and 4 ECHR. I argue that many of the policing decisions around raids can infringe sex workers' rights under Article 8. Finally, section 6 examines the police's HRA obligation to adequately respond to and investigate reports of crimes, and the impact of discrimination against sex workers in relation to this obligation.

I argue that the police exercise significant discretion in relation to policing sex work, with a lack of consistent approaches within forces or between individuals, and a broad range of powers, and that this in turn can lead to unjustified human rights interferences. Moreover, the police need to uphold their positive obligations to protect sex workers, which means taking seriously reports of violence against them. While this chapter highlights key points of tension between the HRA and policing of sex work, the HRA needs to be considered in all aspects of policing, and to find the balance between interference and protection, every decision should be made with the individual rights of the sex worker as a prioritised and adequately weighted concern. Policing inevitably interferes with sex workers' rights, so proportionality needs to be robust and not simply a tick-box exercise.

8.2 Police Discretion and Sex Work

In his important work in the 1960s, Herman Goldstein set out the distinction between 'full enforcement' – whereby it is expected that police will enforce *all* criminal laws against *all* offenders – with 'actual enforcement', in which police have the power, 'because of a variety of factors, to decide overtly how much of an effort is to be made to enforce specific laws'.[14] The gap between full enforcement and actual enforcement, therefore, is where police discretion is deployed. That is, police in the everyday course of their jobs, make decisions about what laws to enforce and under what circumstances. Through a legal lens, discretion can be understood as the space left in a legal provision that allows a particular officer to decide whether a crime has been committed and whether to enforce or not. Some laws are framed in such a broad way that police discretion is increased, where 'the need for resolving these ambiguities frequently places the police in the position of having to determine the forms of conduct which are to be subject to the criminal process'.[15] Discretion, however, goes further than just the leeway of the law, and in fact there are a range of practical opportunities to exercise discretion, including 'which crimes to respond to, which streets to patrol, which members of the public to speak with, how to investigate alleged offences', etc.[16] Resource constraints and force priorities also have a significant impact on the exercise of police discretion.[17]

Discretion is not only inevitable but is also important to ensure that the law is not used as a blunt instrument. Lord Scarman, in his inquiry into the Brixton riots, stated that 'successful

[14] H Goldstein, 'Police Discretion: The Ideal versus the Real' (1963) 23 (3) *Public Administrative Review* 140, 140.
[15] ibid, 141.
[16] G Pearson and M Rowe, Police Street Powers and Criminal Justice: Regulation and Discretion in a Time of Change (London: Hart, 2020), 10.
[17] A Parsons, 'Managerial Influences on Police Discretion: Contextualising Office Decision-Choices' (2015/16) 13 *European Police Science and Research Bulletin* 43.

policing depends on the exercise of discretion in how the law is enforced… Discretion is the art of suiting action to particular circumstances.'[18] It can, however, 'become a cloak under which prejudice and discrimination hides'.[19] In Chapter 3, I demonstrated that the legal provisions that criminalise elements of prostitution are broadly drafted, allowing for broad interpretation. This means that the 'space left' for discretion is significant. Research shows that police can and do use discretion to disproportionately target particular communities, such as those working in the sex industry, especially those with co-existing marginalised identities, such as trans,[20] racial minority, and migrant sex workers.[21] Police decisions can be influenced by emotive, moralistic and stigmatising attitudes towards sex work, along with other co-determinative prejudices. Alex Feis-Bryce's research found that police 'adopt their own interpretations of spacial and sexual morality and how this impacts on the wider public which informs their approach to policing sex work'.[22] As such, discretion can reinforce the marginalisation or harassment of already disempowered groups.

In recent years, there has been an attempt to provide a more consistent approach to policing sex work, through guidance produced by the National Police Chiefs' Council (NPCC). The NPCC has published a National Policing Sex Work and Prostitution Guidance,[23] which, inter alia, suggests a move away from a focus on enforcement towards sex workers' safety. The guidance states that police should not 'start from a position that treats sex workers as criminals

[18] Lord Scarman, *Report of an Inquiry by Lord Scarman: The Brixton Disorders*, (Cmnd 8427, 1981), para. 4.58.
[19] P Waddington, *Policing Citizens: Authority and Rights* (London: UCL Press, 1999), 38.
[20] M Laing, D Campbell, M Jones and A Strohmayer, 'Trans Sex Worker in the UK: Security, Services and Safety', in in T Sanders and M Laing (eds), Policing the Sex Industry (London: Routledge, 2018), 41.
[21] R Bowen, R Hodsdon, K Swindells and C Blake, 'Why Report? Sex Workers Who Use NUM Opt Out of Sharing Victimisation with Police' (2021, forthcoming) *Sexuality Research and Social Policy,* available at: https://doi.org/10.1007/s13178-021-00627-1 (last accessed 10 September 2021).
[22] A Feis-Bryce, 'Policing Sex Work in Britain: A Patchwork Approach', in T Sanders and M Laing (eds), Policing the Sex Industry (London: Routledge, 2018), 24.
[23] National Police Chiefs' Council, *National Policing Sex Work and Prostitution Guidance* (London: NPCC, 2016); updated in National Police Chiefs' Council, *National Policing Sex Work and Prostitution Guidance* (London: NPCC, 2019).

for being sex workers or engaging in practices that have been undertaken to increase their own safety, such as managing or keeping brothels' but should instead 'focus on those exploiting sex workers or committing crimes against them'.[24] Underlying this is a recognition that 'enforcement does not resolve the issue, but rather displaces it, making sex workers more vulnerable'.[25] While there is some over-emphasis on constructions of vulnerability and victimhood in the guidance,[26] overall this is a very positive step for the police's relationship with sex workers, demonstrating an evidence-based approach in relation to the policing on sex workers.[27]

The NPCC guidance provides practical support to police in their interactions with sex workers, including specific advice in relation to migrant sex workers, male and trans sex workers, and victims of crime and coercion,[28] but it is not consistently followed. This guidance is contextualised by a broader shift to localism in policing, meaning more inconsistent approaches to policing between different forces. After New Labour (1997 – 2010), there was a shift towards a policing approach focused on local areas, including the creation of Police and Crime Commissioners in 2012, representing 'a significant constitutional step towards local policing'.[29] Moreover, the NPCC guidance is 'not enforceable and there is no requirement to adopt them as policy or incorporate them into local strategies to prostitution', nor is there any 'requirement that police officers receive training specific to them or even read them'.[30] Not only is this guidance unenforceable, there is no duty for police forces to even have a prostitution

[24] ibid (2019), 9.
[25] National Police Chiefs' Council, (n 23) (2016), 10.
[26] See Chapter 2 for discussion of the limitations of framing sex workers as victims.
[27] L Sherman, 'Evidence-based policing' (1998) *Ideas in American Policing*, 3. Available at: https://www.policefoundation.org/wp-content/uploads/2015/06/Sherman-1998-Evidence-Based-Policing.pdf (last accessed 25 September 2021).
[28] E Klambauer, 'Policing Roulette: Sex Workers' Perception of Encounters with Police Officers in the Indoor and Outdoor Sector in England and Wales' (2018) 18 (3) *Criminology and Criminal Justice* 255, 258.
[29] A Feis-Bryce, (n 22), 22.
[30] ibid, 27.

strategy.[31] Although this guidance has been in place since 2011, National Ugly Mug's research on 152 police officers found that 86% of them had not heard of the guidance.[32] Implementation and knowledge of this guidance is patchy at best, meaning that forces and individual police officers are not guided by it when exercising their wide discretion in their sex work strategies and interactions with sex workers.

The combination of unenforceable guidance, localised policing, and individual interpretations of the policing role has led to what Eva Klambauer refers to as a 'policing roulette'. [33] The impact of wide discretion, and the resulting inconsistency in policing approaches, can be significant to sex workers, leading to uncertainty and lack of trust, particularly where sex workers do not know what type of interaction to expect. In both the street sex market and in brothels, sex workers have highlighted that police interaction *can* be positive. In Klambauer's study on sex workers' experiences of police in London, participants noted that when police treated them with respect, prioritised their safety over enforcement of laws, provided safety advice, and demonstrated a good understanding of the sex industry, then they held more positive trusting attitudes to the police.[34] This is supported by other research that shows improved relations and trust with police when police prioritise safety over enforcement.[35] As such, it is clear that police discretion over whether and when to enforce sex work laws *can* make sex work safer and improve trust.

The flipside of discretion, however, can lead to interactions with police being extremely negative for sex workers. Klambauer's participants reported that 'arbitrary policing practices,

[31] ibid, 29.
[32] R Bowen, R Hodsdon, K Swindells and C Blake, (n 21), 889.
[33] E Klambauer, (n 28), 255.
[34] ibid, 261.
[35] L Connelly, D Kamerāde, and T Sanders, (n 6). This is discussed more in Chapter 3.

police officers' derogatory and humiliating attitudes, lack of sympathy and sexualized harassment and abuse' led to sex workers not trusting the police and thinking of police actions as unjust.[36] One participant reported a police officer extorting sex from her on threat of arrest, while others reported that police were disbelieving and judgmental when sex workers reported sexual assault.[37] Again, this accords with other research on sex workers' interactions with police. In 2020, NUM conducted a survey of 88 sex workers, finding a number of reasons why sex workers choose not to report crimes against them to the police, including: 'experiences or fear of criminalisation' (69%); 'lack of trust in police' (68%), 'not wanting to be outed' (67%), 'disillusionment with the police' (53%); 'fear of harm to others in the industry' (49%), and 'fear of deportation' (32%).[38] Participants' accounts reinforced that many sex workers believe they will not be taken seriously or will not be believed, because they believe that the police do not see them as the stereotypical 'victim' of violence, and/or imply that sex workers put themselves at risk.[39] Some participants felt further stigmatised because of their nationality, ethnicity, or sexuality, with additional fears that reporting to the police would lead to risk of deportation, or increased focus on behaviours such as drug taking.[40] Fear and mistrust of the police is particularly exacerbated where forces have a zero-tolerance or enforcement-heavy approach to regulating sex work.[41] It is apparent that the breadth of police powers, along with structural and individual police attitudes and actions to sex workers, often combine to create a context within which sex workers are made more unsafe.

Police discretion in the enforcement of law against sex workers (as well as in their responses to crimes against sex workers) can mean that individual police actions and omissions

[36] E Klambauer, (n 28), 263.
[37] ibid, 265-266.
[38] R Bowen, R Hodsdon, K Swindells and C Blake,(n 21).
[39] ibid.
[40] ibid.
[41] L Connelly, D Kamerāde, and T Sanders, (n 6), 1.

could potentially violate sex workers' ECHR rights. Given the range of experiences sex workers have with police, an argument could certainly be made that the (inconsistent) enforcement of sex-work specific laws could lead to violations of sex workers' rights under the ECHR. I have already argued, however, that these laws, in themselves, violate sex workers rights under Articles 8, so arguing that it is the enforcement of unjust laws that is the problem would be both misleading and repetitive. A part of the problem with many of these laws, for example controlling prostitution for gain, is that their terms are insufficiently precise and so leave significant scope for discretion. Therefore, instead of returning to look at the enforcement of sex work specific laws, which I have argued create the context for varied and often problematic enforcement, this chapter will now turn to instances of direct abuse that violate sex workers rights, before considering how any additional powers that police enjoy in the regulation of sex work leave space for potential ECHR violations.

8.3 Direct Abuse from Police

One of the reasons some sex workers may mistrust police is that sex workers' experiences of violence may have been perpetrated directly by police. This refers to instances of physical and sexual assault from police officers against sex workers. These types of abuse, including rape, beatings and extortion, have been heavily documented in many jurisdictions,[42] and there is evidence that this also happens within the UK.[43] For example, in Klambauer's sample of 49 sex workers in London, two participants reported instances of sexual abuse by a police

[42] V Odinokova, M Rusakova, L Urada, J Silverman, and A Raj, 'Police sexual coercion and its association with risky sex work and substance use behaviors among female sex workers in St. Petersburg and Orenburg, Russia' (2014) 25 (1) *International Journal of Drug Policy* 96; N Fick, 'Enforcing fear: Police abuse of sex workers when making arrests' (2006) 16 *South African Crime Quarterly* 27; SWAN, *Arrest the Violence: Human Rights Abuses Against Sex Workers in Central and Eastern Europe and Central Asia* (Budapest: Sex Worker Rights Advocacy Network, 2009).
[43] R Bowen, R Hodsdon, K Swindells and C Blake, (n 21).

officer.[44] An investigation by Her Majesty's Inspectorate of Constabulary (HMIC) in 2016 also found that between 2014 and 2016, there were 436 allegations of abuse of power for sexual gain against police officers, including by sex workers who were targeted by police officers.[45] Although there have been no more recent reports by the HMIC setting out the scale of the issue, a Freedom of Information request in 2018 further found that 1,491 complaints of sexual misconduct were filed against the police across 33 forces in England and Wales between 2012 and 2017 (or 2018 for the Metropolitan Police).[46] This mirrors the Independent Police Complaints Commission's findings in 2012 that some police officers took advantage of the vulnerability and marginalisation of sex workers to assault them.[47]

These instances of violence or abuse are clearly beyond police officers' legal powers, and are relatively rare, but it would be remiss not to consider the human rights implications of these actions. Before looking at the human rights law on state actors committing physical and sexual violence, it is worth noting two things. Firstly, the police are a 'pure' public authority under s 6 of the Human Rights Act,[48] meaning that all actions of police forces and officers, whether public or private, must be compatible with the ECHR. While it could be argued that the particular officer committing such egregious acts was acting as a private citizen at the time (because these acts are beyond police powers), evidence suggests that when committing these

[44] E Klambauer, (n 28), 266.
[45] HMIC, *PEEL: Police Legitimacy 2016: A National* Overview (London: HMIC, 2017), available at: https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-police-legitimacy-2016.pdf. See also: J Grierson, 'Hundreds of Police in England and Wales Accused of Sexual Abuse', *The Guardian,* 8 December 2016, available at: https://www.theguardian.com/uk-news/2016/dec/08/hundreds-police-officers-accused-sex-abuse-inquiry-finds (last accessed 8 October 2021).
[46] C Jayanetti, 'Scale of Police Sexual Abuse Claims Revealed', *The Observer*, 18 May 2019, available at: https://www.theguardian.com/uk-news/2019/may/18/figures-reveal-true-extent-of-police-misconduct-foi (last accessed 3 May 2022). See further: F Sweeting, P Arabaci-Hills, and T Cole, 'Outcomes of Police Sexual Misconduct in the UK' (2021) 15 (2) *Policing* 1339.
[47] Independent Police Complaints Commission, *The Abuse of Police Powers to Perpetrate Sexual Violence* (London: IPCC, 2012).
[48] This means that the police's functions are obviously public. The House of Lords stated that police are a pure public authority because of their 'possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution' in *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote v Wallbank* [2003] UKHL 37, [7].

offences, police officers often *use* their position and power as police officers to commit them, including while on duty.[49] As such, these acts of violence can still be actions of the public authority.[50] Secondly, sexually or physically assaulting a sex worker in England and Wales would fall within offences under domestic criminal law. As such, a sex worker would only be able to take a case against the UK to the ECtHR Strasbourg if the sex worker had reported the crime, and the UK had not provided an effective remedy to the sex worker,[51] through thorough and effective investigation and appropriate punishment.[52] Because the HRA makes convention rights enforceable in domestic courts, it is also possible to bring a human rights claim alongside any criminal or civil case against the police.[53]

An HRA claim against a police officer for physical or sexual abuse could be brought under Article 3 of the ECHR, which states that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[54] Article 3 is expressed in unqualified terms, meaning that, unlike Articles 8 and 10 discussed in Chapter 7, ill-treatment falling within it is never permitted, even if it may appear to be justified in the public interest. In light of this strict policy, it is unsurprising that Article 3 has been interpreted to require that ill-treatment 'must attain a minimum level of severity' before the Article is engaged.[55] The ECtHR in *Ireland v UK* held that 'it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.'[56]

[49] Independent Police Complaints Commission, (n 47).
[50] Private actions of police have previously been upheld as being actionable under the HRA when sufficiently connected to their role and public reputation – see *BC v Chief Constable of the Police Service of Scotland* [2020] CSIH 61.
[51] Article 13 of the ECHR.
[52] *Aksoy v Turkey* (1996) EHRR 553; *Assenov v Bulgaria* (1998) 28 EHRR 652.
[53] *BC v Chief Constable of the Police Service of Scotland* (n 48).
[54] Article 13 of the ECHR.
[55] *Ireland v UK* (1979-80) 2 EHRR 25, [162].
[56] ibid.

Within Article 3, there is a hierarchy of suffering, with torture as the gravest type of treatment, followed by inhuman treatment and degrading treatment. This is not only used to determine whether treatment falls within Article 3, but also into which category of ill-treatment it falls. In *Dikme v Turkey*,[57] the Court referred to Article 1 of UN, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[58] which declares that 'torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment', and declared that torture should have a special stigma.[59] Torture was defined in *Ireland* as 'deliberate inhuman treatment causing very serious and cruel suffering'.[60] In relation to torture, 'deliberate' means that the suffering must be 'inflicted intentionally' and 'for a purpose, such as obtaining evidence, punishment, or intimidation'.[61] This threshold is so high that the first finding of torture was not until 1996, in *Aksoy v Turkey*,[62] where the victim's arms were paralysed after being kept in a position called 'Palestinian hanging'.[63] It, therefore, would be extremely unlikely that the type of physical offences reported by sex workers would reach the threshold for torture.

Rape by a public official has, however, been found to be torture in certain circumstances. In *Aydin v Turkey*, a woman was arrested without explanation, beaten, hosed by pressurised water, raped by police and then beaten by multiple people for an hour, and this abuse was

[57] *Dikme v Turkey* (Application no 20869/92) (Judgment 11 July 2000), [167].
[58] UN, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Resolution 3452 (XXX) adopted by the GA A/RES/30/3452 on 9 December 1975, Article 1.
[59] A Riedy, *The Prohibition of Torture: A guide to the implementation of Article 3 of the European Convention on Human Rights* (Strasbourg: Council of Europe, Human Rights Handbook No. 6, 2002), 11.
[60] *Ireland v UK* (n 55), para 167.
[61] *Ihlan v Turkey* (2000) 24 EHRR 869.
[62] *Aksoy v Turkey* (n 52).
[63] C McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58 *International and Comparative Law Quarterly* 565, 572.

cumulatively found to reach the threshold for torture.[64] The ECtHR further stated it it would have reached this conclusion on either grounds, the rape and the other 'terrifying and humiliating' experiences, taken separately.[65] In coming to the conclusion that the rape along could be torture, the court stated that 'rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim'.[66] It is possible that if the rape has occurred in circumstances of detention, for instance if the sex worker has been arrested or otherwise detained, their vulnerability may be analogous to this case, and meet the threshold for torture.

Physical and sexual abuse by police towards sex workers that does not fall within the narrow definition of torture may still, however, violate sex workers' rights under Article 3 as a form of inhuman or degrading treatment. In *Kudla v Poland,* it was held that inhuman treatment must cause 'either actual bodily harm *or* intense physical or mental suffering'.[67] Unlike torture, inhuman treatment need not be intended to cause suffering,[68] and there is no need for the suffering to be inflicted for a purpose.[69] The main difference between torture and inhuman treatment, however, is the degree of suffering. The focus of degrading treatment is on the humiliation or debasement, rather than physical or mental suffering. Degrading treatment has been described as treatment that would break down the physical or moral resistance of the victim,[70] or to drive the victim to act against his will or conscious.[71] According to the ECtHR in *Ireland,* physical assault may be inhuman treatment,[72] and in *BS v Spain,* it was held that a

[64] *Aydin v Turkey* (1997) ECHR 75.
[65] ibid, [86].
[66] Ibid, [83].
[67] *Kudla v Poland* (2000) 35 EHRR 198, 92.
[68] *Ireland v UK* (n 55), para 167.
[69] *Denizci and Others v Cyprus* (1996) 22 EHRR 330.
[70] *Ireland v UK* (n 55), [167].
[71] *The Greek Case* (1969) 12 YB 1, 186.
[72] *Ireland v UK* (n 55).

police officer hitting a sex worker's thigh and wrists met the standard of inhuman and degrading treatment.[73] Sexual assaults have also been included in inhuman and degrading treatment in numerous cases.[74] Degrading treatment also extends to circumstances where the treatment has taken place in private and where the 'victim is humiliated in his own eyes, even if not in the eyes of others'.[75] Even if nobody else sees the treatment of the sex worker, it might still meet the threshold for Article 3. As such, physical and sexual assault of sex workers by police officers, which debase and cause physical and mental suffering, would violate their Article 3 rights and cannot be justified.

These direct forms of abuse on sex workers by police are the most grievous violations of sex workers' human rights. Yet, there is no need for police to directly inflict violence against sex workers to infringe their human rights under the ECHR. There must also be an analysis of every day decisions made by police to consider whether these might lead to violations of sex workers' human rights. In the following section, I consider the use of civil orders against sex workers and their human rights implications.

8.4 Civil Orders

Although not created specifically for use against sex workers, as discussed in Chapter 3, civil instruments such as Criminal Behaviour Orders (CBO)[76] and injunctions[77] are often used by police to spatially manage sex work and sex workers out of particular areas. They have been largely used against street sex workers, but can be used against brothels or indoor premises too.

[73] *BS v Spain* (Application no 47159/08) (Judgment 24 July 2018).
[74] For example: *MC v Bulgaria* (2003) 40 EHRR 459; *Maslova and Nalbandov v Russia* (Application no 839/02) (Judgment 24 January 2008); *IG v Moldova* (2012) ECHR 836.
[75] *Tyrer v UK* (Application no 5856/71)(Judgment of 25 April 1978), [32].
[76] Anti-Social Behaviour, Crime and Policing Act 2014, s 22.
[77] ibid, s 1(2).

The ASBCPA has widened the range of powers available to police in relation to anti-social behaviour, replacing Anti-Social Behaviour Orders[78] (ASBOs) and the Anti-Social Behaviour Orders (on conviction), also known as Criminal Anti-Social Behaviour Orders (CRASBOs). Sarah Kingston and Terry Thomas argue that they are 'more-wide-reaching than earlier laws which tried to take on the problem of anti-social behaviour'.[79] While police powers are wider under the ASBCPA, as discussed in detail below, the core definition of anti-social behaviour, that a person has acted in a manner 'that has caused, or is likely to cause, harassment, alarm or distress to any person',[80] remains unchanged. Because of the relatively scarce research into the new powers, this section will begin by considering how ASBOs were used, to demonstrate the impact of civil orders (while also noting changes in the law). Both the continuation of the terms and the widening of powers are significant for the following section, where I examine the use of these orders, and the way that they might be challenged using the HRA, both on their own terms and in relation to their use. I argue that while it may be difficult to make a successful challenge to these instruments on their own terms under the Article 6 right to a fair trial, individual measures could be disproportionate interferences with sex workers' rights under Article 8.

8.4.1 Civil Orders and their Use by Police

Civil orders are used as part of an increasingly 'pre-emptive, precautionary approach to crime' to 'nip crime in the bud'.[81] Previous incarnations of the current orders, ASBOs, were

[78] Crime and Disorder Act 1998, s 1.
[79] S Kingston and T Thomas, 'The Anti-Social Behaviour, Crime and Policing Act 2014: Implications for Sex Workers and their Clients' (2017) 27 (5) *Policing and Society* 465, 465.
[80] Crime and Disorder Act 1998 s 1(1)(a); Anti-Social Behaviour, Crime and Policing Act 2014, s 2(1)(a).
[81] S Lewis, A Crawford and P Traynor, 'Nipping Crime in the Bud? The Use of Anti-Social Behaviour Interventions with Young People in England and Wales' (2016) 57 (5) *British Journal of Criminology* 1230, 1231.

introduced and used by police and local authorities to manage 'everyday nuisance, disorder and crime' or ongoing cumulative behaviour that does not fit within already proscribed criminal behaviour.[82] An ASBO, which would be effective for a minimum of two years, could be issued if the police or local authority could demonstrate, on the balance of probabilities, that a person had acted 'in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself', and that an order was 'necessary' to protect those persons.[83]

The wide-ranging concept of 'anti-social behaviour' has given an extraordinary amount of discretion to the police to respond to low-level behaviour, and has been heavily criticised by academics and human rights' organisations for being 'defined in the most sweeping possible way'.[84] The breadth of the definition of 'anti-social behaviour' was defended by the Home Office specifically on the grounds that police and local authorities *should* have discretion, that 'antisocial behaviour is inherently a local problem and falls to be defined at a local level'.[85] Importantly for this thesis, the broad definition meant that while ASBOs were not initially indicated for use against sex workers, they were regularly used for that purpose.[86] The Home Office itself, in advice to practitioners, stated that 'prostitution' could fall into this definition because 'the anti-social element of prostitution relates to the presence of prostitutes and their clients engaging in an illegal activity in a public space, which can cause distress to others who use the area'.[87]

[82] Home Office, *More Effective Responses to Anti-Social Behaviour* (London: Home Office, 2011), 5.
[83] Crime and Disorder Act 1998 s 1(1).
[84] A Ashworth, J Gardner, R Morgan, A Smith and A von Hirsch, 'Neighbouring on the Oppressive: The Government's 'Anti-Social Behaviour Order' Proposals' (1998) 16(1) *Criminal Justice* 7, 8.
[85] House of Commons, *Home Affairs Committee - Anti-Social Behaviour: Fifth Report of Session 2004-05* (London: HMSO, 2005), 20.
[86] T Sagar, 'Tackling on-street sex work: anti-social behaviour orders, sex workers and inclusive inter-agency initiatives' (2007) 7(2) *Criminology and Criminal Justice* 153.
[87] Home Office, *Defining and Measuring Anti-Social Behaviour* (London: Home Office, 2004), 5.

Research demonstrates that ASBOs were used 'against sex workers to exclude them from residential areas – in an attempt to provide temporary respite to adversely affected residents'.[88] In Kate Brown and Teela Sander's research in Leeds alone, they found that twenty ASBOs were issued to street sex workers between 2006 and 2013.[89] Young et al similarly found that between 2002 and 2006, 17 women in the King's Cross area in London has been issued with ASBOs for street sex work.[90] The use of ASBOs varied across police areas, with one study documenting 'only two for specific instances of anti-social behaviour in Central, to what might be termed 'blanket use' against sex workers in Westside'.[91] ASBOs were also used against brothels, although it was more difficult for police to evidence anti-social activities – in one case, the judge refused to confirm the order on the basis that there was insufficient evidence of anti-social behaviour, and contrary witness statements from local residents that the brothel did not cause any problems in the community.[92]

In the case of *Chief Constable of Lancashire v Potter,*[93] the High Court considered an appeal by a sex worker, Lisa Potter, where ASBOs had been made against a number of sex workers, not on the basis of their *individual* anti-social behaviour, but because of 'a significant problem caused by a large number of prostitutes operating, albeit not in concert, in a residential area of Preston'.[94] In this case, the police had given evidence that in the area, 'some of the prostitutes' had engaged in conduct including 'the abandonment of used condoms and

[88] T Sagar, (n 86), 156.
[89] K Brown and T Sanders, 'Pragmatic, Progressive, Problematic: Addressing Vulnerability through a Local Street Sex Work Partnership Initiative' (2017) 16(3) *Social Policy and Society* 429, 435.
[90] T Young, S Hallsworth, E Jackson and J Lindsey, *Crime displacement in King's Cross: A Report for Camden Community Safety Partnership* (London: London Metropolitan University, 2006).
[91] Westside and Central are pseudonyms for areas researched in J Scoular, J Pitcher, R Campbell, P Hubbard and M O'Neill, 'What's Anti-Social About Sex Work? The Changing Representation of Prostitution's Incivility' (2007) 6(1) *Community Safety Journal* 11, 13.
[92] T Taylor, 'Soho brothel closed by police can re-open, judge rules', *The Guardian*, 19 February 2009, discussed in S Kingston and T Thomas, (n 79), 468.
[93] [2003] EWHC 2272 (Admin).
[94] [2003] EWHC 74, [2].

hypodermic syringes; telling parents to take their children indoors; and uninvited boarding of vehicles driven by lone males'.[95] Lisa Potter, herself, was not accused of any of these particular behaviours, and in fact her behaviour related only to loitering and soliciting in the area, and 'on one occasion, stepping forward and looking into moving motor vehicles to attract attention'.[96] However, the Court heard that 'by her *mere presence* there for that purpose, she caused, in the sense of *contributed*, to the problem, albeit that there were other contributors and her contribution was relatively small'.[97] Lord Justice Auld held that while he agreed that 'not all prostitution on the streets of a residential area falls foul of the Act', and that it is a 'matter of fact and degree'.[98] Yet, if the combined effect of many sex workers in an area is likely to cause harassment, alarm or distress, then an individual's contribution can be considered to have caused that problem, *even if her own conduct might not, if considered on its own*, constitute harassment, alarm or distress.[99] The result of this case was to allow ASBOs to be given to sex workers who are merely present in a space, if it is found that the general presence of sex work there might cause harassment, alarm or distress – an extremely broad interpretation. No human rights arguments were put forward in this case.

The impact of using ASBOs against sex workers was similar to the impact of heavy enforcement of sex work-specific laws, in that they actively displace sex workers to areas with less police interference,[100] in turn, increasing the risk of violence against sex workers.[101] Some sex workers had ASBOs prohibiting them from whole areas of a city, not just red light

[95] [2003] EWHC 2272 (Admin), [11].
[96] ibid, [14].
[97] ibid. Emphasis mine.
[98] ibid, [46].
[99] ibid, [41].
[100] M Hester and N Westmarland, *Tackling Street Prostitution: Towards a Holistic Approach* (London: Home Office Development and Statistics Directorate, 2004), 23.
[101] L Neville and E Sanders-McDonagh, 'Gentrification and the Criminalization of Sex Work: Exploring the Sanitization of Sex Work in Kings Cross with the use of ASBOs and CBOs' in in T Sanders and M Laing (eds), Policing the Sex Industry (London: Routledge, 2018), 166.

districts,[102] meaning that they may have been prohibited from areas they live as well as work, and where drug treatment clinics may be located.[103] There were also cases of ASBOS prohibiting the carrying of condoms,[104] which clearly has an impact on the sexual health risks of sex workers. The broader 'cumulative' interpretation also meant that the use of ASBOs to displace sex workers became easier.[105] As a result, sex workers were deterred from working together, or 'even talking to each other to share local information about dangerous punters and general safety'.[106] Moreover, a breach of an ASBO could lead to a fine or imprisonment for up to six months.[107] In relation to sex work, this is particularly problematic as Parliament has specifically legislated to remove imprisonment as a punishment for the offence of soliciting.[108] Research suggests that some police had a preference for using ASBOs to regulate sex work because, as civil orders, the due process requirements of criminal law did not apply, despite the criminal punishment on breach, meaning that civil orders they were seen as a harsh deterrent and were used as an 'efficient' tool to disperse and displace sex workers.[109] In one interview with a sex worker, Hester and Westmarland were told 'that's a sly way of sending girls to prison because you can't go to prison for prostitution'.[110]

The ASBCPA 2014 removed ASBOs and created a new range of civil powers that can be used by police to respond to anti-social behaviour, but many of the issues highlighted in relation to ASBOs still apply. Without conviction for any offence, police can use injunctions,

[102] ibid, 167.
[103] T Sanders, 'Controlling the "anti sexual" city: Sexual citizenship and the disciplining of female street sex workers' (2009) 9(4) *Criminology and Criminal Justice* 507
[104] J Phoenix, 'ASBOs and Working Women: A New Revolving Door?', in P Squires (ed) *ASBO Nation: The Criminalisation of Nuisance* (Bristol: Policy Press, 2008), 295.
[105] T Sagar, (n 86), 157.
[106] L Neville and E Sanders-McDonagh, (n 101), 167.
[107] Crime and Disorder Act 1998, s 1(10).
[108] Criminal Justice Act 1982, s 71.
[109] T Sagar, (n 86), 155.
[110] M Hester and N Westmarland, (n 100), 34.

which replace the ASBO.[111] Injunctions can be applied for by a range of authorities, including the police, and are granted if the respondent has engaged in or *threatens to engage* in anti-social behaviour.[112] Anti-social behaviour, as required for injunctions, is defined widely as 'conduct that has caused, or *is likely to cause*, harassment, alarm or distress to any person'; 'conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises'; or 'conduct capable of causing housing-related nuisance or annoyance to any person'.[113] The first definition is almost identical to that found in the definition of an ASBO, so while *Chief Constable of Lancashire v Potter* relates to now-defunct orders, the breadth of this interpretation is likely to remain precedent, and so is still relevant to analysis of these new powers. The only difference in this definition is that now the 'harassment, alarm or distress' can be to any person, rather than 'any person not in the same household',[114] broadening their remit. The second part, which focuses on housing-based nuisance can be used against brothels if it is found that running a brothel could be *capable* of causing nuisance or annoyance – that is, there does not need to be any actual proof (even to a civil standard) that nuisance or annoyance has occurred, surmounting the difficulties police had in evidencing ASB from brothels. Moreover, 'nuisance' and 'annoyance' are extremely broad terms and have not been defined in the statute or statutory guidance. The Metropolitan police have defined nuisance as 'causing trouble, annoyance or suffering to the community at large rather than an individual or group'.[115] Such vague definitions are particularly problematic for sex workers as

[111] Anti-Social Behaviour, Crime and Policing Act 2014, s 1; s 34.
[112] ibid, s 25(2).
[113] ibid, s 1(1).
[114] Crime and Disorder Act 1998, s 1 (1)(a).
[115] Metropolitan Police, *Police Policy on Anti-Social Behaviour and Nuisance*, available at: https://www.met.police.uk/cy-GB/foi-ai/metropolitan-police/disclosure-2020/july/police-policy-on-anti-social-behaviour-and-nuisance/ (last accessed 10 May 2022). This does not align, therefore, with the civil definition of nuisance in tort law, which is based on enjoyment of land interests.

sex work has often been framed in such terms, in and of itself, despite evidence to suggest that the reality for communities is much more complex.[116]

While the definition of anti-social behaviour remains largely the same, the ASBCPA has augmented polices powers both in relation to when an injunction against anti-social behaviour can be applied for, and what an injunction can require. Firstly, while an application for an ASBO required that the person to whom it would apply 'has acted' in an anti-social manner,[117] the injunction only requires that the person has 'engaged or *threatened to engage*' in anti-social behaviour,[118] meaning that these can be used pre-emptively. Secondly, while the authority had to show that an ASBO was 'necessary' to protect others from the anti-social behaviour,[119] an injunction only need be 'just and convenient' to prevent the person engaging in anti-social behaviour.[120] Thirdly, the standard of proof required to have an ASBO granted was the criminal standard of proof, 'beyond all reasonable doubt';[121] the burden of proof for an injunction is only the civil 'balance of probabilities' standard.[122] These latter two changes, taken together, mean that injunctions are easier for police and local authorities to obtain than ASBOs.

Finally, while an ASBO could only prohibit the person from doing anything described in the order,[123] which was already a very broad power, an injunction can be granted to both prohibit or require behaviour by the person.[124] This shift in effect intends to force recipients to

[116] E Cooper, ''It's better than daytime television': questioning the socio-spatial impacts of massage parlours on residential communities' (2016) 19 (5) *Sexualities* 547. See also Home Office and Scottish Home Department, *Report of the Committee on Homosexual Offences and Prostitution* (London: HMSO, 1957).
[117] Crime and Disorder Act 1998, s 1 (1)(a).
[118] Anti-Social Behaviour, Crime and Policing Act 2014, s 1(2).
[119] Crime and Disorder Act 1998, s 1 (1)(b).
[120] Anti-Social Behaviour, Crime and Policing Act 2014, s 1(3).
[121] *R (McCann) v Manchester Crown Court* [2002] UKHL 39.
[122] Anti-Social Behaviour, Crime and Policing Act 2014, s 1(2).
[123] Crime and Disorder Act 1998, s 1 (4).
[124] Anti-Social Behaviour, Crime and Policing Act 2014, s 1(4).

take steps to address their behaviour, a clear attempt at 'responsibilisation', much in the manner of Engagement and Support Orders, as discussed in Chapter 3.[125] This creates an exception to the general criminal law principle of not punishing omissions – here, they could be 'imprisoned for not complying with something they should be doing'.[126] Marian Duggan and Vicky Heap argue that this creates a 'level of contractual governance and social control [that] is unprecedented'.[127] Agreeing, Kevin Brown notes that injunctions are procedurally very similar to ASBOs, but offer even fewer due process requirements to recipients.[128] Because of these broader powers, it is likely that injunctions will be used against sex workers more than ASBOs were,[129] with similar effects to those discussed above. In fact, the House of Commons has produced a briefing paper highlighting 'prostitution' as a key example of when to use injunctions,[130] and there is already some evidence of injunctions being used against street sex workers.[131] There is one positive however, in that injunctions can only last for up to 12 months,[132] rather than at least two years. Balanced against their greater breadth, however, this offers cold comfort for sex workers served with an order whose lives and livelihoods would be disrupted for a year.

There are still significant consequences for breach of an order, including for omitting to do something required by the order. The police may arrest a person under injunction without

[125] A Carline and J Scoular, 'Saving Fallen Women Now? Critical Perspectives on Enforcement and Support Orders and their Policy of Forced Welfarism' (2015) 14 (1) *Social Policy and Society* 103.
[126] M Duggan and V Heap, *Administrating Victimisation: The Politics of Anti-Social Behaviour and Hate Crime Policy* (London: Palgrave, 2014), 69.
[127] ibid.
[128] K Brown, 'Punitive Reform and the Cultural Life of Punishments: Moving from ASBOs to its Successors' (2020) 22 (1) *Punishment and Society* 90, 98.
[129] Liberty, 'Liberty's Response to the Home Office's Proposals on More Effective Responses to Anti-Social Behaviour' (London: Liberty, 2011), 15.
[130] J Brown and G Sturge, *Tackling Anti-Social Behaviour* (London: House of Commons Briefing Paper no 7270, 2020).
[131] Basis Sex Work Project, 'Personal Safety and Sex Work Law and Rights', available at: https://basisyorkshire.org.uk/sex-work-project/street-sexworkers/safety-ugly-mugs/ (last accessed 9 July 2021).
[132] Anti-Social Behaviour, Crime and Policing Act 2014, s1 (6).

warrant 'if he or she has reasonable cause to suspect that the respondent is in breach of the provision'.[133] Unlike ASBOs, injunctions are purely civil orders as there is no longer a criminal second limb. This does not, however, mean that a breach does not lead to a significant punishment. Instead, a breach of an injunction is treated as a contempt of court and can be punishable with an unlimited fine or committal for up to a period of two years.[134] A finding of contempt of court does have the benefit of not registering as a criminal offence on the recipient's record, but the punishment is still potentially detention,[135] thus continuing with the threat of prison for sex workers. The proceedings for a committal for contempt of court follow the Civil Procedure Rules, and in particular Part 81 clarifies that the standard of proof to be met for a finding of contempt of court is the criminal standard of 'beyond reasonable doubt'[136] and that other rules of representation and evidence uphold the defendant's right to a fair trial. Yet, this higher standard of proof only relates to whether the recipient of the injunction has done something prohibited, or not done something required, by their order, rather than as to whether these prohibitions or requirements were proportionate to the nuisance threatened in the first place. As such, although at first glance, injunctions move away from the hybrid civil/criminal approach of ASBOs, an injunction can still be given for relatively low-level behaviour and result in serious punishments if breached, so are likely to be more onerous to sex workers.

Police and local authorities are also able to apply for a Criminal Behaviour Order (CBOs) post-conviction, replacing CRASBOS.[137] These can be applied after the conviction for any offence, and last from two years to indefinitely.[138] A court can make a CBO if it has been

[133] Ibid, s 9 (1).
[134] Contempt of Court Act 1981, s 14 (1).
[135] K Brown, (n 128), 99.
[136] Civil Procedure Rules, Part 81.4 (o).
[137] Anti-Social Behaviour, Crime and Policing Act 2014, s 25
[138] ibid, s 25(5).

satisfied beyond reasonable doubt that the offender has engaged in behaviour that caused or *was likely to cause* harassment, alarm or distress to any person.[139] The court must also consider that the order will prevent the offender from engaging in such behaviour.[140] It is notable here, that these require the criminal standard of proof, and that the behaviour actually has to have occurred rather than be threatened, so CBOs will not have the same ease of use as injunctions. Like an injunction, however, the CBO can prohibit the offender from doing anything or require the offender to do anything.[141] Evidence can be admissible in the proceedings for a CBO that would not have been admissible in the proceedings in which the offender was convicted.[142] So, for example, where hearsay evidence may not be admissible, for example, in relation to a conviction for soliciting or loitering, or for keeping a brothel,[143] it could potentially be used to support the granting of a CBO, reducing the due process protections for that person. It was noted in *Chief Constable of Lancaster v Potter* that much of the evidence used to support an ASBO would likely be 'hearsay, and much of it opinion'.[144] While this is likely to remain the case for injunctions, as the successor of the ASBO, it is particularly concerning that it could be used to support the granting of a CBO because, unlike the breach of an injunction, a breach of a CBO is a direct criminal offence, making the offender liable for up to five years imprisonment or a fine.[145]

Both injunctions and CBOs could have effects on the spatial freedoms of sex workers that are disproportionate to the nuisance caused or threatened. Although injunctions and CBOs must not, as far as practicable, interfere with the respondent's ability to go to work, attend

[139] ibid, s 22(3).
[140] ibid, s 22(4).
[141] ibid, s 22(5).
[142] ibid, s 23(2).
[143] Criminal Justice Act 2003, s 114 and 136.
[144] [2003] EWHC 2272 (Admin), [10].
[145] Anti-Social Behaviour, Crime and Policing Act 2014 s 30 (2).

school or any other educational establishment,[146] and can only exclude someone from their actual home if there is a risk of violence against another person,[147] there is no such requirement for there to be no interference with their capacity to be in the area near where they live. Moreover, it is unlikely that a sex workers' place of work whether that is a street or a brothel would be conceptualised as a place of work, in a way as to avoid interference, as it is more likely the case that it would be seen as the area of the 'anti-social behaviour' being discussed. Therefore, injunctions and CBOs, like ASBOs before them, can be used to prohibit sex workers from entering areas in which they live and work.

In the next two subsections, I consider firstly whether these orders could be challenged on their own terms. That is, whether they violate the Article 6 ECHR right to a fair trial, particularly in relation to their standard of proof and the admission of hearsay evidence. Secondly, if these orders are not inherently a violation of Article 6 rights, or rather if such arguments have little likelihood of success under the HRA, I examine whether individual orders could engage Article 8 rights of sex workers, and thus require more thorough balancing of necessity and proportionality by courts and police.

8.4.2 Challenging Civil Orders

In this subsection, I consider the potential for a HRA challenge to be brought against injunctions and CBOs, in and of themselves, under the Article 6 right to a fair trial.[148] Notably, unlike challenges discussed in Chapter 7, which relate to laws affecting sex workers specifically, this challenge could be brought by anyone who, under locus standi rules, could be

[146] ibid, s 1 (5); 22(9).
[147] ibid, s 13.
[148] Dispersal orders are not considered here as these are authorised and given by the police without engagement with the courts.

a victim of these powers.[149] The issues arising out of these civil orders that are potential Article 6 interferences are: whether it is just to have a civil standard of proof for injunctions given the punishment on breach; and whether there should be protection against hearsay and other opinion-based evidence in relation to injunctions and CBOs.

The first potential challenge to ASBCPA injunctions relates to whether the civil standard of proof, 'on the balance of probabilities', is sufficiently high for an order which could result in a fine or imprisonment if breached. Article 6 of the ECHR sets out the right to a fair trial. There is no detail in Article 6 about what specifically a fair hearing requires, though Article 6(1) links the right with a timely hearing by an independent and impartial tribunal. Case law has held that what constitutes a fair trial cannot be based on a single rule[150] and that ECtHR decisions about the fairness of a trial are based on the overall fairness of the proceedings, 'though one specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings'.[151] Although the general right to a fair trial under Article 6(1) applies to both criminal and civil proceedings, there are further more specific protections set out in Article 6(2) and 6(3) that apply only to criminal cases – these relate to a presumption of innocence, and the process of the criminal proceedings, respectively. The first question that must be considered then, is whether injunctions could, despite domestic classification, be criminal in nature. The second question is whether the right to a fair trial requires a higher standard of proof than 'on the balance of probabilities' for injunctions.

When determining if an order or offence should be considered civil or criminal, the ECtHR in the leading case of *Engels v Netherlands* held that the domestic classification of the

[149] Human Rights Act 1998, s 7(6).
[150] *Gregacevic v Croatia* (Application no 58331/09) (Judgment 10 July 2012).
[151] *Ibrahim v UK* (Application on 50541/08) (13 September 2016).

order only serves as a starting point, and that the Court should also consider the nature of the offence and the severity of any potential penalty that could be incurred by the subject of the order.[152] On the final point, they held that any penalty that would deprive the subject of their liberty belongs to the 'criminal' sphere, 'except those which by their nature, duration or manner of execution cannot be appreciably detrimental'.[153] In *Engels*, four days light arrest and two days strict arrest were not considered sufficient to make the offence 'criminal', but three to four months' committal to a disciplinary unit were clearly 'criminal'.[154] In the later case of *Benham v UK*, the ECtHR considered proceedings around the imposition of a liability order for failure to pay a community charge.[155] The Court noted that the imposition of a penalty was dependent on a finding of culpability, a 'wilful refusal to pay or culpable neglect'.[156] However, despite this 'break' in the causal chain, they also noted that the applicant faced a potential penalty of three months' imprisonment, and held that Benham had in fact been charged with a 'criminal offence' and so Articles 6 (2) and 6 (3) applied.[157] In *Steel v UK*, the ECtHR took the position that even when a penalty is contingent upon a further act of the applicant (in that case, refusing to be bound over in relation to breach of the peace) it *may* still be considered a criminal penalty.[158] However, in a domestic HRA case, *Secretary of State for the Home Department v MB and AF*,[159] Lord Bingham held that, despite criminal punishment on breach,[160] control order proceedings were civil in character, noting there was 'no identification of any specific criminal offence' and that the order was 'preventative in purpose, not punitive or retributive'.[161]

[152] *Engels and Others v The Netherlands* (Application no 5100/71) (Judgment 9 June 1976), 31.
[153] ibid, 31.
[154] ibid, 32.
[155] *Benham v UK* (Application no 19380/92) (Judgment 10 June 1996).
[156] ibid, [56].
[157] ibid, [56].
[158] *Steel v UK* [2005] EMLR 314, [66-67]. Although in that case they did not find that the penalty was unjust detention under Article 5.
[159] *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46.
[160] Prevention of Terrorism Act 2005, s 9.
[161] *Secretary of State for the Home Department v MB and AF* (n 159), [24]

Lord Bingham did, however, note, that a 'preventative measure may be so adverse as to be penal in its effects if not its intention'.[162]

To determine what evidentiary rules, procedural requirements and burden of proof apply, we must therefore go beyond the 'statutory scheme' to classify whether an injunction is civil or criminal,[163] looking at whether the penalty (even where contingent on a further act) is so severe as to make it criminal, and whether the order is 'preventative' rather than 'punitive or retributive'. ASBOs, the predecessor of the current civil orders, were unsuccessfully challenged under Article 6 of the ECHR.[164] In *R (McCann) v Manchester Crown Court,* the appellants argued that ASBOs were criminal orders, and so the criminal standard of proof and rules on evidence should apply. The House of Lords accepted that proceedings for the *breach* of an ASBO were criminal in character[165] and fell under the concept of a 'criminal charge' under Article 6 of the ECHR, which provides for the right to a fair trial. The question that arose in *McCann*, however, was whether the making of the order (ie. *before* a breach) could be considered so severe as to make it criminal, and whether it was only preventative. At the Court of Appeal, Lord Phillips stated that proceedings relating to ASBOs under s1 of the Crime and Disorder Act 1998 were correctly characterised as civil.[166] In coming to this conclusion, Lord Phillips noted firstly that applications for ASBOs were begun by complaint, which is the method for commencing civil orders in magistrates' courts.[167] He went on to say that extensive interpretation of what is considered to be a criminal charge would render 'the injunctive process ineffectual, prejudice[ing] the freedom of liberal democracies to maintain the rule of law by

[162] ibid, [23].
[163] *R (McCann) v Manchester Crown Court* (n 121), [20].
[164] ibid.
[165] ibid, [4].
[166] *R (McCann) v Manchester Crown Court* [2001] EWCA Civ 281
[167] ibid, [20].

use of injunctions'.[168] The House of Lords agreed with the Court of Appeal, with Lord Steyn stating that the ASBO 'itself involves no penalty',[169] and does not involve the determination of a criminal charge,[170] and Lord Hope holding that, while there were no limits to the prohibitions required by an ASBO, the order itself did not deprive the recipient of liberty, and so the order was preventative and not criminal.[171]

McCann followed the *Engels* criteria,[172] emphasising that the key factor in determining whether an order is civil or criminal is the severity of its effects, and so, it follows that a similar determination would likely be made for an injunction, even though the punishment on breach is clearly as severe as that in *Benham*[173] in terms of time. That is, while the injunction can now include requirements as well as prohibited activity, injunctions are applicable for a shorter time than ASBOs, and the effects of a breach are contempt of court proceedings, rather than a direct criminal punishment like the ASBO. Therefore, it is unlikely that, considering the *McCann* judgment, the hearing that imposes an injunction would be a criminal proceeding where proceedings for an ASBO were not. This means that there would not be an *automatic* right to protections under Article 6(2) and 6(3).

Still, whether civil proceedings can require heightened protections because of their potential consequences has been considered by the courts. In *Secretary of State for the Home Department v MB and AF*, the applicant appealed against a control order, claiming it was criminal in nature, but also that, in the alternative, 'if they fall within the civil limb [of Article 6(2)] only they should nonetheless, because of the seriousness of what is potentially involved,

[168] ibid, [31].
[169] *R (McCann) v Manchester Crown Court*, (n 121), [30].
[170] ibid, [34].
[171] ibid, [77].
[172] *Engels and Others v The Netherlands,* (n 152).
[173] *Benham v UK,* (n 155).

attract the protection appropriate to criminal proceedings'.[174] While the House of Lords held that those orders were civil in nature, Lord Bingham agreed with the applicant that the civil limb of Article 6(1) 'does in my opinion entitle such person to such measure of procedural protection as is commensurate with the gravity of the potential consequences'.[175] Referencing *International Transport Roth GmbH v Secretary of State for the Home Department,*[176] Lord Steyn stated: 'judges have regarded the classification of proceedings as criminal or civil as less important than the question of what protections are required for a fair trial'.[177] So it may still be possible that an injunction should require a criminal standard of proof even if classified as civil.[178]

This issue in relation to the standard of proof for civil proceedings was a consideration in *McCann,* after the determination of classification. Lord Steyn stated that 'in principle it follows that the standard of proof ordinarily applicable in proceedings, namely the balance of probabilities, should apply'.[179] He went on, however, to hold that 'given the seriousness of the matters involved', magistrates should 'in all cases under section 1 apply the criminal standard'.[180] Lord Hope agreed, stating that 'account should be taken of the seriousness of the matters to be proved and the implications of proving them'.[181] As such, even though ASBOs were determined to be civil proceedings, the criminal standard of proof applied – so the applicant must show the magistrate *beyond reasonable doubt* that the recipient had acted in an anti-social manner, and that the order was necessary to protect people from further anti-social

[174] *Secretary of State for the Home Department v MB and AF* (n 159), [15].
[175] ibid, [24].
[176] [2002] EWCA Civ 158, [33], [148].
[177] *Secretary of State for the Home Department v MB and AF* (n 159), [17].
[178] Though it is worth noting that the restrictions placed on the recipient of a non-derogating control order in this case were extremely serious, and it is highly unlikely that a recipient of an ASBCPA injunctions would face such restrictions.
[179] *R (McCann) v Manchester Crown Court* (n 121), [37].
[180] ibid, [37].
[181] ibid, [83].

acts. As such, it may be assumed to follow that an injunction, as the successor to the ASBO, should be treated in the same way.

There are, however, more obstacles to get to this point. Even if a court agreed that an injunction was analogous to an ASBO in this way, Parliament has specifically legislated in the ASBCPA that the court must be satisfied 'on the balance of probabilities'.[182] There was no corresponding statement for ASBOs. As such, returning to a court's powers under the HRA discussed in Chapter 6, the court would have to determine whether to 'interpret' this provision in light of the Article 6 requirements,[183] or make a declaration of incompatibility.[184] While uncommon, it is not unheard of for the highest courts to radically 'interpret' evidentiary rules in order to fulfil the requirements of Article 6. In *R v A*, the House of Lords extensively interpreted more restrictive rules on sexual history evidence under the Youth Justice and Criminal Evidence Act 1999[185] to permit 'the admission of evidence or questioning which relates to a relevant issue in the case and which the trial judge considers is necessary to make the trial a fair one'.[186] The courts are less likely to take this approach, however, as the ABSCPA, unlike the Youth Justice and Criminal Evidence Act, was passed after the HRA came into force, so more judicial deference to Parliament and parliamentary scrutiny of human rights implications is likely to be given.[187] Moreover, the drafting of the ASBCPA was after the *McCann* decision, so it has been a deliberate return by Parliament to a civil standard of proof. As such it is unlikely that such an interpretation would 'go with the grain of the legislation'.[188]

[182] Anti-Social Behaviour, Crime and Policing Act 2014 s1(2).
[183] Human Rights Act, s 3.
[184] Human Rights Act, s 4.
[185] Youth Justice and Criminal Evidence Act 1991, s 41.
[186] *R v A* [2001] UKHL 25, [13].
[187] Lord Irvine of Laing, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' (2003) *Public Law* 308.
[188] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [39].

There is a possibility, however, that the Court could make a Declaration of Incompatibility on the basis that this standard of proof infringes recipients' Article 6 rights, if, as likely, they could not interpret 'balance of probabilities' to mean beyond reasonable doubt. A Declaration of Incompatibility is usually only made in the cases where the law infringes citizens' human rights in a particularly grievous way, such as indefinite detention without charge of suspected international terrorists.[189] Given that one of the key reasons that the Court opted for a criminal standard of proof in *McCann* was to make proceedings 'more straightforward' for magistrates,[190] it is unlikely that this infringement of Article 6 would be considered sufficiently unjust as to trigger a Declaration of Incompatibility. As such, even if a criminal standard of proof would more effectively protect the recipients' Article 6 rights, the HRA does not necessarily provide a beneficial route to make this claim successfully.

Moving then to evidentiary protections within Article 6, this section now considers the evidential rules that should apply to both injunction and CBO proceedings and, in particular, whether hearsay evidence or other opinion-based evidence should be allowed. This is important for sex workers receiving injunctions because the evidence used is often hearsay or opinion, particularly in relation to the subjective claims that behaviour or even threatened behaviour is 'likely to' cause harassment, alarm or distress. The first thing to note is that, unlike the standard of proof, there is no statutory guidance in the ASBCPA about whether hearsay evidence should be allowed, either in relation to injunctions or CBOs. The closest the ASBCPA comes to directing on hearsay is to state, in relation to CBOs, that 'it does not matter whether evidence would have been admissible in the proceedings in which the offender was convicted'.[191] This is arguably sufficiently vague that a judicial interpretation would be possible. As such, if the

[189] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
[190] *R (McCann) v Manchester Crown Court* (n 121), [36].
[191] Anti-Social Behaviour, Crime and Policing Act 2014 s 23 (2).

following arguments were accepted by a court, there would be no need for a Declaration of Incompatibility, but rather the courts could develop common law rules on the application of evidentiary standards to these orders.

Article 6(3)(d) states that anyone charged with a criminal offence has the right 'to examine or have examined witnesses against him'. Within this is a presumption against the used of hearsay evidence against a defendant in criminal proceedings. Hearsay is defined in English law as a 'any representation of fact or opinion … not made in oral evidence that is evidence of any matter stated'.[192] Within the requirements of Article 6, evidence from anonymous or absent witnesses would ordinarily only be allowed in exceptional circumstances, such as when there is evidence that a witness is being intimidated.[193] In *Al-Khawaja and Tahery v UK*, the ECtHR held that the admission of evidence of a statement from an absent witness could be incompatible with Article 6, and, when deciding whether it was, the court must examine: whether there was a good reason for the non-attendance of the witness and for the admission of their untested statements of evidence; whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction; and whether there were sufficient counterbalancing procedural safeguards to ensure that the trial, on the whole, was fair.[194] These three principles were also applied in *Schatschaschwili v Germany.*[195] The first principle, that there must be good reason for non-attendance suggests that a blanket rule allowing hearsay would not be aligned with the this principle. In *Schatschaschwili v Germany*, the ECtHR determined the second principle, the 'sole or decisive basis' for conviction to mean that is was the only evidence against the accused, or 'of such significance or importance as it is likely to

[192] Criminal Justice Act 2003, s 114(1).
[193] *Barbera, Messege and Jabardo v Spain* (1989) 11 EHRR 360 and *Doorson v the Netherlands* (1997) 22 EHRR 330.
[194] *Al-Khawaja and Tahery v UK* (Application nos 26766/05 and 22228/06) (Judgment of 15 December 2011).
[195] (Application no 9154/10) (Judgment 15 December 2015).

be determinative of the outcome of the case'.[196] Therefore if this is the main evidence brought to proceedings comes from hearsay, like it did in *McCann*,[197]the proceeding is likely to not be aligned with this principle. Therefore, this could only be redeemed where there were sufficient counterbalancing procedural safeguards to ensure that the trial, on the whole, was fair. How this would be done in such proceedings is difficult to predict, and so these proceedings are likely, I argue, to be a breach of the right to a fair trial. The law in relation to criminal proceedings in England and Wales also begins with this presumption against hearsay evidence, under the Criminal Justice Act 2003.[198] Hearsay evidence can only be admitted if it falls within one of the gateways set out in that Act.[199]

The key issue here then is what happens when proceedings are not considered to be criminal proceedings. There are different rules for civil proceedings, under the Civil Evidence Act 1995, which permits the admission of hearsay evidence into civil proceedings, with minimal safeguards.[200] Further, civil proceedings do not fall into Article 6(3) discussed above, and so there is no requirement for the exclusion of hearsay from civil proceedings. As such, a ruling on hearsay turns on the classification of a proceedings as civil or criminal. Returning to *McCann* then, we can see how this was applied to ASBOs. Lord Hope stated that, because ASBO proceedings were categorised as civil proceedings, hearsay evidence was admissible, and not only that but its use would be 'necessary in many cases if the magistrates are to be properly informed about the scale and nature of the anti-social behaviour and the prohibitions that are needed for the protection of the public.'[201] For injunctions then, which are likely to be similarly defined as civil proceedings, it is likely that the same approach would be taken. An

[196] ibid, [123].
[197] *R (McCann) v Manchester Crown Court* (n 121), [10].
[198] Criminal Justice Act 2003 ss114- 136.
[199] ibid, s114.
[200] Civil Evidence Act 1995, s 1 (1).
[201] *R (McCann) v Manchester Crown Court* (n 121), [77].

argument could, however, be made that a more restrictive approach to hearsay *should* be taken. That is, because of the potentially severe consequences of both an injunction and its breach, we could return to Lord Bingham's statement that civil proceedings ought to have a 'measure of procedural protection as is commensurate with the gravity of the potential consequences'.[202] Rather than a blanket assumption of admissibility of hearsay evidence, then, the courts could begin with a presumption of exclusion, and then consider the necessity of admitting the hearsay evidence in each case, when hearsay evidence is proposed.[203] After all, Lord Hope's inclusion of hearsay evidence reasoned that it may be 'necessary in *many* cases', not that it is always necessary. The Courts in civil proceedings are still bound to be compatible with the civil limb of the Article 6 right to a fair trial, and so this approach would be more flexible in allowing courts to exclude hearsay where, on balance, it would violate a recipients' right to a fair trial.

The situation for CBOs is slightly different, as these are proceedings after a criminal conviction, but are still considered a civil order.[204] The evidential rules for CBOs are found under the Criminal Procedure Rules Part 31, which set out: that a notice must be served if a party wants to introduce hearsay evidence,[205] that, within five days of that notice, a party may apply to cross-examine the person who made the hearsay statement (this is not a guaranteed right but the court cannot dismiss it without hearing the representations of that party);[206] that, within five days of the hearsay notice, a person may apply to challenge the credibility or consistency of the person who has made the hearsay statement (again this is not a guaranteed right).[207] It is notable that these largely reflect the rules set out in relation to hearsay evidence

[202] *Secretary of State for the Home Department v MB and AF* (n 159), [24].
[203] Civil Evidence Act 1995, s 2.
[204] Anti-Social Behaviour, Crime and Policing Act 2014 s22. Following the early discussion, it is also unlikely that they would be characterised differently by the courts.
[205] Criminal Procedure Rules 2020, 31.6
[206] ibid, 31.7.
[207] ibid, 31.8.

in civil proceedings,[208] and there is no requirement for the courts to make a determination of the *relevance* or *necessity* of admitting hearsay evidence for CBO proceedings. Again, an argument can be made then that this does not adequately protect the recipients' right to a fair trial. This argument holds even more strength in relation to CBOs because a breach of a CBO leads to direct liability for up to five years imprisonment or a fine.[209] As such, a recipient could be imprisoned for five years for doing acts or failing to do acts required by an order that was only granted on the basis of spurious evidence in relation to very broadly defined anti-social behaviour. The fair trial protections in the initial proceedings, therefore, should be commensurate with both the impact of the order on the recipient and the potential consequences on breach.

It does appear an argument could be made that there are Article 6 implications in relation to the procedural protections around injunctions and CBOs. In particular, there is a strong legal basis for arguing that the civil standard of proof is insufficient to protect the right to a fair trial of an injunction recipient. It would also be possible to challenge the blanket admission of hearsay evidence in injunction and CBO proceedings on the basis that the severity of consequences of these orders leads to a requirement for stronger procedural protections. Whether these arguments are accepted depends, as ever, on the forum in which they are made and the openness of the courts or Parliament to engage with them.

[208] Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999
[209] Anti-Social Behaviour, Crime and Policing Act 2014, s 30.

8.4.3 Challenging a Particular Civil Order

An individual recipient could also make an HRA-based challenge against a specific injunction or CBO during the proceedings for the granting of the order, on appeal,[210] or through judicial review. The difference with this approach is that it is the content of the specific order that would be challenged, rather than the powers to make the order or the process of making the order, and so the arguments would have to be similarly specific. As JUSTICE have noted, civil courts have 'shown themselves ready to make expansive orders highly restrictive of individual freedoms' and the vast majority of ASBOs were granted in the form applied for by the police or public authority, so 'it is to be doubted that a more restrained approach' to injunctions has or will be taken.[211] As such, the police have effectively been given wide discretion by the ASBCPA and the courts to apply for a broad range of prohibitions and requirements.

An individual challenge would have to make out then, that the prohibitions or requirements of that person's injunction or CBO infringed a particular right under an Article of the ECHR. Although it would depend on the content of the order, for sex workers such a challenge is likely to relate to Article 8 right to private and family life. This reflects the types of restrictions that sex workers have previously been given under these orders – eg. exclusion from geographical areas, prohibitions from association with particular people, prohibitions against carrying condoms, etc. ECtHR and domestic case law has interpreted Article 8 to include personal autonomy, dignity, physical and psychological integrity, and the right to develop relationships.[212] The jurisprudence of Article 8 was dealt with in detail in Chapter 7,

[210] It is worth noting, however, that legal aid is not available to appeal non-housing related injunctions under the ASBCPA – see Civil Justice Council, *Anti-Social Behaviour and the Civil Courts* (London: CJC, 2020), [172].
[211] JUSTICE, 'JUSTICE response to Proposed Changes to the Law on Anti-Social Behaviour' (2011), available at: https://justice.org.uk/proposed-changes-law-anti-social-behaviour/ (last accessed 3 July 2021).
[212] As explained in Chapter 7.

and as such, will not be repeated here. Instead, some key issues relating to injunctions and CBOs against sex workers will be drawn out and analysed. They are: whether an order could engage with and interfere with sex workers' rights under Article 8(1); whether anti-social behaviour is sufficiently well defined as to mean orders are 'in accordance with the law'; and what sort of proportionality tests should police and courts consider when applying for and granting an injunction or CBO against a sex worker.

Firstly, the question of whether a sex worker's Article 8 rights are engaged and interfered with due to an injunction or CBO would depend on the behaviour prohibited and/or required. While it is not possible to determine the merits of any particular claim that Article 8 has been engaged and interfered with without reference to specific orders, we can look at examples of types of restrictions that may interfere with Article 8 rights. For example, injunctions are sometimes used to keep sex workers out of large areas, which are often the areas lived in and worked in by those sex workers. This could potentially engage the right to respect for 'home' under Article 8(1). In *McDonald v McDonald*, Lady Justice Arden stated that the concept of home included 'the social and psychological attachment or bond that develops with one's accommodation, and neighbourhood, rather than simply with the concept of a roof over one's head'.[213] As such, while an injunction or CBO cannot exclude a person from their specific address unless there is a risk of violence to someone else that lives there, if an injunction effectively stops a person from being in their neighbourhood without risk of breach, then it could engage and interfere with their home. An alternative argument could be made where, for example, a sex worker was prohibited from carrying condoms. This would potentially engage and interfere with their Article 8 rights in relation to sexual freedom[214] as well as physical and

[213] [2014] EWCA Civ 1049, [12].
[214] *Stubing v Germany* [2012] ECHR 656.

psychological integrity[215] due to the potential impact on their sexual health. If the injunction or CBO prohibited the sex worker from having contact with particular people, this might engage in their right to private life and relationships.[216] An argument could also be made that where an order puts a sex worker at heightened risk of violence and crime, because they have been displaced from their ordinary beat and fellow sex workers, it could be argued that Article 8 was engaged with and interfered with because of the adverse effects on their physical and psychological integrity.[217] While there would need to be analysis of specific injunction or CBO terms in order to make such a challenge, it is apparent that there is at least the potential that an injunction or CBO would engage and interfere with Article 8 rights on a number of grounds.

Whether the interference was a violation of the sex worker's right would depend on whether it was justified under Article 8(2). The first question that is raised in relation to Article 8(2) is whether the interference is in accordance with the law. These powers stem from the ASBCPA and do, therefore, have a basis in domestic law.[218] This is not in itself sufficient to fulfil this test; the law must be sufficiently clear to enable individuals to act in accordance with it.[219] The lack of clarity of the definition of 'anti-social behaviour' could potentially form the basis of a challenge that it is not sufficiently certain for a person to foresee the circumstances under which an order might be made against them.[220]

A common requirement across injunctions and CBOs is the undefined nature of terms such as alarm, distress, nuisance and annoyance. This is particularly concerning in relation to sex work, where the very presence of sex work is often framed in such terms, and so no further

[215] *ABC v Ireland* (Application no 25579/05) (Judgment of 16 December 2010).
[216] *Mitovi v FYRM* (Application no. 53565/13) (Judgment of 16 April 2015).
[217] *Costello-Roberts v UK* (1993) 19 EHRR 112.
[218] *Groppera Radio AG v Switzerland* (1990) 12 EHRR 321.
[219] *Silver v UK* (Application no 5947/72) (Judgment 25 March 1983).
[220] *Fernandez Martinez v Spain* (Application no 56030/07) (Judgment 12 June 2014), [117].

behaviour beyond sex workers being in a public space may be needed to establish the requirements for these orders.[221] The JCHR, in its legislative scrutiny of this Bill, stated that the broad test for anti-social behaviour did not meet the requirements for legal certainty under the ECHR.[222] In Stavros Demetriou's qualitative research on the use of post-2014 ASB legislation, the majority of his participants, both police and local practitioners, felt that what falls within the limits of the statutory definition 'was quite difficult to conceptualise'.[223] The range of behaviour that could be regarded as anti-social depended on localities, with some being behaviour that 'on face value appears to be part of everyday life, to conduct which is already proscribed by criminal law'.[224] Some of his participants stated that the 'actual and potential impact on others, which is often marked by persistent and repetitive conduct'[225] is a key factor considered when determining if something should be considered ASB. The focus is on 'the needs of the victim'.[226] The impact of the behaviour is a key consideration for courts, but because there is no duty to consider the reasonableness of the victim's reaction, 'which in some cases may be disproportionate to the behaviour itself',[227] given 'the subjective nature of tolerance', this means that there is a broad spectrum of behaviours that could be considered to be ASB, for the purposes of injunctions and CBOs. Baroness Mallalieu, in the House of Lords debate on this legislation, also argued that whoever drafted this definition had found a way 'to take out those who are a nuisance or annoyance in any one of a thousand unspecified ways – and doing it in a manner that admits virtually no defence or safeguard and that requires the minimum of evidence'.[228]

[221] *Chief Constable of Lancashire v Potter* [2003] EWHC 2272 (Admin).
[222] Joint Committee on Human Rights, *Legislative Scrutiny: Anti-Social Behaviour, Crime and Policing Bill* (2013) HL Paper 56. HC 713, 16.
[223] S Demetriou, 'From the ASBO to the Injunction: A Qualitative Review of the Anti-Social Behaviour Legislation post-2014' (2019) *Public Law* 343, 351.
[224] ibid, 351.
[225] ibid, 352.
[226] ibid, 352.
[227] M Duggan and V Heap, (n 126), 62.
[228] Baroness Mallalieu (HL Debate 2013/14), quoted in M Duggan and V Heap, (n 126), 66.

There is also significant discretion for police and courts to apply for and grant orders even where action has not actually yet happened. The 'likely to cause' clause, and the discretion it gives to police and courts was characterised by one of Demetriou's participants as 'frighteningly subjective', while another stated that it was possible for these to 'be used inappropriately and disproportionately against people who do not have a voice, [such as] members of the street community'.[229] Given that the behaviour need not have occurred (and in particular, that the court need only be convinced on the balance of probabilities that it is likely to do so), it seems difficult for a person to be able to foresee with any precision when the circumstances arise that might lead to an injunction or CBO. In *Steel v UK*, the applicants similarly claimed that the definition of 'breach of the peace' was insufficiently precise and the ECtHR held that the concept had been 'clarified by the English Court over the last two decades' and was 'sufficiently established' to be in accordance with the law.[230] It is certainly possible, therefore, that an analogous approach would be taken to the definition of 'anti-social behaviour' which has also remained largely unchanged by statute for two decades.

The interference needs also to have a legitimate aim under Article 8(2). A legitimate aim for an injunction or CBO would be fairly easily established, probably 'for the prevention of disorder or crime' or for the 'protection of the rights and freedoms of others'.[231] The final key question, therefore, that could form the basis of a challenge against a specific order relates to whether the measures therein are necessary in a democratic society, and in particular whether they are 'proportionate to the legitimate aim pursued'.[232] In the case of *R v Avery, Nicholson, Avery and Meddhall*, it was held that interference with ECHR rights by ASBOs could be justifiable, but still had to meet the tests of necessity, prescription by law, and

[229] S Demetriou, (n 223), 353.
[230] *Steel v UK* (n 158), [66-67].
[231] Discussed in more detail in Chapter 7.
[232] *Olsson v Sweden* (1998) 11 EHRR 259.

proportionality.[233] Returning to the *Bank Mellat v HM Treasury* criteria, the necessity and proportionality of specific measures must be judged on the following criteria: that they are based on an objective 'sufficiently important to justify the limitation of a fundamental right'; that the measures are 'rationally connected to the objective'; 'whether a less intrusive measure could have been used'; and whether 'a fair balance had been struck between the rights of the individual and the interests of the community'.[234] This goes far beyond the requirements for an injunction that it is 'just and convenient' – a test which the JCHR stated was incompatible with the ECHR because 'it is a considerably lower test than the requisite standard of 'necessity and proporionate'.[235]

As such, it is key that the measures set out in specific injunction or CBO, whether prohibiting or requiring behaviour, are closely linked to the specific harms that the order seeks to address and do in fact have the capacity to address that harm. As JUSTICE have argued 'it should not form a personal code of conduct for an individual, with restrictions on association and large exclusion zones, nor should it be akin to a criminal sentence'.[236] Further in *W v DPP*,[237] a prohibition 'not to commit any criminal offence' was considered too wide and so the ASBO was held to be invalid. Any prohibition, therefore, must be both easily determinable, and linked clearly to the specific anti-social behaviour engaged in or threatened by the recipient.[238]

Many civil orders do not have this clear link to specific harms, and are in fact ineffective in dealing with them, and would therefore be disproportionate, on the *Bank Mellat* criteria. For

[233] [2009] EWCA Crim 2670.
[234] [2014] AC 700, [20].
[235] JCHR, (n 222), 37.
[236] JUSTICE, (n 211).
[237] [2005] EWCA Civ 1333.
[238] *R v Boness* [2005] EWCA Crim 2395.

example, the police in the area where Lisa Potter was given an ASBO, recognised that ASBOs are 'ineffective against street workers because of their chaotic lifestyles and need to support their own and maybe another person's drug addiction', so instead adopted a strategy of unofficial tolerance in part of the city.[239] Similarly, the Civil Justice Council have noted that where there are underlying mental health problems, homelessness, drug addictions, poverty, etc. giving a civil order preventing behaviours relating to these issues is unlikely to deter future behaviour, and so is likely to be ineffective.[240] It has been shown that civil orders against sex workers have the effect of merely displace them and, in fact, might make it more difficult for sex workers to transition away from sex work. One sex worker in Hester and Westmarland's study, for example, noted that she had been trying to exit sex work but the ASBO had resulted in difficulties getting rehoused.[241] As has been argued previously, simply displacing sex workers continues and exacerbates the context in which they are vulnerable to violence and stigma.

Further, some of the specific measures, such as excluding sex workers from large parts of the city rather than just the red light district are more intrusive than is necessary if the aim is to stop sex work in that areas. The necessity and proportionality of these measures, therefore, needs to be subject to more effective scrutiny, with consideration of these tests, particularly in relation to whether they can effectively respond to 'the problem' and also whether there are less intrusive ways to do so. This analytical framework would attempt to move away from a widely discretionary police approach, where proportionality is often considered by officers to be 'subjective' and 'commonsense' in relation to the 'needs of the community they serve'.[242]

[239] S Kingston and T Thomas, (n 79), 468.
[240] Civil Justice Council, (n 197).
[241] M Hester and N Westmarland, (n 100), 35.
[242] K Bullock and P Johnson, (n 7), 641.

8.5 Raids and Closures

The next set of police powers that this chapter will consider relate to raids and closures of brothels and sex work premises. A raid on a brothel falls under the powers and follows the same rules as a raid on any other business, as set out in the Police and Criminal Evidence Act 1984 (PACE). Police must apply for a warrant from a Magistrates' Court to search a premises and must show that there are reasonable grounds for believing an indictable offence has been committed; that there is material on the premises likely to be of substantial value to the investigation of the offence; and that the material is likely to be relevant evidence in relation to prosecution of that offence.[243] In relation to raiding brothels, a relevant indictable offence may be keeping a brothel,[244] controlling prostitution for gain,[245] causing/inciting prostitution for gain,[246] while police also often rely on trafficking[247] or modern slavery offences[248] for this purpose. Police may seize property including money, condoms, work rotas, menus of services, and diaries as evidence of such offences.[249] These raids may ostensibly appear to be responding to two of the problems of sex work, violence and problematic working conditions, but they, it will be shown may in fact worsen these problems and reinforce stigma against the sex workers subject to the raids.

Often after a raid, the police go on to make arrests and close the premises. The Policing and Crime Act 2009 (PCA) amended the Sexual Offences Act 2003 (SOA) to enhance police powers in relation to closing brothels and other premises related to prostitution.[250] This is a

[243] Police and Evidence Act 1984, s 9(1).
[244] Sexual Offences Act 1956, ss 33-36.
[245] Sexual Offences Act 2003, s 53.
[246] ibid, s 52.
[247] ibid, ss 57-59A; Modern Slavery Act 2015, s 2.
[248] Modern Slavery Act 2015, s 1.
[249] Police and Evidence Act 1984, s 9(1).
[250] Policing and Crime Act 2009, s 21

two-stage process. Firstly, the police may give a Closure Notice[251] where they have 'reasonable grounds for believing' that the premises are being used (or have in the last three months been used) for activities relating to one or more specified offences, [252] and it is necessary to make the closure order.[253] The police must then apply to the court within 48 hours to have a Closure Order granted, and the order is granted on the same grounds of reasonable in both the use of the premises and the necessity of the order.[254] Closure notices and orders can be given even when nobody has been convicted of any of the specified offences. The specified offences include, alongside pornography offences and child sexual exploitation offences, Controlling Prostitution for Gain,[255] and Causing/Inciting Prostitution for Gain.[256] Brothel keeping is not one of the offences that can form the basis of a closure order, but because of the breadth of definition of the two offences that are included, particularly Controlling Prostitution for Gain[257] since *R v Massey*,[258] this could include not only managed premises or brothels, but any premises where a sex worker works with a maid or security guard. A closure order under the SOA closes a premises to all persons, including owners and residents, for a period of up to 3 months.[259] Unlawful entry after a closure order is a criminal offence, punished with a fine of up to £5000 or imprisonment of up to 51 weeks.[260]

Police also have powers to close premises, under the ASBCPA 2014, where the use of the premises has resulted or is likely to result in nuisance to members of the public, or there has been or is likely soon to be disorder from those premises, and an order is necessary to

[251] Sexual Offences Act 2003, s136B
[252] ibid, s 136A (2).
[253] ibid, s 136B (6).
[254] ibid, s 136D
[255] ibid, s 53.
[256] ibid, s 52.
[257] See Chapter 3 and Chapter 7 for further discussion.
[258] [2007] EWCA Crim 2664.
[259] Sexual Offences Act 2003, s 136D (2).
[260] ibid, s 136G (5).

prevent that.[261] An initial order under these powers lasts no more than three months but can be extended for up to six months.[262] This order also has the power to exclude all people, including the resident or owner of the building during the period of closure.[263] These orders are focused on the broadly and subjectively interpreted 'nuisance', discussed above, rather than specifically relating to exploitation which are the supposed focus of the SOA closure orders. Police, therefore, enjoy extremely wide powers of discretion in relation to shutting down brothels, even when no actual exploitative crime, or any crime at all if it is only used by one person, has occurred.

In the following subsections I consider the use of raids and closure orders against sex work premises and their consequences, before addressing the human rights implications of such use. I consider when such raids may in fact be used to uphold sex workers' and others' human rights under Articles 3 and 4 of the ECHR, linking back to discussions on labour law in Chapter 4. I then move on to look at human rights issues raised during these raids and closures, under Article 8.

8.5.1 Use of Raids and Closure Orders against Sex Work Premises

Raids on brothels mostly 'take the form of heavy enforcement'.[264] They are often part of larger operations that conflate consensual sex work with exploitative practices such as controlling/causing/inciting prostitution for gain, and trafficking, and raids are undertaken together by the police and the UK Border Agency.[265] Raids, therefore, often have mixed targets

[261] Anti-Social Behaviour, Crime and Policing Act 2014, ss 76 and 80.
[262] ibid, ss 80-82.
[263] ibid, ss 80 (7).
[264] A Feis-Bryce, (n 22), 24.
[265] Based on powers under the Immigration Act 2016, Part 3.

and may result in arrests for both sex work offences and trafficking offences, alongside other offences, such as money laundering.[266] Concerns around trafficking were the basis for brothel raids in Soho in the 2013 in Operation Companion.[267] 250 police officers raided the Soho area with the ostensible aim of stopping trafficking and 'rescuing' victims.[268] The media was invited and photographs, including of women in their underwear, were taken.[269] Sex workers, after being made to go onto the streets, were forced to fill out 'welfare questionnaires', an action which Feis-Bryce calls 'an extreme manifestation of forced welfarism'.[270] No trafficking victims were found in Operation Companion, but most of the premises were closed down using the Closure Orders set out above, on the basis of controlling/causing/inciting for gain.[271] 18 of the 20 Closure Orders were successfully appealed and the premises reopened, with one judge noting that the sex workers who worked there had in fact paid together for their advertising sign, which police had tried to use as evidence of someone else 'controlling' their prostitution for gain.[272]

A further set of raids in Soho and Chinatown took place in October 2016, as part of Operation Lanhydrock, when police raided six massage parlours, stating their aim was to bring 'to justice those who see to profit from the exploitation of vulnerable people'.[273] Once again, the media were present at the raids taking photographs, and again, no victims of trafficking were found.[274] It is notable, however, that 26 sex workers were arrested for 'immigration

[266] Home Office and UK Border Agency, 'Brothel Raid Results in Arrests' *gov.uk*, 23 June 2011, available at: https://www.gov.uk/government/news/brothel-raid-results-in-arrests (last accessed 12 July 2021).
[267] E Cooper, (n 110), 550.
[268] M Townsend, 'Closure of Soho Brothels Raises Risks for Women, Says Local Priest', *The Guardian* , 23 February 2014, available at: https://www.theguardian.com/society/2014/feb/23/soho-brothel-sex-worker-raids-priest (last accessed 12 July 2021).
[269] ibid.
[270] A Feis-Bryce, (n 22), 24.
[271] B Silcox, 'Oh no, what happened to Soho? A West End burlesque of gentrification and excess' (2021) 6153 *Times Literary Supplement* 19.
[272] A Feis-Bryce, (n 22), 25.
[273] T Sanders and M Laing, (n 1), 4.
[274] ibid, 4.

offences' and some were subsequently deported.[275] NUM and other sex worker rights and outreach groups released a statement on these raids, noting that police paid 'scant regards for welfare despite claims to be addressing vulnerability'.[276] Raids have not been limited to London, with brothel crackdowns and subsequent arrests being documented in Blackburn, Walsall, Pontypridd, Glasgow, Cambridge, Luton, Plymouth, Bury, Teesside, Swindon, Kingsbury, and Surrey in just a six month period in 2015.[277]

Alternatively, entry and search of premises may be based on the more innocuously termed 'welfare check'.[278] In Scoular et al's research on internet sex work, some police forces described appearing at premises unannounced 'having ascertained they were being used for sex work, others where they posed as clients on phone or text to make bookings, appearing at the booking time but then identifying as police'.[279] Even if these visits are aimed at protecting workers, they can have deleterious impacts on sex workers. Many sex workers are not 'out' due to stigma and risks to other employment, housing, families, etc. and so being 'outed' to neighbours and others through these visits can have serious potential consequences.[280] Sometimes, these visits are to sex workers' homes, because that is the address given to clients, exacerbating any potential impacts. Sex workers who work online often use measures to protect their identity online, and this may be undermined by police interference and enforcement,

[275] National Ugly Mugs, English Collective of Prostitutes, Sex Worker Open University, Sex Work Research Hub, SCOT-PEP and Basis, *Joint Statement Expressing Serious Concerns about Police and UK Border Agency Actions Targeting Migrant Sex Workers* (2016), available at: https://basisyorkshire.org.uk/blog/joint-statement-expressing-serious-concerns-police-uk-border-agency-actions-targeting-migrant-sex-workers/ (last accessed 1 September 2021).
[276] ibid
[277] L Watson, 'Raids, Arrests, Prosecutions and Austerity Throughout the UK', in English Collective of Prostitutes (ed), *Decriminalisation of Prostitution: The Evidence. Report of Parliamentary Symposium, 3rd November, House of Commons* (London: ECP, 2016), 52.
[278] English Collective of Prostitutes, *Know Your Rights - A Guide for Sex Workers*, available at: https://prostitutescollective.net/know-your-rights/ (last accessed 12 July 2021).
[279] J Scoular et al, 'Beyond the Gaze and Well Beyond Wolfenden: The Practices and Rationalities of Regulating and Policing Sex Work in the Digital Age' (2019) 46 (2) *Journal of Law and Society* 211, 227.
[280] R Bowen, *Work, Money and Duality: Trading Sex as a Side Hustle* (Bristol: Policy Press, 2021) 153.

particularly where evidence gathering by police uses major sex work platforms.[281] The fear of police surveillance and potential outing can create obstacles for risk management strategies. Angela Jones describes the situation in the USA, where anti-trafficking laws have been used to remove sex work platforms and 'bad-date' review sites, stating that 'workers are careful about how much detail they use in communication with clients online, which affects their ability to rigorously screen customers'.[282] The term 'welfare check' appears to be positive and a way to protect sex workers from violence and managerial exploitation, but it may be more akin to a raid or search used for evidence gathering and as a method of enforcement. There have been cases where welfare checks have resulted in criminal charges and deportations. As Scoular et al note, this is aggravated when immigration authorities are present in operations.[283]

Raids can have significant negative impacts on sex workers caught up in them both at the time of the raid and subsequently. As Annie Hill has stated, 'women taken up in raids cannot refuse police orders, resist arrest and detention or stop the media from taking photographs' and that 'in this profoundly disempowering situation, the police and media objectify women in order to publicise state action against trafficking.'[284] Raids and subsequent closure orders, like other crackdown measures, have the effect of displacing sex workers, with Georgina Perry of Open Doors reporting that because of increased raids throughout London, there were 'more sex workers becoming transitory and working in less safe environments because the safer flats have been closed down'.[285] Sex workers who remain in brothels in the

[281] J Scoular et al, (n 279), 228.
[282] A Jones, 'FOSTA: A Transnational Disaster Especially for Marginalized Sex Workers' (2022, forthcoming) 2 *International Journal of Gender, Sexuality and Law,* 4.
[283] J Scoular et al, (n 279), 228.
[284] A Hill, 'How to Stage a Raid: Police, media and the master narrative of trafficking' (2016) 7 *Anti-Trafficking Review*.
[285] G Perry, 'Policing of Prostitution', in English Collective of Prostitutes (ed), *Decriminalisation of Prostitution: The Evidence. Report of Parliamentary Symposium, 3rd November, House of Commons* (London: ECP, 2016), 59.

area, because they see brothel work as safest, fear eviction if a further raid occurs.[286] For migrant sex workers, the impacts are exacerbated, as are the 'conditions for the exploitation of migrant workers by managers due to the workers being in constant fear of arrest and deportation'. [287] In fact, 'the juxtaposition of vulnerability narratives with traditional enforcement and deportation of migrant sex workers illustrates just how contradictory policy in this area can be'.[288] These impacts feed into concerns that sex workers, and especially migrant sex workers, have about reporting crimes against them to the police, for fear that it will alert police to the presence of the brothel and risk raids, arrests, deportations or closures.[289] As such, they feed into stigma, violence and exploitation. Moreover, money, phones and laptops are sometimes taken by police as evidence and not returned, or only returned when sex workers' rights groups have intervened.[290] In Operation Lanhydrock, tens of thousands of pounds were confiscated from the six massage parlours raided.[291] In sum, then, raids and closures can have serious consequences for sex workers' economic, privacy, and even residential freedoms.

In the next two sections, I consider how raids and closures interact with human rights obligations under the HRA. I begin by considering the positive obligations police may be under to investigate potential instances of slavery, forced labour, or trafficking under Article 4 of the ECHR and forced prostitution under Article 3. Articles 3 and 4 are absolute rights, meaning that interference cannot be justified, and so if an action is required under Articles 3 or 4, then

[286] M Singelenburg and W van Gent, 'Red Light Gentrification in Soho, London and De Wallen, Amsterdam' (2020) 35 *Journal of Housing and the Built Environment* 723, 733.
[287] K Cruz, 'Unmanageable Work, (Un)liveable Lives: The UK Sex Industry, Labour Rights and the Welfare State' (2013) 22 (4) *Social and Legal Studies* 465, 471.
[288] A Feis-Bryce, (n 22), 34.
[289] J Pitcher and M Wijers, 'The impact of different regulatory models on the labour conditions, safety and welfare of indoor-based sex workers' (2014) 14 (5) *Criminology & Criminal Justice* 549, 557.
[290] R Bowen, (n 280), 152.
[291] J Mac, 'Swoop and Rescue' *Verso Books Blog*, 21 October 2012, available at: https://www.versobooks.com/blogs/2895-swoop-and-rescue (last accessed 12 July 2021).

it need not be balanced against other rights. That said, *how* the action takes place might interfere with Article 8 rights of sex workers, and therefore particular processes might be challenged.

8.5.2. Article 4 and Forced Labour, Slavery and Trafficking

Article 4 is one of the absolute rights set out in the ECHR and prohibits slavery, servitude, and forced and compulsory labour. In Chapter 4, drawing on the ILO's Unacceptable Forms of Work framework and Article 4 of the ECHR, I argued that some conditions of sex work are legally unacceptable and violate the human rights of those working in those conditions. I noted that forced or coerced sexual exploitation, whether it amounts to trafficking or not, would violate Article 4. Article 4 does not specifically refer to trafficking, but was explicitly extended in the case of *Rantsev v Russia and Cyprus,* with the ECtHR stating that 'it is unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servititude" or "forced and compulsory labour"'.[292] Instead, the Court held that trafficking itself, within the meaning of the Palermo Protocol,[293] falls within the scope of Article 4. Further, in the recent case of *SM v Croatia*, the ECtHR held that forced and compulsory labour 'aims to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they are related to the specific human trafficking context'.[294] The Court has also held that forced prostitution is a violation of Article 3,[295] but this approach has not been so well developed. A human rights-based approach to sex work requires a robust response to these practices, yet that does not leave the police a carte blanche in *how* it responds. This section therefore analyses what is needed for the state to fulfil

[292] *Rantsev v Russia and Cyprus* [2010] (Application no 25965/04) (Judgment 7 January 2010), [282].
[293] UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, General Assembly resolution 55/25 of 15 November 2000
[294] *SM v Croatia* (2020) ECHR 193, [300].
[295] *Tremblay v France* (Application no 37194/02) (Judgment 11 September 2007).

their positive obligations to protect from trafficking and these types of forced and coerced sex work.

Article 4 creates positive obligations for the state to penalise and prosecute acts of slavery, servitude, or forced labour. In *Siliadin v France*, the ECtHR stated that states have a positive obligation to offer adequate criminal law to prosecute individuals who perpetrate these offences and to provide practical and effective protections against these actions.[296] In relation to trafficking, *SM v Croatia* expanded on this, saying that the positive obligations are:

i. the duty to put in place a legislative and administrative framework to prohibit and punish trafficking;
ii. the duty, in certain circumstances, to take operational measures to protect victims of trafficking; and
iii. a procedural obligation to investigate situations of potential trafficking.[297]

The first requirement is to create laws that prohibit these acts. This has been fulfilled in the UK, through the domestic laws on modern slavery and trafficking, which as discussed in Chapter 4, take a broader approach to trafficking than the Palermo Protocol. The obligation to create a legislative and administrative framework, however, goes beyond just creating a criminal law. In *Rantsev*, the ECtHR noted the 'operational choices that must be made in terms of priorities and resources',[298] but held that states must provide relevant training for law enforcement and immigration officials on trafficking.[299] They further held that Article 4 requires states 'to put in place adequate measures regulating business often used as a cover for human trafficking'.[300]

[296] *Siliadin v France* (Application no 73316/01) (Judgment of 26 July 2005), [148].
[297] *SM v Croatia* (n 294), [306].
[298] *Rantsev v Russia and Cyprus* (n 292), [287]
[299] ibid, [287]
[300] ibid, [284].

The final two obligations set out in *Siliadin*, relating to operational measures and investigating, arise when the state authorities 'were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an *identified* individual had been, or was at real and immediate risk of being, trafficked or exploited'.[301] In line with this, the Court held that 'once a matter has come to the attention of the authorities they must act of their own motion'.[302] In the recent case of *VCL v UK*, it was further held that if this situation occurs, there will be a violation of Article 4 if the 'authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk'.[303] This is a test of 'means not results', so 'the fact that an investigation ends without concrete, or with only limited, results is not indicative of any failures as such'.[304] The Court did note that this should be interpreted so as not to 'impose an impossible or disproportionate burden on the authorities'.[305] This is extendable to forced labour and servitude under Article 4, and so requires that the state not only criminalises forced labour, but that it provides an effective remedy in terms of investigation and protection.

What is apparent then is that the state is in fact obliged to properly investigate, and put in place measures to protect victims, where there is a credible suspicion of trafficking or forced/coerced prostitution of an identified person. It is notable that this does not mean that police have an obligation to raid a brothel because it has migrant sex workers working there and therefore *might* have links to trafficking. Police would be able, most times, to argue that raids on brothels or suspected sex work premises were in line with their obligations under

[301] ibid, [286].
[302] ibid, [288].
[303] VCL and AN *v UK* (Applications no 77587/12 and 74603/12) (Judgment of 16 February 2021), [152].
[304] *SM v Croatia* (n 294), [315].
[305] *VCL and AN v UK* (n 303), [154].

Article 4. It would be difficult to argue then, that these raids should not happen on a human rights basis. It is still possible to argue that *how* they take place goes beyond what is necessary for Article 4 and may in some cases be a disproportionate interference with sex workers' Article 8 rights.

8.5.3 Decision Making in Relation to Raids and Closures

There are a number of points at which there may be an interference with human rights during and after a raid. For example, the police's interactions with sex workers when raiding a brothel, invitations to media to photograph the sex workers, and conviction or deportation after a raid might all potentially engage with Article 8. There are also rules set out in the PACE Code A and B about police procedure when entering and searching property and searching people. I will firstly consider the polices' own rules on these raids to demonstrate how an HRA challenge could run concurrently with a claim under PACE. These claims also may influence each other; if it is found that there is a breach of PACE, it might be clear that the action is not 'in accordance with the law' and so any interference with Article 8 would be unjustified.

Under PACE Code B, at the point of entry, the police officer in charge must identify themselves and explain the authority under which entry is sought, unless alerting the occupier would frustrate the object of the search or endanger anyone.[306] Searches must also be made at a reasonable hour unless this might frustrate the purpose of the search.[307] As noted above, brothel raids often occur in the middle of the night and involve police entering with force. The police, however, would probably argue that this is necessary to avoid alerting potential

[306] Police and Criminal Evidence Act 1984, Code B 2013, [6.4]
[307] ibid, [6.2]

traffickers or those controlling/causing/inciting for gain. Both actions have the effect, however, of making the raids more frightening for the sex workers, who are faced with police breaking down doors and forcing them into the street at night.

PACE Code B also states that searches must be conducted 'with due consideration for the property and privacy of the occupier and with no more disturbance than necessary',[308] and that police should 'exercise their powers courteously and with respect for persons and property and only use reasonable force when this is considered necessary and proportionate to the circumstances'.[309] This is clearly not the case when the media is invited and sex workers are photographed in their underwear outside of a brothel. The fact that these raids purportedly relate to concerns that the sex workers within the brothel are victims of trafficking, modern slavery or controlling/causing/inciting for gain means that it is an especially grievous infringement to their privacy to photograph them. As Hill argues, 'in publicising the raid, the police and media participate in discriminatory practices that reproduce a master narrative of trafficking and cause harm to the women the state purports to protect.'[310] Even when the police's raid or welfare visit is less well publicised, the police's actions can have significant impact on the sex workers' privacy, as sex workers may be outed to neighbours or family, as discussed above.

Beyond PACE, these activities are also likely to interfere with sex workers' rights under Article 8. As has been discussed previously, sexual activity, even when commercial, can fall within the remit of Article 8. Moreover, Article 8 covers information, and images, over which a person might have a reasonable expectation of privacy, including about their sexual

[308] ibid, [6.10].
[309] ibid, [1.4]
[310] A Hill, (n 284).

activity.[311] In *Khelili v Switzerland*,[312] information that could identify a sex worker as such could engage Article 8, so this could be extended to other forms of 'outing' of sex workers to family, neighbours or the public. In *Lopez Ribalda v Spain*, the court also held that 'the right of each person to the protection of his or her image is thus one of the essential components of personal development and presupposes the right to control the use of that image'.[313] Moreover, the ECtHR has held that where visual data relating to private life is recorded and disclosed to the public, this can be a serious interference with the person's Article 8 right.[314] Even in the case of people arrested or under criminal prosecution, the ECtHR has held that releasing photographs to the press without the person's consent or giving photographs to the media was an interference with their right to respect for private life under Article 8.[315] In *Khuzin v Russia*, the Court held stated that just because the applicant 'was the subject of criminal proceedings did not curtail the scope of the enlarged protection of her private life that she enjoyed as an ordinary person'.[316] In that case the police had given the media the applicant's photo without her consent; this is analogous to a situation where the media are invited to take photos themselves.

A similar approach was taken in the case of *Richard v BBC*, where the court held that 'a suspect has a reasonable expectation of privacy in relation to a police investigation' and that 'I do not consider that a search warrant, without more removes the legitimate expectation of privacy'.[317] In that case, Cliff Richard was being investigated for historical sexual abuse, and was subject to immediate and extensive coverage from the BBC. Richard claimed that the BBC

[311] *Van Hannover v Germany No 2* (Applications no 40660/08 and 60641/08) (Judgment of 7 February 2012)
[312] *Khelili v Switzerland* (2011) ECHR 195.
[313] *Lopez Ribalda v Spain* (Applications no 1874/13 and 8567/13) (Judgment of 17 October 2019), [89].
[314] *Peck v UK* (Application no 44647/98) (Judgment of 28 April 2003), [63].
[315] *Khuzin v Russia* (Application no 13470/02) (Judgment 23 October 2008).
[316] ibid, [115].
[317] [2018] EWHC 1837, [248], [255].

violated his rights to privacy, and so the courts weighed his Article 8 rights against the BBC's right to freedom of expression. Factors taken into account included the general public interest, the status of the person involved, any relevant prior conduct of the person, the method by which the information was obtained, and the content, form and consequences of the publication.[318] So, even sex workers who may be subject to criminal investigation would still be protected in this way, but it is especially serious as the sex workers in this context are not necessarily under criminal prosecution and are being framed as victims of crime to justify the raid. The fact that the images of sex workers being walked out of brothels were taken by the media, on the invitation of the police, and published in the age of the internet, where the geographical and temporal scope for the public seeing them suggests an extremely serious interference with their private lives under Article 8. It is perhaps even more weighty that these photos are obtained because of a tip off from the police. In terms of closure orders, these also may interfere with sex workers' Article 8 rights when the working premises is also their home (as residents are prohibited entry during the duration of the order). There may also be consideration of an Article 14 claim if the brothel has been targeted specifically because of the presence of migrant sex workers, without further justification.[319]

In order to justify any Article 8 interferences, then, the state would have to demonstrate that they had a legitimate aim and that the actions were necessary in a democratic society. In relation to brothel raids, it is likely that the legitimate aim would be the protection of the rights of others (which would be Article 4 where the raid is based on suspicion of trafficking, modern slavery or controlling/causing/inciting for gain) or the prevention of crime (which is broader and may include brothel keeping offences). Yet, to be necessary in a democratic society these

[318] ibid, [276].
[319] *BS v Spain* (n 69).

actions would, as with previous discussions, have to be proportionate to that aim. It is difficult to see how forcing sex workers into the street to be photographed, or outing sex workers to their neighbours, family and public through these raids, or pushing sex work further underground as a consequence of raids could effectively tackle any of those crimes. These are quite clearly disproportionate interferences with the right to respect of private life of these sex workers. Similarly, if and when it is clear that there are no crimes relating to controlling/causing/inciting for gain to justify a SOA closure order, because, for example, it is a cooperative premises run by sex workers, then any continuing closure order would be disproportionate to the aim of protecting sex workers from those offences.

The conviction and deportation of migrant sex workers after raids might also violate their rights. The Court has held that prosecuting victims of trafficking, even where they are compelled to commit criminal activity, may be at odds with the State's obligation to protect them. In *VCL v UK*, they stated:

> It is axiomatic that the prosecution of victims of trafficking would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in future. Not only would they have to go through the ordeal of a criminal prosecution, but a criminal conviction could create an obstacle to their subsequent integration into society.[320]

As such, if police identify any potential victims of trafficking in raids, then to convict them of sex work offences or deport them through immigration offences, would potentially breach the states' obligations under Article 4, and certainly goes against the spirit of the law. What is

[320] *VCL and AN v UK* (n 303), [159].

notable, however, is that despite raids often being justified on the basis of preventing trafficking, sex workers taken from the raids are rarely found to be victims of trafficking.[321] While migrant sex workers are often caught up in anti-trafficking organisations, they do not enjoy the protections offered to trafficking victims. Therefore, migrant sex worker would have to look elsewhere to challenge deportation.

The ECtHR has held that each member state has to power to control who can enter and reside in the country,[322] and is not under an obligation to allow a migrant to remain.[323] As a general rule, however, deportations might violate Article 8 unless it is shown that is is in accordance with the law and necessary in a democratic society.[324] For instance, if deportation would create prolonged separation form their families,[325] or would separate parents from their children,[326] then it might create an interference with the deportee's Article 8 right to family life. In these instances, the Government must show that the deportation is necessary and proportionate. The National Immigration and Asylum Act 2002 Part 5A sets out a structure for the proportionality tests. Any immigration tribunal must consider the public interest in immigration controls; the ability of the claimant to speak English and be financially dependence; any weight accorded to family life; and whether any crime has been committed.[327] The weight given to family life will depend firstly on whether there are any 'insurmountable obstacles' or exceptional circumstances in continuing family life in the case of deportation.[328] In those cases, there might be some protection afforded against deportation to sex workers

[321] In part because of the difficulty in separating trafficking and smuggling, as discussed in Chapter 4.
[322] *Abdulaziz, Cabales, and Balkandali v UK* (Application nos 9214/80, 9473/81 and 9474/81) (Judgment of 28 May 1985).
[323] *Jeuness v The Netherlands* (Application no 12738/10) (Judgment of 3 October 2014), [101].
[324] *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27.
[325] *Huang v Secretary of State for the Home Department* [2007] UKHL 11.
[326] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.
[327] National Immigration and Asylum Act 2002, s 117.
[328] *Huang v Secretary of State for the Home Department,* (n 325), [48].

involved in raids. As we have seen, however, raids often do result in a high number of deportations, suggesting that the narrow circumstances that are considered weighty apply very rarely in migrant sex work cases.

8.6 Responding to Reports of Crime

The final issue that will be considered in this chapter is the police's obligations under the HRA when a crime against a sex worker is reported. As has been noted, the percentage of crimes against sex workers that are reported to the police is small. If a crime is not reported, then the police's capacity to respond to it is obviously extremely limited. There is evidence discussed earlier in this chapter, however, that sometimes when sex workers report crimes against them they are not believed or told that it should be expected, and no investigation is undertaken. As Goldstein has noted, police decisions not to investigate or report that constitutes a criminal offence, 'does not ordinarily carry with it consequences sufficiently visible to make the community, the legislature, the prosecutor, or the courts aware of a possible failure of service'.[329]

Failure by the police to report or investigate a rape or serious physical assault maybe a breach of their positive obligations under Article 3. As discussed earlier, rape and serious physical violence can engage the Article 3 right to freedom from inhuman and degrading treatment. While that discussion considered direct instances of abuse, the ECHR does create positive obligations on the state, under certain circumstances, where a private citizen has perpetrated the violence. The leading case on this is *MC v Bulgaria,* in which the ECtHR held

[329] J Goldstein, 'Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice' [1960] 69 (4) *The Yale Law Journal* 543, 552.

that 'in a number of cases, Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation'.[330] Domestically, the Court of Appeal case of *D v Commissioner of Police for the Metropolis*[331] considered the parameters of this duty and how to apply this to a domestic context. In this case, the claimants reported their rapes to the police but neither proceeded further after an initial brief investigation; the perpetrator went on to commit in excess of 100 rapes and sexual assaults before being arrested and charged.[332] Unlike in *MC v Bulgaria*, the law on rape was not complicit in the failure to fulfil the duty, and so the focus was on the police actions and failures to act.[333] Detailed analysis was given to the parameters of the obligation when this case was heard in the High Court, with Justice Green stating that the state had a duty to investigate 'in an efficient and reasonable manner capable of leading to the identification of the perpetrator'.[334] He went on to say that there had been systemic failures in the police's investigation of these cases, which were: "(i) failure properly to provide training; (ii) failure properly to supervise and manage; (iii) failure properly to use available intelligence sources; (iv) failure to have in place proper systems to ensure victim confidence; and (v) failure to allocate adequate resources."[335] There were also multiple operational failures found, including 'failure to collect relevant CCTV evidence',[336] assuming the victim was 'a drunk or an addict', so failing to 'identify her as a victim of a serious crime',[337] and failing to record the incident as a serious sexual offence.[338] Upholding these findings from High Court, Lord Justice Laws stated that there was a sliding scale of acts under Article 3, from deliberate torture by the state to consequences of negligence by non-State agents.[339] He held

[330] *MC v Bulgaria* (n 74), [151].
[331] [2015] EWCA Civ 646.
[332] J Conaghan, 'Investigating rape: human rights and police accountability' (2017) 37 (1) *Legal Studies* 54, 59.
[333] *DSD and NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436, [238].
[334] ibid, [216].
[335] ibid, [245].
[336] ibid, [291].
[337] ibid, [292].
[338] ibid, [310].
[339] *D v Commissioner of Police for the Metropolis* [2015] EWCA Civ 646, [45].

that violent crime by a non-State agent, as was the case here, is higher up the scale and so a 'proper criminal investigation by the State is required'.[340]

In terms of reports of crimes against sex workers to the police then, following the 'sliding scale' approach, what is required from the police depends on the crime reported by the sex worker. Where this is a crime of serious violence or rape, however, it is clear that the police must provide a 'proper investigation', including evidence gathering, taking statements, conducting proper interviews of any suspect, and recording the incident as a serious offence.[341] Failure to do so may be a breach of the police's positive obligations under Article 3. In particular, telling a sex worker to expect it, or not taking a record of it at all, especially where this is because she is a sex worker, would likely be an infringement of her rights and the police's positive obligations under Article 3.

8.7 Conclusion

In this chapter, I considered a number of key areas in which police actions may interfere with sex workers' rights under the ECHR. Policing of sex work will inevitably create interferences with rights, but a more thorough understanding of these tension points allows for a more rigorous scrutiny of decision-making and proportionality by both the courts, on appeal or through judicial review, and by the police themselves in their everyday decision making, in line with their public authority duty under s 6 of the HRA

[340] ibid, [45].
[341] ibid, [76].

This chapter began by considering the wide discretion police enjoy in relation to policing sex work, highlighting again that the broad drafting of the laws on sex work leave significant space for discretionary decision making by the police. Moreover, I highlighted that many ways police exercise discretion are practical and are not usually open to scrutiny – these include which streets to patrol and who to arrest. This allows police to insert their own prejudices into the policing of sex work. While there has been guidance published by the National Police Chief's Council that encourages a move away from enforcement, this is not enforceable and there is no requirement for forces to have a policy on policing sex work. Research also suggests that there is scant knowledge of the guidance among police, so the impact of the guidance is narrow. The inconsistency of approaches between police forces and even among individuals means that while some sex workers have had positive experiences with police, others have experienced humiliation, lack of sympathy, and harassment. As has been noted earlier in this thesis, avoidance of such experiences can lead sex workers to working in poor conditions, and with increased risk of violence. These experiences can also increase stigma faced by sex workers, and impact the trust sex workers place in police, leading to reduced reporting of crimes. As such, the problems highlighted in Chapter 2 of this thesis can be exacerbated by problematic policing.

The chapter then moved on to consider how particular actions by the police might violate sex workers' human rights, beginning with an examination of direct acts of abuse by police, including physical and sexual violence. It was demonstrated in this section that physical or sexual violence from police could in some instances meet the threshold for torture and inhuman and degrading treatment under Article 3 ECHR, and because police are state actors, these actions could therefore amount to violations of that Article. It was, however, noted that direct

acts of abuse are rare and so there must also be a consideration of other situations where human rights interferences may occur.

Moving on to consider the use of civil powers under the ASBCPA, particularly injunctions and civil orders, this chapter examined the breadth of these powers and the definition of anti-social behaviour upon which they rely, highlighting the wide scope these give police to curtail sex workers' activities, and require action from sex workers to address their behaviour. This can have a range of deleterious effects on sex workers, including breaking up peer networks and displacing sex workers from their usual beats, increasing risk of violence. Anti-social behaviour powers can also increase the stigma faced by sex workers, as sex workers' presence alone can be the basis for an order, thus symbolically and spatially separating them from the rest of society. I considered whether these orders could be challenged on their own terms under the Article 6 right to a fair trial, particularly in relation to the standard of proof for injunctions and the admission of hearsay into proceedings for injunctions and CBOs. I argued that these procedural rules insufficiently could amount to a violation of the right to a fair trial, but that any such claim may well be unsuccessful based on previous jurisprudence and deference to Parliament. I then explored whether, rather than the statutory framework, specific orders may create unjustified interferences with sex workers' rights under Article 8, arguing that some terms of civil orders that have been given to sex workers are clearly disproportionate to the aim of reducing nuisance and annoyance. However, I noted that the internal requirement for an injunction to be just and convenient is insufficient for the necessity and proportionality tests set out by the ECHR. As such, a more rigorous analysis of proportionality is required to challenge particular terms, and to frame police and court practice in the use of these civil powers.

The chapter then turned to consider the impact of raids and closures of brothels on sex workers, noting the increased powers police have in this regard. I considered how these have been used heavily in certain areas, impacting on sex workers' capacity to work safely, and also risking sex workers being outed and thus increasing the impact of stigma on their lives. I also noted that these raids rarely find victims of trafficking but do often result in criminal convictions and deportation of sex workers. Because forced prostitution and forced labour violate Articles 3 and 4 of the ECHR, I examined the positive obligations that police owe, and when raids may be required to meet those obligations, noting that this does not give police a carte blanche to use these measures without consideration of their impacts. I then analysed the Article 8 implications of some of the polices' decisions when undertaking these raids, such as inviting media, outing sex workers, and deporting sex workers, arguing that under Article 8, the way that raids are carried out must be both lawful under PACE and proportionate to the aim pursued. I argued that the impact of the raids and the methods of undertaking the raids often creates disproportionate interferences with sex workers' Article 8 rights due to outing, or for migrant sex workers, deportation.

Finally, I examined the extent of the police's positive obligations towards sex workers when they report crimes, drawing on ECHR and domestic case law to demonstrate that where sex workers report serious crimes to police, the police owe them a positive duty under Article 3 to properly investigate and take seriously the report. Therefore, any failure to do so, or dismissal of sex workers' claims may breach Article 3.

Overall, there are human rights implications in a whole range of police interactions with sex workers. On the one hand, police must not interfere with sex workers' rights to private life beyond what is necessary and proportionate to achieve a legitimate aim, or rights to freedom

from degrading treatment at all. On the other hand, police owe positive obligations to adequately investigate activities by private citizens that may amount to inhuman and degrading treatment or forced labour or trafficking. Therefore, it is crucial that police have a good understanding of their obligations and duties under the HRA and that this is at the forefront of all decision making, rather than the HRA simply providing a set of tick-boxes for police to fill in. More robust, HRA-informed, and universal guidance on policing sex work should be considered, to support police to fulfil their obligations as a public body under s 6 of the HRA, and to ensure that sex workers' human rights are prioritised by the authorities.

Chapter 9

CONCLUSION

9.1 Sex Work as a Human Rights Issue

This thesis takes the position that sex work is a human rights issue. Reflecting divisions around the sex industry more generally, debates around the human rights implications of sex work are divided, with some arguing that prostitution is inherently a human rights violation,[1] and others arguing that it is laws and related conditions of sex work that violate, and create the context for violation, sex workers' human rights.[2] Having examined this debate in the introductory chapter, this thesis takes the latter position, and adds to the growing number of activists, academics, and international bodies[3] calling for changes in law and policies around sex work to ensure that sex workers' human rights are upheld. This thesis has filled a gap in knowledge in relation to how such broad claims to human rights might be translated by using the HRA, the only human rights instrument that incorporates a human rights convention into domestic law. The HRA allows for challenges within domestic courts and provides a framework for drawing on specific rights when lobbying Parliament. There has been no previously published work that analyses the potential role of the HRA in the sex worker rights' struggle, and so this thesis is original, timely and important.

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[1] See, for example, C MacKinnon, 'Prostitution and Civil Rights' (1993) 1 *Michigan Journal of Gender and Law* 13; CATW, *International Meeting of Experts on Sexual Exploitation, Violence and Prostitution: Final Report* (Pennsylvania: UNESCO and CATW, 1992).

[2] International Committee for Prostitutes' Rights (ICPR), *World Charter for Prostitutes' Rights,* Amsterdam 1985, reprinted in G Pheterson, (ed), *A Vindication of the Rights of Whores* (Washington: Seal Press, 1989),

[3] UNAIDs, *Guidance Note on HIV and Sex Work* (Geneva: UNAIDS, 2012) UNAIDS/09.09E/JC1696E; Global Commission on HIV and the Law, *HIV and the Law: Risk, Rights and Health* (New York: Bureau for Development Policy, 2012); UNAIDS, UNDP, and UNFPA, *Sex Work and the Law in Asia and the Pacific: Laws, HIV and human rights in the context of sex work* (Bangkok: UNDP Asia-Pacific Regional Centre, 2012), 29; UN General Assembly, *Written statement submitted by the Global Alliance Against Traffic in Women, a non-governmental organization in special consultative status: The need for a critical approach to 'demand' discourses in work to end human trafficking* 10 May 2013 A/HRC/23/NGO/29.

This thesis considers the law relating to sex work[4] in England and Wales[5] through the lens of the Human Rights Act 1998 (HRA). It examines how laws on prostitution, and policy and policing practice around sex work can and do violate sex workers rights under the European Convention on Human Rights (ECHR). It also analyses the mechanisms within the HRA to consider how and to what extent it could be used to respond to these human rights violations. This thesis argues that a number of laws on prostitution - namely laws on soliciting,[6] brothel keeping,[7] controlling prostitution for gain,[8] and causing and inciting prostitution for gain[9] – violate Article 8 of the ECHR by forcing sex workers to choose between working legally (selling sex is legal), and safely. Soliciting laws might also violate street workers' rights to freedom of expression under Article 10, though this is a less obvious and disproportionate interference than the Article 8 one because the effects of the laws more clearly interfere with autonomy and security of the person than expression. Some sex workers may also be subject to violations of their Article 14 right to freedom from discrimination in their enjoyment of their convention rights. This thesis has also shown that policing practices have the potential to violate sex workers rights under Article 8, Article 3 on freedom from torture and inhuman and degrading treatment, Article 4 on forced and compulsory labour and Article 6 on the right to a fair trial.

This thesis then examined whether, in light of these real and potential violations, the HRA can provide sex workers remedy. The HRA creates obligations on the courts and public authorities that can be drawn on to challenge violations of ECHR rights. Laws and police action

[4] The term sex work is used in this thesis to refer to the provision of direct sexual services. This is further explained later in this chapter.
[5] This thesis analyses only those laws relating to sex work in England and Wales, which will be set out in full in Chapter 3. The laws relating to sex work in Scotland and Northern Ireland are devolved and differ from those in England and Wales and, as such, a full analysis of these laws is beyond the scope of this thesis.
[6] Street Offences Act 1959, s 1.
[7] Sexual Offences Act 1956, ss 33-36.
[8] Sexual Offences Act 2003, s 53.
[9] Sexual Offences Act 2003, s 52.

can, firstly, be challenged through court cases. I argue that, in relation to legislation, this is unlikely to provide the solution sought by sex workers. There is no European consensus on sex work and states are likely to be afforded a wide margin of appreciation on this matter. Where there is a lack of clear guidance from Strasbourg jurisprudence and the subject matter is considered to fall within the state's margin of appreciation, domestic courts are inclined towards deferring to the Government and Parliament on how best to balance competing rights and interests. The possibility that a domestic court would go against the established interpretation of these impugned laws or provide a Declaration of Incompatibility is small. Moreover, while a successful claim would have benefits across the sex industry, this still requires someone to bring the claim. Sex workers rights organisations and charities can and do support claims, but due to rules on standing, there must be a sex worker willing and able to be the claimant in such a case. This has been a key limitation so far. Courts are, it is argued, more likely to find violations by public authorities, such as those discussed in relation to the police. Such challenges, however, rely on the facts of the case, and the impact can therefore be limited to the specific claimant. Many sex workers, due to their marginalised status, lack of access and knowledge, and stigma around being 'out', are not in a position to access courts in this way. Therefore, while more likely to be successful, such challenges are out of reach for many.

An alternative approach is to use human rights, and the clear examples of human rights violations apparent in sex work law, policy, and policing, to lobby for change to the law and to policing approaches. Human rights provide a language of political and legal power that represents a demand for inclusion, participation and equality in the political sphere so they can be an important tool for sex workers. This strategy also is not reliant on individual sex workers being able or willing to litigate. Parliament, however, remains sovereign under the HRA, so there is no obligation for them to change legislation even where it is clear that there are

violations, as I argue there are. Moreover, sex workers' rights claims not only have to compete with communitarian interests but also alternative human rights arguments posited against sex work. This has two implications: first, Parliament can choose which approach most appeals to them; and secondly, despite these limitations, not using the political power of rights cedes the terms of the debate to the 'other side'. This thesis therefore argues that while the internal structure of the HRA and ongoing deference to Parliament makes it difficult for sex workers to have their rights uphold, it is important to know where these violations take place, highlight them, and continue to lobby for change.

9.2 The Aims of the Thesis Restated

In the introduction to this thesis, I set out the key objectives of this research. They were:

1. To delineate the problems surrounding sex work around which law and policy should be focused, by examining and rethinking what we know about sex work and how this knowledge has been constructed into narratives about the problem of sex work.
2. To consider if and why reform of the law is necessary, by evaluating the ways the current legal response to sex work in England and Wales responds to these problems, fails to respond to them, or worsens the impacts of these problems on sex workers' lives.
3. To consider how a human rights approach supports, but goes beyond, a labour-based approach to regulating sex work, by examining the benefits and limitations of regulating sex work through labour law and labour rights.
4. To critically evaluate how the HRA could be used to reform the law around sex work: considering the benefits and disadvantages of using human rights discourse at all; examining the constitutional limitations of the HRA; exploring the possible arguments

that could be made in relation to challenging the current law using the HRA; and analysing the ways in which a human rights approach could be used to inform relations between sex workers and public authorities such as the police.

The conclusions drawn on each of these objectives are discussed below.

9.3 The Problems Surrounding Sex Work

To assess the ways both the current legal response to sex work and frame analysis of a human rights based approach, the problems to which the law on sex work should respond need to be examined and delineated. In Chapter 2, this thesis drew on social sciences research around the complex markets and lived experiences of sex work to understand not only empirical realities of sex work, but how these realities have been moulded into narratives about the problems of sex work. This chapter challenged the dominant narratives of sex work as a form of deviancy or as inherently violence against women, arguing that these fail to recognise the heterogeneity of the sex industry. Moreover, I argued that these approaches obscure other structural forces such as race, poverty, sexuality, and capitalism that impact the organisation of the sex industry.

This chapter delineated three interconnected problems that sex workers face, recognising that the extent to which they affect sex workers depends on a range of factors, including the markets in which they work, their backgrounds, marginalised identities, and lived experiences. The three problems set out are: stigma, risk of violence and crime, and poor working conditions. Stigma is a consequence of framing sex work as deviant and sex workers as others, and symbolically and spatially segregates sex workers from society. This in turn can have negative impacts on sex workers' health, risk of violence and crime, and access to services.

Linked closely to stigma, sex workers face serious risks of crime and violence being perpetrated against them. This is varied across markets and the risks are managed by sex workers as far as possible within the regulatory and social context, and dependent upon their personal circumstances and abilities. Many sex workers also work in poor working conditions; the management practices and conditions of their work vary significantly by sector and by the relative power of the sex worker, in terms of class, race, migrant status, etc. These problems underpin the analysis of the rest of the thesis, providing a framework for assessing the impacts of both the current law and alternative labour based and human rights based approaches to sex work.

9.4 The Current Legal Response to Sex Work

This next objective of the thesis was to evaluate the current legal responses to sex work, to consider if and why reform of the law is necessary. In Chapter 3, I examined the statutory and case law relating to sex work in England and Wales, to argue that the law and the ways it is inconsistently enforced by the police, exacerbate the problems set out in Chapter 2. Tracing the development of the law from the 19th century onwards, this chapter demonstrated that the law is based on and reproduces cyclical narratives around sex work, concurrently framing it as a form of nuisance and exploitation. This reinforces the stigma against sex workers, who are constructed in opposition to the rest of the citizenry as 'offensive' or in terms of victimhood. By reflecting on the narratives that inform the law, this chapter placed the law in its social and cultural context, which allowed a much more critical consideration of the possible success of human rights challenges in later chapters of the thesis.

Chapter 3 performed a close analysis of the specific laws regulating to sex work, arguing that many of the laws are poorly or broadly defined in statute allowing both an expansive interpretation in courts, and wide discretion in the policing of sex work. I argued that the law on soliciting and loitering[10] exacerbates the marginalisation of sex workers and provides significant powers for police that displace sex workers into remote areas, breaking up peer networks, and reducing sex workers' capacity to manage risk. As a result, sex workers face increased risk of violence and crime against them. As such, I argued that these laws should be reformed or repealed. This would also have the effect of removing the alternative disposal, Engagement and Support Orders,[11] which I argued increase stigma against sex workers and may reduce engagement with support services.

This chapter examined the laws on brothel keeping[12] and causing/inciting[13] and controlling prostitution[14] for gain, noting that while these have been framed as ways to reduce exploitation against sex workers they have been widely interpreted. These laws have the combined effect of putting sex workers who work together or with a third party for safety at risk of breaking the law. This forces sex workers to choose between working safely or working legally. Some sex workers choose to work alone to avoid criminalisation, and this increases their vulnerability to crime. Others prefer to work in brothels for safety, but this can push them into poor working conditions within which they have little control. As such, I argued these laws should also be reformed or repealed. These arguments formed the basis for analysis in Chapter 7 of the thesis on how the HRA might be utilised to challenge these laws under Articles 8, 10 and 14 of the ECHR.

[10] Street Offences Act 1959, s 1.
[11] Policing and Crime Act, s 17.
[12] Street Offences Act 1956, ss 33-36.
[13] Sexual Offences Act 2003, s 52
[14] Sexual Offences Act 2003, s 53.

This chapter also considered policing approaches to sex work, finding that police not only have sex work specific offences that they can enforce, but that they use a range of further powers, such as civil orders and closure orders to respond to sex work. Therefore, removing the impugned laws on sex work would not necessarily mean that sex workers were free from unjustified police interference. Inconsistency across policing approaches further reduces sex workers' trust in the police, reducing reporting of crimes. This discussion highlighted the need for consideration of the potential impact of the HRA not only on sex work law, but also on policing practices, which is done in Chapter 8 of the thesis.

9.5 A Labour Approach and its Limitations

To demonstrate how a human rights approach supports but goes beyond a labour-based approach to regulating sex work, it was necessary to examine the benefits and limitations of labour law to respond to stigma, risk of violence and poor working conditions. Due to the nature and focus of labour law, working conditions was the problem most apparent in this analysis but Chapter 4 also demonstrated that recognising and regulating sex work as work can have an indirect impact on the violence and stigma faced by sex workers. This chapter drew on the ILO's Decent Work Agenda[15] and its subsidiary Unacceptable Forms of Labour,[16] as well as ECHR jurisprudence around Article 4 to delineate acceptable minimum standards of work. It recognised that there are some conditions, such as child sexual exploitation, and forced prostitution, that are so bad that more direct interference by the state, through criminal law, is needed.

[15] R Anker, I Chernyshov, P Egger, F Mehran and J Ritter, *Measuring Decent Work with Statistical Indicators* (Geneva: ILO, 2002).
[16] D McCann and J Fudge, *Unacceptable Forms of Work (UFW): A Global and Comparative Study* (Geneva: ILO, 2015.

Beyond these Unacceptable Forms of Labour, there remained a focus in Chapter 4 on labour law and its potential to improve working conditions (and indirectly reduce stigma and violence) for sex workers. Current employment law and labour rights in England and Wales are primarily framed around the traditional employee relationship, meaning that many rights would be unavailable to sex workers even if consensual sex work were no longer subject to criminal law. While some sex workers may fall within the definition of 'worker', especially since the Supreme Court decision in *Uber v Aslam*,[17] it was argued that many sex workers will be still categorised as self-employed, following the approach taken by the Court of Appeal in *Quashie*.[18] As such, many sex workers would be ineligible for even the most minimal of labour rights, and labour law's capacity to improve the working conditions of sex workers is therefore restricted. Even where eligible, the nature of these rights, for example minimum wage[19] and working time,[20] may provide a floor of rights, but would be unlikely to improve the situation for many sex workers, particularly those who choose sex work as an alternative to minimum wage work. As such, the current framework of labour law in England and Wales can provide limited benefit in light of the multiple ways that sex work is organised.

Chapter 4 then considered sector-specific labour laws for sex workers, noting that sector specific laws had been used in other labour sectors, such as domestic work. A comparative examination was performed of a range of labour approaches relating to sex work, including New Zealand,[21] where there is minimal involvement of the criminal law, and Germany,[22] the

[17] [2018] EWCA Civ 2748.
[18] [2012] EWCA Civ 1735.
[19] National Minimum Wage Act 1998.
[20] Working Time Regulations 1998.
[21] New Zealand Prostitution Reform Act 2003; New Zealand Health and Safety in Employment Act 2002.
[22] Act Regulating the Legal Situation of Prostitutes (Prostitution Act) 2002.

Netherlands,[23] parts of Australia,[24] and Nevada,[25] where sex work is permitted under some highly controlled conditions, but otherwise remains within the remit of the criminal law. It argued that a number of provisions used in New Zealand could be used as a model for framing a potential labour approach in England and Wales, due to the improvements they have created in terms of working conditions and reduced stigma and violence. This example also demonstrates that sector-specific labour regulation can be used by sex workers to uphold their rights. Any such sector-specific labour framework would need careful consideration of the specific cultural context and to ensure that it promoted sex workers' human rights rather than increased state control. Although labour rights can be understood as a subset of human rights, a human rights approach must go beyond the labour relationship to consider the sex worker's wider inclusion and interactions with the state.

9.6 The HRA and Sex Work

A critical evaluation of how the HRA could be used to reform law and practice around sex work, and reduce the problems faced by sex workers, required consideration of a number of questions, forming four chapters in the thesis. Firstly, this thesis, in Chapter 5 considered whether and why human rights should be used by sex workers at all and what the disadvantages of this approach are. Secondly, Chapter 7 questioned how the HRA could be used to bring a challenge to some of the sex work offences that worsen the problems of sex work. In Chapter 8, I examined the ways policing of sex work might create unjustified interferences with sex

[23] On 1 October 2000, Articles 250bis and 432 were removed from the Criminal Code thus lifting the ban on brothels and pimping.
[24] In Australian Capital Territory and New South Wales, sex work is decriminalised by the ACT Prostitution Act 1992 and The Disorderly Houses (Amendment) Act 1995 respectively. In Victoria, Queensland and The Northern Territories, some sex work is licensed under the Prostitution Control Act 1994, Queensland Prostitution Act 1999 and Northern Territory Prostitution Regulation Act 1992 respectively.
[25] Nevada has allowed legal brothels in some rural counties since 1971. See B Brents and K Hausbeck, 'Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy' (2005) 20 (3) *Journal of Interpersonal Violence* 270.

workers rights under the ECHR, and how the HRA could be used to challenge these and improve policing practice, to reduce stigma and violence and ensure adequate investigation into unacceptable forms of work. Chapter 6 provided an explanation of the procedural framework for these challenges and also highlights the limitations of the HRA that stem from both its constitutional status and judicial deference to Parliament.

9.6.1 The Importance of Human Rights for Sex Workers

While sex workers have long been arguing to have their human rights recognised, it is important to examine what human rights are, what functions they serve, and how beneficial they might be to sex workers. In Chapter 5, I examined legal theory around human rights to evaluate their emancipatory potential for sex workers, before moving on to consider the HRA specifically in Chapters 6, 7 and 8. In this chapter, I argued that although rights are not a perfect tool, they can offer a powerful legal and political framework to manage sex workers relationships with the state, protecting them from unjust interference and allowing them to make demands. Importantly, I argued that for a marginalised group such as sex workers, the discourse of rights as the language of the political community, can challenge the stigma and exclusion of sex workers, and promote inclusion.

Drawing on a Dworkinian theory of human rights,[26] which posits that rights are based on equal membership of the political community, I noted that sex workers are already human rights bearers, even though their rights may not be adequately protected by the law. Rights, as such, exist outside of legal instruments, but these instruments, such as the ECHR and the HRA make them more easily enforceable. Demanding recognition and respect for rights is therefore

[26] R Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

a demand for recognition as equal status in the citizenry. The chapter demonstrated that rights can be used as protections from the state and others, and to make claims from the state. Each of these functions of rights – as protection, as entitlement, and as a linguistic tool for political participation – may have benefits for sex workers, as a marginalised group.

Chapter 5 further engaged with critiques that have been made of rights to produce a more nuanced examination of rights as well as their limitations. A range of critiques were considered – rights expansion is illegitimate; rights are indeterminate and conflicting; rights are individualistic; and rights are too narrow and promote the State as sovereign. For sex workers in the current political climate, the most important of these is perhaps the concern around conflict – that is, a claim to human rights would not only have to challenge a state response, but also a vocal and powerful group arguing that sex work is inherently a human rights violation. Despite the critiques, I argue that while imperfect, rights are an important social, political and legal tool, so to abandon them would be to cede the terms of the debate to the 'other side'. Therefore, although care must be taken with the use of rights, they are still pragmatically an important method for a group who have been historically silenced, stigmatised, and excluded.

9.6.2 Challenging the Law Using the HRA

Linking back to the problems delineated in Chapter 2, it was recognised that these problems are exacerbated by the current criminal laws relating to sex work. As such, the next question on the potential impact of the HRA is whether and how it could be used to challenge these laws. In Chapter 6, I explained that such a challenge could be brought through the domestic courts under the HRA or be made in front of Parliament. While the courts do not have the power to

strike down legislation, they can interpret it 'as far as possible' to be compatible with ECHR rights,[27] and can, if interpretation is impossible, issue a declaration of incompatibility.[28] The courts' ongoing deference to Parliament and how this affects these remedies was noted. The courts also have a duty to take into consideration the jurisprudence of Strasbourg to help with their interpretation of ECHR rights.[29]

In light of this latter duty, Chapter 7 began with an examination of the ECtHR's jurisprudence on sex work. The ECtHR has been reluctant to take a position on the issue of sex work, marking a distinction with forced prostitution[30] or trafficking.[31] They have instead given a wide margin of appreciation to domestic jurisdictions to determine how best to respond to sex work. This means that State justifications for interfering with sex worker's rights would be subject to a less rigorous examination than if a narrow margin of appreciation was given. On a domestic level, this also means that courts do not have to follow a particular Strasbourg approach, and as such are likely to be deferential to Parliament in this area. The potential success of these challenges therefore, is dependent on the forum in which they are made and also the openness of the courts or Parliament to listen.

Drawing on domestic and ECtHR case law, an examination of the potential violations under the ECHR was undertaken. It is argued in this Chapter that four offences - keeping a brothel, soliciting and loitering, controlling prostitution for gain, and causing and inciting prostitution for gain – do violate sex workers' rights under Article 8 of the ECHR. Article 8 has been interpreted to include sexual activity, personal autonomy, relationships (including

[27] Human Rights Act 1998, s 3.
[28] Human Rights Act 1998, s 4.
[29] Human Rights Act 1998, s 4.
[30] *Tremblay v France* (Application no 37194/02) (Judgment 11 September 2007).
[31] *SM v Croatia* (Application no 60561/14) (Judgment 19 July 2018).

commercial relationships), dignity and physical and mental integrity. All four laws engage and interfere with Article 8. The key issue in this analysis was whether such justifications could be justified. This is determined according to criteria set out in *Bank Mellat v HM Treasury.*[32] I found that these laws are not rationally connected to a sufficient important objective, and that that, having regard to the consequences of these laws, less intrusive measures could be used to meet the objectives set out by the law. As such, I argued that none of the four could be justified in their current form. I also analysed whether the soliciting laws might be a breach of Article 10, and whether all four laws could violate Article 14, but found that because commercial expression is given little weight, and the wide powers of justification under Article 14, such claims are less strong.

9.6.3 Policing of Sex Work under the HRA

Reflecting the earlier assertion that a human rights approach requires more than a change in law, in Chapter 8 I explored how the HRA could be used to challenge police practices towards sex workers before the courts, but also to provide a more robust framework for police to use in their everyday policing. In examining police powers, I considered particularly issues practices that exacerbate violence against sex workers, increase stigma, and push sex workers into unsafe working conditions. This chapter began with an assessment of police discretion, and the impacts of inconsistent policing on sex workers, arguing that the wider the discretion left by laws and broad powers, the more room there is for human rights violations.

Reflecting on some sex workers' reports of direct sexual and physical abuse by police, I began by demonstrating that in certain circumstances, that is, where the violence perpetrated

[32] [2014] AC 700, [20].

is sufficient to meet the threshold of inhuman or degrading treatment, such violence would be a violation of sex workers' Article 3 rights. This is an absolute right, so there is no circumstance in which it could be justified. This chapter, however, recognised that direct abuse is not the only way the police might unjustifiably infringe sex workers' rights, and so it then went on to consider the use of civil powers under the ASBCPA 2014 against sex workers. It argued that use of these orders have similar effects to soliciting laws, breaking up peer networks and therefore increasing risks of violence and crime. Moreover, they are often based on stigmatising assumptions that sex work is inherently anti-social. I considered firstly whether these powers could be challenged on the basis of procedural requirements, arguing that a civil standard of proof and the inclusion of hearsay evidence interfere with sex workers' Article 6 rights to a fair trial. While I did find that these do not effectively protect Article 6 rights, previous domestic case law, and courts' deference to Parliament, particularly in relation to post-HRA legislation, means that it is unlikely that such a challenge would be successful. Alternatively, I considered whether challenges could be made to specific orders against sex workers, drawing on case law to demonstrate that injunctions and CBOs can interfere with sex workers' Article 8 rights to private and family life and must be justified accordingly. As such, the internal requirement for an injunction to be 'just and convenient' is insufficient to protect Article 8 rights, and instead police and courts must be cognisant of the requirements of necessity and proportionality in Article 8(2). Particular terms and orders could therefore be challenged at the time of granting, on appeal or on judicial review, if they go beyond what is necessary and proportionate to meet their objectives. While this is more likely to be a successful challenge, the nature of such review means its effects do not challenge the law or the powers themselves, but just the use of them.

I then examined the human rights implications of raiding and closing brothels. Drawing on ECtHR jurisprudence on Article 3 and 4, I found that police have a positive obligation to

adequately investigate if they know or ought to know of circumstances that give rise to a credible suspicion that an identified person is being or is at risk of being exploited,[33] in line with understandings of forced prostitution, forced labour and trafficking. This positive obligation is, therefore, in line with determinations around Unacceptable Forms of Work discussed in Chapter 4. These positive obligations are likely to be used as a justification for raids and closures of brothels, but the requirement of an 'identified person' means that raids are not required simply because a migrant sex worker works there. Moreover, these positive obligations do not give a carte blanche to police in how they perform raids, and a number of practices, such as inviting media, outing sex workers, and forcing them onto streets in their underwear, could be unjustified violations of sex workers' rights under Article 8. As such, these could be challenged under judicial review, and require police to consider the proportionality of their actions.

Finally, I examined the extent to which police owe sex workers a positive obligation under Article 3 to adequately investigate reports of crimes against them. Drawing on recent case law from the Court of Appeal, I demonstrated that the extent of this duty depends on the crime against the sex worker,[34] but a serious crime should be recorded as such, and an investigation of such a crime requires evidence gathering, interviewing, statement taking, and especially not dismissing sex workers. There are, Chapter 8 shows, human rights implications in many of polices' interactions with sex workers, and as such, it is crucial that police have a good understanding of their duties under the HRA and the requirements of necessity and proportionality in decision making.

[33] *Rantsev v Russia and Cyprus* (Application no 25965/04) (Judgment 7 January 2010), [286].
[34] *D v Commissioner of Police for the Metropolis* [2015] EWCA Civ 646

9.6.4 The Limitations of the HRA

The HRA performs a number of functions for sex workers: it allows translation of their claims into the language of political and legal legitimacy; it provides an avenue for challenging unjust laws; and it allows more robust examination of police interactions with sex workers. The HRA, does, however have significant limitations which will be determinative of the potential impact it may have for sex workers. The first of these comes before even making the claim. Because the ECHR is focused on civil and political rights, sex workers' concerns must be moulded to fit within this framework. As such, there is little room for social and economic claims, and the complexity of sex workers' experiences may well be flattened to fit this approach. This is a tactical decision to be made by sex workers, given that the HRA is the only directly enforceable human rights instrument in England and Wales. Moreover, access to courts is determined by both structural and systematic marginalisations and by sex worker's own complex lives. As such, litigation would be an unlikely approach for many sex workers. The second limitation relates to the HRA's constitutional status. The HRA is an Act of Parliament like any other, so unlike other Bills of Rights it can be repealed with a majority of parliamentary votes. This has been threatened by consecutive Conservative governments, so the position of the Act itself is precarious, although the ECHR would still apply so long as the UK is a signatory.

The HRA further reinforces parliamentary sovereignty, meaning that the courts cannot strike down legislation, and the most they can do is interpret it compatibly with the ECHR as far as possible, without going against the 'grain of the legislation'[35] or make a declaration of incompatibility, which has no impact on the continuing effect of the law. Where there is no guidance from Strasbourg jurisprudence, and where the challenge relates to a divisive area, the

[35] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [33].

courts are more deferential to Parliament. As such, even where a claim has significant merit, as I argue the claim in Chapter 7 does, its success relies on courts openness to challenge the policy and legal approaches taken by Parliament. Challenges to the police are likely to have more success, however, as there is no statutory deference to Parliament in the HRA, so when an action violates a right under the ECHR, there is more likely to be a remedy available for the applicant. That said, the laws and powers under which that action is made remain in place, so the best that can be achieved is an individual remedy, and a nudge for the police to take more care in their proportionality assessments in the future. While the HRA, therefore, may offer potential avenues to certain sex workers to challenge the laws and practices that exacerbate the stigma, risks of violence and poor working conditions they face, it is a limited tool to do so.

9.7 Covid-19

There have been recent developments that have profoundly reshaped the organisation and realities of the sex industry. The Covid-19 pandemic occurred after the majority of the research and analysis within this thesis had taken place. The pandemic and associated lockdowns had pervasive effects on the sex industry, including almost total loss of income for some.[36] Many sex workers were able to move to offer online only services, such as asynchronous material through sites such as OnlyFans, or webcamming services. A small minority were already officially established as self-employed entertainment providers for tax purposes, and so were able to access government support for self-employed workers. The street sex market, which has been shrinking for years due to the growth of internet-enabled sex work, reduced through the lockdown to a small number of people who had few choices but to risk breaking Covid-19 protocols and laws. Some extra housing and welfare provisions were provided by local

[36] L Platt et al, 'Sex Workers Must Not be Forgotten in the COVID-19 response' (2020) 396 *The Lancet* 9

governments but those sex workers who were unable to work were reliant largely on mutual aid and community provision from other sex workers and sex work organisations. These effects were discussed in Chapter 2, but due to timing and a lack of extensive research on the ongoing impacts of the Covid-19 pandemic, this thesis was unable to fully explore the shifts produced by the pandemic to fullness. What this thesis does argue, however, is that even though the number of sex workers who work in the street markets is small, they often face multiple marginalisations and are the most policed group of sex workers. As such, the implications of laws and policy on their human rights remains significant and the analysis of this within this thesis is still relevant and important.

9.8 Concluding Remarks and Future Research

This thesis has argued that the current law and policing practice in relation to sex work exacerbates the stigma, risks of violence and poor working conditions that affect sex workers (to varied degrees) in their working lives. As such, I have argued that the law must be reformed to prioritise the human rights of sex workers and to tackle these problems. Labour law and rights can be a useful but not wholly sufficient way of improving working conditions for sex workers. Human rights go beyond the working relationships of sex workers to consider their interactions with the state broadly. Human rights can be a way of translating struggles into the language of political and legal power, offering a route to inclusion, participation and political equality for sex workers. The HRA specifically can allow for challenges to laws and policing practices which may have some benefits to sex workers but is limited by its own internal framework and weak form review. The HRA, therefore, does offer some potential for changing the law and policing practice around sex work, and future research might consider how sex

workers themselves view the benefits and limitations of the HRA, creating a more participatory future project.

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