

**EXPLANATORY
NOTE ON AMNESTY
INTERNATIONAL'S
POLICY ON STATE
OBLIGATIONS TO
RESPECT, PROTECT
AND FULFIL THE
HUMAN RIGHTS OF
SEX WORKERS**

Index: POL 30/4063/2016
26 May 2016

**UNDER STRICT EMBARGO – 00:01 (GMT) 26 May
2016**

**AMNESTY
INTERNATIONAL**



Contents

Terminology	3
Demographics of sex work	5
Entry into sex work	7
Economic, social and cultural Rights	9
Human rights and the criminalization of sex work	9
Stigma	14
Impact of criminalizing the purchase of sex	16
What Amnesty International means by decriminalization	21
Why not legalization?	23
Regulation	24
Indigenous Peoples and decision-making	25
Coercion, consent and autonomy	26
Human rights standards and UN agency positions on sex work	28
Trafficking in persons.....	36
International standards on trafficking in persons	37
Trafficking in persons and its conflation with sex work.....	40
Methodological difficulties in human trafficking research.....	44
Impact of calls for decriminalization of sex work on anti-trafficking initiatives.....	46

This explanatory note provides additional information to supplement Amnesty International’s policy on ‘State obligations to respect, protect and fulfil the human rights of sex workers (POL 30/4062/2016). It aims to explore key conceptual areas of interest in relation to sex work, and decriminalization in particular, and details the research evidence that informed the development of the policy. It is not an exhaustive overview of the full range of issues that may warrant consideration in relation to sex work, nor does it detail every piece of research that Amnesty International considered; rather, it reflects key issues addressed during the development of the policy. This explanatory note is not a stand-alone document and must be read together with the policy.

This note also supplements Amnesty International’s four reports based on primary research in different locations that were developed during consideration of the organization’s policy on the human rights of sex workers:

- *The human cost of ‘crushing’ the market: Criminalization of sex work in Norway* (Index: EUR/36/4034/2016);
- *Harmfully isolated: Criminalizing sex work in Hong Kong* (Index: ASA 17/4032/2016);
- *Outlawed and abused: Criminalizing sex work in Papua New Guinea* (Index: ASA 34/4030/2016), and
- *“What I’m doing is not a crime”: The human cost of criminalizing sex work in the City of Buenos Aires, Argentina* (Index: AMR 13/4042/2016)

TERMINOLOGY

Sex work: For the purposes of this explanatory note the term “sex work” is used to mean the exchange of sexual services (involving sexual acts)¹ between consenting adults for some form of remuneration, with the terms agreed between the seller and the buyer. Sex work takes different forms, and varies between and within countries and communities. Sex work may vary in the degree to which it is more or less “formal” or organized.²

The term “sex work” is used to describe situations where adults who are engaging in commercial sex have consented to do so. Where consent is absent for reasons including threat or use of force, deception, fraud, and abuse of power or involvement of a child, such activity would constitute a human rights abuse which must be treated as a criminal offence. (See definition of ‘**Consent**’ for further discussion.)

Sex worker: For the purposes of this explanatory note, “sex workers” are adults (18 years of age and older) of all genders who receive money or goods in exchange for the consensual provision of sexual services, either regularly or occasionally.

Amnesty International recognizes that the terms used to refer to sex work and sex workers vary across contexts and according to individual preference and that not all people who do sex work

¹ This policy does not apply to adult dancing or the production of sexually explicit material, including pornography.

² See also the definition employed by the World Health Organisation. See WHO, HIV/AIDS Programme, *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries: Recommendations for a Public Health Approach*, 2012, p.12.

identify as “sex workers”. Where possible, Amnesty International will employ the terminology used by rights holders or rights claimants themselves. However, generally Amnesty International uses the terms “sex work” and “sex worker”. As outlined above, these terms are not applicable to children.

Criminalization: For the purposes of this explanatory note, “criminalization” refers to the process of prohibiting consensual adult sex work and attaching punishments in law. Criminalization of consensual adult sex work generally takes three different forms which are applied in a variety of combinations across countries. These can be summarized as:

- Laws which make the sale of sex by consenting adults a criminal offence, including for example laws on solicitation, and under which penalties are imposed upon sex workers themselves.
- Laws which make the organization of adult consensual sex work a criminal offence. These include, but are not limited to, laws against keeping a brothel; promotion of ‘prostitution’; renting premises for the purposes of prostitution; living off the proceeds of sex work; and facilitating sex work through the provision of information or assistance. These laws can result in the imposition of penalties against sex workers themselves for organizing their own sex work and against anyone who assists them; and
- Laws which make the buying of sex from consenting adults a criminal offence and under which penalties are imposed on buyers.

For the purpose of this explanatory note, “criminalization” also refers to other laws not specific to sex work. Such laws could include those on vagrancy, loitering which are either applied in a discriminatory way against people involved in sex work, and/or have a disproportionate impact on sex workers which can in practice work as a *de facto* prohibition. Similarly immigration laws can be applied in a discriminatory way against sex workers as a *de facto* prohibition on sex work by migrants and the criminalization of irregular (sometimes called “illegal”) migration or residence may give rise to – or exacerbate – the penalization of sex work by migrants, as engaging in this type of work may make them more visible and liable to being targeted by state authorities.

Penalization: For the purposes of this explanatory note, “penalization” is used to refer to laws, policies and administrative regulations that have the same intent or effect as criminal laws in punishing, controlling and undermining the autonomy of people who sell sex, because of their involvement in sex work.³ These measures include, but are not limited to the imposition of fines, detention for the purposes of “rehabilitation”, deportation, loss of child custody, disentanglement from social benefits, and infringement on rights to privacy and autonomy.

Human trafficking: For the purposes of this explanatory note, Amnesty International uses the definition of human trafficking (or ‘trafficking in persons’) as set forth in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000). The UN Trafficking Protocol defines trafficking as constituting three elements:

1. An “**action**”: that is, the recruitment, transportation, transfer, harbouring or receipt of persons;

³ See CEDAW, Concluding Observations: Russian Federation, UN Doc. CEDAW/C/RUS/CO/8, 2015, paras. 25-26 (calls upon the government to repeal the provision of the Administrative Code which penalizes prostitution and to establish an oversight mechanism to monitor violence against women involved in prostitution including by the police)

2. A “**means**” by which that action is achieved (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability, and the giving or receiving of payments or benefits to achieve consent of a person having control over another person); and
3. A “**purpose**” (of the action/means): specifically, exploitation.⁴

All three elements must be present to constitute “trafficking in persons” under the UN Trafficking Protocol.⁵ The only exception is when the victim is a child, in which case a trafficking-in-persons crime is deemed to have been committed even if none of the above “means” is involved. Human trafficking, including in to the sex sector, is not the same as sex work.

Consent: While there is no clear uniform definition of consent under international law, for the purposes of this explanatory note Amnesty International applies the term to mean the voluntary and ongoing agreement to engage in a particular sexual activity. Consenting to sex or to sell sex does not mean consenting to violence and consent can be rescinded at any time. Consent analysis is necessarily fact- and context-specific and the views, perspectives and experiences of individuals selling sex should be fundamental to any consideration of issues of consent. (See section on ‘**Coercion, consent and autonomy**’ for further elaboration.)

DEMOGRAPHICS OF SEX WORK

It is difficult to gauge a reliable global estimate of the number of individuals involved in sex work as sex workers rarely feature in official census and other labour data, given the criminalized and stigmatized nature of their work in most countries. Various studies have indicated, however, that figures fluctuate significantly across countries and regions.⁶

In most cases, researchers emphasize the limitations of their data and the challenges in measuring a population that is largely hidden and marginalized. The omission of sex workers from official data also contributes to their frequent exclusion from social policy-making processes.

While reliable data is scarce, there is general acknowledgement that cisgender⁷ women account for a majority of the sex worker population in most countries. This means that social policy responses to sex work must consider the obvious gender dimensions affecting women’s decisions to engage in sex work and/or their reliance on commercial sex as a source of income.

⁴ UN Trafficking Protocol, 2000, Article 3(a).

⁵ See UNODC, *Issue paper: The concept of ‘exploitation’ in the Trafficking in Persons Protocol*, 2015, p. 5.

⁶ L. Cusick et al., “Wild guesses and conflated meanings?: Estimating the size of the sex worker population in Britain”, *Critical Social Policy*, 2009, p. 29; S. Adebajo, et al., “Estimating the number of male sex workers with the capture-recapture technique in Nigeria”, *African Journal of Reproductive Health*, 2013; B. Vuylsteke, et al., “Capture–recapture for estimating the size of the female sex worker population in three cities in Cote d’Ivoire and in Kisumu, western Kenya”, *Journal of Tropical Medicine and International Health*, 2010. National estimates on women involved in sex work vary widely; ranging from between 0.2% and 2.6% of the population in countries across Asia; between 0.1% and 1.5% in the ex-Russian Federation; between 0.4% and 1.4% in Eastern Europe; 0.1% and 1.4% in Western Europe, 0.2% and 7.4% in Latin America and 0.7% and 4.3% in sub Saharan Africa. See J. Vandepitte, et al., ‘Estimates of the number of female sex workers in different regions of the world’, *Journal of Sexually Transmitted Infections*, 2006, p. 82.

⁷ Cisgender people are individuals whose gender expression and/or gender identity accords with conventional expectations based on the physical sex they were assigned at birth. In broad terms, “cisgender” is the opposite of “transgender”.

Gendered labour markets worldwide create differentiated opportunities and norms for women workers, undervaluing their work and denying them equal access to the labour market and to decent work and formal employment rights, including freedom of association. Women are over-represented in the informal sector, working in lower-status / low-pay occupations that are not or only partially recognized as work, and bearing double or triple work burdens in the face of limited social protection. This similarly applies to other marginalized groups and further intersects with other identity factors resulting in economic and social exclusion.⁸

Significant numbers of transgender people and cisgender men engage in sex work worldwide.⁹ A growing number of studies, mainly within the HIV epidemiological field, have identified significant populations of transgender persons and cisgender men sex workers.¹⁰ There is also evidence that while the majority of the world's sex workers are cisgender women, when examined on a per capita basis a larger proportion of the transgender community is involved in sex work in comparison to the proportion of the population of cisgender women who are sex workers. For example, a 2007 study in Sydney, Australia, found that participation in sex work was reported by as many as 44% of the transgender population.¹¹ Transgender people may experience marginalization in a number of areas including education (e.g. leaving or being excluded from school because of enforced gender normative dress codes or bullying) and work (e.g. high unemployment levels due to discrimination on the basis of their gender identity or expression), which often results in high levels of poverty which some transgender people manage through engagement in the sex sector at some point in their lives.¹² Conversely, transgender people are also subject to stereotypes that all transgender women are sex workers. This stereotype increases the stigma, marginalization and violence that transgender individuals, especially women, are subjected to and leads to profiling by police.¹³ Along these lines,

⁸ For example, with respect to women migrant workers the CEDAW Committee points out, "To understand the specific ways in which women are impacted, female migration should be studied from the perspective of gender inequality, traditional female roles, a gendered labour market, the universal prevalence of gender-based violence and the worldwide feminization of poverty and labour migration. The integration of a gender perspective is, therefore, essential to the analysis of the position of female migrants and the development of policies to counter discrimination exploitation and abuse." CEDAW, General Recommendation 26 (Women migrant workers), UN Doc. CEDAW/C/2009/WP.1/R, 2008, para. 5.

⁹ "[Cis m]ale sex workers may be harassed by the police in part because of homophobia, and women sex workers who are perceived to step outside of traditional female roles (e.g. by failing to be subservient) may be disproportionately targeted for arrest." Best Practices Policy Project, Desiree Alliance, and the Sexual Rights Initiative, *Report on the United States of America, 9th round of the Universal Periodic Review*, 2010, para.7; see also Global Network of Sex Work Projects (NSWP), *The needs and rights of trans sex workers*, 2014, available at: www.nswp.org/resource/briefing-paper-the-needs-and-rights-trans-sex-workers; and *The needs and rights of male sex workers*, 2014, available at: <http://www.nswp.org/resource/briefing-paper-the-needs-and-rights-male-sex-workers>.

¹⁰ For example, a 2011 study in Nepal mapped between 7,706 and 9,221 transgender people and between 10,450 and 12,302 cisgender men sex workers operating in the country. The cisgender women sex worker population in comparison was estimated to be between 24,649 and 28,359. See HIV and STI Control Board, National Centre for AIDS and STD Control, *Mapping and size estimation of most at risk populations in Nepal, Vol 3. Female sex workers*, 2011; HIV and STI Control Board, National Centre for AIDS and STD Control, *Mapping and size estimation of most at risk populations in Nepal, Vol. 1 Male sex workers, transgenders and their clients*, 2011.

¹¹ V. L. Hounsfeld, *et al.*, 'Transgender people attending Sydney sexual health services over a 16 year period', *Sex Health*, 2007, p. 4.

¹² K. Slamah, S. Winter and K. Ordek, Stigma and violence against transgender sex workers. *RH Reality Check*, 16 December 2010, available at <https://rewire.news/article/2010/12/16/stigma-exclusion-violence-against-trans-workers/>

¹³ See for example: Arizona Appeal Court Overturns Monica Jones's conviction for 'Walking While Trans', *The Advocate* 27 January 2015.

Amnesty International found that street-based sex workers (most often transgender sex workers) are often arbitrarily detained under a local offences code based on their dress, appearance and mannerisms, despite that such profiling is explicitly prohibited under the law.¹⁴

Despite accounting for a significant proportion of the global sex worker population, recognition of the viewpoints and needs of transgender sex workers and cisgender male sex workers remain largely absent from mainstream public discourse on sex work policy. In human rights terms this is of concern as transgender sex workers and cisgender male sex workers also report high levels of rights abuses and are often overlooked in service provision.¹⁵ One systematic review of HIV risk among transgender people, for example, found that transgender sex workers were over four times more likely to be living with HIV than cisgender women sex workers.¹⁶ Additionally, research by UNAIDS suggests that “HIV prevalence for transgender sex workers is on average nine times higher than for female sex workers and three times higher than for male sex workers.”¹⁷

ENTRY INTO SEX WORK

Sex workers are not a homogenous group. For example, people of different genders, sexual orientations, ethnicities and socio-economic backgrounds undertake sex work for a variety of reasons and report a diversity of experiences.¹⁸ Some sex workers make the decision to engage in sex work as a matter of preference: it can offer more flexibility and control over working hours or a higher rate of pay than other options available to them. For many, the decision to engage in sex work is a reflection of limited livelihood options. For example, it may be one of a limited number of sources of earnings open to irregular migrants who rely on informal economies for work.¹⁹ Other individuals may turn to sex work as a means to address immediate needs because of poverty.

A person’s decision to enter or remain in sex work is often nuanced and influenced by multiple intersecting factors. For example, a study by the International Labour Organization (ILO) and the United Nations Development Programme (UNDP) in Cambodia in 2010 looked at the influences on a group of women who left garment-making factories during the global economic crisis and started work as informal sex workers in the entertainment sector. The study found an increase in women using informal sex work to supplement their income earned within the garment sector in Cambodia

¹⁴ See Amnesty International, “*What I’m doing is not a crime*”: *The human cost of criminalizing sex work in the City of Buenos Aires, Argentina* (Index: AMR 13/4042/2016).

¹⁵ See G. Sethi, *et al.*, ‘HIV, Sexually transmitted infections and risk behaviours in male sex workers in London over a 10 year period’, *Sexually Transmitted Infections*, 2006, pp. 359–363, available at: ncbi.nlm.nih.gov/pmc/articles/PMC2563850/; L.R. McKinnon, *et al.*, ‘High HIV risk in a cohort of male sex workers from Nairobi, Kenya’, *Sexually Transmitted Infections*, 2014, p. 90.

¹⁶ J.D. Schulden, *et al.*, “Rapid HIV testing in transgender communities by community based organizations in three cities”, *Public Health Reports*, 2008, p. 123.

¹⁷ UNAIDS, ‘The gap report’ 2014, p. 218, available at: www.unaids.org/sites/default/files/media_asset/UNAIDS_Gap_report_en.pdf.

¹⁸ R. Weitzer, “The mythology of prostitution: Advocacy research and public policy”, *Sexuality Research and Social Policy*, 2010, R. Weitzer, ‘Sociology of sex work’, *Annual Review of Sociology*, 2009.

¹⁹ Those who migrate through irregular channels to earn a better livelihood should not immediately be conflated with those who are forced, defrauded or coerced to travel to another country for work (*i.e.* human trafficking). See, for example, L.M. Agustín, *Sex at the margins: Migration, labour markets and the rescue industry*, 2008. Similarly, refugees have reported turning to sex work including because they cannot find other work or to supplement the subsistence they receive, see Women’s Refugee Commission, *Mean streets: Identifying and responding to urban refugees’ risk of gender-based violence - Refugees engaged in sex work*, 2016.

in the 1990s and marked a rise in crossover to sex work following the global economic crisis in 2008. Many of the women interviewed had begun to bolster their income with informal sex work after suffering a series of labour-related abuses throughout their lives, starting from forced entry into the labour market as child workers, abuse as domestic workers, mistreatment as factory workers, and harassment and abuse at the hands of managers and clients as entertainment workers.²⁰ However, almost all workers interviewed said they preferred entertainment/sex work to working in garment factories. Most felt life was harder in the factories, with lower pay, long hours, harsh and unhealthy working conditions, and overly controlling managers. Many suggested they would turn down a factory job if offered one again.²¹

There are many personal, social, political and macro-economic drivers of sex work. Economic, social, labour, and immigration policies work – at national, regional, and global levels and together with factors such as intersectional discrimination – to create the conditions in which individuals make decisions about how to earn an income. As such, they contribute to an individual's decision to engage in sex work. A major report carried out on behalf of the ILO in 1998 concluded:

Prostitution is probably linked, albeit inadvertently, to the macro-economic policies of governments which have a tendency to spawn rapid urbanisation at the expense of rural development, to promote cheap labour for industrialization, to facilitate the export of female labour for overseas employment and to promote tourism as a foreign exchange earner. All these features of modern, export-oriented economies, combined with the pervasive lack of social safety nets and deep-rooted gender discrimination against females, probably contribute to the growth of the sex sector.²²

Thus, any policies on sex work need to be situated within a realistic understanding of labour, economic, and social policy contexts. They should recognize the exploitation that can occur in many of the alternative forms of labour often available to women in, or considering, sex work, such as cleaning or food serving,²³ and the role that sex work plays in securing vital income for some individuals.

The use of the criminal law to prohibit sex work does not address or challenge the macro socioeconomic forces and systemic discrimination that can lead people to do sex work, particularly individuals from marginalized groups. It does not offer alternative employment options or improved rates of pay. Rather, criminalization compounds the marginalization of people in sex work, forcing them to sell sex in clandestine and dangerous conditions while limiting their access to justice and stigmatizing and punishing them for their decisions. Amnesty International recognizes the

²⁰ In Cambodia the term “entertainment worker” is often used interchangeably with “sex worker”. Whilst there is an overlap in some cases in which entertainment workers may sell sex opportunistically, the ILO has described “entertainment workers” as people employed in the entertainment sector, e.g. beer promoters, karaoke singers, massage workers and hostesses, regardless of their possible involvement in direct or indirect sex work. See ILO, Union Aid Abroad-APHEDA, *Cambodia - Addressing HIV vulnerabilities of indirect sex workers during the financial crisis: Situation analysis, strategies and entry points for HIV/AIDS workplace education*, 2011.

²¹ ILO, *Research snapshot: Study of indirect sex workers from the garment industry*, 2010, available at: www.un.org.kh/attachments/338_ILO_research_IndirectSexWorkers_20100715.pdf; ILO, Union Aid Abroad-APHEDA, *Cambodia - addressing HIV vulnerabilities of indirect sex workers during the financial crisis: Situation analysis, strategies and entry points for HIV/AIDS workplace education*, 2011, p.19.

²² ILO, L. Lim, *The sex sector: The economic and social bases of prostitution in Southeast Asia*, 1998.

²³ Anti-Slavery International, J. Bindman and J. Doezeema, *Redefining prostitution as sex work on the international agenda*, 1997.

importance of respecting the agency and life decisions of individuals, particularly those who have limited economic opportunities.²⁴

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Simply decriminalizing sex work will not by itself resolve the range of human rights abuses that sex workers face, nor lead to full realization of sex workers' human rights. States have a duty to ensure that no one is living in a situation of extreme deprivation. The International Covenant on Economic, Social and Cultural Rights (ICESCR) outlines states' responsibilities to realize the right of everyone to an adequate standard of living for themselves and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.²⁵ At a minimum, states must develop and implement effective initiatives and policies in line with their human rights obligations to realize economic, social and cultural rights. Social exclusion and marginalization can lead some individuals to engage in sex work and sex work often compounds social exclusion and undermines accountability of state actors in realizing the rights of those individuals.²⁶ States should also ensure that all persons have options in determining the type of work they engage in. No one should have to sell sex if they do not want to do so.

Amnesty International does not consider that confining sex work to unregulated, informal economies through criminalization, and denying individuals' access to labour rights, including the ability to unionize and safe working conditions, is an effective means to protect the economic, social and cultural rights of marginalized people who engage in sex work.

Amnesty International believes that policies which aim to support and improve the situation of marginalized and disadvantaged groups must focus on empowering these individuals and directly addressing structural disadvantages such as poverty and discrimination, as opposed to devaluing their decisions and choices or criminalizing the contexts in which they live their lives. We believe an approach based on human right principles that values and reflects the input and experiences of sex workers is the most likely to build foundations on which human rights abuses can be identified and tackled, and to ensure no one enters or stays in sex work involuntarily. Sex workers should be supported and enabled to participate in the development of laws and policies impacting their lives. It is important for states to not only focus on ensuring that people can leave the sex sector, but also take measures to increase their rights, safety and well-being while in the sector.

HUMAN RIGHTS AND THE CRIMINALIZATION OF SEX WORK

The criminalization of sex work is increasingly recognized as a human rights concern. Criminalization of sex work, in all its forms, disproportionately impacts those most marginalized by society.²⁷ The

²⁴ See also Ratna Kapur, 'Post-colonial economies of desire: Legal representations of the sexual subaltern', *Denver University Law Review*, 2001, p. 869; C.A. Mgbako, *To Live Freely in This World: Sex Worker Activism in Africa*, NYU Press, 2016.

²⁵ International Covenant on Economic, Social and Cultural Rights, Article 11.

²⁶ See for example, Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, Mission to India, Rashida Manjoo, UN Doc. A/HRC/26/38/Add.1, 2014, para. 21: "...social exclusion and poverty lead some widows to engage in sex work and prostitution..."; C. Overs and B. Loff, 'Toward a legal framework that promotes and protects sex workers' health and human rights', *Health and Human Rights*, Vol.15, No.1, 2013.

²⁷ Amnesty International, *Stonewalled: Still demanding respect. Police abuses against lesbian, gay, bisexual and*

enforcement of criminal laws against sex work can lead to forced evictions, arbitrary arrests, investigations, surveillance, prosecutions and punishment of sex workers.²⁸ In some contexts, sex work and public nuisance laws create an enabling environment for police and others to commit extortion and engage in harassment and violence against sex workers with impunity.²⁹

“Rescue raids” of sex sector establishments by police, often under the guise of anti-trafficking initiatives, can result in abuses against sex workers, including arbitrary detention in “rehabilitation centres”, and can lead to the dispersal of sex workers from safer working environments.³⁰ According to the World Health Organization (WHO) and the Global Coalition on Women and AIDS, “in several countries certain activities such as rescue raids of sex establishments have exacerbated violence against sex workers and compromised their safety.”³¹ In India and Indonesia, researchers have found that sex workers who were rounded up in raids were beaten, coerced into sex by police, and placed in institutions where they were sexually exploited and otherwise suffered physical abuse.³² In Papua New Guinea, police raids resulted in some sex workers being forced to chew and swallow condoms and being raped in custody, in addition to other degrading treatment.³³ Amnesty International’s research in Argentina, Hong Kong, and Papua New Guinea also documented violence by police

transgender people in the USA (Index: AMR 51/001/2006); J. Amon, ‘Canada’s prostitution bill a step in the wrong direction’, *Ottawa Citizen*, 2014, available at: www.hrw.org/news/2014/06/18/canadas-prostitution-bill-step-wrong-direction; International Committee on the Rights of Sex Workers in Europe (ICRSE), *Underserved. Overpoliced. Invisibilised. LGBT sex workers do matter*, 2016; Women’s Refugee Commission, *Mean streets: Identifying and responding to urban refugees’ risk of gender-based violence - Refugees engaged in sex work*, 2016; NSWP Statement on High Levels of Violence Against Transgender Sex Workers in Turkey, 2016, available at: www.nswp.org/resource/nswp-statement-high-levels-violence-against-transgender-sex-workers-turkey.

²⁸ See Human Rights Watch, *Sex workers at risk: Condoms as evidence of prostitution in four U.S. cities*, 2012; M.H. Wurth, et al., “Condoms as evidence of prostitution in the United States and the criminalization of sex work”, *Journal of the International AIDS Society*, 2013; Amnesty International, *Stonewalled: Police abuse and misconduct against lesbian, gay, bisexual and transgender people in the United States* (Index: AMR 51/122/2005); UNDP, Global Commission on HIV and the Law, *Risks, rights & health*, 2012; UNDP, UNFPA, UNAIDS and APNSW, *Sex work and the law in Asia and the Pacific: Laws, HIV and human rights in the context of sex work*, 2012; WHO, UNFPA, UNAIDS, NSWP, *Prevention and Treatment of HIV and other sexually transmitted infections for sex workers in low- and middle-income countries: Recommendations for a public health approach*, 2012, available at: apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf; C.A. Mgbako, *To live freely in this world: Sex worker activism in Africa*, NYU Press, 2016; Amnesty International, *The human cost of ‘crushing’ the market: Criminalization of sex work in Norway* (Index: EUR/36/4034/2016).

²⁹ See UNDP, Global Commission on HIV and the Law, *Risks, rights & health*, 2012, p. 37; WHO, *Violence against women and HIV/AIDS: Critical intersections, violence against sex workers and HIV prevention*, 2005; Women’s Network of Unity, *Violence against sex workers is prevalent in Cambodia with customers and the police often the perpetrators*, 2011; W. Lyon, “Client criminalisation and sex workers’ right to health”, *Hibernian Law Journal*, 2014; UNFPA, UNDP and APNSW (CASAM), *The right(s) evidence – Sex work, violence and HIV in Asia: A multi-country qualitative study*, 2015; Asijiki – Coalition to Decriminalise Sex Work in South Africa, *Sex Work and HIV, Fact Sheet*, 2015, available at: www.sweat.org.za/wp-content/uploads/2016/02/Sex-work-and-HIV-Asijiki-1.pdf.

³⁰ Sex Workers Project, *The use of raids to fight trafficking in persons: A study of law enforcement raids targeting trafficking in persons*, 2009; Empower Foundation, *Hit & run: The impact of anti-trafficking policy and practice on sex workers’ human rights in Thailand*, 2012.

³¹ WHO and the Global Coalition on Women and AIDS, *Violence against sex workers and HIV prevention, violence against women and HIV/AIDS: Critical intersections, Information Bulletin Series*, Number 3, 2005.

³² See R. Surtees, ‘Brothel raids in Indonesia – Ideal solution or further violation?’, *Research for Sex Work*, 2003, pp. 5-7; Sangram, Point of View and VAMP, *Rehabilitation: Against their will? Of veshyas, vamps, whores and women: Challenging preconceived notions of prostitution and sex work*, 2002.

³³ See Human Rights Watch, *Bashed up: Family violence in Papua New Guinea*, 2015, available at www.hrw.org/report/2015/11/04/bashed/family-violence-papua-new-guinea (providing an overview of government law and policy measures to address family violence).

against sex workers, in some cases amounting to torture.³⁴ Human Rights Watch has also documented widespread police abuses against sex workers in Cambodia and China, including beatings and arbitrary detention.³⁵

Criminal laws against sex work further undermine sex workers' ability to collaborate with the police and each other to identify and report violent clients.³⁶ The criminal status that is placed on sex workers means that they are severely disadvantaged in seeking justice and redress for violent crimes against them, offering attackers impunity and leaving sex workers at risk of further violence and abuse.³⁷ The WHO notes that: "Criminalization of sex work contributes to an environment in which violence against sex workers is tolerated, leaving them less likely to be protected from it."³⁸ Where sex workers risk criminalization or penalization if they report crimes against themselves, their capacity to demand payment from or condom use with clients is also compromised.³⁹ Police routinely confiscate condoms and use them as evidence of sex work in a number of countries around the world.⁴⁰

³⁴ Amnesty International reports: *Harmfully isolated: Criminalizing sex work in Hong Kong* (Index: ASA 17/4032/2016); *Outlawed and abused: Criminalizing sex work in Papua New Guinea* (Index: ASA 34/4030/2016); "What I'm doing is not a crime": *The human cost of criminalizing sex work in the City of Buenos Aires, Argentina* (Index: AMR 13/4042/2016).

³⁵ Human Rights Watch, *Off the streets: Arbitrary detention and other abuses against sex workers in Cambodia*, 2010; Human Rights Watch, *Swept away: Abuses against sex workers in China*, 2013.

³⁶ See for example, Empower Foundation, *Hit & run: The impact of anti-trafficking policy and practice on sex worker's human rights in Thailand*, 2012.

³⁷ See C.M. Lowndes, et al., "Injection drug use, commercial sex work, and the HIV/STI epidemic in the Russian Federation", *Sexually Transmitted Diseases*, 2003; UNDP, Global Commission on HIV and the Law, HIV and the Law, *Rights, risks & health*, 2012, p.37 (citing UNIFEM, 'A legal analysis of sex work in Anglophone Caribbean', 2007; USAID, C. Jenkins, C. Sainsbury, Cambodian Prostitutes' Union, Women's Network for Unity, *Violence and exposure to HIV among sex workers in Phnom Penh, Cambodia*, 2006; A. Crago, *Our lives matter: Sex workers unite for health and rights*, 2008, pp. 31-32; I. Pauw and L. Brener, "You are just whores—"You can't be raped": Barriers to safer sex practices among women street sex workers in Cape Town", *Culture, Health & Sexuality*, 2003, pp. 465-81; Women's Refugee Commission, *Mean streets: Identifying and responding to urban refugees' risk of gender-based violence - Refugees engaged in sex work*, 2016, and Amnesty International reports: *The human cost of 'crushing' the market: Criminalization of sex work in Norway* (Index: EUR/36/4034/2016); *Harmfully isolated: Criminalizing sex work in Hong Kong* (Index: ASA 17/4032/2016); *Outlawed and abused: Criminalizing sex work in Papua New Guinea* (Index: ASA 34/4030/2016), and "What I'm doing is not a crime": *The human cost of criminalizing sex work in the City of Buenos Aires, Argentina* (Index: AMR 13/4042/2016).

³⁸ WHO and the Global Coalition on Women and AIDS, *Violence against sex workers and HIV prevention, Violence against women and HIV/AIDS: Critical intersections, Information Bulletin Series*, Number 3, 2005. See also M. Rekart, "Sex-work harm reduction", *The Lancet*, 2005, pp. 2123-2134.

³⁹ See UNAIDS, *Guidance Note on HIV and Sex Work*, Annex 2, 2009, p. 8; S. Dodillet and P. Östergren, *The Swedish sex purchase act: Claimed success and documented effects*, (conference paper presented at the International Workshop: Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges, The Hague), 2011 (hereinafter S. Dodillet and P. Östergren, *The Swedish sex purchase act: Claimed success and documented effects*) (citing D. Kulick, 'Sex in the new Europe: The criminalization of clients and Swedish fear of penetration', *Anthropological Theory*, 2003, pp. 199-218); see also NSWP, *Research for sex work*, No. 12, 2010.

⁴⁰ Amnesty International Reports: *The human cost of 'crushing' the market: Criminalization of sex work in Norway* (Index: EUR/36/4034/2016); *Harmfully isolated: Criminalizing sex work in Hong Kong* (Index: ASA 17/4032/2016); *Outlawed and abused: Criminalizing sex work in Papua New Guinea* (Index: ASA 34/4030/2016); Human Rights Watch, *Sex workers at risk: Condoms as evidence of prostitution in four US cities*, 2012; Open Society Foundations, *Criminalizing condoms, how policing practices put sex workers and HIV services at risk in Kenya, Namibia, Russia, South Africa, the United States and Zimbabwe*, 2012; C. Overs and B. Loff, 'Toward a legal framework that promotes and protects sex workers' health and human rights', *Health and*

Where sex work is criminalized, sex workers are also often forced to alter, limit or dispense with their safety strategies and take greater risks in order to avoid police detection, such as working in isolated areas or negotiating with clients quickly without adequate time to assess risks or screen out potentially dangerous clients.⁴¹ Similarly, criminal laws against sex work often prohibit sex workers from working together for safety. For example, in Hong Kong, Amnesty International found that the provision forbidding sex workers from working together in an apartment exacerbated the risk of clients and others targeting them for crimes and human rights abuses.⁴² In research conducted in the City of Buenos Aires, Argentina, Amnesty International found that sex workers who sought to work together in collectives for safety were subjected to often violent and lengthy raids by a range of law enforcement officials.⁴³

The criminalization of sex work also frequently works to exclude sex workers from access to protections under labour laws and can impede or prohibit them from organizing trade unions to secure better working conditions and improved health and safety standards. This in turn can leave sex workers at risk of harm from exploitative third parties.⁴⁴

Criminalization also has a negative impact on sex workers' access to health services.⁴⁵ For example, both health care providers and sex workers interviewed by Amnesty International in the City of Buenos Aires, Argentina, said that stigma and discrimination are the primary barrier to health care faced by sex workers. Additionally, interviews with sex workers revealed experiences of torture and other ill-treatment when accessing health services.⁴⁶ Sex workers, particularly migrant sex workers who may often be in "irregular status", may fear being arrested, detained and deported if they seek health care, including sexual and reproductive health services. Many sex workers who do access services have reported experiencing discrimination and stigmatization by health care providers.⁴⁷

A study by Anti-Slavery International in 1997 concluded that:

The marginal position of sex workers in society excludes them from the international, national and customary protection afforded to others as citizens, workers or women. Their vulnerability to human and labour rights violations is greater than that of others because of the stigma and

Human Rights, 2013, Vol.15, No.1.

⁴¹ A. Krūši, and K. Pacey, *et al.*, Criminalisation of clients: Reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada – A qualitative study, *BMJ Open*, 2014.

⁴² See Amnesty International, *Outlawed and abused: Criminalizing sex work in Papua New Guinea* (Index: ASA 34/4030/2016).

⁴³ See Amnesty International, *"What I'm doing is not a crime": The human cost of criminalizing sex work in the City of Buenos Aires, Argentina* (Index: AMR 13/4042/2016).

⁴⁴ NSWP, *Sex work and the law: Understanding legal frameworks and the struggle for sex work law reforms*, 2014, available at www.nswp.org/sites/nswp.org/files/Sex%20Work%20&%20The%20Law.pdf.

⁴⁵ See for example, UNAIDS, *The gap report*, 2014; WHO, UNFPA, UNAIDS, NSWP, The World Bank, *Implementing comprehensive HIV/STI programmes with sex workers: Practical approaches from collaborative interventions*, 2013.

⁴⁶ See Amnesty International, *"What I'm doing is not a crime": The human cost of criminalizing sex work in the City of Buenos Aires, Argentina* (Index: AMR 13/4042/2016).

⁴⁷ WHO, *Sexual health, human rights and the law*, 2015; NSWP, *Global Briefing Paper: Sex workers' access to HIV treatment around the world*, 2014, available at: www.nswp.org/resource/sex-workers-access-hiv-treatment-around-the-world; Amnesty International, *"What I'm doing is not a crime": The human cost of criminalizing sex work in the City of Buenos Aires, Argentina* (Index: AMR 13/4042/2016).

*criminal charges widely attached to sex work. These allow police and others to harass sex workers without ever intervening to uphold their most elementary rights.*⁴⁸

Contact with the criminal justice system can have lasting negative consequences for sex workers, particularly for those individuals or communities who face intersecting discrimination and marginalization,⁴⁹ setting up a cycle that can prove difficult to break and further marginalizing the individual. For example, significant difficulties may be encountered for those seeking later to expunge criminal records; such records create barriers to travel (freedom of movement), employment (right to work), secure housing and accessing alternative employment. A criminal record adds a further layer of stigma to that already frequently associated with sex work. In some jurisdictions this is further compounded by the individual who has been convicted for sex work-related offences having to register as a sex offender.⁵⁰

Similarly, fear of law enforcement officials (such as police and immigration officials) can prevent migrant women sex workers from exercising their rights such as seeking health services or seeking legal protection for crimes or other human rights abuses.⁵¹ Along these lines, there are reports of immigration laws being used disproportionately against sex workers.⁵²

Criminalization of sex work also provides a context that empowers, sometimes through direct authority and sometimes more implicitly, non-state actors to “take action” against individuals who are or are suspected to be sex workers, leading to human rights abuses against those individuals.⁵³

While the link between the direct criminalization of sex workers (for example, through laws that make selling sex a crime) and human rights violations is linear and relatively clear, the increased risk of human rights violations that sex workers experience is not linked purely to the criminalization

⁴⁸ Anti-Slavery International, J. Bindman and J. Doezema, *Redefining prostitution as sex work on the international agenda*, 1997.

⁴⁹ For example, Amnesty International’s research on police brutality has documented how “LGBT individuals who do not conform to traditional gender norms, especially in their appearance or presentation, are more likely to be singled out for verbal, physical and sexual abuse. It also shows that transgender individuals are disproportionately targeted by law enforcement officials.” This risk increases further in the intersection with race or migrant status. Amnesty International has previously found that: “Within the LGBTI community, transgender individuals, people from ethnic or racial minorities, young people, homeless people, and sex workers are at most risk of police abuse and misconduct.” See Amnesty International, *Stonewalled: Still demanding respect. Police abuses against lesbian, gay, bisexual and transgender people in the USA* (Index: AMR 51/001/2006), quotes at p.14 and p.6. Research in Brooklyn, New York, USA, found that people of colour come before the Human Trafficking Intervention Court and face prostitution-related charges at a disproportionately high rate. See Red Umbrella Project, *Criminal, victim, or worker: The effects of New York’s human trafficking intervention courts on adults charged with prostitution-related offences*, 2014.

⁵⁰ Best Practices Policy Project, Desiree Alliance, and the Sexual Rights Initiative, *Report on the United States of America, 9th round of the Universal Periodic Review*, November 2010. See also, Women with a Vision, *Victory at Last! Louisiana will remove hundreds of individuals unconstitutionally placed on sex offender registry*, 2013, available at: wwav-no.org/victory-at-last-louisiana-will-remove-hundreds-of-individuals-unconstitutionally-placed-on-sex-offender-registry.

⁵¹ Empower Foundation, *Hit & run: The impact of anti trafficking policy and practice on sex worker’s Human Rights in Thailand*, 2012.

⁵² UNDP, UNFPA, UNAIDS and APNSW, *Sex work and the law in Asia and the Pacific: Laws, HIV and human rights in the context of sex work*, 2012; Amnesty International, *The human cost of ‘crushing’ the market: Criminalization of sex work in Norway* (Index: EUR/36/4034/2016).

⁵³ “Vigilantes whip ‘prostitutes’ in Peruvian nightclub attack”, *The Telegraph*, 2007; Amnesty International, *Urgent Action: Vigilante attack on transgender woman sex worker in Peru* (Index: AMR 46/004/2009).

of the selling of sex. Antagonistic relationships between sex workers and the police occur wherever sex workers, clients or those providing services to sex workers are criminalized. Such relations compromise the safety of sex workers and limit their ability to effectively manage risks or secure redress for abuse or exploitation.⁵⁴ (See sections on **'Impact of criminalizing the purchase of sex'** and **'Impact of criminalizing the organization of sex work'** for further elaboration.)

STIGMA

Criminalization in all its forms actively stigmatizes sex work which can, in turn, bolster public prejudice, denial of agency, and active marginalization of sex workers by the state, including discrimination within the criminal justice and social protection systems:

Stigma often finds its way into legislative and policy frameworks mirroring societal attitudes and prejudices. In many countries, stigmatization is reflected in the criminalization of work-related activities and practices or the lack of legal protection. For instance, the lack of protection creates a climate of impunity, invisibility and silence and violence against sex workers. They are often forced to work in unsafe environments, including in the outskirts of cities, with no access to services.⁵⁵

This type of deep-rooted stigma intersects with and compounds harmful stereotypes against women and marginalized groups involved in sex work on the basis of their perceived failure to conform to social and gender-based norms of sexual behaviour. Women who sell sex are frequently subjected to harmful gender stereotypes on account of being perceived to transgress traditional notions of what is acceptable sexual behaviour for women.⁵⁶ Stigmatization of sex work is also frequently informed by and enmeshed with racist and colonialist notions of the racialized, sexualized "Other" and/or heteronormative prejudices, which characterize Indigenous communities, refugees, migrants, ethnic or racial minorities and LGBTI people as overtly sexualized and requiring containment, rescue or rehabilitation by the colonial power,⁵⁷ or by the ethnic and/or heteronormative majority.⁵⁸

Criminal laws which prohibit sex work serve as both an expression of this stigma, as they are the manifestation of society's disapproval of certain conduct, and as a driver of ongoing stigmatization

⁵⁴ See K. Blankenship and S. Koester, "Criminal law, policing policy, and HIV risk in female street sex workers and injection drug users", *Journal of Law, Medicine and Ethics*, 2002. Raids, cautions, arrests, and the use of antisocial behaviour orders (ASBOs) against sex workers in the United Kingdom have been found to shift sex workers toward unsafe areas and to diminish sex workers' ability to choose clients and negotiate condom use.

⁵⁵ Human Rights Council, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque: Stigma and the realization of the human rights to water and sanitation*, UN Doc. A/HRC/21/42, 2012, para. 41.

⁵⁶ R. Fassinger and J. Arseneau, "Diverse Women's Sexualities", in F. Denmark and M. Paludi, *Psychology of women: A handbook of issues and theories*, 1993.

⁵⁷ C.A. Mgbako, *To live freely in this world: Sex worker activism in Africa*, NYU Press, 2016, p. 50.

⁵⁸ R. Kapur, "'Faith' and the 'good' liberal: The construction female sexual subjectivity in anti- trafficking legal discourse", *Sexuality and the Law: Feminist Engagements*, 2007, pp. 223-258; L.M. Agustín, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry.*, 2007; Women's Refugee Commission, *Mean streets: Identifying and responding to urban refugees' risk of gender-based violence - Refugees engaged in sex work*, 2016; The International Committee on the Rights of Sex Workers in Europe (ICRSE), *Underserved. Overpoliced. Invisibilised: LGBT sex workers do matter*, 2016, available at: www.sexworkeurope.org/underserved-overpoliced-invisibilised-lgbt-sex-workers-do-matter; New Zealand Prostitutes Collective, *Decriminalisation of sex work in New Zealand: Impact on Maori*, 2013, available at: www.sexworklaw.co.nz/pdfs/Decriminalisation_of_Sex_Work_in_New_Zealand_-_Impact_on_Maori.pdf.

and stereotyping, as they confirm and compound the perception of people who undertake, or are suspected of undertaking, sex work as criminal and unwanted.⁵⁹

The UN Human Rights Committee, which monitors state compliance with the International Covenant on Civil and Political Rights, has long acknowledged the critical role that culture has played in women's full enjoyment of their rights under the Covenant. In its General Comment 28, the Human Rights Committee elaborated: "Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes... States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's... equal enjoyment of all Covenant rights."⁶⁰

Article 5 of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) calls upon states to confront harmful⁶¹ stereotyping by requiring state parties to:

Modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

This requirement applies to the full range of harmful stereotyping that people face and that impacts their human rights. In particular, Article 5 covers both gender stereotypes that are based on a view of women as being inferior to men and sex-role stereotypes.⁶² Additionally, Article 2(f) reinforces Article 5 by requiring state parties to "take all appropriate measures, including legislation, to modify or abolish laws, regulations, customs and practices which constitute discrimination against women."⁶³

Criminalizing sex work reinforces the notion that sex work is deviant, and stigmatizes the individuals who engage in it. These stereotypes preserve the social circumstances and norms that allow sex workers' human rights to be violated. The existence of such stereotypes has led to a situation where laws, policies and practices punish sex workers for engaging in non-normative sex and gender expression, and have institutionalized violence against all persons engaging in sex work, regardless of their sex, gender identity and/or sexual orientation. Laws that punish non-normative sex between consenting adults contravene government obligations to combat sex and gender stereotyping. This is also the case of laws criminalizing the purchase of sex, because these laws similarly maintain or create new stereotypes regarding the sellers of sex.

The CEDAW Committee has also affirmed that the CEDAW's protections, and states' related obligations, apply to all women and therefore include discrimination against women who are lesbians, bisexual, and/or transgender, particularly given the specific forms of gendered discrimination they face.⁶⁴ The

⁵⁹ R. Fassinger and J. Arseneau, "Diverse women's sexualities", in F. Denmark and M. Paludi, *Psychology of women: A handbook of issues and theories*, 1993; Amnesty International, *The human cost of 'crushing' the market: Criminalization of sex work in Norway* (Index: EUR/36/4034/2016). I NSWP, *Briefing Paper #02, The criminalisation of clients*, 2011, available at: www.nswp.org/sites/nswp.org/files/Criminalisation%20of%20Clients-c.pdf.

⁶⁰ Human Rights Committee, General Comment 28 (Equality of rights between men and women (article 3)), U.N. Doc. CCPR/C/21/Rev.1/Add.10, 2000, para. 5.

⁶¹ *V.V.P. v Bulgaria*, UN Doc. CEDAW/C/53/D/31/2011, 2012, para. 9.6.

⁶² CEDAW, Article 5; see also OHCHR, *Gender stereotyping as a human rights violation*, 2013, p. 23.

⁶³ OHCHR, *Gender stereotyping as a human rights violation*, 2014, p. 24.

⁶⁴ See CEDAW, General Recommendation 28 (Core obligations of States Parties under Article 2 of CEDAW), UN Doc. CEDAW/C/2010/47/GC.2, 2010, paras. 18 and 26; see also CEDAW, General Recommendation 26 (women

CEDAW Committee has affirmed through its analysis of intersectional discrimination in General Recommendation 28 that “the discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them”. As such, CEDAW prohibits the full range of gender-based discrimination.⁶⁵

IMPACT OF CRIMINALIZING THE PURCHASE OF SEX

Criminalizing those who purchase sex (whilst decriminalizing certain aspects of selling sex) is sometimes proposed as a means to reduce/eradicate sex work by ostensibly shifting the criminal burden from sex workers to clients, creating a disincentive against buying sex, and thereby working to reduce demand for commercial sex.

This approach was first adopted by the Swedish government in 1999. In recent years, similar legal frameworks have been adopted in a number of other jurisdictions, including Norway, Iceland, Northern Ireland and France. Amnesty International has sought to impartially consider whether this legislative model is an effective means to protect more broadly the human rights of sex workers and women and girls. For a fuller exploration of the human rights impact of this approach, see Amnesty International’s report on criminalization of sex work in Norway: *The human cost of ‘crushing’ the market: Criminalization of sex work in Norway*.⁶⁶

In both Sweden and Norway, researchers have found evidence of increased risk-taking among sex workers in relation to their safety since the passage of the purchasing ban. Research in 2012 by Pro Sentret, Norway’s national centre of expertise on sex work policy, indicated that since the introduction of the prohibition on purchasing sex, some sex workers have reported seeing a decrease in “good” clients and that the remaining “bad” clients now make up a greater proportion of available options. The report indicates that sex workers are taking greater risks in their interactions with clients, such as agreeing to visit their homes, concluding negotiations with clients more quickly or in secluded spaces that are safer for the client, and agreeing to engage with more dangerous clients.⁶⁷ Research also indicates that this increase in risk is felt most acutely by resource-poor, street-based sex workers who cannot relocate indoors and now face increased competition for “bad” clients, more pressure to conclude negotiations quickly and covertly, and reduced bargaining power.⁶⁸

migrant workers), UN Doc. CEDAW/C/2009/WP.1/R, 2008, para. 14.

⁶⁵ See CEDAW, General Recommendation 28, UN Doc. CEDAW/C/2010/47/GC.2, 2010, paras 18 and 26; see also CEDAW, General Recommendation 26 (Women migrant workers), UN Doc. CEDAW/C/2009/WP.1/R, 2008, para. 14.

⁶⁶ Amnesty International, *The human cost of ‘crushing’ the market: Criminalization of sex work in Norway* (Index: EUR/36/4034/2016).

⁶⁷ U. Bjørndahl, *Dangerous Liaisons: A report on the violence women in prostitution in Oslo are exposed to*, Municipality of Oslo and Ministry of Justice and Public Safety, 2012.

⁶⁸ J. Levy and P. Jakobsson, “Sweden’s abolitionist discourse and law: Effects on the dynamics of Swedish sex work and on the lives of Sweden’s sex workers”, *Criminology and Criminal Justice*, British Society of Criminology, 2014; S. Dodillet and P. Östergren, *The Swedish sex purchase act: Claimed success and documented effects*.

Both the Swedish and Norwegian government evaluations identified negative impacts on sex workers since the passage of the purchasing ban. The Swedish evaluation reported that current sex workers considered that the law had “intensified the social stigma of selling sex” and that they are being “treated as incapacitated persons”.⁶⁹ However, the Swedish evaluation also reported some support for the law among some sex workers.

The Norwegian evaluation, carried out by a social science consultancy for the government, reports that:

Women in the street market report to have a weaker bargaining position and more safety concerns now than before the law was introduced. At the indoors market, prostitutes express concerns for “out-door calls.” They prefer to have customers visiting them at their own apartment or own hotel room. The threshold for reporting a violent customer to the police also seems to be higher after the law. People in prostitution are afraid that such actions will come back to halt them at later stages.⁷⁰

The criminalization of the purchase of sex has also reportedly impacted HIV prevention and harm reduction. Condom distribution among clients has been publicly criticized for “encouraging sex work” and running contrary to the law, and has been scaled back in one area of Sweden since the passage of the law.⁷¹

There is also some evidence to suggest that the legal framework and associated police activities in these countries may serve to increase reliance on third parties among sex workers.⁷² For example, researchers have reported that some sex workers in Sweden may now more often rely on third parties to secure clients.⁷³ In Norway, some sex workers report being discriminated against by landlords who (because of stereotyping on the basis of nationality or race leading to assumptions that they could be sex workers) refuse to rent flats to them for fear of repercussions from the police. Sex workers may thus have to rely on third parties to rent accommodation for them.⁷⁴ In both Norway and Sweden there have been some reports of women being profiled on the basis of their nationality or race and excluded from public spaces⁷⁵ and hotels in order to “prevent” prostitution.⁷⁶

⁶⁹ A. Skarhead, *Prohibition of the purchase of sexual services. An evaluation 1999-2008*, Government of Sweden, Committee of Inquiry to Evaluate the Ban against the Purchase of Sexual Services, 2010.

⁷⁰ Vista Analyse, *Evaluering av forbudet mot kjøp av seksuelle tjenester* (English Summary), 2014, available at: vista-analyse.no/site/assets/files/6813/eng1.pdf.

⁷¹ J. Levy J. and P. Jakobsson, “Sweden’s abolitionist discourse and law: Effects on the dynamics of Swedish sex work and on the lives of Sweden’s sex workers”, *Criminology and Criminal Justice*, British Society of Criminology, 2014.

⁷² S. Dodillet and P. Östergren, *The Swedish sex purchase act: Claimed success and documented effects*.

⁷³ S. Dodillet and P. Östergren, *The Swedish sex purchase act: Claimed success and documented effects*. Purchasing Sexual Services in Sweden and the Netherlands. Legal Regulation and Experiences. A Report by a Working Group on the legal regulation of the purchase of sexual services. Norwegian Ministry of Justice and Police (2004).

⁷⁴ U. Bjørndahl, *Dangerous Liaisons: A report on the violence women in prostitution in Oslo are exposed to*, Municipality of Oslo and Ministry of Justice and Public Safety, 2012.

⁷⁵ Swedish Appeals Court Approves Discrimination Against ‘Asian-Looking Women’ on the Grounds of ‘Preventing Prostitution’ NSWP. Available at: <http://www.nswp.org/news/swedish-appeals-court-approves-discrimination-against-asian-looking-women-the-grounds>

⁷⁶ For more information on the situation in Norway see Amnesty International, *The human cost of ‘crushing’ the market: Criminalization of sex work in Norway* (Index: EUR/36/4034/2016).

A research report commissioned by RFSU, the Swedish Association of Sexuality Education (an affiliate of the International Planned Parenthood Federation), also raises concerns that the empirical basis which claims that the 1999 Swedish law reduced the demand for sex, one of the law's goals, is weak. It also indicates that the law has had negative consequences, including leading sex workers to sell sex in more secluded areas and placing them in more dangerous situations, as well as increasing stigmatization.⁷⁷

A 2011 study by Norwegian researchers used longitudinal data to explore the effect that the introduction of the law against purchasing sex has had on public attitudes in Norway.⁷⁸ The authors of the study surveyed members of the public in Norway in the latter part of 2008 and again in the same period of 2009 (after the law had been enacted). The study did not find any significant change in support for the criminalization of buying sex nationally. However, people surveyed who lived in the capital, Oslo, were more likely to support the criminalization of buying sex after the introduction of the law, and did not report having a more negative view of selling sex. The study also found that young people were more likely to change their attitudes towards buying sex and to view it more negatively.

At the same time, however, the study also found that there was greater overall support for the criminalization of selling sex at the national level after the passage of the law and that "Norwegians became more likely to think it should be illegal to sell sex than they would have been in the absence of legal change."⁷⁹ The authors recognized that this change in attitudes was the "opposite of what was intended⁸⁰ by legislators."

Similarly, a Swedish study published in 2010 looked at the impact of the ban on purchasing sex on public attitudes towards the sale and buying of sex in Sweden.⁸¹ It compared the findings of four surveys conducted in 1996, 1999 (the year the Swedish ban was introduced), 2002 and 2008. Support for criminalization of buying sex among respondents grew over the course of the surveys between 1996 and 2002 and remained high in 2008.⁸² However, the same study also found that support for the criminalization of selling sex increased – particularly among women. The study concluded that:

[I]t becomes clear that, after the enactment of the legislation, a change in public opinion in the direction of greater support for prohibition, both as regards the sale and purchase of sex, took place.⁸³

⁷⁷ C. Holmström, *Förbud mot köp av sexuell tjänst i Sverige - en kunskapsöversikt om avsedda effekter och oavsedda konsekvenser*, 2015.

⁷⁸ A. Kotsadam and N. Jakobsson, "'Do laws affect attitudes': An assessment of the Norwegian prostitution law using longitudinal data", *International Review of Law and Economics*, 2011, pp. 103-115.

⁷⁹ A. Kotsadam and N. Jakobsson, "'Do laws affect attitudes': An assessment of the Norwegian prostitution law using longitudinal data", *International Review of Law and Economics*, 2011, p. 108.

⁸⁰ A. Kotsadam and N. Jakobsson, "'Do laws affect attitudes': An assessment of the Norwegian prostitution law using longitudinal data", *International Review of Law and Economics*, 2011, p. 108.

⁸¹ J. Kuasmanen, "Attitudes and perceptions and legislation prohibiting the purchase of sexual services in Sweden", *European Journal of Social Work*, 2010.

⁸² In 1996, 32% of those surveyed supported the criminalisation of buying sex, rising to 76% in 1999 and 2002 and 71% in 2008.

⁸³ J. Kuasmanen, "Attitudes and perceptions and legislation prohibiting the purchase of sexual services in Sweden", *European Journal of Social Work*, 2010, p. 8.

While these studies indicate that laws can be used to affect changes in public attitudes towards buying sex, they also suggest that attitudes towards sex workers have become more punitive as a result of their introduction. Punitive attitudes towards sex workers are an indicator of increased stigma and are a driver of discrimination against sex workers. The extent to which states can selectively stigmatize one side of the sex work transaction without also increasing stigma against the other group involved – namely people who sell sex – is therefore called into question.

The aim of “purchasing” prohibitions is to reduce or abolish sex work, and this means that police still pursue sex workers (and former or presumed sex workers) as a means to detect and prosecute purchasers or third parties, in order to eradicate sex work. Media coverage and academic research in Norway, for example, indicates that raids, “stings” and surveillance of sex workers are a feature of the approach taken by Norwegian police to detect clients of sex workers and third parties involved in the “promotion” of sex work.⁸⁴ Research in Sweden also reports that some sex workers “feel hunted” by the police and are subjected to “invasive searches and questioning”.⁸⁵ This can add to the stigma and barriers that sex workers face in leaving sex work.

It is also crucial to note that under these models sex workers can still be either directly or indirectly criminalized under “third party offences”. For example, in Norway police have actively targeted landlords of sex workers in a crackdown on third parties known as “Operation Homeless”. This has led to the eviction of sex workers from their places of work and homes.⁸⁶ Similarly, the Northern Ireland Assembly introduced the criminalization of the purchase of sex in 2014. Whilst solicitation charges were repealed, sex workers working with any other person in an indoor location for the purposes of safety will still be criminalized under brothel-keeping prohibitions.⁸⁷ For example, media coverage on the first arrests after the introduction of the new purchasing ban in Northern Ireland demonstrated that in the first raid, one man was arrested for buying sex, while three women were arrested under the “brothel-keeping” law.⁸⁸

⁸⁴ *Sex-purchase law has had little effect* NRK, 2012, available at: www.nrk.no/norge/sexkjopsloven-har-hatt-liten-effekt-1.8348302; J. Kanestrøm, “Prostitutes are abused in the hunt for criminals”, *Science Nordic*, 2013, available at: sciencenordic.com/prostitutes-are-abused-hunt-criminals; M. Skilbrei and C. Holmström, ‘The Nordic Model of Prostitution Law is a Myth’, *The Conversation*, 2013, available at: theconversation.com/the-nordic-model-of-prostitution-law-is-a-myth-21351; NSWP, *Statement: In response to the Norwegian evaluation of the ban on the purchase of sex*, available at: www.nswp.org/sites/nswp.org/files/NSWP%20Statement%20Norwegian%20Report%20on%20the%20Ban%20of%20the%20Purchase%20of%20Sex.pdf.

⁸⁵ S. Dodillet and P. Östergren, *The Swedish sex purchase act: Claimed success and documented effects* (citing D. Kulick, “Sex in the new Europe: The criminalization of clients and Swedish fear of penetration”, *Anthropological Theory*, 2003, pp. 199-218); see also NSWP, *Research for sex work: No. 12*, 2010.

⁸⁶ A. Brunovskis, *Fem prostitusjonstiltaks erfaringer gjennom et halvt år: Februar til juli 2012*, Fafo-rapport, 2013; U. Bjørndahl, *Dangerous liaisons: A report on the violence women in prostitution in Oslo are exposed to*, Municipality of Oslo and Ministry of Justice and Public Safety, 2012; Amnesty International, *The human cost of ‘crushing’ the market: Criminalization of sex work in Norway* (Index: EUR/36/4034/2016).

⁸⁷ The Sexual Offences (Northern Ireland) Order 2008, Section 64.

⁸⁸ “First arrest made under Northern Ireland’s new offence of paying for sex”, *Guardian*, 2015.

IMPACT OF CRIMINALIZING THE ORGANIZATION OF SEX WORK

The criminalization of the organization of sex work, including through offences like “brothel-keeping”, “renting premises for the purposes of prostitution” and “living off the proceeds of prostitution”, criminalize activities that are seen as facilitating sex work. These laws are used in most countries where sex work is criminalized.

While it is perhaps logical to consider these offences as being necessary for the protection of sex workers, the relevant legislation rarely distinguishes between organizational activity that is exploitative, abusive, or coercive, and activity that is personal, practical, supportive or for the purposes of safety. Legislation instead tends to apply blanket prohibitions on all collaborative organization of sex work. As such, sex workers working together or with a receptionist, cleaner, security guard or driver for the purposes of safety, can frequently be criminalized and subjected to police enforcement under organizational prohibitions.

Notably, this type of criminal law enforcement limits sex workers’ ability to address safety concerns in their working environments. In 2013, the Supreme Court of Canada struck down three provisions of the Canadian Criminal Code, specifically: “keeping or being found in a bawdy house”, “living on the avails of prostitution” and “communicating in public for the purpose of prostitution” on the grounds that they violate sex workers’ right to security of person. In the decision, the Chief Justice described how “the negative impact of the bawdy-house prohibition (s. 210) on the applicants’ security of person is grossly disproportionate to its objective of preventing public nuisance.”⁸⁹

Equally, provisions against “living off the avails” of sex work can criminalize support workers and family members of sex workers. India’s Immoral Traffic Prevention Act (1956) states that any adult over the age of 18 “living with” or “habitually in the company of a prostitute” “shall be presumed to be... knowingly living on the earnings of prostitution of another person.”⁹⁰ This works in effect to criminalize the adult children or partners of sex workers who live with them.⁹¹ In some cases, this may violate the right to freedom of association, by criminalizing those who live with or associate with sex workers, even if they have no involvement in commercial sex and related activities. Laws against “living off the avails” or organizing sex work are also commonly used or threatened against landlords of sex workers or suspected sex workers leading to the frequent eviction of sex workers from their homes or workplaces.

Amnesty International supports the criminal prosecution of abuse, coercion or violence by third parties involved in sex work. It also supports the criminalization of forced labour and trafficking into the sex sector. These are serious crimes, and all allegations and reports of crimes against individuals in the sex sector should be promptly and impartially investigated and those found responsible (through a fair trial) brought to justice.

States have a duty to ensure that the laws they use to address these issues are appropriately focused on harm, are not overly broad and do not violate the human rights of sex workers. States should remove existing laws against operating or servicing sex work businesses so that sex workers can

⁸⁹ *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

⁹⁰ Immoral Traffic (Prevention) Act 1956 (India), Section 4.2(a).

⁹¹ NSWP, *The decriminalization of third parties* (Briefing), 2013, available at: www.nswp.org/sites/nswp.org/files/thirdparties3_0.pdf.

exercise their labour rights, including their right to a safe working environment, and take action when those rights are denied.⁹² States should focus on ensuring that sex workers can enjoy equal protection under the law and specifically from violence under general laws on assault, rape and intimidation, for example. This approach ensures that the criminal law is used to protect the rights of sex workers instead of obstructing, interfering with and criminalizing their attempts to make their working environments safer, and preventing them from reporting crimes to police.

WHAT AMNESTY INTERNATIONAL MEANS BY DECRIMINALIZATION

Among other things, Amnesty International's proposed policy calls for "decriminalization" of sex work. This means the removal of all laws and policies that make sex work a criminal offence (such as those prohibiting selling, soliciting, manifesting, buying or facilitating sex work or living off the proceeds). It also relates to the discriminatory use of other laws, which are not specific to sex work, to harass, intimidate, exploit, arrest or justify the use of force against individuals engaged in sex work. Laws against vagrancy, public lewdness, public nuisance, homosexuality and cross-dressing, and regulations such as those on public nuisance or quality of life, among others, are all used in a discriminatory way against individuals engaged in sex work.⁹³ In many cases, the mere existence of these laws – even if they are rarely applied – is used to justify the harassment and extortion of sex workers, or people presumed to be sex workers, both by police and others. Sex workers who are from marginalized groups such as transgender or gender non-conforming people, and/or who work in public spaces such as on the street, are at increased risk of being targeted and punished. This makes transgender sex workers (especially transgender women) particularly visible to law enforcement officials, increasing their likelihood of arrest where sex work is criminalized or under vague laws that are often used to target them through discriminatory policing.⁹⁴

Decriminalization of sex work does not mean decriminalization of violence or other rights violations that occur within sex work. In a decriminalized system, the same laws that generally apply to other businesses may be applied to sex work. Thus, relevant tax, zoning and employment laws, as well as occupational health and safety standards, apply equally to sex workers and sex work establishments.⁹⁵ Similarly, laws on assault, intimidation, harassment, blackmail, labour exploitation, forced labour and human trafficking, among others, can and should be used to protect the rights of sex workers. Furthermore, decriminalization can lead to improved conditions that

⁹² International Committee on the Rights of Sex Workers in Europe (ICRSE), *Exploitation: Unfair labour arrangements and precarious working conditions in the sex industry*, 2016, available at: www.sexworkeurope.org/fr/news/general-news/may-day-icrse-lance-community-report-exploitation-sex-industry; Empower Foundation, *Moving toward decent sex work*, Empower University Press, 2016, available at: <http://www.nswp.org/sites/nswp.org/files/Moving%20Toward%20Decent%20Work%2C%20EMPOWER%20-%20April%202016.pdf>.

⁹³ Similarly, laws against sex work have been used against individuals who have been targeted by the authorities though not for selling sex. For example, Amnesty International's work on the "Queen Boat" case in Egypt from 2001 (see *Egypt: Torture and imprisonment for actual or perceived sexual orientation* (Index: MDE 12/033/2001) and several subsequent cases. Amnesty International's research in Papua New Guinea also documented how male sex workers are prosecuted under sections of the criminal code also applied to same-sex relations between men. Amnesty International, *Outlawed and abused: Criminalizing sex work in Papua New Guinea* (Index: ASA 34/4030/2016).

⁹⁴ On the use of vague laws such as "morals regulations" and "quality of life" ordinances against transgender people, see for example Amnesty International, *Stonewalled: still demanding respect. Police abuses against lesbian, gay, bisexual and transgender people in the USA* (Index: AMR 51/001/2006).

⁹⁵ C. Harcourt et al. "The decriminalization of sex work is associated with better coverage of health promotion programs for sex workers", *Australian and New Zealand Journal of Public Health* 34(5): 482-486, 2010.

enable sex workers to report violence against them to the police or pursue civil protections without fear of arrest.⁹⁶

The Prostitution Reform Act decriminalized sex work in New Zealand in 2003 with the aim of safeguarding the human rights of sex workers. The New Zealand Ministry of Justice Prostitution Law Review Committee commissioned a literature review in 2005 and a review of research in 2008 in order to assess the impact of the Prostitution Reform Act.⁹⁷

Prior to decriminalization, sex workers were hesitant to disclose their occupation to health care workers or to carry condoms for fear of criminal sanctions.⁹⁸ As a result of reform, the Committee saw “increased confidence, well-being and a sense of validation among sex workers”, which had “a positive spin-off in many areas, such as the improvement of employment conditions, and the ability to ensure that safer sex practices remain standard throughout the industry.”⁹⁹ Sex workers also reported that they were more able to refuse particular clients and practices and to negotiate safer sex.¹⁰⁰

Additionally, the relationship between sex workers and the police was improved. Sex workers reported feeling more confident that incidents of violence against them would be taken more seriously, and 70% of sex workers, particularly those working on the street, felt more likely to report incidents of violence to the police.¹⁰¹ Following decriminalization of sex work, 77% of surveyed sex workers felt police officers were concerned for their safety, and a majority felt police attitudes had changed for the better since the Prostitution Reform Act was enacted.¹⁰² Subsequent research has found “decriminalizing sex work in New Zealand has shifted the balance of power between police

⁹⁶ In the 2010 *Bedford v Canada* ruling, the Ontario Superior Court cited evidence that most sex workers do not report violence against them because of fear of arrest or other punishment (including losing custody of their children) in their decision that certain criminal prohibitions on sex work violated the Canadian Charter of Rights and Freedoms: *Bedford v Canada*, 2010 ONSC 4264.

⁹⁷ J. Jordan, *The sex industry in New Zealand: A literature review*, New Zealand Ministry of Justice, 2005; *Prostitution Law Review Committee: Report of the prostitution law review committee on the operation of the prostitution reform act 2003*, New Zealand Ministry of Justice, 2008.

⁹⁸ J. Jordan, *The sex industry in New Zealand: A literature review*, New Zealand Ministry of Justice, 2005, p. 65;

⁹⁹ *Prostitution Law Review Committee: Report of the prostitution law review committee on the operation of the prostitution reform act 2003*, New Zealand Ministry of Justice, 2008 p. 50.

¹⁰⁰ *Prostitution Law Review Committee: Report of the prostitution law review committee on the operation of the prostitution reform act 2003*, New Zealand Ministry of Justice, 2008 pp. 46-47, 50 (In the 2008 study, 61.3% of sex workers working in brothels who participated in the survey reported refusing a client in the last 12 months, and 67.3% felt more capable to refuse clients since the PRA); C. Harcourt, et al., “The decriminalization of prostitution is associated with better coverage of health promotion programs for sex workers”, *Australian and New Zealand Journal of Public Health*, 2010, pp. 482-86; G. Abel, “A decade of decriminalization: Sex work ‘down under’ but not underground”, *Criminology and Criminal Justice*, 2014, p.585 (Research carried out prior to decriminalization reported that 47 per cent of brothel workers had refused to see a client in the previous 12 months, yet research done after decriminalization has reported that 68 per cent of brothel workers had done this).

¹⁰¹ *Prostitution Law Review Committee: Report of the prostitution law review committee on the operation of the prostitution reform act 2003*, New Zealand Ministry of Justice, 2008, p. 57.

¹⁰² 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 Reform Committee)*, 2007, p. 163, available at: www.otago.ac.nz/christchurch/otago018607.pdf (60% of sex workers perceived the police as some concerned, and 17.2% perceived the police as most concerned for safety of sex workers).

and sex workers in two distinct ways: first, in reducing the power police have over sex workers by removing the risk of arrest; and second, empowering sex workers through the provision of rights.”¹⁰³

As a result, sex workers have been able to access justice through the court system. For example, a sex worker can take a client to court for deliberately removing a condom during commercial sex,¹⁰⁴ or receive award damages and other remedies for sexual harassment from a brothel owner.¹⁰⁵ The Prostitution Reform Act had little impact on the number of people working as sex workers,¹⁰⁶ and a study of migrant sex workers found no evidence of trafficking of migrant sex workers to New Zealand.¹⁰⁷

Although decriminalization is one crucial step to protect sex workers, it is not a panacea for all violations and abuses facing sex workers.¹⁰⁸ For example, even in decriminalized jurisdictions such as New Zealand, transgender sex workers are often still found working on the street as they are excluded from brothels.¹⁰⁹ Other steps listed in the policy aiming at addressing discrimination and denial of economic, social and cultural rights are also crucial.

WHY NOT LEGALIZATION?

Different legal regulatory approaches to sex work pose different implications for human rights.¹¹⁰ Amnesty International’s policy does not call for “legalization”, which involves not only decriminalization, but development and enforcement of additional specific laws and policies aimed at regulating sex work, distinct from other employment sectors. Decriminalization focuses more on individuals involved in the sex sector, whereas legalization is associated with structuring the industry itself.¹¹¹ Along those lines, Amnesty International’s policy is concerned with the realization of the human rights of individuals who sell sex.

¹⁰³ L. Armstrong, “From law enforcement to protection?: Interactions between sex workers and police in a decriminalized street-based sex industry”, *British Journal of Criminology*, 2016, p.1.

¹⁰⁴ G. Abel, *Decriminalisation: A Harm Minimisation and Human Rights Approach to Regulating Sex Work*, PhD Thesis, Public Health and General Practice, University of Otago, Christchurch, 2010, in G. Abel, “A decade of decriminalization: Sex work ‘down under’ but not underground”, *Criminology and Criminal Justice*, 2014, p. 586.

¹⁰⁵ Human Rights Review Tribunal of New Zealand, *DML v Montgomery* [2014] NZHRRT6.

¹⁰⁶ 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 Reform Committee)*, 2007, p. 40.

¹⁰⁷ M. Roguski, *Occupational Health and Safety of Migrant Sex Workers in New Zealand*, Kaitiaki Research and Evaluation, 2013, p. 58.

¹⁰⁸ For additional information on labour issues in the sex sector see, International Committee on the Rights of Sex Workers in Europe (ICRSE), *Exploitation: Unfair labour arrangements and precarious working conditions in the sex industry*, 2016, available at: www.sexworkerurope.org/fr/news/general-news/may-day-icrse-launches-community-report-exploitation-sex-industry; Empower Foundation, *Moving toward Decent Sex Work*, Empower University Press, 2016, available at: www.nswp.org/resource/moving-toward-decent-sex-work.

¹⁰⁹ The New Zealand Family Planning Association estimated 50 per cent of transgender sex workers work on the street. New Zealand Human Rights Commission, *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People*, 2007, p. 51.

¹¹⁰ J. Pritcher and M. Wijers, “The impact of different regulatory models on the labour conditions, safety and welfare of indoor-based sex workers”, *Criminology & Criminal Justice*, 2014 (online version). This article reviews the human rights impact of the UK’s fragmented criminalized and the Netherlands’ legalized regulatory approaches to sex work.

¹¹¹ Global Alliance Against Traffic in Women (GAATW), *Moving beyond ‘supply and demand’ catchphrases: Assessing the uses and limitations of demand- based approaches in anti-trafficking*, 2011.

While setting out the issues in 2000, the Special Rapporteur on violence against women stated that:

Decriminalization seeks only to punish non-consensual acts. Legalization also seeks to address prostitution outside the purview of criminal law. Instead, it seeks to regulate prostitution through zoning, licensing and, in some cases, mandatory health checks. Lastly, decriminalization with a human rights approach calls for the protection of the legal rights of sex workers. Thus, it calls for decriminalization of prostitution and related acts, and the application of existing human rights and labour rights to sex workers and sex work.¹¹²

Legalization involves direct state regulation and control of sex work, for example through the passage of laws that limit the numbers involved or locations of commercial sex premises or the imposition of the mandatory testing of sex workers for HIV and sexually transmitted infections (STIs). In these systems the police are most commonly used to enforce the legal framework, as opposed to protecting sex workers from violence and other crime. Notably, legalization of sex work does not necessarily permit all types of sex work. For example, legal sex work may be limited to brothels that are subject to licensing restrictions. The regulatory requirements of some legalized systems can mean that many sex workers that operate outside legalized settings, such as on-street locations, are still criminalized and subject to policing and punishment, thus exposing them to human right violations. This creates a two-tiered system of legal and illegal sex workers.

The regulatory restrictions in some legalized systems can also work to prohibit sex workers from organizing collectively and managing their own sex work, meaning in effect that in order to operate legally they have to work for a licensed operator such as a commercial brothel. While some sex workers may choose to work in commercial establishments, Amnesty International considers that the freedom to work collectively and/or self-organize is crucial to ensure the safety of all sex workers and the realization of their rights. Some regulations within legalized systems directly violate human rights.

REGULATION

States can impose legitimate restrictions on the sale of sexual services provided that such restrictions comply with international human rights law. In particular they must be for a legitimate purpose, appropriate to meet that purpose, provided by law, necessary for and proportionate to the legitimate aim sought to be achieved, and not discriminatory. Regulations should respect the agency of sex workers and guarantee that individuals who engage in sex work do so voluntarily and in safe conditions, free from exploitation, and are able to leave if and when they choose. States should also ensure the participation and consultation with sex workers in the development of any regulatory frameworks, and that the varying lived experiences of sex workers play a pivotal role in determining what form any regulations take.

Amnesty International does not take a position on whether states should formally recognize sex work as a form of work that requires specifically designed regulation. Amnesty International recognizes that different contexts require varying responses and that states may consider that some regulation

¹¹² UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy*, UN Doc. E/CN.4/2000/68, 2000, para. 21.

of sex work will be required.¹¹³ Amnesty International does not take a position on the exact form such regulation should take, or whether it is necessary for states to develop regulations specifically designed for sex work, which are separate from the general laws that broadly regulate other businesses or employment practices in a country. However, any regulatory system put in place must comply with international human rights standards.

INDIGENOUS PEOPLES AND DECISION-MAKING

The human rights framework recognizes the collective organization and decision-making processes of Indigenous Peoples and the fact that historic patterns of marginalization and oppression lead to increased risks of further violation when decisions are imposed by the dominant society. As such, Indigenous Peoples have specific rights to participate in decision-making processes, including the exercise of free, prior and informed consent when decisions are taken that may have the potential for a distinct impact on the rights of Indigenous Peoples.¹¹⁴ When governments are taking decisions of general applicability, the free, prior and informed consent of Indigenous Peoples should be sought when such decisions have a differentiated effect on them or affect them in ways not felt by other groups in society.¹¹⁵ The exact application of these rights protections will vary based on the facts of each situation. At the very least, wherever Indigenous history and identity (including, for example, racialized gender stereotyping, history of displacement, and ongoing impunity for violence) is a factor in the multiple forms of discrimination affecting sex workers, Indigenous Peoples, including Indigenous sex workers, Indigenous women's organizations, and others should be part of a meaningful consultation process in formulation of policies and programmes to protect the rights of sex workers.

Free, prior and informed consent may be expressed directly either by the community as a whole, or via their specifically designated decision-making structures. The exercise of free, prior and informed consent requires that all sectors of the community – particularly those specifically affected by the issue under debate and especially Indigenous sex workers who may be affected by the decision in question – are able to participate effectively. Decision-making processes should respect the rights of all sex workers to participate without discrimination in decisions affecting their lives, ensuring meaningful participation and consultation.¹¹⁶ In some cases, Indigenous Peoples' authorities exercise jurisdiction over many or most decisions affecting their territories and communities.

¹¹³ J. Pritcher and M. Wijers, "The impact of different regulatory models on the labour conditions, safety and welfare of indoor-based sex workers", *Criminology & Criminal Justice*, 2014 (online version).

¹¹⁴ See further Amnesty International, *Policy paper on Indigenous Peoples' right to free, prior and informed consent* (FPIC) (POL 39/001/2010); and *Policy paper on defending the human rights of Indigenous Peoples* (POL 30/014/2005).

¹¹⁵ United Nations Declaration on Indigenous Peoples' Rights, Article 19. The previous UN Special Rapporteur on the rights of indigenous peoples, James Anaya, has stated that it would be unrealistic to say that the duty of States to consult directly with indigenous peoples through special, differentiated procedures applies to all State decision that affect them. Rather, "it applies whenever a State decision may affect indigenous peoples in ways not felt by others in society. Such a differentiated effect occurs when the interests or conditions of indigenous peoples that are particular to them are implicated in the decision, even when the decision may have a broader impact, as in the case of certain legislation. For example, land or resource use legislation may have broad application but, at the same time, may affect indigenous peoples' interests in particular ways because of their traditional land tenure or related cultural patterns, thus giving rise to the duty to consult." Report of the UN Special Rapporteur on the rights of indigenous peoples, UN doc A/HRC/12/34, 15 July 2009, para. 43.

¹¹⁶ See the section on 'Law and policy development by governments' in Amnesty International, *Policy on state*

Decisions at all levels of government, including at the national, regional, local and community levels, must ensure the protection of the human rights of sex workers, including by refraining from criminalizing or penalizing sex work.

COERCION, CONSENT AND AUTONOMY

A key component of Amnesty International's definition of sex work is the focus on consent as a factor to distinguish sex work from human trafficking, and sexual and gender-based violence more broadly. There is no clear definition of consent under international law.¹¹⁷ The majority of the legal analysis around consent has arisen in its absence: in legal decisions on rape, war crimes and human trafficking. Debates around the concept of consent arise in all legal systems in relation to a range of issues.¹¹⁸ From a human rights perspective, consent analysis needs to be situated in the broader understanding of individual autonomy.

International criminal law and international human rights law are clear that force or coercion negate consent.¹¹⁹ As Amnesty International has previously stated, "both logically and legally, both parties to sexual acts must be unforced and uncoerced in participating in sexual acts for those acts to be legal."¹²⁰

One position in the debate on criminalization of sex work is that it is impossible for a person to consent to sell sex, and thus commercial sex is always non-consensual, regardless of the perspectives or experiences those who sell sex. However, as referenced earlier (under '**Entry into sex work**'), while many systemic factors and personal circumstances such as poverty, discrimination and gender inequality can contribute to an individual's decision to engage in sex work, such conditions do not inevitably render individuals incapable of exercising agency in these contexts, and more specifically to consenting to engage in sex work.¹²¹ Constrained circumstances do not eliminate an individual's ability to make decisions about their own lives, except under particular circumstances that amount to coercion – where an individual faces threats, violence or abuse of authority. Nevertheless, there may be an increased risk of exploitation for individuals making decisions in the context of poverty, displacement and/or conflict. States have obligations to protect all individuals

obligations to respect, protect and fulfil the human rights of sex workers (POL 30/4062/2016).

¹¹⁷ For additional discussion, see Alice Miller, International Council on Human Rights Policy, *Sexuality and human rights*, 2009, available at: http://www.ichrp.org/files/reports/47/137_web.pdf.

¹¹⁸ UNODC, *Issue paper: The role of 'consent' in the Trafficking in Persons Protocol*, 2014, p. 34.

¹¹⁹ See, for example, *Prosecutor v Kunarac, Kovac and Vukovic* IT-96-23-T & IT-98-30/1-T, 2001, paras 457-458; *Prosecutor v Kunarac, Kovac and Vukovic*, IT-96-23 & IT-96-23/1-A, 2002, para. 132; UN Women, 'Consent', available at: <http://www.endvawnow.org/en/articles/469-consent.html>. For additional discussion, see Alice Miller, *International Council on Human Rights Policy, Sexuality and human rights*, 2009, available at: http://www.ichrp.org/files/reports/47/137_web.pdf.

¹²⁰ Amnesty International, *Rape and sexual violence-human rights law and standards in the ICC* (Index: IOR 53/001/2011); see also European Court of Human Rights, *M.C. v Bulgaria*, Application No. 39272/98, 2003, para. 163 ("Consent must be given voluntarily, as a result of the person's free will, assessed in the context of surrounding circumstances.").

¹²¹ Anti-Slavery International, J. Bindman and J. Doezeema, *Redefining prostitution as sex work on the international agenda*, 1997 ("The street worker who accepts a client she would prefer to reject, for fear of being unable to meet daily expenses, or the worker in hired premises who must earn a minimum amount to pay the proprietor for that day's hire of the premises, is facing not slavery but simple economic and social injustice, of the kind which constrains workers in every field to accept inequitable or dangerous conditions. The solution to this injustice lies... in the field of economic and social rights.") See also C.A. Mgbako, *To live freely in this world: Sex worker activism in Africa*, NYU Press, 2016.

from exploitation and the conditions that create a risk of exploitation. However, in doing so, states must also recognize and respect the agency and capacity of adults engaged in consensual sex work. States must address the conditions that give rise to exploitation, by enhancing sex workers' choices and control over their own circumstances.

Law enforcement bodies, other government bodies and clients often make assumptions, based on stereotypes, that sex workers always consent to sex (because they may engage in sex frequently for their work) or, conversely, that sex workers can never consent to sex (because no one could rationally consent to selling sex). These assumptions lead to violation of sex workers' human rights, particularly their safety, access to justice and equal protection under the law. Criminalization of sex work often reinforces these problematic assumptions.

It is important to avoid approaches to the issue of consent and sex work that eliminate any possibility of consent and thereby actively disempower sex workers, denying them individual agency and bodily autonomy.¹²² Sex work implies consent of sex workers and their capacity to exercise that consent voluntarily. The exercise of agency – that is, people determining for themselves what they want to do and when – is central to the definition of sex work.¹²³ Along these lines, human rights bodies, experts and instruments increasingly recognize that individuals have the capacity to consent to sell sex,¹²⁴ and critique criminalization of sex work as a matter of human rights.¹²⁵

¹²² See J. Chuang, "Exploitation creep and the unmaking of human trafficking law", *American Journal of International Law*, 2014, p. 640.

¹²³ UNAIDS, *Guidance note on HIV and sex work*, 2012, p. 16.

¹²⁴ See UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44*, UN Doc. E/CN.4/2000/68, 2000, para. 36 (recognizing that some individuals do consent to selling sex and thus should not be classified as trafficking victims); OHCHR, *Recommended principles and guidelines on human rights and human trafficking: Report of the United Nations High Commissioner for Human Rights (Addendum)*, UN Doc. E/2002/68/Add.1, 2002, Guideline 8.1 (Similar to the Trafficking Protocol, these Guidelines recognize consent as a defence for trafficking of adults.); UNAIDS, *Guidance note on HIV and sex work*, 2012, p. 16; UNDP, *Global Commission on HIV and the Law, Risks, rights & health*, 2012, p. 39; UN Fourth World Conference on Women International, *Beijing Platform for Action*, 1995, para. 96; ILO, L.L. Lim, 'The economic and social bases of prostitution in Southeast Asia', in *The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia*, 1998, pp. 1, 213. After conducting research on the sex sector in Southeast Asia conducted in 1998, the ILO concluded that while coercion often accompanied sex work, it could be freely chosen.

¹²⁵ See WHO, UNFPA, UNAIDS, NSWP, *Prevention and Treatment of HIV and other sexually transmitted infections for sex workers in low- and middle-income countries: Recommendations for a public health approach*, 2012, p.8, available at: apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf (Calling for all countries to "work toward decriminalization of sex work and elimination of the unjust application of non-criminal laws and regulations against sex workers."); UNDP, *Global Commission on HIV and the Law, Risks, rights & health*, 2012, pp. 36-43 (Global research documenting that criminalising the sale of sex can negatively impact sex workers' human rights in several ways, including by directly violating their rights to life, health, physical and mental integrity, equality and non-discrimination and autonomy, by rendering sex workers and those who work with them more vulnerable to violence, abuse and extortion by police, clients and third parties, infringing upon their privacy and bodily autonomy, and through shaping negative attitudes that lead to their diminished human rights protection.); see also CEDAW Committee, *Concluding Observations: Fiji*, UN Doc. A/57/38, 2002, paras. 64-65; Kenya, UN Doc. CEDAW/C/KEN/CO/6, 2007, paras 29-30; Republic of Korea, UN Doc. CEDAW/C/KOR/CO/6, 2007, paras. 19-20; France, UN Doc. CEDAW/FRA/CO/6, 2008, paras. 30-31; Albania, UN Doc. CEDAW/C/ALB/CO/3, 2010, para. 29.

For the purposes of Amnesty International’s policy on sex workers’ rights, the term “consent” refers to the voluntary and ongoing agreement to engage in a particular sexual activity. Consenting to sex or to sell sex does not mean consenting to violence. Sex workers, like other people, can change or rescind their consent to have or sell sex at any point and this must be respected by all parties involved (e.g. clients, potential clients, third parties, law enforcement officials, judges and other officials). Where consent is absent for reasons including threat or use of force, deception, fraud, and abuse of power or involvement of a child, such activity would constitute a human rights abuse which must be treated as a criminal offence.

Consent analysis is necessarily a fact- and context-specific analysis. When conducting this type of analysis, the views, perspectives and experiences of individuals selling sex is fundamental in any considerations of issues related to consent. Moreover, it is vital that law- and policy-makers and service providers engage directly with the individuals who engage in sex work to develop laws, policies and practices that protect human rights of sex workers.

Sex work laws that fail to recognize that sex workers have agency and bodily autonomy and that they can and do make conscious decisions about their lives and how they use their bodies, raise a range of human rights concerns. Despite approaching the issue with different motivations, criminal laws that either designate all sex work and sex workers as “immoral/criminal”, or laws that conceive all sex workers as “victims” of gender-based violence against women or as people who lack full understanding of the harm they face, can deny sex workers the ability to make decisions about their lives and bodies and enjoy their human rights. Such approaches are problematic from a human rights perspective, as they deny agency and decision-making to an entire group of people (most of whom are women) and place the power to make decisions about their lives in the hands of the state. Framing the entirety of the sex industry as abusive obscures the harm and the rights abuses that sex workers may face, paralleling “some popular beliefs [that] dictate that women who sell sex cannot be raped, because they have already agreed to have sex, albeit for money”.¹²⁶ The Special Rapporteur on violence against women has also raised concern that sex workers are positioned as being “outside the boundaries of what could constitute rape”, reinforcing sex workers’ marginal status.¹²⁷

HUMAN RIGHTS STANDARDS AND UN AGENCY POSITIONS ON SEX WORK

The primary and secondary evidence gathered by Amnesty International demonstrates that the criminalization of consensual sex work between adults has a foreseeable negative impact on a range of human rights. These include the rights to life, liberty and security of person; freedom from torture, or cruel, inhumane or degrading treatment or punishment; freedoms of expression and association; the rights to health, housing, equality and non-discrimination; freedom from unlawful interference with privacy, family and home; the rights to just and favourable conditions of work and

¹²⁶ F. Pickup, with S. Williams and C. Sweetman, *Ending violence against Women. A challenge for development and humanitarian work*, 2001, p. 15; Asijiki – Coalition to Decriminalise Sex Work in South Africa, *Sex Work and Human Rights*, Fact Sheet, 2015, available at: <http://www.sweat.org.za/wp-content/uploads/2016/02/Sex-work-and-human-rights-Asijiki-1.pdf>; International Committee on Rights of Sex Workers in Europe, *Community Report: Exploitation: Unfair labour arrangements and precarious working conditions in the sex industry*, 2016.

¹²⁷ Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/1997/47, 12 February 1997, para. 40; Anti-Slavery International, J. Bindman and J. Doezema, *Redefining prostitution as sex work on the international agenda*, 1997.

an adequate standard of living; the right to family life and the right to found a family; and the right to a remedy. Specific examples include:

- Sex workers' rights to life, liberty and security of person are threatened by provisions that compromise their safety and/or put their lives at risk, expose them to arbitrary and unlawful detention, or violence and harassment from state actors or non-state actors.
- Sex workers' right to the highest attainable standard of health is undermined by laws, policies or processes (such as the confiscation of condoms or use of condoms as evidence of sex work) that interfere with programmes to assist sex workers, in particular HIV prevention, testing and treatment.
- Sex workers' right to a remedy for human rights abuses is impacted when they are prevented from seeking redress for abuses due to fear of penalization, prosecution, arbitrary arrest and detention or violence from the authorities.
- Fear of discrimination, harassment, violence and prosecution also impedes sex workers' ability to participate in decision-making and to engage with state actors in a way that is equal to other members of society, thereby undermining their right to be free from discrimination. They are also frequently discriminated against in employment, access to health care and access to housing because of their past or present sex work, including due to criminal records.
- Sex workers' right to adequate housing is undermined by penalties for leasing or selling housing to sex workers, which can lead to forced evictions.
- Sex workers' right to just and favourable conditions of work, in particular safe and healthy working conditions, is harmed by provisions that deny them protection offered to others under labour and health and safety laws, including the possibility to form or join trade unions, putting them at greater risk of exploitation.
- Sex workers' right to an adequate standard of living, in particular where sex work is undertaken due to a lack of other options, is undermined when their livelihood is criminalized and no alternative, acceptable form of earning a livelihood is provided.

As a matter of design, criminalization of consensual sex work between adults undermines the right to privacy. The right to privacy under international human rights law has been applied to sexuality and to individuals' autonomous decisions with regard to their bodies.¹²⁸ At least one human rights body has directly applied the right to privacy to sex outside the confines of marriage. The UN Human Rights Committee in *Toonen v Australia* held that laws criminalizing same-sex activity in private were in breach of the ICCPR. Moreover, the Committee's reasoning did not solely focus only on sexual orientation-based discrimination, but rather it found a violation of the right to privacy because the laws interfered with adult consensual sex in private. This reasoning suggests that all laws prohibiting consensual sex outside marriage may be in breach of Article 17 (privacy) of the ICCPR. There is a strong argument that the right to privacy equally applies to consensual sex between adults for remuneration, and therefore governments would need to articulate a compelling state interest in interfering in individual sexual interactions.

Article 6 of CEDAW requires that states take "all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."¹²⁹ The language

¹²⁸ ICCPR, Article 17(1)(2), ICRPD, Article 22(1), Human Rights Committee, *K.L. v Peru*, Comm. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003, paras. 6.4-6.5; CEDAW, General Recommendation 24 (Article 12: Women and health), UN Doc. A/54/38/Rev.1, 1999, chap. I.

¹²⁹ See CEDAW, Article 6. CEDAW does not define the terms "exploitation" or "prostitution".

used in Article 6 indicates that the drafters acknowledged that not all instances of sex work are inherently exploitative or constitute a violation of women's human rights. Indeed, when the text of CEDAW was being drafted, a proposal for the amendment of Article 6 to call for the abolition of "prostitution" in all its forms was rejected.¹³⁰

In its General Recommendation 19 (on violence against women), the CEDAW Committee recognized poverty, unemployment, armed conflict and the occupation of territories as contexts that may increase the incidence of women engaging in prostitution.¹³¹ Furthermore, the Committee called on states to report on their efforts to prevent violence against women who sell sex and to ensure they enjoy the equal protection of laws against rape and other forms of violence.¹³²

The Committee has expressed concern about how "[w]omen are also disproportionately criminalized due to their situation or status, for instance women in prostitution."¹³³ It has also consistently expressed concern about the criminalization of women engaging in sex work, while noting, in line with the CEDAW text, that criminal sanctions should be reserved for those who profit from "the exploitation of prostitution".¹³⁴

Over the past two decades, the CEDAW Committee has called on at least four state parties to stop the criminalization of sex workers.¹³⁵ The Committee has also called on at least one state party to repeal a provision of its Administrative Code which penalizes prostitution and to establish an oversight mechanism to monitor violence against women involved in prostitution, including by the police.¹³⁶

The Committee has not taken a consistent approach as to whether or not the clients of sex work should be criminalized, tending to tailor its recommendations to the legal framework around sex work in the country under examination. For example, the Committee welcomed the criminalization of the purchase of sexual services in Sweden, but has called on the Swedish government to evaluate the effect on women in prostitution of its partial criminalized approach, citing concern for women engaging in clandestine sex work.¹³⁷ The Committee later expressed further concern to Sweden about "the limited availability of programmes for women who wish to leave prostitution" and

¹³⁰ J. Doezema, "Forced to Choose: Beyond Voluntary v. Forced Prostitution Dichotomy", *Global Sex Workers: Rights, Resistance and Redefinition*, 1998, p. 39.

¹³¹ CEDAW, General Recommendation 19 (violence against women), UN Doc. A/47/38, 1992, paras. 15, 16.

¹³² CEDAW, General Recommendation 19 (violence against women), UN Doc. A/47/38, 1992, para.15, see also para. 24(h).

¹³³ Committee on the Elimination of Discrimination against Women, General Recommendation 33 (Women's access to justice), UN Doc. CEDAW/C/GC/33, 23 July 2015, para. 49.

¹³⁴ See, for example, CEDAW, Concluding Observations: Fiji, UN Doc. A/57/38, 2002, paras. 64-65; Hungary, UN Doc. A/57/38, 2002, paras. 323-324; Kenya, UN Doc. CEDAW/C/KEN/CO/6, 2007, paras. 29-30; Republic of Korea, UN Doc. CEDAW/C/KOR/CO/6, 2007, paras. 19-20; France, UN Doc. CEDAW/FRA/CO/6, 2008, paras. 30-31; Germany, UN Doc. CEDAW/C/DEU/CO/6, 2009, paras. 49-50; Japan, UN Doc. CEDAW/C/JPN/CO/6, 2009, para. 39; Albania, UN Doc. CEDAW/C/ALB/CO/3, 2010, paras. 28-29; Cook Islands, UN Doc. CEDAW/C/COK/CO/1, 2007 paras. 26-27.

¹³⁵ See CEDAW, Concluding Observations: Fiji, UN Doc. A/57/38, 2002, paras. 64-65; Kenya, UN Doc. CEDAW/C/KEN/CO/6, 2007, paras. 29-30; Republic of Korea, U.N. Doc. CEDAW/C/KOR/CO/6, 2007, paras. 19-20; Albania, UN Doc. CEDAW/C/ALB/CO/3, 2010, para. 29.

¹³⁶ See CEDAW, Concluding Observations: Russian Federation, UN Doc. CEDAW/C/RUS/CO/8, 2015, paras. 25-26.

¹³⁷ See CEDAW, Concluding Observations: Sweden, UN Doc. A/56/38, 2001, paras. 354, 355.

recommended that the state “strengthen the assistance provided to women and girls who wish to leave prostitution, including by providing alternative income-generating opportunities.”¹³⁸

In certain cases, the Committee calls on states to discourage demand for “prostitution”,¹³⁹ and in at least two cases, has called for demand for “prostitution” to be “sanctioned”¹⁴⁰ or criminalized.¹⁴¹ In the Netherlands, where sex work is legalized, the CEDAW Committee has expressed concern that the country’s legal registration system for sex workers would compel some to work illegally and called on the government to assess the impact of the law on sex workers’ privacy rights and safety.¹⁴² Similarly, in Germany where sex work is also legalized, the Committee has expressed concern that while sex workers are obliged to pay taxes “they still do not enjoy the protection of labour and social law.”¹⁴³ Significantly, as states start to decriminalize or legalize sex work (or aspects of sex work), including New Zealand, the Netherlands, and Germany, the Committee has not found that decriminalization violates CEDAW.¹⁴⁴

The CEDAW Committee has consistently made clear that, in line with the Convention text, criminal sanctions should be reserved for those who profit from the “exploitation of prostitution.”¹⁴⁵ Along those lines, the Committee has noted that only imposing criminal penalties on sex workers “entrenches sexual exploitation of women”¹⁴⁶ and increases their vulnerability to violence.¹⁴⁷ The Committee has specifically condemned policies that seem to exacerbate the situation of sex workers instead of improving it. For example, in its concluding observations to China, the Committee expressed concern that “the continued criminalization of prostitution disproportionately impacts on prostitutes rather than on the prosecution and punishment of pimps and traffickers.”¹⁴⁸ Furthermore, in General Recommendation 33 (on women’s access to justice), the Committee calls for states to abolish “discriminatory criminalization, and review and monitor all criminal procedures

¹³⁸ CEDAW, Concluding Observations: Sweden, UN Doc. CEDAW/C/SWE/CO/8-9, 7 2016, paras. 28, 29.

¹³⁹ CEDAW, Concluding Observations: Japan, UN Doc. CEDAW/C/JPN/CO/6, 2009, para. 40; Cook Islands, UN Doc. CEDAW/C/COK/CO/1, 2007, para. 27.

¹⁴⁰ CEDAW, Concluding Observations: Kenya, UN Doc. CEDAW/C/KEN/CO/7, 2011, para. 28.

¹⁴¹ CEDAW, Concluding Observations: Belgium, UN Doc. CEDAW/C/BEL/CO/7, 2014, para. 27.

¹⁴² See CEDAW, Concluding Observations: The Netherlands, UN Doc. CEDAW/C/NLD/CO/5, 2010, paras. 30-31.

¹⁴³ CEDAW, Concluding Observations: Germany, UN Doc. A/55/38, 2000, para. 325.

¹⁴⁴ See CEDAW, Concluding Observations: New Zealand, UN Doc. A/58/38, 2003, para. 413.

¹⁴⁵ See CEDAW, Concluding Observations: Fiji, UN Doc. A/57/38, 2002, paras. 64-65; Hungary, UN Doc. A/57/38, 2002, paras. 323-324; Kenya, 27 UN Doc. CEDAW/C/KEN/CO/6, 2007, paras. 29-30; Republic of Korea, UN Doc. CEDAW/C/KOR/CO/6, 2007, paras. 19-20; France, UN Doc. CEDAW/FRA/CO/6, 2007, paras. 30-31; Germany, UN Doc. CEDAW/C/DEU/CO/6, 2009, paras. 49-50; Japan, UN Doc. CEDAW/C/JPN/CO/6, 2009, para. 39; Albania, UN Doc. CEDAW/C/ALB/CO/3, 2010, para. 29.

¹⁴⁶ CEDAW, Concluding Observations: Lithuania, UN Doc. A/55/38, 2000, para. 152; see also Armenia, UN Doc. CEDAW/C/ARM/CO/4/Rev.1, 2009, para. 27 (addressing administrative penalties imposed on sex workers); Egypt, UN Doc. CEDAW/C/EGY/CO/7, 2010, para. 25 (expressing concern that women in prostitution are punished, as opposed to clients).

¹⁴⁷ CEDAW, Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. CEDAW/C/OP.8/CAN/1, 2015, para. 120.

¹⁴⁸ See CEDAW, Concluding Observations: China (including mainland China, Hong Kong and Macau), UN Doc. CEDAW/C/CHN/CO/6, 2006, para. 19. In a subsequent country review of China, the Committee expressed concern that “notwithstanding the abolition of the re-education through labour system, the State party continues to use the custody and education programme that involves the incarceration of women, which disproportionately affects women in prostitution.” CEDAW, Concluding Observations: China, UN Doc. CEDAW/C/CHN/CO/7-8, 2014, para. 28.

Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of China, CEDAW/C/CHN/CO/7-8, para. 28

to ensure that they do not directly or indirectly discriminate against women”, having expressed concern that “[w]omen are also disproportionately criminalized due to their situation or status, for instance women in prostitution”.¹⁴⁹

The Committee has expressed concern, in at least one country review, about “discrimination against sex workers and the lack of State party’s action aimed at ensuring safe working conditions”.¹⁵⁰ The Committee is also very clear in its expectations that states parties provide proper opportunities for women and girls to leave sex work when they want to, and has criticized the “absence of specific shelters and crisis centres adapted for their needs and the lack of exit and reintegration programmes for women who wish to leave prostitution.”¹⁵¹

In 1993, the Declaration on the Elimination of Violence against Women (DEVAW) was adopted by the UN General Assembly.¹⁵² The DEVAW contains a single reference to “prostitution” in its definition of “violence against women.” Article 2(b) refers to “physical, sexual and psychological violence occurring within trafficking in women and forced prostitution.”¹⁵³ The absence of a general reference to “prostitution” shows a recognized distinction between forced and voluntary prostitution. Since the adoption of the DEVAW, most international human rights agreements distinguish between forced commercial sex and consensual sex work.¹⁵⁴

In addition to raising a range of concerns about forced prostitution, the Special Rapporteur on violence against women has noted: “Where prostitution is not legal, women are unprotected by labour laws. This means they have no guarantee of being able to work in a safe environment and they have no right to social security. They have no right to reject clients and if they experience abuse, they have no means to take action against the abusers. It may not be possible for the women to decide on the use of condoms and thus they may also be exposed to sexually transmitted diseases (STDs).”¹⁵⁵

In addition to violence and the disparate impact of criminal sex work laws on sex workers, human rights bodies and experts are increasingly focusing on the impact of punitive regulation on sex workers’ right to health. The right to health contains both freedoms and entitlements, including the “right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference,” as well as “equality of opportunity for people to enjoy the highest attainable level of health.”¹⁵⁶ Like other rights, the right to health is subject to non-discrimination

¹⁴⁹ CEDAW, General Recommendation 33 (Women’s access to justice), UN Doc. CEDAW/C/GC/33, 2015, paras. 5(i) and 49.

¹⁵⁰ CEDAW, Concluding Observations: Hungary, UN Doc. CEDAW/C/HUN/CO7-8, 2013, para. 22.

¹⁵¹ See CEDAW, Concluding Observations: Hungary, UN Doc. CEDAW/C/HUN/CO7-8, 2013, para. 22; CEDAW, Concluding Observations: China (including mainland China, Hong Kong and Macau), UN Doc. CEDAW/C/CHN/CO/6, 2006, para. 19

¹⁵² See *Declaration on the Elimination of Violence against Women*, G.A. Res. 48/104, U.N. Doc. A/Res/48/104, 1994.

¹⁵³ See *Declaration on the Elimination of Violence against Women*, G.A. Res. 48/104, U.N. Doc. A/Res/48/104, 1994, Art. 2.

¹⁵⁴ See J. Doezema, “Forced to choose: Beyond voluntary v. forced prostitution dichotomy”, *Global Sex Workers*, 1998, p. 40.

¹⁵⁵ Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences: Economic and social policy and its impact on violence against women*, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/2000/68/Add.5, 2000, para. 51.

¹⁵⁶ CESCR, General Comment 14 (The right to the highest attainable standard of health (article 12 of the ICESCR)), UN Doc. E/C.12/2000/4, 2000, para. 8.

guarantees, including the right to non-discrimination on the basis of sex, property, or other status. The CEDAW Committee has recommended that special attention should be given to the health rights of women belonging to marginalized groups, which include “women in prostitution”.¹⁵⁷

The Committee on Economic, Social and Cultural Rights confirmed that states must specifically ensure that people in sex work have access to the full range of sexual and reproductive health care services.¹⁵⁸ Additionally, in at least one country review, the Committee on Torture has expressed concern at the “alleged lack of privacy and humiliating circumstances amounting to degrading treatment during medical examinations” during the weekly medical check-ups required of registered sex workers and calls on the state to ensure that “medical examinations are carried out in an environment where privacy is safeguarded and in taking the greatest care to preserve the dignity of women being examined.”¹⁵⁹

UN Special Procedures have also given their attention to the human rights impact of criminalizing sex work. For example, the UN Special Rapporteur on the right to health has explicitly called for the decriminalization of sex work and for existing domestic labour laws, occupational health and safety laws, social insurance schemes and other protections to be extended to sex workers, including irregular migrant workers.¹⁶⁰ The UN Special Rapporteur on torture has expressed concern about the compulsory detention of sex workers in so-called rehabilitation centres and observed: “[b]reaches of privacy and confidentiality are a further indignity experienced by sex workers in health settings.”¹⁶¹

In her report on stigma, the Special Rapporteur on the rights to water and sanitation also addressed discrimination against sex workers, recognizing criminalization as the foundation of the stigma that results in, among other rights abuses, the denial of access to services, including a safe water supply and sanitation.¹⁶² The Special Rapporteur on extreme poverty and human rights has also identified the linked issues of criminalization and stigma as barriers to the effective realization of the human rights of sex workers, calling it a failure “to provide all persons equal and effective protection of the law and take measures to prevent and combat indirect systemic discrimination on the form of legal

¹⁵⁷ CEDAW, General Recommendation 24 (Article 12: Women and health), UN Doc. A/54/38/Rev.1, chap. I, 1999.

¹⁵⁸ Committee on Economic, Social and Cultural Rights, General Comment 22 (Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)), UN Doc. E/C.12/GC/22, 2016, para. 32.

¹⁵⁹ Committee against Torture, Concluding observations: Austria, CAT/C/AUT/CO/4-5, 2010, para. 22.

¹⁶⁰ 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, UN Doc. A/HRC/14/20, 2010, paras. 46-50; 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, UN Doc. A/HRC/23/41, para. 76(j) .

¹⁶¹ Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, UN Doc. A/HRC/22/53, 2013, paras. 40, 75. The Special Rapporteur on violence against women has also expressed concern about the use of forcible detention and rehabilitation against sex workers: *Report of the Special Rapporteur on violence against women, its causes and consequences*, Mission to India, Rashida Manjoo, UN Doc. A/HRC/26/38/Add.1, 2014, para. 78 (e). The discrimination exhibited by health-care workers towards sex workers was also raised as a concern by the previous Special Rapporteur on the right to health: Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, *Addendum Mission to Romania*, UN Doc. E/CN.4/2005/51/Add.4, 2005, para 4.2.

¹⁶² Human Rights Council, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque: Stigma and the realization of the human rights to water and sanitation*, UN Doc. A/HRC/21/42, 2012.

rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups in the enjoyment of their rights.”¹⁶³

The criminalization of sex work and related activities has increasingly been recognized as a major impediment in the global fight against HIV/AIDS¹⁶⁴ because it interferes with sex workers’ – and sometimes their clients’ – ability to take necessary precautions to lower the risk of transmission, and it serves as a chilling effect to deter sex workers from testing or seeking treatment for fear of arrest. The importance of recognizing and promoting sex workers’ human rights is a basic building block of sound HIV prevention as reflected in the policy positions of the Global Fund to Fight AIDS, Tuberculosis and Malaria, and the Joint UN Programme on HIV/AIDS (UNAIDS).¹⁶⁵

In 2008, the Independent Commission on AIDS in Asia¹⁶⁶ called for the removal of legislative, policing, and other barriers that prevent sex workers from organizing collectives, and asked donors to remove conditions attached to aid that prevent their partners from working with sex worker organizations.¹⁶⁷ In 2009, the Independent Commission on AIDS in the Pacific called on countries to “undertake progressive legislative reform to repeal legislation that criminalizes high-risk behaviour [identified in the report to include sex work].”¹⁶⁸ The Commission noted that “[c]hanging the laws need not imply approval of the behaviour but would signal a greater concern for people.”¹⁶⁹ In 2012, the Global Commission on HIV and the Law¹⁷⁰ recommended the decriminalization of sex work and called for laws and policies to ensure safe working conditions to sex workers.¹⁷¹ Additionally, research published in 2014 in the scientific medical journal *The Lancet* confirmed that of all potential interventions identified, “[d]ecriminalization of sex work would have the greatest effect on the course of HIV epidemics across all settings, averting 33–46% of HIV infections in the next decade.”¹⁷²

¹⁶³ Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights*, Ms. Magdalena Sepúlveda Carmona, Addendum: Mission to Namibia (1 to 8 October 2012), UN Doc. A/HRC/23/36/Add.1, 17 May 2013, para. 53.

¹⁶⁴ UNDP, Global Commission on HIV and the Law, *Risks, rights & health*, 2012, p. 38.

¹⁶⁵ See, for example, UNAIDS Strategy 2011-2015, “Getting to Zero”, 2010, p. 7. UNAIDS issued an updated Guidance Note on HIV and Sex Work in 2009 and some additional Annexes to the Guidance Note in 2012. See also UNAIDS, *On the fast-track to end AIDS: UNAIDS 2016–2021 Strategy*, p. 64, available at: www.unaids.org/sites/default/files/media_asset/20151027_UNAIDS_PCB37_15_18_EN_rev1.pdf (“Evidence-informed analyses also indicate that decriminalization of sex work could prevent people from acquiring HIV through combined effects on violence, police harassment, safer work environments and HIV transmission pathways.”).

¹⁶⁶ The Independent Commission on AIDS in Asia was created by UNAIDS in 2006 and given an 18-month mandate to study and assess the impact of AIDS in Asia.

¹⁶⁷ UNAIDS and Oxford University Press, *Redefining AIDS in Asia: Crafting an effective response: Report of the Commission on AIDS in Asia*, 2008, para. 5.3.

¹⁶⁸ UNAIDS, *Turning the tide: An open strategy for a response to AIDS in the Pacific: Report of the Commission on AIDS in the Pacific*, 2009, p. 6, para. 4.

¹⁶⁹ UNAIDS, *Turning the tide: An open strategy for a response to AIDS in the Pacific: Report of the Commission on AIDS in the Pacific*, 2009, p. 6, para. 4.

¹⁷⁰ The Global Commission on HIV and the Law was an independent expert body created under UN auspices to develop actionable, evidence-informed and human rights-based recommendations for effective HIV responses that promote and protect the human rights of people living with and most vulnerable to HIV.

¹⁷¹ UNDP, Global Commission on HIV and the Law, *Risks, rights & health*, 2012, p. 99.

¹⁷² K. Shannon, et al., ‘Global epidemiology of HIV among female sex workers: Influence of structural determinants’, *The Lancet*, 2014, p. 10, available at: [dx.doi.org/10.1016/S0140-6736\(14\)60931-4](https://doi.org/10.1016/S0140-6736(14)60931-4).

As referenced earlier, criminalizing elements of the buying or selling of adult consensual sex also threatens the right to liberty and security of persons where sex workers or their clients are arbitrarily detained, or held in shelters or “re-education centres” from where they cannot leave voluntarily.¹⁷³ Any person held on grounds that are not in accordance with the law is arbitrarily detained and therefore unlawfully. Detention can also amount to arbitrary detention, even if it is authorized by law, if it includes “elements of inappropriateness, injustice, lack of predictability and due process of law.”¹⁷⁴ The UN Human Rights Committee has determined that legally authorized detention must be reasonable, necessary and proportionate, taking into account the specific circumstances of a case.¹⁷⁵

International human rights law stipulates that everyone is entitled to just and favourable conditions of work, including safe and healthy working conditions (Article 7, ICESCR), including those who are self-employed or who make their living in informal settings. This is affirmed in General Comment 23 issued by the UN Committee on Economic, Social and Cultural Rights, which states that “laws and policies should explicitly extend to workers in the informal economy”.¹⁷⁶ The Committee also stressed the importance of involving workers (including informal workers) and their representative organizations in formulating, implementing, reviewing and monitoring laws and policies relating to the right to work.¹⁷⁷ The ILO agreed in 2010 that its recommendation on HIV and the World of Work (200/2010) should apply to all workers, both formal and informal, and that this should include sex workers.¹⁷⁸

International law is clear with regard to the prohibition on the involvement of children – that is all those under 18 – in commercial sex acts. This prohibition is spelled out through the Convention on the Rights of the Child, its Optional Protocol on the sale of children, child prostitution and child pornography, and in ILO Convention Number 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. Under these treaties, states are obliged to protect children from economic exploitation, sexual exploitation, and any work that is likely to be hazardous or harmful to a child’s health or to physical, mental or social development.¹⁷⁹ The “use, procuring or offering” of a child for prostitution or pornography is considered one of the “worst [forms] of child labour,” for which states shall design and implement action programmes to eliminate as a priority.¹⁸⁰ States are also required to criminalize “offering, obtaining, procuring or providing a child” for use “in sexual activities for remuneration or any other form of

¹⁷³ See Human Rights Watch, *Off the streets: Arbitrary detention and other abuses against sex workers in Cambodia*, 2010.

¹⁷⁴ See Human Rights Committee, Comm. 458/1991, *A. W. Mukong v Cameroon*, UN Doc. CCPR/C/51/D/458/1991, 1994, para. 9.8.

¹⁷⁵ Human Rights Committee, Comm. 305/1988, *Van Alphen v The Netherlands*, UN Doc. CCPR/C/39/D/305/1988, 1990, para. 5.8; Human Rights Committee, Comm. No. 560/1993, *A. v Australia*, UN Doc. CCPR/C/59/D/560/1993, 1997, para. 9.2.

¹⁷⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the Right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, 8 March 2016, para.47(iv). See also ILO Recommendation 200, Recommendation Concerning HIV and AIDS and the World of Work, adopted by the Conference at its Ninety-Ninth Session, Geneva, 17 June 2010 defines a “workplace” as “any place in which workers perform their activity”; and a “worker” as referring to “any persons working under any form or arrangement.” p. 6.

¹⁷⁷ General Comment No. 23, para. 56.

¹⁷⁸ ILO Report of the Committee on HIV/AIDS ‘*HIV Aids and the World of Work*’ Provisional Record 13 (Rev.) 99th session 2010 paras. 192-210.

¹⁷⁹ CRC, Arts. 32(1) and 34.

¹⁸⁰ ILO Convention No. 182 (Worst Forms of Child Labour), 1999, Arts. 3(b) and 6(1).

consideration.”¹⁸¹ Importantly, states must “take all feasible measures” to ensure that all children who have been involved in sexual activities for remuneration or any other form of consideration receive “all appropriate assistance . . . including their full social reintegration and their full physical and psychological recovery.”¹⁸² Such assistance should include the “necessary and appropriate direct assistance for the removal of children” from such work and ensuring “access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour.”¹⁸³

Notably, a range of international NGOs have called for decriminalization of sex work, including Human Rights Watch¹⁸⁴, Open Society Foundations¹⁸⁵ and Global Alliance Against Traffic in Women (GAATW),¹⁸⁶ among other groups. Most significantly, a large number of sex worker organizations and networks, including the Global Network of Sex Work Projects, support the decriminalization of sex work as a means to realize sex workers’ human rights.¹⁸⁷

TRAFFICKING IN PERSONS

Trafficking in persons is a grave abuse of human rights. Victims of such crimes are entitled to protection and remedies, regardless of their sex, nationality, health status, sexual orientation, gender identity, prior work history, willingness to contribute to prosecution efforts, or other factors. As reaffirmed in the policy on the protection of sex workers’ human rights, Amnesty International is committed to ending human trafficking, as well as slavery and child sexual exploitation. In addition to calling upon states to respect, protect and fulfil the human rights of sex workers (including through calling for decriminalization of adult consensual sex work, among other things), the policy reaffirms Amnesty International’s call for the criminalization of human trafficking, including in the sex sector, which is one component of protecting the human rights of all people who engage in sex work. It further reaffirms that anti-trafficking laws must comply with international human rights standards.

¹⁸¹ CRC, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, UN Doc. A/54/49, 2000, Arts. 2(b) and 3(1)(b).

¹⁸² CRC, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, UN Doc. A/54/49, 2000, Art. 9(3).

¹⁸³ ILO Convention No. 182 (Worst Forms of Child Labour), 1999, Arts. 7(2)(b) and (c).

¹⁸⁴ J. Amon, *Canada’s prostitution bill as step in the wrong direction*, Human Rights Watch (media release), 2014, available at: www.hrw.org/news/2014/06/18/canadas-prostitution-bill-step-wrong-direction

¹⁸⁵ Open Society Foundations, *Ten reasons to decriminalize sex work*, 2012.

¹⁸⁶ See Global Alliance Against Traffic in Women (GAATW), *Statement to the Human Rights Council*, 2012, available at www.gaatw.org/statements/GAATWStatement_05.2013.pdf

¹⁸⁷ For example, “more than 160 sex worker organisations in over 60 countries across the globe” supported the Global Network of Sex Work Projects, *Consensus Statement on Sex Work, Human Rights, and the Law: A Summary*, which is guided by “opposition to all forms of criminalisation and all other legal oppression of sex work (including sex workers, clients, third parties*, families, partners and friends)” (p.1) and is available at <http://www.nswp.org/sites/nswp.org/files/ConStat%20PDF%20EngSum.pdf>; see also the English Collective of Prostitutes’ campaign for decriminalization at: www.pledgedecrim.com.

INTERNATIONAL STANDARDS ON TRAFFICKING IN PERSONS

Trafficking in persons was only defined at the turn of the 21st century.¹⁸⁸ The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) was adopted in 2000 and defines trafficking as constituting three elements:

1. An **“action”**: that is, the recruitment, transportation, transfer, harbouring or receipt of persons;
2. A **“means”** by which that action is achieved (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability, and the giving or receiving of payments or benefits to achieve consent of a person having control over another person); and
3. A **“purpose”** (of the action/means): specifically, exploitation.¹⁸⁹

All three elements must be present to constitute “trafficking in persons” under the Trafficking Protocol.¹⁹⁰ The only exception is when the victim is a child, in which case the “means” requirement is no longer an element of the crime.¹⁹¹ The agreed definition of trafficking in persons further states that consent to the intended exploitation is irrelevant where any of the means of trafficking have been used.¹⁹²

Until the Trafficking Protocol was adopted, the primary international legal instrument focused on human trafficking was the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention). However the 1949 Convention did not define the crime of trafficking or reflect substantive human rights principles. The UN Special Rapporteur on violence against women described the 1949 Convention in the following terms:

¹⁸⁸ For a full discussion, see, A.T. Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, 2010; for a focused analysis from a rights-based perspective, see, Office of the High Commissioner on Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary*, 2010

¹⁸⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol), 2000, Art. 3(a).

¹⁹⁰ See UNODC, *Issue paper: The concept of ‘exploitation’ in the Trafficking in Persons Protocol*, 2015, p. 5.

¹⁹¹ As Amnesty International’s policy on the human rights of sex workers does not apply to children, discussion of trafficking in persons in this explanatory note is also focused only on adults.

¹⁹² Trafficking Protocol, Article 3(b).

*The Convention does not take a human rights approach. It does not regard women as independent actors endowed with rights and reason; rather, the Convention views them as vulnerable beings in need of protection from the evils of prostitution. As such, the 1949 Convention does very little to protect women from and provide remedies for the human rights violations committed in the course of trafficking, thereby increasing trafficked women's marginalization and vulnerability to human rights violations. Further, by confining the definition of trafficking to trafficking for prostitution, the 1949 Convention excludes vast numbers of women from its protection. Documentation shows that trafficking is undertaken for a myriad of purposes, including but not limited to prostitution or other sex work, domestic, manual or industrial labour, and marriage, adoptive or other intimate relationships.*¹⁹³

By the 1990s, states began to recognize that the 1949 Convention was inadequate to address the realities of trafficking in persons.¹⁹⁴ The adoption of the Trafficking Protocol provided an agreed legal definition of trafficking that expanded on earlier conceptions to include men, women, and children, and to recognize exploitation outside the sex sector, in an open-ended listing. It frames human trafficking as a criminal justice issue, supplementing the major crime control treaty, the UN Convention against Transnational Organized Crime.¹⁹⁵

Although the Trafficking Protocol is situated within the criminal justice framework of the UN, trafficking in persons is a cause and a consequence of human rights violations and the promotion and protection of human rights must be central to any anti-trafficking initiative. Following adoption of the Trafficking Protocol, the Office of the UN High Commissioner for Human Rights (OHCHR) published the Recommended Principles and Guidelines on Human Rights and Human Trafficking to provide practical, rights-based guidance for states.¹⁹⁶ The Recommended Principles and Guidelines affirm the primacy of human rights and call on states to ensure that anti-trafficking measures do not adversely affect human rights.¹⁹⁷ For example, Guideline 5.6 calls on states to implement “measures to ensure that “rescue” operations do not further harm the rights and dignity of trafficked persons”.¹⁹⁸ The more detailed Commentary further developed these principles and guidelines. One

¹⁹³ Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/2000/68, 2000, para. 22.

¹⁹⁴ See J. Chuang, Exploitation creep and the unmaking of human trafficking law, 108 *American Journal of International Law* No 4, 609, 2014, p. 614. Prior to the adoption of the Trafficking Protocol, trafficking was often conflated with other issues including facilitated irregular migration. The Trafficking Protocol makes clear that trafficking is not the same as migrant smuggling, see GAATW, *Smuggling and Trafficking: Rights and Intersections*, GAATW Working Paper Series 2011; OHCHR, *Human Rights and Human Trafficking*, Fact Sheet No. 36, 2014.

¹⁹⁵ The Trafficking Protocol sits outside of the human rights machinery of the UN, with the UN Office on Drugs and Crime (UNODC). Negotiations on the text of the Trafficking Protocol focused, in part, on whether human trafficking “should be approached primarily as a crime and border control issue or as a matter of states’ obligations under international law to safeguard trafficked persons’ human rights.” J. Chuang, ‘The United States as global sheriff: Using unilateral sanctions to combat human trafficking’, *Michigan Journal of International Law*, 2006, p. 441, citing B. Anderson and J. O’Connell Davidson, *Trafficking—A Demand Led Problem?*, 2002, pp. 16-18.

¹⁹⁶ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights* (Addendum), UN Doc. E/2002/68/Add.1, 2002

¹⁹⁷ Principle 3: Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers. OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*.

¹⁹⁸ Guideline 5.6, OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*

of the issues it addresses is the “discrimination and associated harms in the criminal justice response to trafficking [that] are most obvious in relation to trafficked women and girls”, citing as an example “[d]iscriminatory and inappropriate investigatory responses that criminalize women and girls, especially vulnerable groups, including migrants and prostitutes.”¹⁹⁹

Amnesty International’s policy is consistent with CEDAW, one of only two human rights treaties to contain substantive provision against trafficking. It requires states to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”²⁰⁰ The CEDAW Committee is also clear in its recommendations that root causes of trafficking in persons must be tackled. Since the adoption of the Trafficking Protocol, trafficking has been repeatedly recognized as a serious violation of human rights including in the Council of Europe’s Convention on Action against Trafficking in Human Beings and the European Union Directive on preventing and combating trafficking in human beings and protecting its victims. Similarly, the UN General Assembly and Human Rights Council as well as many of the international human rights mechanisms have repeatedly affirmed that trafficking violates human rights.

The UN Special Rapporteur on violence against women has noted the need to ensure that “measures to address trafficking in persons do not overshadow the need for effective measures to protect the human rights of sex workers.”²⁰¹ The Special Rapporteur on the right to health has also spoken out against the conflation of consensual sex work and human trafficking which can lead to “at best, the implementation of inappropriate responses that fail to assist either of these groups in realizing their rights, and, at worst, to violence and oppression”, and called for human rights protection of trafficked persons and of sex workers.²⁰²

However, human rights are not always central to state responses to trafficking.²⁰³ In many instances, cross-border trafficking is addressed as an immigration issue, or trafficking addressed solely as a criminal justice matter, for example, rather than being anchored in victims’ rights and states’ obligations established by international human rights law.²⁰⁴ But under international human rights law, trafficked persons must not be detained, charged, prosecuted or otherwise held responsible for unlawful acts and offences committed by them as part of the crime of trafficking; this includes engagement in sex work where that is illegal.²⁰⁵ Furthermore, many of the human rights instruments,

¹⁹⁹ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary*, 2010, pp. 199-200.

²⁰⁰ CEDAW, Article 6. Outside of the scope of this policy development but relevant for AI’s wider work, the UN Convention on the Rights of the Child also contains a substantive reference to trafficking (Article 35).

²⁰¹ Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, Mission to India, Rashida Manjoo, UN Doc. A/HRC/26/38/Add.1, 2014, para. 78 (e).

²⁰² See 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, U.N. Doc. A/HRC/14/20, 2010, for example at para.33.

²⁰³ J.A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, *University of Pennsylvania Law Review*, Vol. 158, 2010.

²⁰⁴ For a fuller elaboration see, OHCHR, *Human Rights and Human Trafficking*, Fact Sheet No. 36, 2014.

²⁰⁵ A. Gallagher and K. Skrivankova, *Human Rights and Trafficking in Persons*, Background Paper for the 15th Informal Asia-Europe Meeting (ASEM) Seminar on Human Rights, 24-26 November 2015. This principle, of non-prosecution or non-punishment for status offences, was not addressed in the UN Trafficking Protocol but was introduced in the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking (Guideline 5.5: “Guaranteeing that traffickers are and will remain the focus of anti-trafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation”), and adopted into law in the Council of Europe Trafficking Convention, the EU

although not legally binding, provide valuable guidance to states on fulfilling their obligations to trafficked persons, for example with regard to the right to remedy which is required by the Trafficking Protocol and elaborated in the Recommended Principles and Guidelines and the work of the Special Rapporteur on trafficking.²⁰⁶

Anti-trafficking responses must not create or exacerbate situations that cause or contribute to trafficking or further undermine the human rights of anyone, especially women and people belonging to other marginalized groups. As stated by the former UN High Commissioner for Human Rights:

*That [...] is the only way to retain a focus on the trafficked person: to ensure that trafficking is not simply reduced to a problem of migration, a problem of public order or a problem of organized crime. It is also the only way to ensure that well-intentioned anti-trafficking initiatives do not compound discrimination against female migrants or further endanger the precariously-held rights of individuals working in prostitution.*²⁰⁷

TRAFFICKING IN PERSONS AND ITS CONFLATION WITH SEX WORK

Trafficking in persons, including into the sex sector, is not the same as sex work. Sex work refers to a contractual arrangement where sexual services are negotiated between consenting adults with the terms of engagement agreed upon between the seller and the buyer.²⁰⁸ Trafficking is expressly non-consensual.

The definition of human trafficking as set out in the Trafficking Protocol was the result of heated debates which centred primarily on how to address consensual sex work.²⁰⁹ Those advocating for the

Trafficking Directive, and the 2014 ILO Forced Labour Protocol. Furthermore, the fear of stigma-driven ostracization, including from their family or community due to having been trafficked into the sex sector from countries where prostitution is criminalized, may amount to a well-founded fear of persecution triggering international protection under refugee law. In the EU, the risk of being harassed, arrested, detained or prosecuted by the authorities for involvement in prostitution is a factor that needs to be taken into account when assessing whether to return an individual who is claiming asylum after being trafficked in the sex industry to the first point of entry to the EU for assessment of their case (under the Dublin Regulation). See, OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, *Joint UN Commentary on the EU Directive – A Human Rights-Based Approach*, 2011.

²⁰⁶ UN General Assembly, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/66/283, 9 August 2011.

²⁰⁷ OHCHR, *Message from the UN High Commissioner for Human Rights, Mary Robinson, to the Ad Hoc Committee on the Elaboration of a Convention Against Organised Crime*, Fourth session, Vienna, 28 June-9 July 1999.

²⁰⁸ See UNDP, *Global Commission on HIV and the Law, Risks, rights & health*, 2012, p. 41.

²⁰⁹ See for example, A. Gallagher, 'Human rights and the new UN Protocols on trafficking and migrant smuggling: A preliminary analysis', *Human Rights Quarterly*, 2001, pp. 975–1004; J. Doezema, 'Who gets to choose? Coercion, consent and the UN Trafficking Protocol', *Gender and Development*, Vol.10, No. 1, 2002; M. Ditmore and M. Wijers, 'The negotiations on the UN Protocol on Trafficking in Persons', *Nemesis*, 2003; J. Doezema, *Sex slaves and discourse masters: The construction of trafficking*, 2010. The split on the issue of prostitution/sex work amongst delegates and civil society groups in the negotiations exerted strong influence on the final text: "The focus on sex workers has however had tremendous influence on the trafficking debate also after the adoption of the Protocol, which is evident e.g. in the focus on trafficking of women and of women and children for sexual exploitation, a focus which is not necessarily promoting the human rights of trafficking victims, nor the fight against traffickers in the most effective way, as will be considered below." UNESCO, K. Touzenis, *Trafficking in Human Beings: Human rights and transnational criminal law, developments in law and practices*, 2010, p.32. Debates about prostitution/sex work have emerged in many other negotiations where they

inclusion of prostitution as a form of trafficking in the Protocol's definition argued that it is inherently abusive and women cannot consent to it. This proposal would have undermined the framework of the definition – requiring the three elements of action, means and purpose to be present – and would have rendered women trafficked in the sex industry equivalent to children, for whom the “means” of the trafficking definition does not apply. The Human Rights Caucus working at the negotiations of the Trafficking Protocol observed that “[s]uch a stance historically has ‘protected’ women from the ability to exercise their rights.”²¹⁰ The UN Office on Drugs and Crime (UNODC) has clarified:

*It is important to note that the Protocol does not equate prostitution with trafficking. For prostitution involving adults to fall within the definition of trafficking all three definitional elements (action, means and purpose). The relevant ‘purpose’ is ‘exploitation of prostitution’. This term refers not to prostitution per se but rather, to deriving some benefit from the prostitution of another person.*²¹¹

In the end, to reach consensus, states intentionally did not define references to “exploitation of prostitution of others” and “other forms of sexual exploitation” in the text of the Trafficking Protocol – and neither phrase is defined in international law.²¹² As confirmed by the interpretive notes for the official records, these formulations did not preclude states from addressing sex work under their domestic laws, subject to their obligation to protect and promote the human rights of all persons within their jurisdiction.²¹³ Similarly, the delineation between “traffic in women” and “exploitation of prostitution” in CEDAW recognizes the two issues as a distinct, but in some cases related, phenomenon.²¹⁴

have been used as a tactic by some states and non-state actors to undermine rights protections in the negotiations, including those at the Fourth World Conference on Women (1995), the UN General Assembly Special Session on HIV/AIDS in 2001, and the UN General Assembly Special Session on children in 2002. See International Gay and Lesbian Human Rights Commission (IGLHRC) and the Center for Women's Global Leadership (CWGL), C. Rothschild, S. Long and S. Fried, *Written out: How sexuality is used to attack women's organizing*, 2005.

²¹⁰ J. Doezeema, 'Who gets to choose? Coercion, consent and the UN Trafficking Protocol', *Gender and Development*, Vol.10, No. 1, 2002 (quoting the Human Rights Caucus, 1999, p.21).

²¹¹ UNODC, *Issue paper: The concept of 'exploitation' in the Trafficking in Persons Protocol*, 2015, p.7. See also A.T. Gallagher, *The International Law of Human Trafficking*, 2010, p. 39 (“There was clear consensus within the drafting group that the Trafficking Protocol definition was not to extend to prostitution or pornography per se”.) This is affirmed by the Council of Europe, working from the Council of Europe Convention, which clarifies a distinction between the prostitution and trafficking in persons: “It must be clear that the forms of exploitation covered by the Convention are not limited to sexual exploitation. Moreover, trafficking in human beings differs from “prostitution” in that it is a new form of slavery which can include sexual exploitation, but not necessarily. Prostitution can only be qualified as “trafficking in human beings” if one of the actions e.g. “recruitment” and means, “threat or use of force referred to under at. 4 of the Convention have been used.” Statement by the Head of the Minorities, Media and Equality Department, Directorate General of Human Rights, Council of Europe as published in Proceedings from the regional seminar in Riga, 2006. Directorate General of Human Rights, Council of Europe, Strasbourg, 2007.

²¹² UNODC, *Issue paper: The concept of 'exploitation' in the Trafficking in Persons Protocol*, 2015, p. 27; Travaux Préparatoires for the Organized Crime Convention and Protocols, p. 347.

²¹³ Interpretive Notes for the Official Records (travaux préparatoires) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto, UN Doc. A/55/383/Add.1, 2000, para. 64.

²¹⁴ See also General Recommendation General Recommendation 19 (violence against women), UN Doc. A/47/38, 1992, para. 16; CEDAW, Concluding Observations: Indonesia, UN Doc. CEDAW/C/IDN/CO/5, 2007, paras. 28-29.

Conflation of human trafficking and sex work creates numerous problems in practice: it creates confusion amongst practitioners, media and the public and can lead to harmful laws and policies that negatively impact trafficked persons, migrants, and sex workers among others.²¹⁵ For example, coercive or overreaching interventions, such as raids or “rescues” solely on the basis that commercial sex is conducted, have resulted in sex workers being driven away from established sex work collectives or forced to move from one place to another. This undermines the connections and social fabric that can help keep them safe, including through disrupting HIV programmes.²¹⁶

Additionally, such interventions can impede trafficked persons from reaching out for legal protection and support, and/or leaving commercial sex.²¹⁷ States that fail to make a distinction between trafficking and sex work may also be failing to comply with their international legal obligations on trafficking, particularly through the deportation of migrants deemed to be sex workers.²¹⁸ Conversely some states respond by restricting women’s rights, including their freedom of movement, in the name of preventing trafficking in persons, particularly into the sex sector.²¹⁹ The first two holders of the mandate of Special Rapporteur on trafficking in persons have raised concerns about failures of the criminal justice system that simultaneously fail to identify trafficked persons and breach the principle of non-prosecution or non-punishment for status offences, instead arresting, detaining, charging and prosecuting women for engaging in sex work.²²⁰

Anti-trafficking experts have expressed concern that over-extending the definition of trafficking in persons to include all cases of commercial sex undermines initiatives to end trafficking by diluting attention and effort: “The equation of prostitution with trafficking (typically through a broad reading of the means ‘abuse of a position of vulnerability’) provides a case in point: it permits states to claim easy credit for virtually effortless arrests and prosecutions that do little or nothing to address those

²¹⁵ UNAIDS, *Guidance note on HIV and sex work*, 2012, p.14; Urban Justice Center, Sex Workers Project, *The danger Of conflating trafficking and sex work - A position paper*, 2007, available at: sexworkersproject.org/media-toolkit/downloads/20070330-BriefingPaperOnConflationOfTraffickingAndSexWork.pdf; GAATW, *Collateral damage: The impact of anti-trafficking measures on human rights around the world*, 2007; Urban Justice Center, Sex Workers Project, *Submission on Mexico to the general discussion of rural women to the United Nations Committee on the Elimination of all forms of Discrimination Against Women (CEDAW)*, 2013, available at: sexworkersproject.org/downloads/2013/20130919-cedaw-recommendations-rural-women-mexico.pdf; NSWP, *Briefing Paper #03 Sex work is not trafficking*, 2011 available at: www.nswp.org/sites/nswp.org/files/SW%20is%20Not%20Trafficking.pdf.

²¹⁶ See UNAIDS, *Guidance note on HIV and sex work*, 2012; A. Ahmed, ‘The unintended consequences of Nick Kristof’s anti-sex trafficking crusade’, *Guardian*, 2012.

²¹⁷ See New York Anti-Trafficking Network, *Ending Trafficking: #Talk Traffic Video Series*, NYATN 2015, available at: nyatn.org/talktraffic/ (see particular episodes on *Human Rights Approach* and *Solutions*).

²¹⁸ Arrest/working in a criminalized sector can invalidate status even for migrant workers who are in regular status. See Best Practices Policy Project, Desiree Alliance, and the Sexual Rights Initiative, *Report on the United States of America, 9th round of the Universal Periodic Review*, 2010, para. 7; Amnesty International, *The human cost of ‘crushing’ the market: Criminalization of sex work in Norway* (Index: EUR/36/4034/2016).

²¹⁹ Special Rapporteur on Violence Against Women, its Causes and Consequences, speaking at the ‘Prostitution, Trafficking and the Global Sex Trade in Women’ conference, NYU Law School, 2001, referenced in J. Doezeema, ‘Who gets to choose?: Coercion, consent and the UN Trafficking Protocol’, *Gender and Development*, Vol. 10, No. 1, 2002, 25.

²²⁰ See Human Rights Council, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc. A/HRC/20/18, 2012, para. 23; Commission on Human Rights, Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Addendum: Mission to Lebanon, UN Doc. E/CN.4/2006/62/Add.3, 2006, para. 58; Commission on Human Rights, Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc. E/CN.4/2005/71, 2004, para. 10.

egregious forms of sexual exploitation that the Protocol was intended to challenge.”²²¹ Similarly, the Special Rapporteur on trafficking in persons has urged more attention to the structural root causes of trafficking.²²²

Furthermore, anti-trafficking organizations, including the Global Alliance Against Traffic in Women (GAATW), La Strada International, and the Freedom Network have documented the harm done to sex workers, entertainment workers, migrants, and others (including people who have been trafficked) by anti-trafficking laws, policies, programmes and initiatives that conflate sex work and trafficking.²²³ For example, sex workers may face increased policing in public (as they are susceptible to arrest for crimes such as “loitering” or “trespassing”) and police targeting of sex workers’ regular clientele may result in sex workers accepting clients they have previously rejected as unsafe. Additionally, a recent study on Cambodia’s Anti-Trafficking Law found that by equating sex work with trafficking, the law increased the exploitation of women, including police violence and negative health outcomes.²²⁴ Amnesty International research in the City of Buenos Aires, Argentina, confirmed that sex workers are frequently subjected to ill-treatment by law enforcement officials during anti-trafficking raids on apartments where commercial sex is suspected. Frequently, sex workers are detained for long periods of time and subjected to coercive and intimidating questioning where the authorities attempt to persuade them that they are victims of violence and human trafficking.²²⁵

²²¹ A.T. Gallagher and J.N. Ezeilo, “The UN special rapporteur on trafficking: A turbulent decade in review”, *Human Rights Quarterly*, Vol.37, No.4, 2015, pp. 913-940.

²²² “[The Special Rapporteur] wants to shift the attention away from exclusively tackling consumer demand and to underline the critical need to ensure that undivided attention is paid to prevention strategies that focus on tackling the structural root causes of trafficking while respecting the human rights of trafficked persons.” UN General Assembly, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, UN Doc. A/65/288, 2010, para. 36.

²²³ See GAATW, *Collateral damage: The impact of anti-trafficking measures on human rights around the world*, 2007; La Strada International NGO Platform - United against human trafficking in Europe, *Statement 17 December: International day to end violence against sex workers, 2013*, available at: lastradainternational.org/lsidocs/LSI%20statement%2017%20December%20-%20end%20violence%20against%20sex%20workers%20day%20def.pdf; Freedom Network USA, *Human trafficking and sex workers rights*, 2015, available at: freedomnetworkusa.org/wp-content/uploads/2012/05/E2%80%8CFINAL-April-2015-HT-and-Sex-Workers-Rights.pdf. The harms of this conflation have also been documented by anti-trafficking experts, health professionals, funders, women’s rights groups, and sex worker rights groups. See for example, Urban Justice Center, Sex Workers Project, *The danger of conflating trafficking and sex work - A position paper*, 2007; Urban Justice Center, Sex Workers Project, Working group on sex work and human rights, *Human trafficking and sex work*, available at: <http://sexworkersproject.org/media-toolkit/downloads/05-HumanTraffickingAndSexWork.pdf>; CREA, NSW, OSF, *Sex Work and trafficking: A donor-activist dialogue on rights and funding* (conference report), 2008, available at: www.opensocietyfoundations.org/sites/default/files/dndreport_2009.pdf; Georgina Perry, “Sex work and the London 2012 Olympics – How was it for you?”, *The Trafficking Research Project*, available at: thetraffickingresearchproject.wordpress.com/2012/09/14/sex-work-and-the-london-2012-olympics-how-was-it-for-you/; Empower Foundation, *Hit & run: The impact of anti-trafficking policy and practice on Sex Workers’ Human Rights in Thailand*, 2012; A.T. Gallagher, “Two cheers for the Trafficking Protocol”, *Anti-Trafficking Review*, Issue 4, 2015.

²²⁴ See L. Maher, et al., ‘Conflicting rights: How the prohibition of human trafficking and sexual exploitation infringes the right to health of female sex workers in Phnom Penh, Cambodia’, *Health and Human Rights*, 2015, available at: www.hhrjournal.org/2015/04/30/conflicting-rights-how-the-prohibition-of-human-trafficking-and-sexual-exploitation-infringes-the-right-to-health-of-female-sex-workers-in-phnom-penh-cambodia/.

²²⁵ Amnesty International, “*What I’m doing is not a crime*”: *The human cost of criminalizing sex work in the City of Buenos Aires, Argentina* (Index: AMR 13/4042/2016).

METHODOLOGICAL DIFFICULTIES IN HUMAN TRAFFICKING RESEARCH

There is no accurate data on the prevalence of trafficking in persons, and researchers have questioned the accuracy of commonly used statistics.²²⁶ Because human trafficking is a clandestine criminal activity, it is difficult to produce accurate data. However, the UN Office on Drugs and Crime (UNODC), which collects and publishes countries' data on trafficking in persons, identifies a number of additional challenges, confirming that research on human trafficking is often unreliable because of the variable definitions used to define "trafficking victims"²²⁷ and the divergent understandings of what constitutes human trafficking. This means that states are measuring different things.²²⁸ In its most recent global report, UNODC stated: "At present, there is no sound estimate of the number of victims of trafficking in persons worldwide. Due to methodological difficulties and the challenges associated with estimating sizes of hidden populations such as trafficking victims, this is a task that has so far not been satisfactorily accomplished."²²⁹

UNODC also notes that "In the majority of States surveyed, sexual exploitation is considered to be the most prevalent form of trafficking-related exploitation – or at least it is the most commonly investigated and prosecuted form. With the exception of one State, practitioners generally agreed that trafficking into the sex sector is easier to investigate and to successfully prosecute than other

²²⁶ American University, Washington College of Law, Center for Human Rights & Humanitarian Law, Program on Human Trafficking and Forced Labor, A. Jordan, *Fact or fiction: What do we really know about human trafficking? Issue Paper 3*, 2011; L. Fedina, 'Use and misuse of research in books on sex trafficking: Implications for interdisciplinary researchers, practitioners, and advocates', *Trauma Violence Abuse*, 2014; F.M. Shaver, 'Sex work research: Methodological and ethical challenges', *Journal of Interpersonal Violence*, 2005, pp. 296-319; J. McGaha and A. Evans, "Where are the victims?: The credibility gap in human trafficking research", *Intercultural Human Rights Law Review*, 2008, pp. 239, 243-244. The figures quoted for the number of individuals in a situation of "modern slavery", which is often erroneously used synonymously with trafficking, have been widely criticized. See for example, A. Gallagher, "The Global Slavery Index: seduction and obfuscation", *Open Democracy*, 2014, available at: www.opendemocracy.net/5050/anne-gallagher/global-slavery-index-seduction-and-obfuscation.

²²⁷ See UNODC, *Global report on trafficking in persons*, 2014, available at: www.unodc.org/unodc/data-and-analysis/glotip.html.

²²⁸ See GAATW, *Collateral damage: The impact of anti-trafficking measures on human rights around the world*, 2007, available at: www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf; J.A. Chuang, "Rescuing trafficking from ideological capture: Prostitution reform and anti-trafficking law and policy", *University of Pennsylvania Law Review*, Vol. 158, 2010.

²²⁹ UNODC, *Global Report on Trafficking in Persons*, 2014, p. 16. UNODC comment further, "Generating a methodologically sound estimate of the global number of trafficking victims is a commendable objective. Achieving it, however, would require significant resources and a long-term perspective", p. 30. For further discussion on some of the problems in the methodologies used to ascertain the number of trafficked persons and the biases in some attempts of those attempts, see J. Block, "Sex trafficking: Why the faith trade is interested in the sex trade", *Conscience*, Summer/Autumn (vol. XXV, no.2), 2004, pp. 32-35; P. Buckley, "The bias in counter-trafficking data and need for improved data collection: Reflections on trafficking onto fishing boats", *The Trafficking Research Project*, 2013, available at: thetraffickingresearchproject.wordpress.com/2013/05/10/the-bias-in-counter-trafficking-data-and-need-for-improved-data-collection-reflections-on-trafficking-onto-fishing-boats/; J.A. Chuang, "Rescuing trafficking from ideological capture: Prostitution reform and anti-trafficking law and policy", *University of Pennsylvania Law Review*, Vol. 158, 2010; A. T. Gallagher and R. Surtees, "Measuring the success of counter-trafficking interventions in the criminal justice sector: Who decides—and how?", *Anti-Trafficking Review*, 2012, pp. 10-30; K. Kangaspunta, "Was trafficking in persons really criminalised?", *Anti-Trafficking Review*, 2015, pp. 80-97; Lensvelt-Mulders, et al., *On the boundaries of what we can measure: The methodological quality of international studies on the prevalence of prostitution related human trafficking with emphasis on North West Europe* (English summary of the Dutch original), available at: www.wodc.nl/onderzoeksdatabase/2667-internationale-vergelijking-relatie-prostitutiebeleid-en-omvang-mensenhandel.aspx?cp=44&cs=6796.

forms of trafficking-related exploitation, although the reasons as to why varied.”²³⁰ This bias in the data in turn shapes views of trafficking in persons and leads to bad policy and ineffective programming.²³¹

A study published in 2013 used non-comparable data to claim an association between “human trafficking inflows” and legalized prostitution, which the authors interpret as “causality”.²³² The researchers acknowledged that their correlational finding cannot demonstrate causality, so used what they term “anecdotal evidence” for three countries whose policies have changed, although data on “trafficking inflows” are lacking for two of the three countries. This research has been heavily critiqued and challenged.²³³ The criticisms encompass the authors’ failure to define any of the terms or how they are comparing these undefined categories across the countries under examination, ignoring official data on trafficking cases in favour of their own generated estimates, and estimating trafficking numbers across all sectors (not just into the sex sector) by whether or not a country has legalized prostitution, when there is no reason why that would have any bearing on, for example, trafficking in to another labour sector.²³⁴

A systematic review of recent books on sex trafficking also found that the majority of studies cited at least one of three flawed sources of data.²³⁵ In particular, much replicated figures produced by the US State Department, namely that around 800,000 people are trafficked across international borders annually, have been criticized for being based on apparently weak methodologies that the State Department refuses to disclose publicly.²³⁶ Because rigorous and methodologically sound trafficking research is difficult to conduct, the use and misuse of flawed prevalence data limits the efficacy of anti-trafficking efforts. In order to meet their obligations to combat trafficking, it is

²³⁰ UNODC, *Issue paper: The concept of ‘exploitation’ in the Trafficking in Persons Protocol*, 2015, p. 107. This is a mix of gender bias in the understanding of who is trafficked, with the focus usually on women and girls rather than men and boys, and “visibility bias” in that trafficking for forced prostitution is more likely to be detected than trafficking for forced labour, which itself reflects a gender bias. See UNESCO, K. Touzenis, *Trafficking in Human Beings: Human rights and transnational criminal law, developments in law and practices*, 2010, pp. 47-48; J.A. Chuang, “Rescuing trafficking from ideological capture: Prostitution reform and anti-trafficking law and policy”, *University of Pennsylvania Law Review*, Vol. 158, 2010; M. Wijers, “Purity, victimhood and agency: Fifteen years of the UN Trafficking Protocol”, *Anti-Trafficking Review*, issue 4, 2015.

²³¹ American University, Washington College of Law, Center for Human Rights and Humanitarian Law, Program on Human Trafficking and Forced Labor; A. Jordan, *Fact or fiction: What do we really know about human trafficking? Issue Paper 3*, 2011; A. Boff, *Shadow city: Exposing human trafficking in everyday London*, GLA Conservatives, 2012.

²³² S. Cho, A. Dreher and E. Neumayer, “Does legalized prostitution increase human trafficking?”, *World Development*, 2013, pp. 67-82.

²³³ See R. Weitzer, ‘New directions in research on human trafficking’, *The Annals of the American Academy of Political Science and Social Science*, 2014, pp. 6-24 (referencing the Cho et. al., study, p. 13 - “[E]ven more problematic, the authors relied on aggregate national human trafficking figures (lumping sex trafficking together with other kinds of human trafficking) in their attempt to assess whether legalizing prostitution increases or decreases the amount of all trafficking, not just sex trafficking. Thus, there is a glaring mismatch between the trafficking figures and their relationship to prostitution: The trafficking “data” are based on a compound of different types of trafficking, yet these generic figures are used to assess whether prostitution law is related to the incidence of all kinds of trafficking.”)

²³⁴ L. Agustín, “Does legalised prostitution increase trafficking?: Who knows, without real data?”, *The Naked Anthropologist*, 2012, available at: www.lauraagustin.com/does-legalised-prostitution-increase-trafficking-who-knows-without-real-data.

²³⁵ L. Fedina, “Use and misuse of research in books on sex trafficking: Implications for interdisciplinary researchers, practitioners, and advocates”, *Trauma Violence Abuse*, 2014.

²³⁶ L. Fedina, “Use and misuse of research in books on sex trafficking: Implications for interdisciplinary researchers, practitioners, and advocates”, *Trauma Violence Abuse*, 2014.

important that governments collect adequate data on the extent of the problem, engaging in international cooperation to that end.

IMPACT OF CALLS FOR DECRIMINALIZATION OF SEX WORK ON ANTI-TRAFFICKING INITIATIVES

The available evidence indicates that criminalization of sex work does not reduce trafficking. This is noted by *The Lancet* and other credible research institutions.²³⁷

Some research indicates that decriminalization of adult consensual sex work may in fact help victims of trafficking and lead to more effective anti-trafficking efforts.²³⁸ When not threatened with criminalization, sex worker organizations have collaborated with law enforcement to identify women and children who have been trafficked, and to refer them to the necessary services.²³⁹ Equally, there is some evidence that traffickers use the existence of criminal law and policy enforcement against sex work to control trafficked persons and discourage them from approaching police for help.²⁴⁰ Criminalization also impedes sex workers' efforts to organize with peers and with law enforcement agencies to combat trafficking or otherwise change an unsafe working environment.²⁴¹ The UNAIDS Guidance Note on HIV and Sex Work highlights that sex worker organizations are best positioned to refer women and children who are victims of trafficking to appropriate services.²⁴² A number of anti-trafficking advocacy organizations are critical of criminal justice approaches that carry out raids that penalize both sex workers and victims of trafficking.²⁴³

Some further argue that decriminalizing sex work leads to increased trafficking into the sex industry.²⁴⁴ There is no definitive evidence, however, to support these claims. (See 'Methodological

²³⁷ Anti-Slavery International, Submission by Anti-Slavery International to the Committee on Justice on the proposal of Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill, Northern Ireland Assembly, 2014 (citing Europol); "Keeping sex workers safe", *The Lancet*, 2015, available at: [www.thelancet.com/journals/lancet/article/PIIS0140-6736\(15\)61460-X/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(15)61460-X/fulltext).

²³⁸ R. Weitzer, "The mythology of prostitution: Advocacy research and public policy", *Sexuality Research and Social Policy*, 2010, pp. 23-25.

²³⁹ See, for example, Durbar Mahila Samanwaya Committee, *Innovative approaches to combat trafficking of women in sex trade by Durbar Mahila Samanwaya Committee (Kolkata)*, available at: www.sexworkeurope.org/sites/default/files/resource-pdfs/dmsc_innovative_approaches_trafficking.pdf; Open Society Foundations, *10 reasons to decriminalize sex work: A reference brief*, p. 6, available at: www.opensocietyfoundations.org/sites/default/files/decriminalize-sex-work-20120713.pdf; UNAIDS, *Guidance note on HIV and sex work*, 2012.

²⁴⁰ Institute for Applied International Studies, A. Brunovskis and G. Tyldum, "Crossing borders: An empirical study of transnational prostitution and trafficking in human beings", *Eldis*, 2004.

²⁴¹ Empower Foundation, *Hit & run: The impact of anti-trafficking policy and practice on Sex Worker's Human Rights in Thailand*, 2012. There is some research to suggest sex purchase laws act as a disincentive to clients reporting any trafficking concerns. See J. Levy, "Swedish abolitionism as violence against women", *Sex Worker Open University (SWOU)*, 2013.

²⁴² UNAIDS, *Guidance Note on HIV and Sex Work*, 2009, p 12.

²⁴³ See Freedom Network, *Policy statement on human trafficking and sex workers rights*, 2010, available at: freedomnetworkusa.org/wp-content/uploads/2012/05/Human+Trafficking+and+Sex+Workers+Rights+September+2010-final.pdf; GAATW, *Feeling good about feeling bad...: A global review of evaluation in anti-trafficking initiatives*, available at: www.gaatw.org/publications/GAATW_Global_Review.FeelingGood.AboutFeelingBad.pdf

²⁴⁴ US Department of State, Bureau of Public Affairs, *The link between prostitution and sex trafficking*, 2004, available at: 2001-2009.state.gov/r/pa/ei/rls/38790.htm ("Where prostitution is legalized or tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and

issues in human trafficking research' for further analysis). The EUROPOL unit that deals with trafficking confirmed in 2012 that there is no evidence in Europe to show any significant impact on the issue of trafficking by any laws on prostitution (regulation or prohibition) and that the two are separate issues.²⁴⁵

In Germany, where sex work is legalized (as opposed to decriminalized), the Federal Crime Office has reported that: "*The number of identified cases of human trafficking for sexual exploitation in Germany has been decreasing in the past years and in 2013 it has reached the lowest point since 2006.*"²⁴⁶ Additionally, a recent study on Germany's 2002 Prostitution Act (which decriminalized the "solicitation of sex work" and under which sex work is generally legal in Germany), confirmed that claims that Germany's legal framework leads to increased human trafficking were unsubstantiated.²⁴⁷ Many complaints about the legal framework in Germany refer to the lack of proper implementation of the current law on sex work.²⁴⁸

There is also a lack of reliable evidence that criminalizing sex work and/or specifically the purchase (often referred to as the "demand") for sex work reduces trafficking as claimed. For example, in Sweden, where this approach, the "Nordic Model", originated, the Chancellor of Justice has confirmed in a government report on the impact of its law that data on the prevalence of trafficking is not completely reliable.²⁴⁹ Further, the Swedish National Council for Crime Prevention found no evidence that after 10 years of implementation the Swedish law criminalizing the buying of sex had any significant impact on decreasing trafficking into the sex industry in Sweden.²⁵⁰ While police

children trafficked into commercial sex slavery."); see also S. Cho, A. Dreher and E. Neumayer, "Does legalized prostitution increase human trafficking?", *World Development*, 2013, pp. 67-82 (This research report claimed to find a quantitative association between legalized sex work and trafficking. However, the methodology used has been convincingly rebutted by R. Weitzer) see R. Weitzer, "New directions in research on human trafficking", *The Annals of the American Academy of Political Science and Social Science*, 2014, pp. 6-24.

²⁴⁵ This was reported by Anti-Slavery International in *Submission by Anti-Slavery International to the Committee on Justice on the proposal of Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill*, Northern Ireland Assembly, 2014, para. 4.12.

²⁴⁶ Federal Criminal Police Office (BKA), 'Lagebilder menschenhandel', available at: www.bka.de/nn_231620/DE/ThemenABisZ/Deliktsbereiche/Menschenhandel/Lagebilder/lagebilder__node.html?_nnn=true. While some claim human trafficking has increased since a 2002 reform of Germany's law (which decriminalized "solicitation" and recognized contracts between sex workers and clients and enabled sex workers to sue clients for refusing to pay), sex work was actually legalized in 1927.

²⁴⁷ See D. Czarnecki, et al., *Prostitution in Germany – A comprehensive analysis of complex challenges*, SPI Research, 2015, pp. 25-26, available at: www.spi-research.eu/wp-content/uploads/2014/11/ProstitutioninGermanyEN_main.pdf. Notably, this research report did confirm that "[s]uccessive opening of EU borders to southeastern European countries, and the associated (in part still restricted) freedom of movement for employment purposes, has led to higher levels of labor migration to Germany.")

²⁴⁸ See D. Czarnecki, et al., *Prostitution in Germany – A comprehensive analysis of complex challenges*, 2015, pp. 25-26.

²⁴⁹ A. Skarhead, *Prohibition of the purchase of sexual services. An evaluation 1999-2008*, Government of Sweden, Committee of Inquiry to Evaluate the Ban against the Purchase of Sexual Services, 2010, p.34.

"Although it is hard to assess the exact scale of human trafficking for sexual purposes, in Sweden the establishment of this kind of crime is considered to be substantially smaller in scale than in other comparable countries. According to the Swedish Police, it is clear that the ban on the purchase of sexual services acts as a barrier to human traffickers and procurers who are considering establishing themselves in Sweden." *Id.* at p.9.

²⁵⁰ BRA (Swedish National Council for Crime Prevention), Stockholm, *The organisation of human trafficking: A study of criminal involvement in sexual exploitation in Sweden, Finland and Estonia*, 2008, p.79 (cited in Anti-Slavery International, *Submission by Anti-Slavery International to the Committee on Justice on the proposal of Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill*, Northern Ireland Assembly, 2014, para. 4.8.

reported that they believe the law deters traffickers,²⁵¹ no other sources were consulted to corroborate this view.

In 2007, the Swedish National Board of Health and Welfare highlighted the difficulty in drawing clear conclusions on any reduction in sex work, finding that the initial reduction in street-based sex workers had been short-lived and that numbers were returning to previous levels:

*It is also difficult to discern any clear trend of development: has the extent of prostitution increased or decreased? We cannot give any unambiguous answer to that question. At most, we can discern that street prostitution is slowly returning, after swiftly disappearing in the wake of the law against purchasing sexual services. But as said, that refers to street prostitution, which is the most obvious manifestation. With regard to increases and decreases in other areas of prostitution – the “hidden prostitution” – we are even less able to make any statements.*²⁵²

In Norway, the recent evaluation of the purchasing law concluded that the commercial sex market has decreased by approximately 20-25% since the introduction of that law.²⁵³ However, leading academic researchers have cautioned that the reported decrease in sex work is far from certain, publicly stating that they chose not to bid for the role carrying out the government evaluation of the law because they considered that “the mandate and funding was insufficient for sound research”.²⁵⁴ They point to “too many uncertainties”²⁵⁵ in the data produced by the evaluation on both outdoor and indoor markets, which the evaluation report authors themselves acknowledge in the body of the report but do not fully reflect in the overall conclusions.²⁵⁶

The UNAIDS Advisory Group on Sex Work has noted that there is no evidence that criminalization focused on purchasers or “ending demand” for sex work actually reduces sex work or trafficking into the sector, improves the quality of life of sex workers, or tackles gender inequalities.²⁵⁷

Amnesty International will continue to closely examine emerging evidence on human trafficking and forced labour, and on sex work and any interlinking concerns. We will champion good practice, and hold states to account for failures to effectively prevent human right abuses experienced by trafficked persons and individuals who have been subjected to forced labour. We will, however,

²⁵¹ Swedish National Police, *Situation report 13: Trafficking in human beings for sexual and other purposes*, 2012, available at: www.polisen.se/Global/www%20och%20Intrapolis/Informationsmaterial/01%20Polisen%20nationellt/Engelskt%20Informationsmaterial/Trafficking_1998_/Trafficking_report_13_20130530.pdf.

²⁵² A. Erriksen and A. Gavara (Sweden National Board of Health and Welfare, Individual & Family Unit), *Prostitution in Sweden 2007*, Socisalstyrsen, 2008, p. 63, available at: www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/8806/2008-126-65_200812665.pdf.

²⁵³ The evaluation of the purchasing law in Norway in 2014 concluded that the commercial sex market has decreased by approximately 20-25% since the introduction of that law. See I. Rasmussen, et al, *Evaluering av forbudet mot kjøp av seksuelle tjenester*, Vista Analyse, 2014.

²⁵⁴ A. Brunovskis and M. L. Skillbrei, *The evaluation of the Sex Purchase Act brings us no closer to a conclusion*, 2014.

²⁵⁵ A. Brunovskis and M. L. Skillbrei, *The evaluation of the Sex Purchase Act brings us no closer to a conclusion*, 2014.

²⁵⁶ A. Brunovskis and M. L. Skillbrei, *The evaluation of the Sex Purchase Act brings us no closer to a conclusion*, 2014; Amnesty International, *The human cost of ‘crushing’ the market: Criminalization of sex work in Norway* (Index: EUR/36/4034/2016).

²⁵⁷ UNAIDS, *Guidance note on HIV and sex work*, 2012.

oppose overly broad approaches to trafficking in persons that conflate it with consensual sex work, thereby leading to human rights violations against sex workers and undermining efforts to help trafficked persons.