

The legal status of sex work Key human rights and public health considerations

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In recent years, the debate on the legal status of sex work, and activities relating to it,¹ has received heightened attention in countries and multinational institutions across the world. Underlying this debate, there are mixed, and sometimes conflicting, ideological, social, moral, public health and security considerations. Depending on their positions on these issues, countries have adopted a variety of legal and policy approaches to sex work that range from total criminalisation (i.e. all aspects of sex work are prohibited) to total decriminalisation (i.e. the removal of criminal laws relating to all aspects of sex work).² Between these two positions, other countries have chosen to criminalise or regulate specific aspects of sex work, such as the purchase of sex work, soliciting, living off the avails or operating a brothel.

Often, misconceptions and prejudice about sex work, and those involved in it, preclude rational and evidence-informed discussions on the issue – thus leading to the embrace of coercive approaches that violate human rights and harm public health. The present document is offered to address misconceptions around sex work and to present the human rights and public health considerations that plead in favour of decriminalisation of sex work, including the purchase of sex.

Sex work should not be conflated with human trafficking.

Sex workers are female, male and transgender adults (18 years and older) who receive money or goods in exchange for sexual services, either regularly or occasionally. It is important to note that sex work is consensual sex between adults, which takes many 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.³

Any form of involvement of children (people below 18) in the sale of sex is a violation of human rights. Sex work, therefore, refers to consensual acts between adults and do not involve coercion. Sex work cannot and should not be conflated with human trafficking or sexual exploitation which constitute human rights violations and are prohibited under international and national laws. States have a responsibility to prevent and address human trafficking and sexual exploitation. However, these efforts should not justify criminal prosecution or other coercive measures against adults who voluntarily engage in sex work, either as sex workers or clients. Experts and researchers working on trafficking have clarified that there is no evidence that “prostitution in itself is a cause of human trafficking”.⁴

Criminalisation of sex workers or their clients negates the right to individual self-determination, autonomy and agency.

For adults who voluntarily engage in sex work, it is an expression of individual self-determination and agency to assert control over their own bodies. Criminalising sex workers therefore is a negation of this right to self-determination, autonomy and agency. Criminalising the clients of sex workers has a similar impact to criminalising sex workers as it directly affects the ability of sex workers to earn a living based on the expression of their agency over their own body and it perpetuates the stigma and prejudice against sex workers. In a 2013 *Note on sex work, sexual exploitation and trafficking*, the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) expressly stated that criminalisation of sex work violates “sex workers rights to health and self-determination”.⁵

Human rights bodies have called for decriminalisation of sex work.

The United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee) has on several occasions expressed concerns about the criminalisation of sex work and its negative impact on the human rights, health and security of sex workers.⁶ The CEDAW Committee has thus called on States to decriminalise sex work.⁷

The United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has conducted a thorough analysis of the impact of criminalisation of sex work which shows that:

“the failure of legal recognition of the sex-work sector results in infringements of the right to health, through the failure to provide safe working conditions, and a lack of recourse to legal remedies for occupational health issues”.⁸

Similarly, the Global Commission on HIV and the Law has recommended that rather than “punishing consenting adults involved in sex work, countries must ensure safe working conditions and offer *sex workers and their clients* access to effective HIV and health services and commodities”.⁹ (Emphasis added)

At national level, the Supreme Court of Canada in a landmark decision in 2013 held that criminalisation of different aspects of sex work violates the right to security as provided under the *Canadian Charter of Rights and Freedoms*.¹⁰

The “Nordic model” of criminalising clients of sex workers raises serious concerns.

In the past decade, a handful of countries have adopted legislation to criminalise the clients of sex workers as an approach to reduce the demand for sex work and to “protect” sex workers. This approach known as the “Nordic” or “Swedish” model was first introduced in Sweden in 1999, and was later adopted in Finland, Iceland, Norway and more recently in France. Independent research conducted on the impact of laws criminalising the clients of sex workers show that they have not been effective in reducing prostitution: “*while the number of sex workers working on the street appeared to decline following the passage of the law, sex*

workers have merely moved indoors, online and to neighbouring countries".¹¹ Recorded negative consequences of the criminalisation of clients include:¹²

- increased risks of, and experience of, violence;
- decreased negotiating power for safer sex practices;
- threat to safety networks and warning systems among sex workers;
- reluctance among clients to report violence that they witness against sex workers;
- use of condoms as evidence against clients of sex workers; and
- increased difficulty in accessing and maintaining housing.

Decriminalising sex work, including the purchase of sex, protects human rights and supports public health efforts.

Sex workers and their clients are at increased risk of HIV and other sexually transmitted infections (STIs).¹³ In spite of their heightened vulnerability to HIV and other STIs, sex workers and their clients have limited access to HIV prevention, treatment, care and support services. Key barriers to access and uptake of HIV services for sex workers and their clients include punitive laws relating to sex work. The World Health Organization (WHO), the United Nations Populations Fund (UNFPA), the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the Global Network of Sex Workers Projects (NSWP) warn that:

"Laws that directly or indirectly criminalize or penalize sex workers, *their clients* and third parties, [...] can undermine the effectiveness of HIV and sexual health programmes, and limit the ability of *sex workers and their clients* to seek and benefit from these programmes."¹⁴ (Emphasis added)

Removing punitive laws associated with sex work, including laws that punish clients of sex workers, can help create empowering environments that allow them to access HIV and other health services, to denounce violence and abuse (including by police) and to take steps to mitigate the impact of HIV.¹⁵ In New Zealand, a Review Committee established to evaluate the impact of the law decriminalising sex work, including the purchase of sex work, found that the number of people in sex work did not increase after the passage of the law.¹⁶ The Review Committee further found that 90% of sex workers felt that their legal rights were protected under the law and that the level of condom use among sex workers had increased.¹⁷

All United Nations Member States have committed on several occasions to creating or strengthening legal environments that protect the human rights of people living with and vulnerable to HIV, including sex workers and their clients, and that help remove the barriers to their access to effective HIV prevention, treatment, care and support services.¹⁸ The realisation of these commitments calls for the decriminalisation of all aspects of sex work that do not involve coercion, deceit or violence. This would include decriminalising the purchase of sex.

¹ Sex work comprises many components. However, the main ones include: selling sex, buying sex, running a brothel, living off the avails, soliciting.

² For an overview of the range of approaches, see M Richter *et al* “Sex work and the 2010 FIFA World Cup: Time for public health imperatives to prevail” *Globalisation and Health* 2010, 6(1), available at <http://www.globalizationandhealth.com/content/pdf/1744-8603-6-1.pdf> and also Open Society Foundations *Laws and policies affecting sex work: A reference brief*, 2012, available at <http://www.opensocietyfoundations.org/sites/default/files/sex-work-laws-policies-20120713.pdf>.

³ See UNAIDS, *Guidance Note on HIV and Sex Work*. Geneva, 2009, updated 2012 and 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.

⁴ See Ann Jordan *et al* “Letter to Ambassador John Miller, Director, Office to Monitor and Combat Trafficking in Persons, U.S. Department of State” 21 April 2005. Available at <http://www.nswp.org/sites/nswp.org/files/USSTATE-LETTER.pdf>.

⁵ See UN Women “Note on sex work, sexual exploitation and trafficking”, 9 October 2013, available at <http://www.nswp.org/sites/nswp.org/files/UN%20Women's%20note%20on%20sex%20work%20sexual%20exploitati%20and%20trafficking.pdf>.

⁶ See notably *Report of the Committee on the Elimination of Discrimination against Women*, Twentieth session, 1999, p. 32; *Concluding comments of the Committee on the Elimination of Discrimination against Women on China*, Thirty-sixth session, 2006, p. 4; and *Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya*, thirty-ninth session, 2007, p. 6.

⁷ See, in particular, *Report of the Committee on the Elimination of Discrimination against Women*, Twentieth session, 1999, Consideration of the third and fourth periodic reports of China, p. 32.

⁸ See *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Commission of Human Rights, 14th Sess, Annex, Agenda Item 3, A/HRC/14/20, 2010, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>, p 1.

⁹ Global Commission on HIV and the Law (2012) *HIV and the law: Risks, rights & health*, p. 99, available at <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf>. The Global Commission on HIV and the Law is an independent body, convened by the United Nations Development Programme (UNDP) on behalf of the Joint United Nations Programme on HIV/AIDS (UNAIDS). The Commission was supported by a Technical Advisory Group, which reviewed and analysed existing public health and legal evidence and also commissioned original analysis. The Commission issued its landmark report *Risks, rights & health* in July 2012. Additional information on the Commission, its processes and work is available at www.hivlawcommission.org.

¹⁰ See *Canada (Attorney General) v. Bedford*, 2013 SCC 72, available at <http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/13389/index.do>.

¹¹ See Canadian HIV/AIDS Legal Network “Sex work law reform in Canada: Considering problems with the Nordic Model” Briefing Paper, January 2013, available at <http://www.nswp.org/sites/nswp.org/files/NordicBrief-ENG.pdf>; and also J Kilvington *et al* “Prostitution policy in Europe: A time of change?” 2001, *Feminist Review*, 97.

¹² See among others A Jordan “The Swedish law to criminalise clients: a failed experiment in social engineering” Issue paper 4, April 2012, available at <http://rightswork.org/wp-content/uploads/2012/04/Issue-Paper-4.pdf>; S Ka Hon Chu and R Glass “Sex work law reform in Canada: Considering problems with the Nordic Model” 2013 *Alberta Law Review* 51:1, pp 101-124.

¹³ See, among others, E Coughlan *et al* “Male clients of female commercial sex workers: HIV, STDs and risk behaviour” 2001 *Int J STD AIDS* 12(10), pp 665-659 and WHO, UNFPA, UNAIDS and 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*. Geneva, 2012

¹⁴ WHO, UNFPA, UNAIDS and NSWP. *Prevention and Treatment of HIV and other Sexually Transmitted Infections for Sex Workers in Low-and Middle-income Countries*, p 16.

¹⁵ UNAIDS, *We can remove punitive laws, policies, practices, stigma and discrimination that block effective responses to HIV, Joint Action for Results. UNAIDS Outcome Framework: Business Case 2009–2011*. Geneva, 2010, p. 7.

¹⁶ Government of New Zealand. *Report of the Prostitution Law Review Committee on the operation of the Prostitution Reform Act of 2003*, 2008, available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>.

¹⁷ *Id.*

¹⁸ See General Assembly Resolution, *Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS*, UN Doc A/RES/65/277, June 10, 2011, at para. 77. And also United Nations General Assembly Special Session on HIV/AIDS, *Declaration of Commitment on HIV/AIDS*, (A/RES/S-26/2), June 27, 2001.