

# WORKING PAPER

## Sex Work, HIV and the Law

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### Introduction

This paper is intended to provide a perspective on legal frameworks and their implications for HIV-related policy goals, particularly with respect to prevention, treatment, care and support. The criminalisation of practices and identities, through the use of criminal law as the primary and often only intervention with issues including drug use, sex between men, or the transmission of HIV, for example – is one particular focus of these papers. The reason for this focus is a straightforward one: the impact of expanding spheres of illegality tends to push conduct and economies underground, rather than eradicating them, leaving people within them and connected to them in situations of greater vulnerability. Furthermore, the people concerned – e.g., men who have sex with men (MSM), or those living with HIV – are marginalised and at risk even before the law intervenes. Widespread stigma, societal violence, denial of public services mean that the starting point is typically one of isolation and vulnerability, which is then only exacerbated by criminalisation: the individuals are not treated as victims of state-sanctioned abuse and neglect, but as criminals who must then be on the run, unable to seek support from the police, the courts, or from civil society.

From the perspective of global leaders attempting to address HIV, there is a consensus on the importance of shaping and enhancing legal frameworks “to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV and members of vulnerable groups [...] and developing strategies to combat stigma and social exclusion connected with the epidemic,” as stated in a declaration adopted by the UN General Assembly in 2006.<sup>2</sup>

This paper tries to analyse the regulation of sex work around the world through that same expansive lens – looking not just at the operation of criminal law, but other frameworks, including administrative law and labour regulation, for example – to understand how they might intersect with HIV policy. The emphasis, certainly, is on how laws might directly support or undermine public health goals with respect to HIV, but this means being attentive to the human rights of sex workers, as recognised above: problems of discrimination, stigma and social exclusion are inextricably “connected with the epidemic.”

For the purposes of this paper, “sex worker” refers only to adults involved consensually in sex work, though it recognises that legal frameworks are often involved in probing, policing and potentially redefining the boundaries of what is

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<sup>2</sup> United Nations General Assembly, *60/262 Political Declaration on HIV/AIDS*, 15 June 2006, A/RES/60/262, para 29.

considered consensual, or what may be consented to. "Sex worker" is used to refer to male, female and transgender adults involved in sex work. Finally, with respect to the definition of "sex work," I would as a general matter join with scholars who consider that the term covers a range of erotic services, including sexual intercourse, stripping, work in pornography etc. But, because each of these tend to be governed under very different regulatory regimes, and because this paper has a limited scope, with an emphasis on the practices where there is greatest vulnerability to HIV, it restricts itself to addressing what is often termed prostitution. However, the historical and political connotations of "prostitution" make it a problematic term to use, since it has often been a term promoting stigma, discrimination and marginalisation.

## Methodology

This paper relies on a number of different approaches and resources:

- the author's own interpretation of current and proposed legislation.
- reports by governmental and intergovernmental agencies.
- expert analyses of legislation, policy and implementation, in law reviews, journals, and other professional for a.
- contemporary documentation of current events, in newspaper and magazine articles.
- testimony from individuals and groups affected, particularly sex workers themselves, from a range of documents including submissions made at Regional Dialogues convened by the Global Commission on HIV and the Law.

The author did not engage in direct interviews or field research, given limitations of time and resources. The framing of the themes was coloured by her own academic and professional experience as a lawyer working on international and comparative labour rights, with workers' movements including sex workers' organisations and trade unions supporting sex workers' rights.

For these and other reasons, the paper inevitably privileges certain discourses and lenses of analysis over others, and should be read in the context of those limitations.

## Sex work in the context of HIV policy

There are several ways in which sex work demands attention and analysis, when shaping policy trying to address vulnerability to HIV, limit transmission, and promote access to treatment. Sex workers' vulnerability to HIV, and the difficulties they face in securing access to prevention, treatment, care and support services, are shaped by a range of factors.

These factors include:

- *The work*: Sex work often involves having sexual intercourse in situations of secrecy, facing the constant fear of exposure or violence. The circumstances make it difficult to ensure that safer sex is practiced consistently.
- *Violence*: Rape by police, clients, or strangers emboldened by the atmosphere of impunity for those who attack sex workers, in many countries, increases the risk of contracting HIV. More broadly, where communities are demoralised by the lack of access to justice for victims of violent attacks, HIV policies that rely on empowered individuals insisting on safer sex cannot possibly succeed.
- *Lack of access to services*: Sex workers may find it difficult to secure appropriate state health care services related to HIV prevention and treatment, due to social stigma as well as the outright refusal, in some cases, to provide services to sex workers.

When these factors are combined with a legal framework that further marginalises or terrorises sex workers, the implications for effective HIV policy are significant. A recent report quoted a South African sex worker who is HIV-positive, commenting on her constant fear of arrest under laws imposing criminal penalties for those engaging in "carnal intercourse" for "reward;" in prison, she would not have access to antiretroviral treatment or other necessary medications.<sup>3</sup>

In spite of this, issues related to sex workers' health and rights are not typically considered when framing laws and policies with respect to sex work. Many legal frameworks situate sex work within anti-trafficking policies, as another paper in this series points out,<sup>4</sup> or consider it coterminous with violence against women. The latter conflation raises

3 Arnott J, and Crago A-L (2009), *Rights Not Rescue: Female, Male, and Trans Sex Workers' Human Rights in Botswana, Namibia, and South Africa*, Open Society Institute, p.10.

4 See Shah, S (2012), Working Paper on *Trafficking and the Conflation with Sex Work: Implications for HIV Control and Prevention* prepared for the Global

further problems in terms of creating coherent policy, since male and transgender sex workers are not only rendered invisible, but their status may be further problematised by laws criminalising sex between men, or transgender conduct. Such laws, as well as others criminalising drug use, HIV transmission, or non-disclosure of HIV status to sexual partners, may bring sex workers into the ambit of legal frameworks that may not be explicitly about sex work, and should be assessed when shaping a regulatory approach to sex work.<sup>5</sup>

As a recent study points out, while it is generally accepted, with respect to MSM, or people living with HIV/AIDS, for example, that a population's invisibility and marginalisation is counter-productive to effective HIV-related interventions, this understanding does not extend to sex work. This is in spite of the evidence that the core dynamic – "Criminalisation leads to marginalisation and invisibility; invisibility masks the need for adequately funded, effective services" – is just as true in the sex work context.<sup>6</sup> Thus, there is an urgent need to bring this issue into focus.

### **What is the relevance of "the law"?**

Some scholars have suggested that laws have a limited role to play in shaping sex workers' choices, addressing social stigma and discrimination against sex workers and their families, mitigating violence and exploitation in sex work, or transforming working conditions in the sex industry.<sup>7</sup> However, as others have indicated, such analyses tend to rely on a narrow understanding of the legal realm, restricted to laws "on the books."<sup>8</sup> In supporting calls that law be taken seriously by those concerned about sex work in the context of HIV, this paper privileges an understanding of law that is more capacious. When analysing systems of allocating legal rights, duties and privileges, we must be attentive to consequences that include the coercive power of the state, but are not limited to it. This would mean, in effect, looking not just at law on the books, or even law as applied, but comprehensively at law in society.

Such an approach would involve considering who is empowered and disempowered through the operation of legal frameworks and how; devoting attention to both individual and collective bargaining in the shadow of the law; and undertaking empirical studies to understand the impact on individual rights and public health. It does not entail having to subscribe to the belief that law alone has the ability to create or erase social stigma, erode or improve working conditions, or shape the course of an epidemic.

In concrete terms, it means that we should be concerned about the potential of selective and discriminatory enforcement of facially neutral laws to target sex workers and their clients, the ways in which the legal system tries (or fails) to take account of the marginalisation and socio-economic exclusion of sex workers, the persuasive or dissuasive impact of legal norms on sex worker allies and partners including health service providers, trade unions, funding organisations, and the possibility of weakening or strengthening criminal networks including traffickers or corrupt police who thrive when economies are pushed underground.

Documented instances of police extortion of and violence against sex workers indicate both the importance of and the limitations of law: while the actions of corrupt police officers are clearly illegal, they also frequently rely on threats of legal arrest. For example, a recent report describes a sex worker in Macedonia saying, of a police officer, "*He tells me if I don't give him money every day, he will arrest me for prostitution.*"<sup>9</sup>

The suppression of sex workers' rights through law is generally accompanied by failed HIV policy, as another study suggests:

*"The Administrative Punishment Act in China warrants detention of both sellers and purchasers of sexual services. The punishment is detention for 15 days and a fine, or four years in re-education centres or 'labour camps'. Each year, approximately 40-50 thousand women are detained in these 're-education through labour' camps for selling sex and as many as 300,000 may currently be incarcerated. More recently, the law has included STI and HIV prevention education due to the rise in prevalence, but unfortunately implementation of this aspect of the law has been far from adequate."*<sup>10</sup>

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Commission on HIV and the Law. .

5 These laws and their impact are addressed through other working papers prepared for the Global Commission on HIV and the Law. See for example Chui, J and Burris S (2012), *Working Paper on Punitive Drug Law and the Risk Environment for Injecting Drug Users: Understanding the Connections*.

6 Forbes A (2010), *Sex Work, Criminalization, and HIV: Lessons from Advocacy History*, BETA, Summer/Fall 2010, p.21.

7 See Laura Agustín L (2008), *Sex and the Limits of Enlightenment: The Irrationality of Legal Regimes to Control Prostitution*, *Sexuality Research and Social Policy*, Vol. 5, No. 4, pp.73-86.

8 See Scoular J (2010), *What's Law Got to Do With It? How and Why Law Matters in the Regulation of Sex Work*, *Journal of Law and Society*, Vol. 37, No.1, pp.12-39.

9 Sex Worker Rights Advocacy Network (2009), *Arrest the Violence: Human Rights Violations Against Sex Workers in 11 Countries in Central and Eastern Europe and Central Asia*, p.34.

10 Kendall M, and Razali K (2010), *Sex Work and HIV: China*, HIV and AIDS Data Hub for Asia-Pacific, p.4.

It is not possible to mobilise sex workers as the agents of HIV prevention while treating them as a social problem.

Law has a limited role to play in the broader context of the marginalisation and stigmatisation of sex workers. However, from the perspective of advancing goals of HIV prevention and treatment access, there is a clear set of outcomes that the law *could* promote or contribute to:

- They should create avenues for sex workers and their clients to report crimes voluntarily, including rape or the operation of organised crime networks.
- They should prohibit the discrimination and abuse that sex workers often face when seeking services for the prevention and treatment of HIV.
- They should ensure that the free flow of information about HIV through peer-led interventions or mass media is not blocked by censorship.
- They should provide meaningful, well-enforced penalties for police who engage in harassment or blackmail of sex workers.
- They should encourage the collectivisation or collective voice of sex workers.
- They should ensure that there are no obstacles to advocacy and service provision groups supporting sex workers.

### **Modes of state regulation of sex work: Strengths and weaknesses in the context of HIV policy**

The analysis above does not necessarily amount to a call for a particular regulatory model. Some scholars have attempted to classify state approaches to regulating sex work – such as prohibition, abolition, decriminalisation, legalisation – but I would suggest that these categories tend to produce overly gross characterisations, saying both too much and too little about what jurisdictions are trying to do, and thus obscuring some very significant distinctions as well as areas of overlap. Given that there are no uniform definitions of *terms* such as those above, it may be more useful to sketch out some broad *approaches* that have been adopted.

- Some legal frameworks seek to prohibit all aspects of sex work, and to frame criminal penalties for all of those involved in sex work, including clients, sex workers, and third parties such as brothel owners.
- Other jurisdictions may try to draw distinctions, tacitly or explicitly permitting some transactions, or sites of sex work, but not others.
- In some legal contexts, there may be no criminal penalty that singles out any area of sex work, though of course sex work and sex workers will be covered by laws of general application with respect to child sexual abuse, forced labour, rape etc.
- Some jurisdictions may shape regulations specific to sex work and sex workers, with respect to occupational health and safety, zoning, taxation etc.

Clearly, these broad-brush classifications of regulatory approaches to sex work do not actually answer critical questions about how a particular jurisdiction actually works, or how it understands sex workers – as a problem to be ‘managed’ or as a sector like any other with workers who deserve protection and workers’ rights, or otherwise. Efforts to abolish sex work through the operation of law, for example, may be framed on the basis of a belief that all sex work is violence against women, and that all sex workers are victims – or it may reflect the legislature’s conviction that all sex workers are criminals. Similarly, the direct regulation of sex work, for example, may or may not be implemented in ways consonant with human rights principles: historically, many actual and proposed frameworks for legalised sex work have involved forced health testing of sex workers, accompanied by quarantining, shaming or even branding sex workers determined to have diseases of public health significance.<sup>11</sup>

Studies indicate, however, that the protection of sex workers’ and clients’ human rights is not only consistent with effective HIV policy, but a prerequisite. The importance of combating discrimination, both with respect to direct discrimination in access to condoms, lubricant, anti-retroviral therapies etc., and in terms of the indirect impact that discrimination has in furthering stigma, has been recognised repeatedly at the international level, for well over a decade, by leaders of states concerned about effective HIV policy.<sup>12</sup> So, for the purposes of this paper, it would be important to

11 For example, the *Contagious Diseases Act* passed in Britain in 1864 required that prostitutes living and working close to military encampments be tested for venereal disease, and forcibly confined to “lock hospitals” for a course of treatment if determined to be infected and contagious. A similar, but even more draconian proposal was contained in a bill presented to the legislature of the state of Maharashtra, in India: it would have required the registration of all prostitutes, with compulsory HIV testing; all those found to be HIV-positive would be branded with a permanent tattoo.

12 See e.g. UN Declaration of Commitment on HIV/AIDS, adopted by General Assembly resolution S-26/2, 27 June 2001. See particularly, para

note that, while efforts at regulation address the particularities of sex work in the jurisdiction, in terms of occupational health and safety issues or other labour rights, they do not devolve into the types of control and surveillance that ultimately promote stigma and discrimination, and limit sex workers' autonomy.

The regulatory approach adopted by Germany in 2002<sup>13</sup> was understood by many sex workers' organisations as the state's affirmation of their rights. Especially for the purposes of this paper, it should be considered in tandem with the law addressing infectious diseases, which replaced the prior legislation, a sexually transmitted diseases act on 1 January 2001. As noted by a research institute commissioned by the government to evaluate the legal reforms, the new laws shifted the emphasis from mandatory testing of sex workers – which is no longer a feature of the German approach – to prevention, through public information, and voluntary engagement with sex workers on health and safety issues, including HIV prevention.<sup>14</sup>

While there have been concerns raised by sex workers and their advocates about the law, most of these are preoccupied with issues of regulatory fairness (e.g. lack of equity in taxation, or denial of the right to advertise sexual services on par with other services) which are important but not centrally related to the themes of this paper.

Other concerns, especially those related to the prostitution law's intersection with immigration law, do have consequences for HIV-related policy, as will be discussed at greater length later. In brief, the problem, as noted by the European Network for HIV/STI Prevention and Health Promotion among Migrant Sex Workers (TAMPEP), is that the law on sex work currently does not enable legal and independent migration to Germany from outside the European Union (EU) for work in the sex industry, thus keeping migrant sex workers in underground, high-risk environments where they will not trust law enforcement to protect their rights, given constant fear of deportation.<sup>15</sup>

While some critics of the German law alleged that legalisation would result in job seekers losing their unemployment benefits if they refused an offer of work in the sex industry<sup>16</sup> – implying, in fact, that legalisation is a form of sex trafficking – there has been no such case documented. Most employment and social security frameworks allow job seekers to refuse any offer of employment on reasonable grounds, without penalty.

The authors of the study assessing the impact of the legal change point out that, in some ways, the greatest successes of the law have been symbolic. This, for example, while most sites of sex work are not covered by the extensive workplace regulations in Germany that address *“working hours, breaks, access to daylight, indoor temperature, hygiene, maternity protection, handling dangerous substances etc.”* since they apply only to wage-based employment, these concerns are now *“on the agenda”* with respect to sex work.<sup>17</sup>

At the same time, the state's affirmation of sex workers' rights has not had immediate effect on workers' distrust of the state. Sex workers as well as staff of support centres told the researchers that *“they felt rather disillusioned and resigned about the question of whether there will be a fundamental change in the moral attitude to prostitutes and prostitution,”*<sup>18</sup> which does not create an adequate foundation for the types of close collaborations necessary between sex workers and states, in the interests of all.

While there are reasons to examine closely how regulation can be put in place in effective ways, it appears clear that decriminalisation is an important initial step. Furthermore, as the World AIDS Campaign states, it is possible for states to decriminalise sex work without promoting it: *“Arguing for the decriminalisation of sex work does not necessarily mean an endorsement of sex work. It shows an awareness of the dangers of the criminal law.”*<sup>19</sup> No decriminalised arrangement currently in place anywhere in the world reflects a total absence of sex industry-specific regulation by the state. While some have suggested that general criminal law frameworks, general labour codes and age of consent provisions, for example, would be adequate to govern a decriminalised sex sector, this is not in practice the case. For example,

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13: *“Noting further that stigma, silence, discrimination, and denial, as well as lack of confidentiality, undermine prevention, care and treatment efforts and increase the impact of the epidemic on individuals, families, communities and nations and must also be addressed,”* and para 23, *“Recognising that effective prevention, care and treatment strategies will require behavioural changes and increased availability of and non-discriminatory access to, inter alia, vaccines, condoms, microbicides, lubricants, sterile injecting equipment, drugs, including anti-retroviral therapy, diagnostics and related technologies, as well as increased research and development.”*

13 Act Regulating the Legal Situation of Prostitutes (Germany, 2002).

14 Kavemann B, and Rabe H (2007), *Findings of a study on the impact of the German Prostitution Act*, Sozialwissenschaftliches FrauenForschungsinstitut e.V. an der Evangelischen Fachhochschule Freiburg, p.7.

15 TAMPEP (2007), *National Report on HIV and Sex Work: Germany*, Amsterdam, p.9.

16 See for example Chapman C, *If you don't take a job as a prostitute, we can stop your benefits*, in The Telegraph (UK), 30 January 2005: <http://www.telegraph.co.uk/news/worldnews/europe/germany/1482371/If-you-dont-take-a-job-as-a-prostitute-we-can-stop-your-benefits.html>

17 Kavemann B, and Rabe H (2007), *Findings of a study on the impact of the German Prostitution Act*, Sozialwissenschaftliches FrauenForschungsinstitut e.V. an der Evangelischen Fachhochschule Freiburg, p.18.

18 *Ibid* at p.33.

19 World AIDS Campaign, *Sex Work and the Law: The Case for Decriminalization*, p.5.

child labour laws are typically sector- and industry-specific, based on the state's determination of the level of hazard associated with the work. Thus, a state may consider that it is not in the best interests of those under 18 to have a regime that equates the age of entry into sex work with the (typically lower) age of consent for sexual intercourse. So, while New Zealand is widely portrayed as an example of a regime that has decriminalised sex work without legalising it, it should be noted that the *Prostitution Reform Act* of 2003 does in fact prohibit the "use in prostitution" of those under 18,<sup>20</sup> even though the age of consent is 16.<sup>21</sup>

It is sometimes suggested that self-regulation by sex workers, in tandem with decriminalisation, would be an adequate framework for governance of the sex industry. Indeed, self-regulation, particularly in the context of peer-led safer HIV prevention initiatives, or efforts to counter the use of fraud or coercion in recruitment into sex work, has been demonstrably successful, the work of the Durbar Mahila Samanwaya Committee in India indicates.<sup>22</sup> However, from the perspective of effective HIV policy and rights promotion, it would not be wise to treat self-regulation as a substitute for regulation by the state, at least in some key respects. There is always the possibility that self-regulation, without guarantee of democratic process, can reify the control of sex industry management, sex workers with more power and privilege, or others whose perspectives cannot be considered a proxy for sex workers who are most vulnerable to exploitation, and thus to HIV.

It is important to note here that the absence of references to sex workers, in the criminal law, cannot be equated with decriminalisation in all cases. As pointed out in a submission for the Africa Regional Dialogue of the Global Commission on HIV and the Law from Malawi, without clear legal guidance to the contrary, police in that country feel empowered to arrest and harass sex workers on trumped-up grounds, accusing them of spreading HIV, and forcing them to be tested.<sup>23</sup> Decriminalisation requires a broad understanding at the level of the state that such treatment, by those acting under color of law, must be stopped.

## Bringing international norms to bear

A recent, comprehensive discussion paper on sexuality and human rights, prepared for the International Council on Human Rights Policy, highlights the difficulties of relying on international legal frameworks to guide the shaping of domestic law with respect to sex work. "*UN treaty bodies do not have a common position on sex workers' demands for freedom from abuse, safe conditions of work and the right to participate in decisions that concern them,*" the paper notes.<sup>24</sup> The paper goes on to note, in the context of sexuality advocacy in general, that international instruments typically allow the state to impose limitations on internationally-recognised rights such as "*the expression in sexual matters of the freedom of belief, the right to advocate and the right to information, association and assembly*" on grounds of public health, public order, and morality. These caveats have, in some ways, engulfed the principle, producing laws that are vague, relying on terms such as "causing offence to the public", "public scandal", or "immoral" activity.<sup>25</sup>

In the context of sex work, there are many examples of laws that prohibit similarly vague conduct, and are thus extremely frequently open to the abuse of discretion by law enforcement officials. For example, TAMPEP's survey of laws in Europe mentions Italy's Domestic Security laws of June 2008, which "*invests mayors with the judicial power to declare anything that might endanger the security and decorum of the cities an emergency.*" TAMPEP points out that, under this provision, "*sex workers and their clients have been subject to special ordinances that allow municipal police to administer fines.*"<sup>26</sup> This is, of course, in addition to the ways in which 'public health' claims have been used within various frameworks, though particularly ones which legalise sex work, to justify violations of sex workers' rights through compulsory HIV testing, forced disclosure of HIV status, and policies of quarantining and/or otherwise restricting freedom of movement.

Compulsory HIV testing also tends to have the opposite of the desired effect, leading clients to seek sexual services without protection, since they wrongly assume that the results of the test mean that the sex worker must therefore be HIV-negative at the time of the sexual contact.

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20 The law frames criminal penalties for third parties who "*may cause, assist, facilitate, or encourage a person under 18 years of age to provide commercial sexual services to any person,*" (Section 20) as well as clients contracting for or securing the sexual services of those under 18 (Section 22). There are no penalties for the minors themselves. *Prostitution Reform Act* (New Zealand, 2003).

21 Section 134, *Crimes Act* (New Zealand, 1961), most recently amended 1 June 2010.

22 See e.g. Bandyopadhyay, N (2008), *Streetwalkers show the way: Reframing the global debate on trafficking from sex workers' perspectives*, Working Paper 309 of the Institute of Development Studies, University of Sussex.

23 Submission made by Dingan Mithi, Journalists Association Against AIDS, Malawi, for the Africa Dialogue of the Global Commission on HIV and the Law.

24 Miller A (2009), *Sexuality and Human Rights: Discussion Paper*, International Council for Human Rights Policy, Geneva, p.33.

25 *Ibid* at p.40.

26 TAMPEP (2009), *Sex Work, Migration, Health: A report on the intersections of legislations and policies regarding sex work, migration and health in Europe*, p.19.

As noted in the International Guidelines on HIV/AIDS and Human Rights, jointly developed by the UN Office of the High Commissioner for Human Rights and UNAIDS, “[a]lthough such measures may be effective in the case of diseases which are contagious by casual contact and susceptible to cure, they are ineffective with regard to HIV since HIV is not casually transmitted.” Furthermore, the Guidelines stress, “these coercive measures drive people away from prevention and care programmes, thereby limiting the effectiveness of public health outreach.”<sup>27</sup>

In Malawi, heavy-handed measures are currently being challenged in a case where 11 sex workers were arrested and forced to undergo HIV tests; the results were then announced publicly by the Magistrate. Advocates in Malawi have argued that the measures violate core principles of constitutional rights.<sup>28</sup>

In addition to national rights frameworks, there are several guiding principles at the international level that are sufficiently specific to the issues at hand – sex work and HIV – that they can help orient us towards frameworks that combine effective public health policy with attention to rights. Broad principles related to HIV policy in the context of vulnerable groups, such as the International Guidelines on HIV/AIDS and Human Rights cited above, are one source of norm-setting; the Guidelines have pointed out, for example, that mandatory testing and public disclosure of HIV status constitutes a violation of the right to privacy, and segregation of anyone identified to be HIV-positive is a disproportionate intrusion on the right to liberty of person.<sup>29</sup>

Norms attentive to workers’ rights are another potential site for the development of suitable law. For example, as noted by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, writing in support of the broad decriminalisation of sex work, “Alongside the right to health, the International Covenant on Economic, Social and Cultural Rights protects the right to freely chosen, gainful work (art. 6).”<sup>30</sup> Occupational health and safety can also serve as a good lens for framing a concrete approach to regulating sex work in ways sensitive to HIV vulnerability, since it is also a capacious enough concept to address sex workers’ concerns about violence and exploitation that they may face. From that perspective, the International Labour Organisation’s (ILO) Recommendation Concerning HIV and AIDS and the World of Work<sup>31</sup> makes some important points:

- it defines “workers” as “any persons working under any form or arrangement,” (Article 1(j)) developing principles applicable to sex workers as well as many other marginalised workers.
- it urges that “workers’ participation and engagement in the design, implementation and evaluation of national and workplace programmes should be recognised and reinforced,” (Article 3(f)).
- It emphasises that “no workers should be required to undertake an HIV test or disclose their HIV status.” (Article 3(i)).
- It highlights the need to prioritise “the protection of workers in occupations that are particularly exposed to the risk of HIV transmission.” (Article 3(k)).

Again, it would be worth emphasising that none of these point to very particular provisions, though it is clear that certain types of approaches would be considered preferable to others. Thus, the Special Rapporteur’s report, cited above, urges that “[t]he decriminalisation or legalisation of sex work with appropriate regulation forms a necessary part of a right-to-health approach to sex work, and can lead to improved health outcomes for sex workers.”<sup>32</sup> Beyond this minimum threshold, however, there remains an extremely broad terrain within which jurisdictions can develop context-specific regulatory forms to address sex work.

The following sections address some of the nuances, and provide an overview of the ways in which different legal frameworks have sought to resolve important dilemmas, highlighting the implications for HIV policy.

27 UN Office of the High Commissioner for Human Rights and UNAIDS (First published 1998, revised and consolidated version published 2006) *International Guidelines on HIV/AIDS and Human Rights*, para 105.

28 Press release: “Malawi: Case Challenging Mandatory HIV Testing of Sex Workers Filed in High Court”, available on the website of the Paulo Longo Research Initiative at <http://www.plri.org/story/malawi-case-challenging-mandatory-hiv-testing-sex-workers-filed-high-court>

29 OHCHR & UNAIDS (2006), *International Guidelines on HIV/AIDS and Human Rights*, para 105.

30 Grover A (2010), *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Human Rights Council, 14<sup>th</sup> session, Agenda item 3, A/HRC/14/20, para 30.

31 International Labour Organisation, Recommendation 200 of 2010 Concerning HIV and AIDS and the World of Work, adopted by the 99<sup>th</sup> Session of the General Conference, Geneva, 17 June 2010.

32 Grover A (2010), *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Human Rights Council, 14<sup>th</sup> session, Agenda item 3, A/HRC/14/20, para 46.

## Defining sex work

The legal definitions of sex work vary widely, from country to country and even among the jurisdictions within a country. Lawmakers must engage in multiple levels of decision-making, ranging from how to reference the entire phenomenon of sex work, to how to define and talk about the legal elements: the acts, the persons involved, the transaction, and the place(s) at which the transaction and/or acts take place. Each of these, clearly, can have legal significance, though often they are addressed in vague, or over- and under-inclusive terms without legal content.

Some jurisdictions try to regulate sex work through 'immoral conduct' provisions, which offer little guidance as to what is prohibited and what is not. For example, the state of Massachusetts, in the United States (US), frames penalties for "*Resorting to restaurants or taverns for immoral purposes.*" The law states that "*immoral solicitation or immoral bargaining*" must take place, but fails to define either, such that it is not even clear whether a monetary transaction must have taken place or been intended.<sup>33</sup>

Others may try to regulate sex work in conjunction with other 'social evils,' through broad provisions such as Article 18 of the Bangladesh Constitution, which directs the state to "*adopt effective measures to prevent prostitution and gambling,*" and "*the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic and other intoxicating drinks and drugs which are injurious to health.*" Ultimately, in the year 2000, the High Court Division of the Supreme Court of Bangladesh clarified that there was, in fact, no prohibition in place on sex work, and that the *Penal Code's* prohibition of non-consensual sexual intercourse could not be used with respect to consensual sex work.<sup>34</sup> As noted above, vague laws create greater uncertainty and fear among the populations they target, and allow for abuse of discretion in enforcement, in ways that threaten to undermine HIV prevention and treatment policies.

The conflation of trafficking and sex work is addressed in a separate paper, but one of its effects – defining 'prostitution' in a way that does not distinguish it from 'exploitation of prostitution' – is also important to note. For example, India's *Immoral Traffic (Prevention) Act* states that "*prostitution' means the sexual exploitation or abuse of persons for commercial purposes or for consideration in money or in any other kind, and the expression 'prostitute' shall be construed accordingly.*"<sup>35</sup> Thus, it is not even clear whether the law is designed to treat sex workers as criminals or victims.

As is clear above, many of the problems of vagueness are a consequence of jurisdictions trying to locate a public moral vision within laws regulating sex work. It should be noted that negative moral judgments about sex work are present in both legalised and criminalised systems; acceptance of/opposition to sex work is not a definitive dividing line between those approaches. Given that law is inevitably understood as a shared moral vision – in spite of the obvious impossibility of identifying a 'common morality' with respect to sex and relationships, as the World AIDS Campaign points out<sup>36</sup> – making a case for it to avoid moral determinations altogether in favour of a framework that is about effective HIV policy, for example, would be very difficult.

Even the decision of the Canadian court overturning three elements of the anti-prostitution law did not do so on the grounds that morality should play no role in lawmaking. The court determined, in fact, that "*a law grounded in morality remains a proper legislative objective so long as it is in keeping with Charter values,*" (referring to the Canadian Charter of Rights and Freedoms).<sup>37</sup> So, based on Section 7 of the Charter, which provides that "*Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice,*" the court found that the provisions indeed did violate principles of fundamental justice. Some of the principles cited by the court, in describing whether the anti-prostitution laws in question reflected principles of justice, could well be helpful in guiding others to determine whether moral prescriptions in their own legal frameworks are appropriate or not:

*"(1) laws must not arbitrarily deprive individuals of their protected rights; (2) laws must not be broader than necessary to accomplish their purpose; (3) the harmful effects of a law must not be grossly disproportionate to the benefits gained; and (4) the state must legislate in accordance with the rule of law."*<sup>38</sup>

Arbitrariness, over-inclusiveness, and lack of relationship between the claimed public good and the means used by the law to promote it, have all been cited in current challenges to Bulgaria's framework, which sets forth penalties for engaging in work that is not 'socially beneficial,' without defining what might constitute a benefit to society. As advocates

33 *Massachusetts General Laws*, Chapter 272 (Crimes Against Chastity, Morality, Decency and Good Order), Section 26.

34 Shukla R (2010), *Sex Work and Laws in South Asia: A Monograph*, Sampada Gramin Mahila Sanstha (SANGRAM), pp. 4-5.

35 Section 2(f), *Immoral Traffic (Prevention) Act* (India, 1956,) as amended by Act No. 44 of 1986

36 World AIDS Campaign, *Sex Work and the Law: The Case for Decriminalisation*, p.19.

37 *Bedford v. Canada*, 2010 ONSC 4264 (CanLII), para 225.

38 *Ibid* at para 368.

have noted, *“Because sex work is not clearly regulated, sex workers experience a great amount of arbitrary treatment from the police and the authorities.”*<sup>39</sup>

To pick up the debate above, perhaps the strongest argument for decriminalisation, and regulation through civil laws, is not so much that it is morally neutral – that cannot always be considered the case – as that it constitutes in most situations an appropriate balancing of public morality with sex workers’ rights. And there is certainly space to argue that moral determinations with respect to sex work are hard to justify in criminal law contexts, if there is no indicator of harm, or absence of meaningful consent.

## Migration and Citizenship

Migration is without question an important dimension of the sex industry, all over the world. However, regardless of the broad approach to the regulation of sex work practiced by a given country, it is rare that it will allow migrant sex workers to operate on a par with sex workers who are citizens. Whether sanctions are put in place through immigration laws that deny individuals visas if they are prospective sex workers or deport them if they are found to be engaged in sex work, laws specific to the sex industry limiting registration or licensing to citizens, labour laws that deny full protections – including trade union rights – to migrant workers, or anti-trafficking laws that treat migrant sex workers as victims to be ‘rescued and rehabilitated,’ the impact with respect to HIV-related interventions is generally the same. Migrant sex workers generally operate in hidden environments, in fear of law enforcement, and without adequate access to HIV-related information or services.

Austria permits its citizens, and citizens of other members of the EU to register officially as sex workers. Following amendments to the *Asylum Act* in 2003, asylum seekers are also permitted to engage in sex work, as “new self-employed workers” in temporary or seasonal occupations. While individuals from all countries outside the EU had been able to enter on “prostitution visas” for a number of years, following new regulations of the Ministry of the Interior issued in 2001, this visa – a temporary residence permit issued upon demonstration that the individual had health insurance and an offer of employment – was done away with in the process of comprehensive reform of immigration laws in 2006. While short-term visas (of three to six months) remain in theory available for those seeking to work in the sex industry, these are actually almost impossible for sex workers to secure.<sup>40</sup> Advocates note that *“sex workers who had previously been working and living legally in Austria for years on the basis of the former residence permit have effectively become illegalised.”*<sup>41</sup>

Curaçao, part of the former Dutch Antilles, adopted a different approach to migrant sex workers. In 1949, when it was a territory administered by the Netherlands, a large government-regulated brothel was opened, which continues to operate. However, women of Dutch Antillean nationality were not permitted to enter the brothel or work on the premises, except as medical professionals, cooks or other service workers. Foreign workers seeking employment at the brothel applied directly to the immigration authorities for permission to travel. In order to maintain residence in Curaçao and employment at the brothel, the sex workers are required to undertake weekly health tests.<sup>42</sup> It is not clear what consequences would follow the results of a test indicating health problems.

It cannot be disputed, of course, that states have a strong interest in regulating migration and the labour markets within which migrant workers and citizens participate, including the sex sector. However, the presence of migrant sex workers, without legal rights of residence and adequate labour rights, requires urgent attention, especially in situations where it is clear that the domestic sex industry is heavily dependent on them, and they form a substantial percentage of the workforce. As with any other labour sector, the presence of unprotected, highly vulnerable migrants in the sex industry not only places those workers themselves in an untenable position, in terms of health and rights, but also erodes labour standards for other, non-migrant workers in the industry and more broadly. A state-sanctioned multi-tiered system of labour and social protections – with one framework for citizens, and another, diminished one for migrants – ultimately places all sex workers in situations of greater vulnerability: if migrants have diminished bargaining power in terms of insisting that their clients engage in safer sex, it reduces the capacity of non-migrant workers also.

While it need not follow, from this analysis, that states institute schemes to ensure visas or legal residency for migrant sex workers, it is clear that harsh enforcement, through raids, deportations and compulsory testing programmes, only make migrants harder to reach. Successful strategies for bringing these workers into national regulatory frameworks,

39 TAMPEP (2009), *Sex Work, Migration, Health: A report on the intersections of legislations and policies regarding sex work, migration and health in Europe*, p.16.

40 Kartusch, A and Hoebart, C (2007), *Women at Work – Sex Work in Austria*, SOPHIE, BildungsRaum für Prostituierte, Vienna, p.21.

41 TAMPEP (2009), *Sex Work, Migration, Health: A report on the intersections of legislations and policies regarding sex work, migration and health in Europe*, p.15.

42 Information drawn from Kempadoo K (2009), *Prostitution, Sex Work and Transactional Sex in the English-, Dutch- and French-Speaking Caribbean: A literature review of definitions, laws and research*, Pan-Caribbean Partnership Against HIV-AIDS (PANCAP), pp. 31-2.

including HIV programmes, have instead relied on guaranteeing of equal labour and social protections for all workers, regardless of migration status.<sup>43</sup>

## Dealing with gender and sexuality

There are a number of ways in which jurisdictions may address (or fail to address) gender and sexuality in sex work that will have implications for their efforts to develop coherent and effective HIV policies. One, as mentioned above, and discussed in greater depth in other papers prepared for the Global Commission on HIV and the Law<sup>44</sup>, is the criminalisation of sex between men, or of sex reassignment surgery – this will make it hard to conduct outreach to male and transgender sex workers, for example. Potential areas of intersection between laws prohibiting ‘sodomy’ or ‘unnatural sex,’ for example, and the regulatory framework specific to sex work, must be scrutinised closely; efforts to integrate sex workers in HIV interventions through decriminalisation, for example, will not be fully effective unless they reach a fuller range of the statuses, identities and acts implicated in sex work – beyond the presumption that the entire industry consists of female sex workers engaging only in penile-vaginal intercourse with male clients. As documented in a recent report, in Botswana, a context where sex between men is illegal, the vast majority of male and transgender sex workers were unwilling to be open with their doctors, and did not receive the medical advice that they needed.<sup>45</sup>

There have been efforts made by some states to graft a vision of gender-neutrality onto existing regulatory frameworks for sex work, but a number of these reforms have resulted in greater confusion. Where the original legislation was motivated by a particular vision of gender relations, and assumptions about male and female sexuality, a superficial modification of pronouns could not suffice to develop a truly gender-sensitive approach. So, for example, when India amended its controlling piece of legislation, the *Suppression of Immoral Traffic in Women and Girls Act* of 1956, the reformed *Immoral Traffic (Prevention) Act* of 1986 did not address the needs of male and transgender sex workers, but merely included them selectively among a list of prohibitions and prescriptions. The original legislation was informed by an understanding of sex workers as powerless and essentially unwilling women. The revised legislation does not revisit these assumptions, and retains provisions for the rescue and rehabilitation of sex workers – and keeps these gender-specific. Thus, under the revised legislation, there is no provision for the “rehabilitation” of non-female sex workers; Section 10-A remains applicable only to a “female offender” whose “character, state of health and mental condition” render her fit for corrective instruction. It should also be noted that India retains a law criminalising sexual activity “against the order of nature,” and sexual assault laws that do not currently protect non-female victims – two factors that further enhance the vulnerability of male and transgender sex workers.

The legislation governing sex work, brothels and sexually transmitted diseases (STDs) in Turkey puts in place a licensing regime which brothel-based sex workers are required to participate in. However, the law defines the sex worker as “a woman who acquires an artisanship of giving satisfaction to others’ sexual needs in return for profit and who engages in sexual relationship with different men.” Thus, as a researcher points out, “preoperative transgender women and male sex workers fall outside the established rules regulating the operation of brothels,” and are barred from participation in brothel-based sex work both by law and in practice. A proposal to extend the regulation beyond female sex workers was proposed in 2001 and passed by the Council of State, but failed to receive the support of the Prime Minister. As the researcher describes, “The proposal changed the terms ‘generalised woman’ to ‘sex worker’ without reference to sexual identity and ‘generalised house’ to ‘place of intercourse,’ and defined prostitution as ‘the act of engaging in sexual intercourse with various people in exchange for financial benefit.’”<sup>46</sup>

In the state of Louisiana in the US, where all aspects of sex work are criminalised, human rights groups are currently challenging the use of a ‘Crime Against Nature’ statute from 1805 against sex workers soliciting oral and anal sex – “sex acts historically associated with homosexuality,” as one of the groups involved in the litigation, the Center for Constitutional Rights, notes. Convictions under that statute have more severe consequences for sex workers than those under the regular prostitution statute. “A prostitution conviction is a misdemeanor, but a Crime Against Nature conviction subjects people to far harsher penalties. Most significantly, individuals convicted of a Crime Against Nature are forced to register as sex offenders for 15 years. Multiple convictions require them to register for life.” The impact on sex workers has been significant, in many of the terms relevant to the topic of this study. As the groups involved in the litigation have said, many of the sex workers convicted of a Crime Against Nature “have been unable to secure work or housing,” others “have been barred from homeless shelters,” or “refused residential substance abuse treatment because providers will not accept sex offenders at their

43 See generally, TAMPEP (2009), *Sex Work, Migration, Health: A report on the intersections of legislations and policies regarding sex work, migration and health in Europe*.

44 See for example Beyrer, C and Baral, S (2012), *MSM, HIV and the Law: The Case of Gay, Bisexual and other men who have sex with men*.

45 Arnott J, and Crago A-L (2009), *Rights Not Rescue: Female, Male, and Trans Sex Workers’ Human Rights in Botswana, Namibia, and South Africa*, Open Society Institute, p.17.

46 Taşcıoğlu, EE (2011), *What do transgender women’s experiences tell us about law? Towards an understanding of law as legal complex*, Oñati Socio-Legal Series, Vol.1, No.1, p.11.

facilities.” This only exacerbates existing vulnerability: “Many of these women are survivors of rape and domestic violence themselves, many have struggled with addiction and poverty, yet they are being treated as predators.”<sup>47</sup>

## Sex workers, clients, third parties

In addition to defining and regulating sex work, legal frameworks may additionally define and regulate the actors within it, beyond the transaction itself. This would follow as a matter of course from a criminalisation model, though it can and does play a role in other approaches as well.

### Sex Workers:

With respect to sex workers, some jurisdictions that have criminal penalties for soliciting allow condoms to be introduced as evidence of intent to engage in prostitution. In New York State, in the US, there have been legislative efforts underway for over a decade to change current state codes of criminal procedure in order to ensure that “evidence that a person was in possession of one or more condoms may not be admitted at any trial, hearing or other proceeding in a prosecution for any offense, or any attempt to commit any offense.”<sup>48</sup> There is clearly a lack of coordination in state policy, given that city health departments in New York State currently spend millions of dollars distributing condoms and information on safer sex, to have law enforcement creating such strong disincentives for individuals to carry and use them.

Even in jurisdictions where the evidentiary rules do not explicitly enable condoms to be produced as evidence – and even in places where sex work is an administrative rather than a criminal offence – police practices may create the same types of disincentives to carrying condoms. A recent report on human rights abuses of sex workers in Central and Eastern Europe describes the multiples ways in which unchecked, illegal police misconduct of this nature also undermines HIV prevention goals: “Sexual violence committed by police against sex workers puts sex workers at direct risk of HIV infection. Police also expose sex workers indirectly to risks by confiscating condoms to use as ‘evidence’ of sex work, forcing sex workers to rush or skip negotiations about condom use with their clients, and financially burdening sex workers with police fines and demands for bribes, which can create situations in which sex workers sacrifice condom use for the increased income of unprotected sex. State failure to halt police crackdowns and violence puts sex workers at higher risk of sexual violence, including rape, and violent coercion to forego the use of condoms. These also pose a direct risk of HIV transmission.”<sup>49</sup>

Even jurisdictions criminalising clients and ostensibly treating sex workers as victims have adopted similar policies. A researcher who has studied the impact of the 1999 law in Sweden prohibiting the purchase (but not the sale) of sexual services notes: “A report issued by the National Police Board [...] instructs the police to confiscate condoms if found, as these can be used as evidence.”<sup>50</sup> The Swedish approach does not provide sex workers with the services they need – information about and access to safer sex materials, temporary shelter, child care – but rather, makes their lives more difficult by trying to force them to leave sex work, and to testify against clients or others in the sex industry.

In regimes where sex work is regulated, too, sex workers may not typically be seen as partners in tackling HIV, but rather, as a public health hazard. As a scholar noted in her analysis of the legal framework in the state of Queensland, in Australia, where sex workers are required to undergo HIV tests, the public policy rationale for such a step is weak, given “the lack of compulsory testing for other workers vulnerable to infections, including doctors and nurses.”<sup>51</sup>

In part, the above analysis indicates the pressing need for states to ensure that sex workers are not subjected to discrimination through the law – whatever form the regulation of sex work may take. Overtly discriminatory laws are often outside legal frameworks primarily concerned with sex work, in any case. For example, Swaziland’s *Girls and Women’s Protection Act* nevertheless states that defence for men charged with statutory rape may raise as a defence “that at the time of the commission of the offence the girl was a prostitute.”<sup>52</sup> Similarly, restrictions against “loitering” in the

47 Center for Constitutional Rights, *Groups Challenge Disparate Punishment Under Louisiana’s Crime Against Nature Law*, Press Release, 16 February 2011, available at <http://ccrjustice.org/newsroom/press-releases/groups-challenge-disparate-punishment-under-louisiana%E2%80%99s-crime-against-nature>

48 This language is from the most recent bill in this regard, from the New York Senate Judiciary Committee, S323-2011, introduced on 5 January 2011, available at <http://open.nysenate.gov/legislation/api/1.0/html/bill/S323>

49 Sex Worker Rights Advocacy Network (2009), *Arrest the Violence: Human Rights Violations Against Sex Workers in 11 Countries in Central and Eastern Europe and Central Asia*, p.43.

50 Bryngemark j (2006), *On the ‘Swedish Model’* (paper delivered at conference of the Collective of Sex Workers and Supporters (COSWAS), Taipei, available at [http://www.scarletalliance.org.au/issues/swedish\\_model/bryngemark\\_06/](http://www.scarletalliance.org.au/issues/swedish_model/bryngemark_06/)

51 Sullivan B (2010), *When (Some) Prostitution is Legal: The Impact of Law Reform on Sex Work in Australia*, in *Journal of Law and Society*, Vol. 37, No.1, pp.85-104.

52 See Gallinetti J (2007), *Harmonisation of laws relating to children – Swaziland*, The African Child Policy Forum, available at [www.africanchildinfo.net/documents/Swaziland final Sarah.doc](http://www.africanchildinfo.net/documents/Swaziland%20final%20Sarah.doc). The offence under section 3(1) of Swaziland’s *Girls and Women’s Protection Act* is as follows: “Every male person who has unlawful carnal connection with a girl under the age of sixteen years or who commits with a girl under that age immoral or indecent acts or who solicits or entices a girl under such age to the commission of such acts shall be guilty of an offence and liable on conviction

Botswana Penal Code directly single out sex workers. Section 179A's focus on "idle and disorderly persons" targets the "common prostitute, [who] behaves in a disorderly or indecent manner" and any person who "without lawful excuse [engages in an] indecent act" or "solicits for immoral purposes."<sup>53</sup> The Anti-Vagrancy Law in the Philippines takes a similar approach, according to a submission made for the Asia-Pacific Regional Dialogue of the Global Commission on HIV and the Law.<sup>54</sup>

It is true, of course, that these forms of discrimination run deeper than the law on the books, and that the problems are compounded by discrimination and prejudice at multiple levels of the legal system. This does not make it any the less urgent for jurisdictions to frame non-discriminatory laws that will help build sex workers' trust in the legal system, and their openness to partnering with the state to develop and implement critical interventions for HIV prevention.

### Clients:

The approach to clients may mirror that adopted towards sex workers, or radically differ. Where it is a crime to sell and purchase sexual services, clients may be prosecuted, and in some cases, forced to register as sex offenders.<sup>55</sup> It is rare to find jurisdictions, which criminalise the selling but not the purchase of sex. Taiwan is one example of such a framework, though the law is no longer being enforced, following a decision of the Constitutional Court that it was a violation of principles of equality to punish sex workers, but not their clients. The court noted that the government should replace the provision with a programme suited to addressing public welfare, including public health, such as "safe sex awareness."<sup>56</sup> The government is currently considering whether to frame regulations for the operation of a red-light district, or small brothels.

Clients are often targeted through provisions related to conduct prior to a sexual transaction, such as the United Kingdom's "kerb-crawling" law, the *Sexual Offences Act* of 1985 (as amended in 2003) contains provisions for "penalising in certain circumstances the soliciting of another person for sexual purposes." It is addressed, in part, to "kerb-crawling," defined as soliciting someone "for the purpose of prostitution" from a car in a public place, "in such manner or in such circumstances as to be likely to cause annoyance [...]"<sup>57</sup>

As TAMPEP has noted, given that there are already public nuisance laws in place to address the problems described above, singling out sex workers and their clients only enhances stigma and isolation, and penalties for "kerb-crawling" mean that sex workers are more likely to make hasty, risky decisions about clients, with less regard for their own health and safety than they might otherwise have exercised.<sup>58</sup>

The policy of criminalising of clients while lifting penalties from those selling sexual services has already been discussed above, with respect to the Swedish framework, in terms of the negative impact on sex workers. It should be noted that shifting the stigma of sex work onto their clients merely pushes yet another, even larger group of people underground, out of the reach of HIV prevention and treatment programmes.

While the Swedish government's own evaluation of the successes and failures of its law criminalising clients has not addressed the issue of HIV, and states that the law has succeeded in its goal of combating the purchase of sexual services, it does acknowledge that clients are harder to contact, and that clients' fear and discomfort is about stigma – "the possibility that the offence of which they are suspected will become known to family and acquaintances" – rather than the criminal penalty.<sup>59</sup>

### Third parties:

Jurisdictions take a range of approaches to regulating those in the sex industry besides the sex worker and the client, including brothel owners or managers, individuals who facilitate the transaction in any way (variously referred to in

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to imprisonment not exceeding 6 years with or without whipping not exceeding 24 lashes and with or without a fine not exceeding one thousand Emalangen in addition to such imprisonment and lashes."

Section 3(3) provides defences to such a charge, one of which is that at the time of the commission of the offence the girl was a prostitute.

53 Arnott J, and Crago A-L (2009), *Rights Not Rescue: Female, Male, and Trans Sex Workers' Human Rights in Botswana, Namibia, and South Africa*, Open Society Institute, p.27.

54 Submission made by Maria Lourdes S. Marin, ACHIEVE, Philippines, for the Asia-Pacific Dialogue of the Global Commission on HIV and the Law.

55 For example, the *Sex Offender Registration Act* of the State of California, US), Penal Code 290 PC

56 Constitutional Court of Taiwan, Interpretation of Article 80, *Social Order Maintenance Act*, 6 November 2009. Unofficial English translation available at [http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03\\_01\\_printpage.asp?expno=666](http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03_01_printpage.asp?expno=666)

57 Section 1, Chapter 44, *Sexual Offences Act*, (UK, 1985 amended by the *Sexual Offences Act* of 2003).

58 TAMPEP (2009), *Sex Work, Migration, Health: A report on the intersections of legislations and policies regarding sex work, migration and health in Europe*, pp.26-7.

59 Ministry of Justice, Government of Sweden, *Selected extracts of the Swedish government report SOU 2010:49: The Ban against the Purchase of Sexual Services. An evaluation 1999-2008*, (official English translation), p. 9.

legislation as pimps/ panderers/ procurers/ madams), even friends, lovers and family members who may be supported through the earnings of the sex worker.

It is common, in contexts where both the buying and selling of sexual services is legal, to maintain prohibitions on third parties of any kind, through provisions related to:

- aiding or abetting prostitution
- living off/ exploiting the prostitution of another
- procuring for the purposes of prostitution
- encouraging another to enter into prostitution
- using premises as a brothel

So, for example, Switzerland only allows “freelance” sex work, by those who are entirely self-employed. The approach is based on the country’s constitution, which guarantees economic freedom, and in particular, the free choice of profession and free exercise of private economic activity (Article 27).

Recent studies suggest that provisions seeking to limit the involvement of third parties, supposedly in the interests of sex workers, tend to have negative consequences in practice. Interviews with sex workers in Namibia, for example, note that the sections of the law that prohibit the involvement of third parties are set forth as “*protective’ legislation aimed at preventing women from being enticed into, or procured for, sex work.*” However, “[i]n practice, some sections of the law concerning third parties have been used as punitive instruments to discipline sex workers. For example, a single sex worker working in her own home can be found guilty of brothel keeping.”<sup>60</sup>

On the other hand, Germany’s 2002 law legalising sex work also removed the prohibition on “promoting prostitution” in the *Criminal Code*. As a research study notes, “*Commercial promotion of prostitution by facilitating introductions (previously a form of pimping) is now a criminal offence only if the prostitute’s personal or economic freedom of movement is curtailed.*”<sup>61</sup>

The Canadian court decision mentioned above, which overturned three elements of national legislation related to sex work, is also worth analysing in this context, since two of the provisions scrutinised related to third parties. Section 210 of the *Criminal Code* addresses brothels, stating that:

*“(1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years*

*(2) Every one who*

*(a) is an inmate of a common bawdy-house,*

*(b) is found, without lawful excuse, in a common bawdy-house, or*

*(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,*

*is guilty of an offence punishable on summary conviction.”*

The other provision, Section 212, deals with those who are supported by sex workers, and states that:

*“(1) Every one who (j) lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.”*

The provisions were challenged by sex workers on the grounds that they made sex work more dangerous, without actually serving any concrete public policy goal. For example, the prohibition on brothels meant that they had to engage in street-based work, which is more isolated and less safe. The prohibition on supporting others with their earnings deterred them from hiring security guards, drivers, or others who might reduce the risks of violence. The court agreed, saying that under the current framework, “*Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient*

60 Arnott J, and Crago A-L (2009), *Rights Not Rescue: Female, Male, and Trans Sex Workers’ Human Rights in Botswana, Namibia, and South Africa*, Open Society Institute, p. 25.

61 Kavemann B, and Rabe H (2007), *The Act Regulating the Legal Situation of Prostitutes – Implementation, Impact, Current Developments*, Sozialwissenschaftliches FrauenForschungsinstitut e.V., Berlin, p.12.

contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence.<sup>62</sup> While the court's decision was focused on violence against sex workers, and does not mention HIV, it is still reasonable to consider making an analogy, given our understanding of the ways in which violence and isolation contribute to vulnerability to HIV.

## Regulating as labour

The position that 'sex work is work' does not settle all potential regulatory questions, as is true of any labour sector. In the context of legalised sex work, approaches have varied widely.

The experience of New Zealand indicates some of the dilemmas, for those seeking to follow a labour rights-based approach to reform, based on an evaluation conducted by the government of the successes and failures of the *Prostitution Reform Act*.<sup>63</sup> While this Act was designed to promote a labour rights and human rights approach, founded on decriminalising brothel-keeping and soliciting, the evaluation points out that "[t]here is no fundamental human right not to be discriminated against on grounds of occupation." And, of the human rights that were a motivation – "the right of those under 18 not to be used in sex work; the right of adults not to be forced to engage in sex work, including the right to refuse a particular client or sexual practice; and the right not to be subject to exploitative, degrading employment practices" – these do not necessarily lead to an affirmative vision for what *should* be done.

Thus, with respect to the "health, safety and well-being" of sex workers, it was hard to gauge results. HIV levels had been low prior to passage of the Act, given campaigns begun in the late 1980s, and remained low in the wake of the act, indicating that vulnerabilities had not been increased by the reform. However, the evaluation indicated that it was certainly easier for sex workers to negotiate safer sex, since it is against the law not to practice it. One sex worker interviewed described telling a client seeking unprotected sex: "I could be fined and go to jail, and if you take it off, then I could send you to jail."<sup>64</sup>

An issue of concern in New Zealand – and in other countries where certain types of legislative frameworks (such as labour) are simultaneously the purview of national and state/local regimes – is that these broadly protective frameworks can sometimes be eroded, through city council ordinances or provincial laws that seek to curtail sex workers' rights. For example, as a submission for the Asia-Pacific Regional Dialogue of the Global Commission on HIV and the Law from New Zealand pointed out, the *Regulation of Prostitution in Specified Places Bill* currently pending before the Manukau City Council would, if passed by the Council, allow the criminalisation of street-based sex workers and their clients where sex work is deemed to cause "a nuisance or serious offence to ordinary members of the public."<sup>65</sup>

In most respects, Germany's 2002 law has extended general labour protections to sex workers. So, for example, it renders agreements between clients and sex workers enforceable in a court of law. That is to say, if the client does not pay, he or she can be taken to court. If sex workers do not provide the agreed service, then they must return the money paid to them. The client cannot insist that the service be performed.<sup>66</sup> (It should be emphasised that this approach is not particular to sex work – it is an accepted principle of all contracts for services that the would-be recipient cannot demand that the service be performed, since that would constitute forced labour, and is entitled only to monetary damages).

At the same time, there are complaints that sex work is currently categorised in Germany only as an "activity" rather than a "profession."<sup>67</sup> It was hoped that greater state recognition would result in state-led improvements in working conditions, and smoother labour relations. On the other hand, Brazil's Ministry of Labour and Employment, following its classification of sex work as a profession in 2002, even issued a "Primer for Sex Professionals," as was done for other professional categories on its website. While elements of the Primer were considered controversial, for including guidelines on how to attract and satisfy customers, it also provided strong reinforcement of sexual health messages, pointing out the need to "minimise vulnerability" through measures including negotiating the use of condoms with the customer, applying water-based lubricant gel, participating in safer sex workshops, learning how to recognise STDs, and having regular health checks.<sup>68</sup>

62 *Bedford v. Canada*, 2010 ONSC 4264 (CanLII), para 362.

63 Ministry of Justice of the New Zealand Government, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003*, May 2008.

64 *Ibid.*

65 Submission made by New Zealand Prostitutes Collective, New Zealand, to the Asia Pacific Dialogue of the Global Commission on HIV and the Law.

66 Section 1, *Act Regulating the Legal Situation of Prostitutes* (Germany).

67 TAMPEP (2007), *National Report on HIV and Sex Work: Germany*, Amsterdam, p.9.

68 Brazil, Labour and Employment Ministry, *Primer for Sex Professionals*, CBO: 5198-05; unofficial English translation available at <http://prostitution.procon.org/sourcefiles/BrazilLaborAndEmploymentMinistryPrimerOnSexProfessional.pdf>

In October 2010, the Constitutional Court in Colombia determined that a woman employed at a brothel providing sexual services, who was fired when she got pregnant, was entitled to compensation from her employer for the 12 weeks of maternity leave she should have received. However, while the court said that there was a *de facto* contract of employment, based on her uninterrupted work there until the point at which she was terminated, it would not order reinstatement. The court stated that, even though sex work and brothels are both legal in Colombia, reinstatement into sex work would be immoral.<sup>69</sup> An activist involved in the case, while lauding the victory, noted that the court's refusal to reinstate the worker had potentially consigned her to a more hazardous and precarious livelihood on the streets.

Recognising sex work as work is, in some cases, not inconsistent with a legislative framework that criminalises the selling of sexual services. In South Africa, sex work is criminalised under the *Sexual Offences Act* of 1957, and thus a lower Labour Court determined that a sex worker fired from her job at a brothel was not entitled to protections from unfair dismissal contained in the country's *Labour Relations Act* (Section 185(a)), on the basis of the common law principle that courts "ought not to sanction or encourage illegal activity."<sup>70</sup> However, the Labour Appeal Court subsequently set aside the ruling, in part on the grounds that the Constitution's guarantee that "everyone has the right to fair labour practices" (Section 23(1)) was capacious enough to extend to sex workers. The Labour Appeal Court also noted that it would be against public policy to allow unscrupulous employers in the sex industry to benefit from the illegal status of sex work, at the expense of their workers.<sup>71</sup>

As noted in a submission made to the Africa Regional Dialogue of the Global Commission on HIV and the Law, there are other outstanding issues related to labour rights for sex workers in South Africa, such as excessive deductions from earnings – up to 40% – by brothel owners.<sup>72</sup> General principles of workplace fairness have not, as yet, been extended into this realm.

## Association, Collectivisation and Allies

As was noted at the first Asia-Pacific Regional Consultation on Sex Work and HIV, "[o]ne of the most effective responses to injustices and the health risks that flow from them is self organising by sex workers." But, it is also the case that "this is complicated in many countries by regulations that limit formal register [sic] as an association or NGO to people of 'good character' or through other barriers to NGO registration."<sup>73</sup>

The Durbar Mahila Samanwaya Committee in India encountered opposition on these grounds when they first attempted to set up an income generation project, Usha Coop Multipurpose Stores, to employ older sex workers, as well as sex workers seeking to exit sex work for other reasons. The bureaucratic machinery in the state of West Bengal initially resisted allowing the group to form since the concerned legislation on forming cooperatives requires cooperative representatives to be of "good moral character." However, the state ultimately permitted the registration,<sup>74</sup> recognising perhaps that they would be keeping women in sex work against their wishes if they did not.

Even the most basic rights of assembly and association may be denied to sex workers by law. Legislation still on the books in the United Kingdom penalises any coffee shop owner, or proprietor of any other place of refreshments, who "knowingly suffers common prostitutes or reputed thieves to assemble at and continue in his premises."<sup>75</sup> Organisations have indicated that these laws continue to be used by police to harass and disrupt sex workers' efforts to meet together in groups in public places.

At the same time, laws such as these run counter to explicitly formulated state policies that recognise the importance of collectivisation for effective HIV prevention, given the ways in which it promotes peer education and information-sharing, as well as empowerment.

Full trade union rights for sex workers also continue to be denied under existing legal frameworks in many jurisdictions, even though trade union support and strategies have played a crucial role in combating HIV in a range of sectors all over the world.<sup>76</sup> The Labour Appeal Court decision from South Africa, cited above, did indicate that sex workers

69 See <http://www.semana.com/nacion/prostitucion-tambien-trabajo-corte-constitucional/145531-3.aspx>

70 *Kylie v CCMA* (2008), 29 ILJ 2234 (LC).

71 *Kylie v CCMA* (2010), 31 ILJ 1600 (LAC).

72 Submission made by Kyomya Macklean and Eric Harper, ASWA South Africa, South Africa, to the Africa Dialogue of the Global Commission on HIV and the Law.

73 UNFPA (2010), Asia and the Pacific Regional Consultation on HIV and Sex Work, *Creating an Enabling Legal and Policy Environment for Increased Access to HIV & AIDS Services for Sex Workers*, <http://asiapacific.unfpa.org/webdav/site/asiapacific/shared/Publications/2011/Building%20Partnerships%20on%20HIV%20and%20Sex%20Work%202.pdf>

74 Kennedy T, Report for *International Initiatives for Co-operatives* (copy on file).

75 Section 35, Chapter 89, *Town Police Clause Act* (United Kingdom, 1847).

76 See generally, International Labour Conference, *Fifth item on the agenda: HIV/AIDS and the world of work: Report of the Committee on HIV/AIDS*, 99<sup>th</sup>

might be entitled to form and join a trade union, in spite of the provisions criminalising the selling of sexual services in the country. The court insisted, however, that its determination “does not mean that collective agreements purportedly concluded between brothels and sex worker unions which amount to the commission of crime or the furtherance of the commission of a crime are enforceable under the LRA nor does it imply that sex worker unions would be entitled to exercise organisational rights, including the right to strike to that end.”<sup>77</sup> This limitation, unfortunately, denies sex workers crucial strategies used by other South African unions, including the National Union of Mineworkers, to integrate proposals related to HIV prevention and care into their collective bargaining agreements.<sup>78</sup> (It is noteworthy that sex workers have also seen indirect gains from these bargaining agreements.) A recent report interviewed a sex worker whose clients had been through peer education programmes targeted at mineworkers. She stated: “I have seen the changes. Since the peer education with men and in the taverns, clients don’t disagree with using condoms as much as they used to.”<sup>79</sup>

Perhaps one of the most significant obstacles to sex worker organising was (and continues to be) a result of transnational rather than domestic regulation. The restrictions imposed by the US on recipients of their global HIV/AIDS funding programmes, through the so-called Anti-Prostitution Pledge, requires the organisations to have a policy explicitly opposing prostitution and sex trafficking, and requires that “None of the funds made available under this agreement may be used to promote or advocate the legalisation or practice of prostitution or trafficking.” The initial framing of the prohibition took place during the presidency of George W. Bush, but as recent scholarship indicates, even under the most recent regulations issued by the Department of Health and Human Services, under President Barack Obama, the requirements of the Anti-Prostitution Pledge continue to be enforced.<sup>80</sup> The extremely negative impact of this policy on organisations all over the world, addressing the needs of sex workers in terms of HIV-related outreach, information and services, has been well documented.<sup>81</sup>

## Conclusion

There are a few key points that should be reiterated, with respect to analysing legal frameworks and their implications for HIV-related policy goals.

While law has a limited role to play, in the broader context of the stigmatisation of sex workers and discrimination against them, legal frameworks should take care to avoid further marginalising and isolating sex workers and their clients. Furthermore, from the perspective of advancing goals of HIV prevention and treatment access, there is a clear set of outcomes that the law *could* promote or contribute to:

- They should create avenues for sex workers and their clients to report crimes voluntarily, including rape or the operation of organised crime networks.
- They should prohibit the discrimination and abuse that sex workers often face when seeking services for the prevention and treatment of HIV.
- They should ensure that the free flow of information about HIV through peer-led interventions or mass media is not blocked by censorship.
- They should provide meaningful, well-enforced penalties for police who engage in harassment or blackmail of sex workers.
- They should encourage the collectivisation or collective voice of sex workers.
- They should ensure that there are no obstacles to advocacy and service provision groups supporting sex workers.

With this in mind, jurisdictions should strongly consider the decriminalisation of sex work, bearing in mind that it is possible to do so without endorsing or incentivising the industry. Ideally, decriminalisation should reach all elements of the sex industry – sex workers, clients, and third parties – based on the principle that crimes such as child abuse, forced labour and public nuisance can be tackled through existing laws of general application. Beyond this minimum

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Session, Geneva, 2010.

77 *Kylie v CCMA* (2010) 31 ILJ 1600 (LAC), paras 58-9.

78 International Federation of Chemical, Energy, Mine and General Workers’ Unions (2006), *HIV/AIDS: A Training Manual for Collective Bargaining*, available at [http://www.icem.org/files/PDF/Key\\_issues\\_pdfs/AIDS/0606ICEMHIVAIDSManualEN.pdf](http://www.icem.org/files/PDF/Key_issues_pdfs/AIDS/0606ICEMHIVAIDSManualEN.pdf)

79 Arnott J, and Crago A-L (2009), *Rights Not Rescue: Female, Male, and Trans Sex Workers’ Human Rights in Botswana, Namibia, and South Africa*, Open Society Institute, p.46.

80 Ahmed, A, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women’s Health*, Harvard Journal of Law and Gender 34 (2011) pp. 225-58.

81 See e.g. Ditmore, MH and Allman, D (2010), *Implications of PEPFAR’s anti-prostitution pledge for HIV prevention among organizations working with sex workers*, HIV AIDS Policy Law Review, 15(1) pp. 63-4.

threshold, jurisdictions could develop context-sensitive regulations to address the labour and social aspects of sex work, through sector-specific rules of entry and exit, occupational health and safety guidelines etc.

In terms of labour-related norms, the provisions of the ILO Recommendation Concerning HIV and AIDS and the World of Work could be borne in mind:

- it defines “workers” as “any persons working under any form or arrangement”.
- it urges that “workers’ participation and engagement in the design, implementation and evaluation of national and workplace programmes should be recognised and reinforced”.
- It emphasises that “no workers should be required to undertake an HIV test or disclose their HIV status”.
- It highlights the need to prioritise “the protection of workers in occupations that are particularly exposed to the risk of HIV transmission”.

Legal frameworks should bear in mind the full range of workers in the sex industry, especially those who are most vulnerable and invisible. There are two particularly important issues here:

- *Migration status*: Regardless of the underlying immigration scheme in place, states should ensure that migrant sex workers receive, at a minimum, the same labour protections and access to health services as other sex workers. Deportations should be avoided.
- *Gender and Sexuality*: Efforts to integrate sex workers in HIV interventions will not be fully effective unless a fuller range of the statuses and identities implicated in sex work are considered, and ensured access.

Bearing in mind that sex worker organising is demonstrably one of the most effective modes of addressing HIV, jurisdictions should not restrict non-governmental organisation (NGO), collective or trade union formations. And, once formed, the organisations should be able to function like any other NGO, collective, or trade union, in terms of registration, access to funding, or core activity.