RECOMMENDATIONS

To ensure an effective, sustainable response to HIV that is consistent with human rights obligations:

3.2. Countries must reform their approach towards sex work. 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. Countries must:

3.2.1 Repeal laws that prohibit consenting adults to buy or sell sex, as well as laws that otherwise prohibit commercial sex, such as laws against “immoral” earnings, “living off the earnings” of prostitution and brothel-keeping. Complementary legal measures must be taken to ensure safe working conditions to sex workers.

3.2.2 Take all measures to stop police harassment and violence against sex workers.

3.2.3 Prohibit the mandatory HIV and STI testing of sex workers.

3.2.4 Ensure that the enforcement of anti-human-trafficking laws is carefully targeted to punish those who use force, dishonesty or coercion to procure people into commercial sex, or who abuse migrant sex workers through debt bondage, violence or by deprivation of liberty. Anti-human-trafficking laws must be used to prohibit sexual exploitation and they must not be used against adults involved in consensual sex work.

3.2.5 Enforce laws against all forms of child sexual abuse and sexual exploitation, clearly differentiating such crimes from consensual adult sex work.

3.2.6 Ensure that existing civil and administrative offences such as “loitering without purpose”, “public nuisance”, and “public morality” are not used to penalise sex workers and administrative laws such as “move on” powers are not used to harass sex workers.

3.2.7 Shut down all compulsory detention or “rehabilitation” centres for people involved in sex work or for children who have been sexually exploited. Instead, provide sex workers with evidence-based, voluntary, community empowerment services. Provide sexually exploited children with protection in safe and empowering family settings, selected based on the best interests of the child.

3.2.8 Repeal punitive conditions in official development assistance—such as the United States government’s PEPFAR anti-prostitution pledge and its current anti-trafficking regulations—that inhibit sex workers’ access to HIV services or their ability to form organisations in their own interests.

3.2.9 Take decisive action to review and reform relevant international law in line with the principles outlined above, including the UN Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women And Children (2000).
3.2 SEX WORKERS

Many more than 100 countries explicitly criminalise some aspect of sex work. Some countries, such as most of the United States, Cuba, People’s Republic of China, Iran, Vietnam and South Africa, outlaw it entirely. Some in Western Europe, Latin America and Canada prosecute only related activities such as brothel-keeping or transporting sex workers, communicating for the purposes of prostitution, street soliciting and living off its profits. Norway and Sweden arrest the clients of sex workers but not the workers themselves. This so-called “Swedish approach” is seen as more just to sex workers, who are perceived as victims by its proponents. This approach has been applied in other countries and has actually resulted in grave consequences for the workers.

Some governments deploy anti-human-trafficking laws so broadly that they conflate voluntary and consensual exchanges of sex for money with the exploitative, coerced, often violent trafficking of people (primarily women and girls) for the purposes of sex. Municipalities may interdict commercial sex under the authority of vaguely worded statutes relating to “public decency”; “morality” and even rape; “nuisance” laws prohibiting loitering and vagrancy; or zoning or health regulations. Although these statutes often do not mention the words “sex worker” or “prostitute,” they nevertheless give police wide latitude to arrest and detain sex workers and give the state legal support for making medical examinations compulsory—a fundamental human rights abuse. Sometimes, police use the mere possession of condoms as evidence of sex work. Even if sex workers are detained only briefly, their working lives are vexed by harassment and fear. These laws codify profound discrimination; they reflect general social contempt toward female, male and transgender sex workers.

CRIMINALISATION + STIGMA = DANGER

For sex workers, especially those who are gender-nonconforming, the threat of violence—from both clients and police—is a daily reality. Criminalisation, in collusion with social stigma makes sex workers’ lives more unstable, less safe
and far riskier in terms of HIV. There is no legal protection from discrimination and abuse where sex work is criminalised.

- Laws invite police harassment and violence and push sex work underground, where it is harder to negotiate safer conditions and consistent condom use. Some sex workers fear carrying condoms, which are used as evidence against them, sometimes as an explicit provision of law.

- Police violence prevents sex workers from seeking their assistance, which ingrains a culture of more client and police violence.

- Stigmatised, criminalised sex workers are unable to access programmes of HIV prevention and care.

- Criminals and clients deploy the threat of criminal sanctions to control and exploit sex workers.

- Rape and assault are difficult to report when the sex worker fears that she will be arrested, and sexual violence heightens exposure to HIV.

- Working in the informal sector reduces sex workers' access to education and housing, thus increasing their dependence on others, including pimps.

LEGAL "NON-PERSONS"

Some laws not only criminalise sex work and the activities related to it but also deny sex workers fundamental civil entitlements. Sex workers may be unable to own or inherit property; register the births of their children; access education, justice, health care or banking services; or purchase housing or utilities. Deprived of the means by which others can make claims on elected officials, employers and service providers, sex workers experience social exclusion and entrenched poverty. And their disadvantaged position in

SEX WORK & LAW

Number of countries

116
Countries and territories that have punitive laws against sex work

80
Countries and territories that have some degree of protection in law for sex work

13
No information available

Source: Inter-Parliamentary Union (IPU), UNAIDS, UNODC Brief for Parliamentarians on HIV and AIDS: Making the law work for the response to HIV/AIDS, 2011.

Soon as the sex was over, the man started slapping me and cuffing me up and he empty my purse and take away all my money, not just what he pay me...How could I go to the police and make a report when sex work is not really legal?

Sex worker from Guyana, Caribbean Regional Dialogue, 12–13 April 2011.
negotiating access to goods and services leads to exploitation, abuse and increased vulnerability to HIV.\textsuperscript{155}

In such circumstances sex workers are not fully recognised as persons before the law and are rendered incapable of holding or exercising the range of human rights available to others. Swaziland provides a poignant example of law that denies the fundamental humanity of the sex worker. Section 3 (3) of the Swaziland Girls' and Women's Protection Act provides the following defence to the charge of carnal knowledge of a girl child under 16: “At the time of the commission of the offence the girl was a prostitute.”\textsuperscript{159} Under this law, a girl under the age of 16 cannot consent to sex, regardless of whether she is a sex worker, but she also cannot claim protection from the law if someone has sex with her against her will. By granting her neither agency nor security, the law renders her a non-person.\textsuperscript{160}

Virtually all of these conditions of work and life increase HIV vulnerability.\textsuperscript{161} It is not surprising that sex workers globally are approximately eight times more likely to be infected with HIV than other adults.\textsuperscript{162} A recent study found that female sex workers in developing countries are

\section*{VICTIMISING THE “VICTIM”}
\textbf{The Swedish Approach}

Lauded as a less punitive and more gender-sensitive legal strategy to reduce and ultimately eliminate sex work, the “Swedish approach” criminalises the client and not the worker. Based on the premise that women in sex work need protection, it regards the sex worker as the “victim” and the client as the “exploiter.” Since its enactment in 1999, the law has not improved—indeed, it has worsened—the lives of sex workers.\textsuperscript{163} The law’s record so far\textsuperscript{164}.

\subsection*{Underground trade, more violence}
Street-based sex work is halved in Sweden, according to the police, but the sex trade remains at pre-law levels. It has simply moved further underground,\textsuperscript{165} to hotels and restaurants, as well as the Internet—and to Denmark. The Swedish State Criminal Department warns that the sex trade may now be more violent. Especially worrying is the trade in foreign women, who often fall entirely under the control of pimps.\textsuperscript{166}

\subsection*{Few prosecutions and convictions}
Sweden’s Alliance of Counties says that resources for social work are scarce, as the money has been siphoned to policing. In spite of over 2,000 arrests, only 59 clients have been reported suspected of buying occasional sex. Only two have been convicted, after pleading guilty. No one has been jailed, and only low fines have been imposed, as per the law. Evidence to prove a crime is nearly unattainable. Workers do not consider themselves to be victims and are almost always unwilling to testify against their clients.\textsuperscript{167}

\subsection*{Criticism and organising}
The law has given impetus to the formation of a sex workers’ rights organisation in Sweden, which has argued strenuously against the law.\textsuperscript{168} Some Swedish authorities are demanding an evaluation of how the new legislation is affecting the underground prostitution trade.
14 times more likely to be infected with HIV than women of reproductive age. Clients of sex workers also have sex with other partners, and sex workers have lovers and spouses and children, who in turn have sex or use drugs with others; consequently, HIV travels. High rates of infection among sex workers affect everyone.176

This does not have to be the case. Where sex workers organise, where the police don’t harass them and they are free to avail themselves of quality HIV services, sex workers have lower rates of STIs, more economic power and a greater ability to get education for their children.177

Criminal sanctions against human trafficking and commercial sexual exploitation of minors are essential—but the laws must clearly differentiate these activities from consensual adult sex work.

**TRAFFICKING IN MISCONCEPTIONS**

Sex work and sex trafficking are not the same. The difference is that the former is consensual whereas the latter coercive. Sex worker organisations understand sex work as a contractual arrangement where sexual services are negotiated between consenting adults. Sex work is not always a desperate or irrational act; it is a realistic choice to sell sex—in order to support a family, an education or maybe a drug habit. It is an act of agency.178

By contrast, trafficking in persons, as defined by international and local treaties, is “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”179 Such exploitation can include many forms of forced labour or slavery—in factories, fields, homes or brothels. Trafficking for the purposes of commercial sexual exploitation involves adults or children providing sexual services against their will, either through force or deception. A denial of agency, trafficking violates their fundamental freedoms.178

Setting aside the question of whether people would choose sex work if they had better options, a point of view that casts “voluntary prostitution” as an oxymoron erases the dignity and autonomy of the sex worker in myriad ways. It turns self-directed actors into victims in need of rescue.

And yet some governments deploy anti-human-trafficking laws so broadly as to conflate consensual adult sex work with the exploitative, coerced trafficking of people (primarily women and girls) for the purposes of sex.179 Indeed, negotiations in the writing of United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children (2000) were riven by disputes over these definitions. Some states and NGOs argued for the language to be amended to limit the law’s purview to people engaged in the international sex trade by force or coercion.178 This amendment was defeated on the grounds that no victim should have to prove that she did not consent, but the language now also implies that any person selling sex is so vulnerable that she is by definition unable to consent. The definition now explicitly states that the consent of the “victim” is irrelevant to the prosecution of the trafficker.179

In part as a result of this overly broad definition, governments have cracked down, often violently, on sex workers or compelled them to undergo the same kinds of brutal “rehabilitation” in detention to which drug users are subjected. Forced to work clandestinely, sex workers cannot muster the collective power to improve their wages or working conditions, enjoy the
PEPFAR’s Anti-Prostitution Pledge

All organisations outside of the US receiving money under PEPFAR must sign the pledge. It reads, in part:

“The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalisation or practice of prostitution or sex trafficking.”

The pledge puts grantees in an impossible bind. If they don’t sign, they are denied the funds they need to control and combat HIV. If they sign, recipient organisations are barred from supporting sex workers in taking control of their own lives—which is to say, their own health and that of their families and clients, including taking steps to avoid HIV and prevent its spread.

Protection of labour law or join together in trade unions or another organisation, whose benefits include access to public health care or the empowerment to establish health services run by sex workers themselves.

International anti-human-trafficking campaigns often promote the prohibition, either intentional or effective, of proven best practices in HIV prevention. For instance, crusaders in the United States have used the influence of PEPFAR—the President’s Emergency Plan for AIDS Relief, the primary vehicle of United States financial support to AIDS-combating organisations around the world—to compel other governments to accept the conclusion of human trafficking with sex work by conditioning the receipt of funds on the signing of its Anti-Prostitution Pledge.

Maurice Middleberg, Vice-President of the Global Health Council, calls the pledge proof that the anti-human-trafficking agenda is an anti-prostitution agenda. He points both to the pledge’s language—which calls prostitution “harmful and dehumanising” and links prostitution with human trafficking—and the way the pledge has been put into practice.

Although the pledge has been legally challenged in its application within the United States and was supposed to be reviewed by the Obama administration in early 2009, it remains in full force for organisations receiving funds under PEPFAR beyond the borders of the United States.

WORKPLACE RIGHTS

The International Labour Organization (ILO) has recommended that sex work be recognised as an occupation so that it can be regulated in ways that protect workers and customers. Sex workers in such frameworks could exercise both individual and collective initiative in affecting their economic and social conditions. The ILO’s labour standard on HIV/AIDS, adopted in 2010, includes non-discriminatory access to health services and occupational safety for sex workers, including empowerment to insist on safe and protected paid sex in their workplaces.

Decriminalisation is the first step toward better working conditions—and with them, less HIV risk—and some jurisdictions have removed some penal provisions related to sex work. New Zealand’s Prostitution Reform Act (2003) decriminalised prostitution, opening the way for sex workers to operate in public and in safety. The New Zealand Prostitutes’ Collective, brothel operators and the Labour Inspectorate have collaborated to develop workplace health and safety standards for sex work. Sex workers can bring employment discrimination complaints to the Human Rights Commission, and the Mediation Service on Employment adjudicates disputes. The police support sex workers in
reporting violence. Although it applauds these advances, the Prostitutes’ Collective stresses that stigma and discrimination remain and calls for law and policy to address them. Recently, the Kenya National Commission on Human Rights called for the decriminalisation of sex work.107

Some national courts have recognised the rights of sex workers. A court in Bangladesh halted abusive action by police who evicted sex workers from brothels, concluding that this curtailment of their livelihood was a violation of their right to life.108 Similarly, in the 2010 case Bedford v AG Canada, a judge struck down three provisions of the Canadian criminal code outlawing prostitution, calling them a violation of the country’s Charter of Rights, as they “force prostitutes to choose between their liberty interest and their right to security of the person.”109 The subsequent 2012 decision of the Ontario Court of Appeal found that provisions prohibiting brothels and living off the avails of prostitution were both unconstitutional in their current form.110 In 2010, the South African Labour Appeal Court held that even though sex work was illegal, the people who do it were entitled to protection against unfair dismissal by employers.111

Unfortunately, decriminalisation sometimes replaces punishment with regulation, which in its details is enforced through criminal law. Greece, Latvia and parts of Australia all have mandatory and forced medical testing, a human rights abuse and thus a form of punishment.112 In the United States, Nevada is the one state where prostitution is legal. But sex work is allowed only in a few licenced brothels in rural counties. In the tourist hot spot Las Vegas, by contrast, police stings for solicitation are common, and anywhere in the state both workers and clients can be arrested for indecent exposure or ‘open and gross lewdness’, which carry penalties of fines and jail time.113, 114

According to an international labour rights advocate, “the direct regulation of sex work may or may not be implemented in ways consonant

THE DIGNITY OF ALL WORK

*Kylie v Commission for Conciliation, Mediation and Arbitration and 2 others*

Kylie, a sex worker who worked in a massage parlor, brought a claim before South Africa’s Labour Court that she had been unfairly dismissed without a hearing and deserved compensation from her employer. The Court rejected her claim, finding that she was not entitled to protection or redress because prostitution is illegal. The courts “ought not to sanction or encourage illegal activity”, it said. On appeal, however, Judge Dennis Davis ruled that Kylie could be awarded monetary compensation for her illegal firing, no matter what her job was. The Labour Relations Act (LRA) guarantees “everyone” the right to fair labour practices, he said—and everyone means everyone. The LRA’s express purpose “is to advance economic development, social justice, labour, peace and the democratisation of the workplace”, and he noted a purpose that is underlined by an even higher principle: the dignity of all workers. The judge opined: “As sex workers cannot be stripped of the right to be treated with dignity by their clients, it must follow that, in their other relationship—namely with their employers—the same protection should hold. Once it is recognised that they must be treated with dignity not only by their customers but by their employers, section 23 of the Constitution, which, at its core, protects the dignity of those in an employment relationship, should also be of application.”115
with human rights principles. Actual and proposed frameworks for legalised sex work have involved not only forced HIV testing but also "quarantining, shaming or even branding sex workers determined to have diseases of public health significance." A proposal presented to the Maharashtra, India, state legislature "would have required the registration of all prostitutes, with compulsory HIV testing; all those found to be positive would be branded with a permanent tattoo."

**POLICE COOPERATION FOR BETTER HEALTH**
When the state recognises the human and civil rights of sex workers, it can deploy the police in a radically different way. Rather than unleashing police to beat and arrest sex workers, it can put them to work alongside sex workers in enabling widespread safer sex practices. When this was done in India, condom use among sex workers rose as high as 85% in some parts of the country and HIV prevalence among sex workers fell from over 11% in 2001 to less than 4% by 2004. In the Philippines, Action for Health Initiative (ACHIEVE) partnered with the Quezon City Health Department to bring together the police department and the association that represents entertainment establishments to talk about improving condom distribution in venues where sex is sold.

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*Police officers are now starting to think for the first time of sex work as having implications for human rights.*

African Sex Workers Alliance (ASWA) Mozambique, Africa Regional Dialogue, 3–4 August 2011