Submission regarding the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill

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Dear Committee members,

Please find below my submission to the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill.

By way of background, I hold an LLM in International Human Rights Law from Griffith College Dublin, which I completed in 2011 with a dissertation entitled *Prohibitory Prostitution Laws and the Human Right to Health*. The focus of my research was the impact of anti-prostitution criminal laws on sex workers' right to health, as protected under international human rights law.

In my dissertation, I examined the existing evidence from jurisdictions across the globe. My research found criminal laws aimed at controlling, reducing or abolishing prostitution to be associated with negative outcomes for sex workers' right to health.

In this submission I will focus on Clause 6 of the bill, which provides for a new offence of "paying for sexual services of a person". The overwhelming weight of the evidence supports the conclusion that criminalising sex workers' clients has adverse implications for sex workers' right to health. While much of this evidence is necessarily anecdotal, it is remarkably consistent across jurisdictions and despite variations in the manner by which clients are criminalised.

For the convenience of those Committee members without legal backgrounds, I have confined the main body of this submission to what appear to be the practical, real-world effects of criminalising the purchase of sex. Members concerned with how this subject fits into the international human rights law framework can refer to Appendix A. In Appendix B, I have cited various bodies in the global health and human rights sector(s) who have taken positions critical of client criminalisation.

Submission

1. The adverse effects of client criminalisation on sex workers' health

1.1. Increased risk of violence against sex workers

Although no *direct* link has been proven between client criminalisation and the rate of violence against sex workers,[1] there are, nonetheless, a number of ways in which the law may

[1] A report commissioned by the City of Oslo in 2012 found that the number who had experienced violence in prostitution rose to 59% from 52% in 2007, shortly before Norway criminalised the purchase of sex. However, these figures are not directly comparable, as the first relates solely to the previous three years while the latter reflects lifetime experience. Ulla Bjørndahl, *Dangerous Liaisons: A report on the violence women in prostitution in Oslo are exposed to* (Pro Sentret, 2012) *http://prosentret.no/?wpfb_dl=575* [Accessed 27 October 2013] p.12.

No such research appears to have been carried out in Sweden, and anecdotal reports are contradictory. An official Swedish government evaluation concluded that predictions that the law would "increase the risk of

foster an environment of greater vulnerability to violence—or hinder action against those who commit it.

1.1.1 Fear of engagement with police

In Norway, client criminalisation appears to have harmed rather than helped sex workers' relationship with police:

- The 2010 Annual Report of Pro Sentret, an Oslo official service for current and former sex workers, reports frequent police harassment and threats to expel sex workers from certain areas—or to arrest them on other charges—because they are viewed as encouraging criminal activity.[2]
- A 2012 City of Oslo report states that sex workers *feel* criminalised and controlled under the law, and that consequently women in sex work "do not perceive the police as an ally they can turn to when they are the victim of a crime".[3]

Swedish police do not seem to perceive themselves as allies, either. According to Stockholm's Detective Superintendent Jonas Trolle: "It should be difficult to be a prostitute in our society—so even though we don't put prostitutes in jail, we make life difficult for them."[4]

1.1.2 Risks taken to avoid police

It is logical that when police have a mandate to stop sex work from occurring, those whose income depends on it will have a strong incentive to avoid them. A consequence of this may be to divert prostitution into areas where it is less likely to be detected. It is not necessary that the sex worker is the one facing arrest—the client's fear of arrest may also have a dispersal effect, as the following evidence demonstrates:

- A New England sex worker described the effect of police crackdowns: "We still gotta work. It's not like that stops … you might do it in a more secluded place, like go into the park or something. 'Cause he don't want to get caught."[5]
- A 2008 report of the Swedish National Board of Health and Welfare cited one sex worker's view that "there may be fear among clients that makes it harder to use safe meeting places. Instead, the meeting places have become more out of the way, such as

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physical abuse … have not been realized": Swedish Institute, "Selected Extracts of the Swedish government report SOU 2010:49: 'The Ban against the Purchase of Sexual Services. An evaluation 1999–2008'", *http://www.government.se/download/0e51eb7f.pdf?major=1&minor=151488&cn=attachmentDuplicator_1_attachment* [Accessed 27 October 2013] p.32. However, in reviewing a wide range of governmental, NGO and academic reports, two researchers found that some sex workers do report an increase in violence since the law's enactment: Susanne Dodillet and Petra Östergren, "The Swedish Sex Purchase Act: Claimed Success and Documented Effects" (Conference paper presented at the International Workshop: *Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges*, The Hague, 3-4 March 2011) *http://www.plri.org/sites/plri.org/files/Impact%20of%20Swedish%20law_0.pdf* [Accessed 20 October 2013] p.23

[2] Pro Sentret, *Året 2010* (Pro Sentret, 2011) *http://prosentret.no/?wpfb_dl=438* [Accessed 20 October 2013] pp.72, 78–79

[3] Bjørndahl, *supra* note 1, p.38

[4] "Could Sweden's prostitution laws work in the UK?" *BBC News* 30 September 2010, *http://www.bbc.co.uk/news/world-europe-11437499* [Accessed 20 October 2013]

[5] Kim Blankenship and Stephen Koester, "Criminal Law, Policing Policy and HIV Risk in Female Street Sex Workers and Injection Drug Users" (2002) 30 Journal of Law, Medicine and Ethics 548, p.550

wooded areas, isolated stairwells and office premises, where clients do not risk discovery".[6]

- In Norway's 2010 Country Progress Report to UNAIDS, the Norwegian Directorate of Health reported that "sex workers in escort services are forced to sell sex at the customer's arena, which makes them more vulnerable to violence and abuse".[7]
- The 2012 City of Oslo report also found that "Fear of being discovered by the police has led several of those working in massage parlours to quit selling sex in such establishments. Instead they agree to sell sex when giving a massage at the parlour and then meet the client later on in their own flat. This means the service is performed where the seller and buyer are alone, which increases the level of vulnerability."[8]

1.1.3 Interference with effective screening mechanisms

Laws that criminalise sex workers' clients may also inhibit sex workers' ability to screen out potentially dangerous clients, by forcing them to make quick decisions about whether or not to accept a client:

- The "kerb-crawling" provision in s.1 of the UK Sexual Offences Act 1985[9] places pressure on sex workers to get into clients' cars more quickly.[10]
- In Sweden, sex work now involves a "lightning decision" in which street-based workers simply get into the first car that stops for them.[11]
- In Norway, the pressure to reach a quick agreement has "increased considerably after the criminalization of the purchasing of sex".[12]

1.1.4 Increase in the proportion of dangerous clients

The premise is that criminalising the purchase of sex will reduce prostitution by reducing "demand". However, it appears to be mainly the non-violent clients that criminalisation deters—with little effect on the dangerous ones. This is logical, as someone whose intention is to commit a serious (and already criminal) offence of bodily harm seems unlikely to be dissuaded by a new law against the relatively minor offence of paying for sex.

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[6] Annika Eriksson and Anna Gavanas, *Prostitution in Sweden 2007* (Socialstyrelsen 2008) http://www.socialstyrelsen.se/lists/artikelkatalog/attachments/8806/2008-126-65_200812665.pdf [Accessed 27 October 2013] p.48

[7] Helsedirektoratet (Norwegian Directorate of Health), *UNGASS Country Progress Report Norway: January 2008–December 2009* (Helsedirektoratet, April 2010) http://www.unaids.org/en/dataanalysis/knowyourresponse/countryprogressreports/2010countries/norway_2010_country_progress_report_en.pdf [Accessed 27 October 2013] p.36

[8] Bjørndahl, *supra* note 1, pp.34–35.

[9] This legislation defines "kerb-crawling" as a man soliciting a woman from a motor vehicle "persistently or in such manner or in such circumstances as to be likely to cause annoyance to the woman (or any of the women) solicited, or nuisance to other persons in the neighbourhood".

[10] Teela Sanders, "The Risks of Street Prostitution: Punters, Police and Protestors" (2004) 41 Urban Studies 1703, p.1713

[11] Ulf Stridbeck (ed.), *Purchasing Sexual Services in Sweden and the Netherlands: Legal Regulation and Experiences—An Abbreviated English Version. A Report by a Working Group on the legal regulation of the purchase of sexual services* (Justis-og Politidepartementet, 2004) http://www.regjeringen.no/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216-purchasing_sexual_services_in_sweden_and_the_nederlands.pdf [Accessed 27 October 2013] pp.13 and 19; see also Petra Östergren, "Sexworkers critique of Swedish Prostitution policy" (2004), *http://www.petraostergren.com/pages.aspx?r_id=40716* [Accessed 20 October 2013]

[12] Bjørndahl, *supra* note 1, p.39

- The 2012 City of Oslo report states: "Another trend is the change of customer base with fewer 'good' clients than before. 'Good' clients are described as men approaching women to buy sexual services, and who then pay the agreed price and stick to the agreement. … There is no reduction in the number of 'bad' clients reported by the police or welfare services. The designation 'bad' clients is used about clients who do not stick to the agreement, try to negotiate the price, do not want to use a condom, have a lack of respect for the women by being derogatory, are violent/threatening, mentally unstable/sick or approach women not only buy sexual services but because they want to abuse them.

  "The consequence of a reduction of clients, and fewer 'good' clients, while the number of 'bad' clients remains the same, is that the 'bad' clients have become a greater part of the customer base than before. Sex workers have become more dependent on 'bad' clients even though they have not increased in number, as the earnings base from 'good' clients has decreased."[13]

- Sex workers, police and social workers have told researchers in England that operations against clients "can have the effect of deterring the 'decent punter' whilst doing nothing to deter dangerous and violent individuals who commit crime against women involved in street prostitution".[14]

- According to a Swedish police interview conducted several years after the law was introduced, "most of the 'normal' clients have been scared off by the law. And because the client base has changed and prices have fallen, then [sic] the girls today have to take clients they don't feel safe with".[15]

1.1.5 Interference with client negotiations

Having "set prices" and services is a common strategy by which sex workers assert control over a potential transaction.[16] However, the client's fear of arrest can adversely affect the safe negotiation process.

The Oslo report states: "Clients are more stressed because they fear the police will discover them, which means contact made on the streets must be quicker and you must get away from the area quickly. This is very challenging for many of the women as it becomes more difficult to make a deal with a client when it comes to agreeing on a price, sexual services, local for the sex and use of condoms before they have to get away from the area with the client. Agreements must be made after getting to a 'safer' place for the client, like a hotel room, a car or at one of the parties' flats. This increases the vulnerability level for the women as they

[13] Bjørndahl, *supra* note 1, p.37

[14] Marianne Hester and Nicole Westmarland, *Tackling Street Prostitution: Toward an Holistic Approach* (London: Home Office Research, Development and Statistics Directorate, 2004) p.24; Rosie Campbell and Merl Storr, "Challenging the Kerb Crawler Rehabilitation Programme" (2001) 67 Feminist Review 94, 102 citing Steph Wilcock, *The Lifeline Sexwork Project Report: Occupational Health and Safety Issues and Drug Using Patterns of Current Sexworker: Survey Findings* (Manchester: Lifeline, 1998).

[15] Stridbeck, *supra* note 11, p.13

[16] Gemma Cox and Teresa Whitaker, *Drug Use, Sex Work and the Risk Environment in Dublin* (Dublin: Government Publications, 2009), p.127

often are alone with the client when the final agreement is made, because conflict can more easily arise about what has been agreed upon … ."[17]

This impact is likely to be especially profound for those engaged in survival sex work, who may need to negotiate with a client on his terms if the only practical alternative is losing the client entirely. A diminution of the client base through criminalisation will only magnify this effect.

1.1.6 Diminished independence

Criminalising clients may increase sex workers' reliance on pimps:

- In Sweden, "dependence on pimps has increased because street prostitutes cannot work as openly as before. The police informed us that it is more difficult to investigate cases of pimping and Trafficking in Human beings because prostitution does not take place so openly on the streets any more."[18]
- In relation to Swedish indoor prostitution, "Someone is needed in the background to arrange transport and new flats so that the women's activity is more difficult to discover and so that it will not attract the attention of the police."[19]
- The law may also make it easier for exploitative pimps to avoid justice: "clients no longer provide tip-offs about pimps, for fear of being arrested themselves".[20]
- The Swedish National Board of Health and Welfare reported in 2008: "According to one informant in Göteborg, there are probably more pimps involved in prostitution nowadays. The informant says the law against purchasing sexual services has resulted in a larger role and market for pimps, since prostitution cannot take place as openly.

  "A woman engaged in indoor prostitution in Göteborg relates that when the law took effect in 1999, about ten women engaged in prostitution from various Eastern European countries approached her business because they wanted to hide indoors. Informants from the Stockholm Prostitution Centre also mention that the law has opened the door to middlemen (pimps), because it has become more difficult for sellers and buyers of sexual services to make direct contact with one another."[21]

- Norway has also seen vulnerable drug-using street workers increasingly entering into relationships of extreme dependency, becoming reliant on a particular man (or men) for survival. "Many of the women who are drug addicts have changed their method of contacting clients. Most of the welfare services have seen women establish a more long-term relationship to the men, and they are referred to as 'friends', 'boyfriends', 'uncles', or acquaintances. These are men they stay in touch with over the phone and men they stay with for longer periods of time, which may be hours, days or weeks. They have sex with these men in exchange for the men supplying them with drugs, money or other necessities. Many of the welfare service providers say they find these women very vulnerable when they are in such a relationship as they become very dependent on the few clients they have."[22]

[17] Bjørndahl, *supra* note 1, pp.33–34
[18] Stridbeck, *supra* note 11, p.52 (capitalisation as in original)
[19] *Ibid*, p.53
[20] *Ibid*, p.19.
[21] Eriksson and Gavanas, *supra* note 6, pp.47–48.
[22] Bjørndahl, *supra* note 1, p.39

1.2 Increased risk of HIV and other sexually-transmitted infections (HIV/STI)

It cannot be said definitively that criminalising the purchase of sex leads to an increase in HIV/STI infection. There are, however, serious grounds for concern that this law may increase sex workers' *vulnerability* to HIV/STI:

1.2.1 Obstacles to accessing health services

The criminalisation of clients may lead to alienation of sex workers from health and social services, including services related to HIV/STI prevention and treatment.

- NGOs from the Norwegian HIV/AIDS sector have stated that "The effects of police enforcement has [sic] affected the sex workers' relation to other services, such as harm reduction services, as many refuse to associate with anything or anyone that may give the police a suspicion of sex work … ."[23]
- The NGOs also state that the ban on purchasing sex "makes it increasingly difficult to reach sex workers with prevention work and information".[24]
- An increased feeling of stigmatisation on the part of sex workers may also adversely affect their interaction with health services. This will be discussed further below.

1.2.2 Deterrents to condom use

1.2.2.1 Condoms as evidence of prostitution

There is an apparent (though as yet unconfirmed) belief in Sweden and Norway that condoms are used as evidence by police seeking to prevent or prosecute prostitution:

- The Swedish sex workers' organisation Rose Alliance claims that police seeking to avert prostitution or arrest clients "look for condoms as evidence of sex. This gives sex workers a strong *incentive not to carry condoms*".[25]
- Norway's Directorate of Health has acknowledged concerns "that individual sex workers no longer want to carry condoms and lubricants out of fear that they will be used by the police as indicators of sale of sexual services."[26]
- NGOs from Norway's HIV/AIDS sector have likewise alleged that condoms are now used as evidence of prostitution.[27]

1.2.2.2 Barriers to condom negotiation

Client criminalisation may promote unprotected commercial sex by reducing sex workers' "bargaining power" over clients reluctant to use condoms:

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[23] Helsedirektoratet, *supra* note 7, p.95.
[24] *Ibid* p.102
[25] Johannes Eriksson, "The 'Swedish model': Arguments, Consequences: Presentation to Green Ladies' Lunch, Prostitution in Europe—Berlin" (Global Center for Women's Politics, 2005) *http://www.glow-boell.de/media/de/txt_rubrik_2/160305LLVortrag_Eriksson.pdf* [Accessed 20 October 2013], para. 5 (emphasis in original)
[26] Helsedirektoratet, *supra* note 7, p.36
[27] *Ibid,* p.94

- A decrease in clients and consequent loss of income can lead to increased competition among workers[28] and make requests for unsafe sex more difficult to refuse.[29]
- In Norway: "Since the customer base has been somewhat reduced in parts of the prostitution market, several of the welfare services report that women have had to lower their client standards. Many women have had clear demands about which clients they serve; examples of selection criteria are nationality, use of drugs, mental health/client appearance. Women also had other standards that were clearly defined; which sexual service they sold/did not sell, where sales took place, number of clients they take on at the same time, price and use of condoms. Several of the welfare service providers are of the opinion women have had to lower their original demands to acquire clients and make the amount of money they need. It is difficult for the welfare service providers to analyse if this has led to increased violence and increased levels of sexually transferred diseases. However, there appears to be an agreement among them that women feel more vulnerable, more at risk and are in less control over the relation to the client now than before because they have had to lower their standards."[30]
- In Fiji, which criminalised both the purchase and sale of sex in 2009, research has also found an increase in unprotected commercial sex due to the resulting decrease in clients: "The criminalisation of clients has reduced the ability of sex workers to negotiate over the terms of the transaction and has created more pressure to accept clients' terms …. Fear of losing a client is an incentive to comply with a client's wishes for sex without a condom."[31]

1.2.3 Opposition to targeted HIV prevention measures

HIV prevention measures targeting sex workers and their clients may meet resistance for being seen as contradicting the aim of deterring prostitution. According to the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights:

- The distribution of condoms to sex workers has been opposed on the grounds that it is incompatible with the country's "zero tolerance" approach to sex work.[32]
- Sweden's criminal law has also been implicated in the cancellation of client-targeted HIV prevention measures.[33]

1.2.4. Violence and STI

If client criminalisation does promote violence against sex workers, as indicated above, this in itself would increase their susceptibility to infection: violence against sex workers is

[28] Stridbeck, *supra* note 11, p.13; Glenn Betteridge, "Sex, Work, Rights: Reforming Canadian Criminal Laws on Prostitution" (Canadian HIV/AIDS Legal Network, 2005) *http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=199* [Accessed 27 October 2013] p.42

[29] Blankenship and Koester, *supra* note 5, p.550;Eriksson, *supra* note 25, para. 5; Stridbeck, *supra* note 11, p.12 citing Socialstyrelsen, *Kännedom om Prostitution 2003* (Socialstyrelsen, 2004); Östergren, *supra* note 11; Campbell and Storr, *supra* note 14; Pro Sentret, *supra* note 2, p.57

[30] Bjørndahl, *supra* note 1, p.40

[31] Karen McMilland and Heather Worth, *Sex Workers and HIV Prevention in Fiji—after the Fiji Crimes Decree 2009* (Sydney: International HIV Research Group, University of New South Wales, 2011) p.24

[32] Riksförbundet för Homosexuellas, Bisexuellas och Transpersoners Rättigheter (Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights), *Förbud mot köp av sexuell tjänst. En utvärdering 1999–2008, SOU 2010:49* (RFSL 2010) *http://app.rfsl.se/apa/19/public_files/ry_101025_kop_av_sexuell_tjanst.pdf* [Accessed 27 October 2013] p.8

[33] *Ibid*, p.2

associated with an increased likelihood of HIV and STI acquisition.[34] This is unsurprising, as rape rarely takes place with a condom,[35] and can cause injuries that facilitate STI and HIV transmission.[36]

1.3 Mental ill-health

While various factors may contribute to mental ill-health among sex workers, there are number of ways in which criminalisation of sex workers' clients appears to play some role.

1.3.1 Ill-health effects from other adverse consequences of criminalisation

The adverse consequences already referred to in this submission may have knock-on effects for sex workers' mental health:

- A clear association has been found between violence against sex workers and mental ill-health.[37]
- The ongoing risk of exposure to HIV/STI may also have mental health implications.[38]
- Logically, then, any law that increases the risk of violence or infection will also increase the risk of mental ill-health.
- A link has also been found between violence and an increase in risky behaviour, STI and reduced access to health services—possibly as a result of the mental health effects of violence.[39]

1.3.2 Stigmatisation

The impact of stigmatisation on sex workers' health cannot be overstated. It has been described as the single biggest issue facing sex workers—even those who operate legally.[40] There are strong indications that the stigma against sex workers has increased in Sweden and Norway since the laws against buying sex were enacted:

- According to the 2012 City of Oslo report: "The welfare services report [that] the debate about prostitution prior to and after the Act was changed has greatly influenced how the average person viewed women selling sex, meaning more women have experienced an increase in harassment from strangers in public spaces.

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[34] Kate Shannon et al., "Prevalence and structural correlates of gender based violence among a prospective cohort of female sex workers", BMJ 2009;339:b2939, *http://www.bmj.com/content/339/bmj.b2939* [Accessed 27 October 2013]

[35] Nel van Beelen and Aliya Rakhmetova, "Addressing violence against sex workers" (2010) 12 Research for Sex Work 1, p.1

[36] Elizabeth Pisani, *The Wisdom of Whores: Bureaucrats, Brothels and the Business of AIDS* (London: Granta, 2008), p.129

[37] Wulf Rössler et al., "The Mental Health of Female Sex Workers," (2010) 122(2) Acta Psychiatrica Scandinavica 143.

[38] Barbara Brents and Kathryn Hausbeck, "Violence and Legalized Brothel Prostitution: Examining Safety, Risk and Prostitution Policy" (2005) 20 Journal of Interpersonal Violence 270, p.293.

[39] Tara S.H. Beattie et al., "Violence against female sex workers in Karnataka state, south India: impact on health, and reductions in violence following an intervention program", (2010) 10 BMC Public Health 476, *http://www.biomedcentral.com/1471-2458/10/476/* [Accessed 20 October 2013]

[40] Sharon Pickering, JaneMaree Maher and Alison Gerard, *Working in Victorian Brothels: An Independent Report Commissioned by Consumer Affairs Victoria into the Victorian Brothel Sector* (Consumer Affairs Victoria, 2009), *http://www.consumer.vic.gov.au/library/publications/resources-and-education/research/working-in-victorian-brothels-2009.pdf* [Accessed 27 October 2013], p.17

"In recent years the services for sex workers have regularly received reports about people frequenting the streets in Oslo to harass these women. There have been reports of name calling, objects being thrown at them and impolite behaviour, especially after unfavourable media reports involving these women.

"In addition to changes in how women in prostitution are described in the public debate, there is also a tendency to point to a greater proportion of the population perceiving sex workers as criminals, even though they have not been criminalized."[41]

- In Sweden, public opinion about the people who sell sex seems to have hardened since the criminalisation of buyers. In 1996, three years before the law was introduced, 19% of men and 41% of women answered "yes" to the question: "A woman receives payment for sexual relations. Should the woman be regarded as a criminal?" Twelve years later, in response to the question "Should the sale of sex be prohibited by law?", 49.4% of men and 66% of women answered "yes".[42] While the softer framing of the 2008 question likely accounts for some of the difference, the sheer size of the increase suggests that an actual public opinion shift has also occurred.

- As noted above, Detective Superintendent Jonas Trolle has admitted that Sweden deliberately makes life "difficult" for sex workers.

- According to a 2010 evaluation of the law commissioned by the Swedish Department of Justice and overseen by Chancellor Anna Skarhed: "People who are currently being exploited in prostitution state that the criminalization has intensified the social stigma of selling sex. They describe having chosen to prostitute themselves and do not consider themselves to be unwilling victims of anything. Even if it is not forbidden to sell sex, they feel they are hunted by the police. They feel that they are being treated as incapacitated persons because their actions are tolerated but their wishes and choices are not respected. … For people who are still being exploited in prostitution, the above negative effects of the ban that they describe must be viewed as positive from the perspective that the purpose of the law is indeed to combat prostitution."[43]

This evidence suggests that stigmatisation of sex workers is not merely an accidental consequence of the law, but is actually built into the law's design.

1.4 Occupational health and safety

To the extent that client criminalisation has the effects already outlined in this submission, it clearly promotes conditions inconsistent with the right to occupational health and safety. Laws that disperse sex workers to more isolated and dangerous locations also deny them access to a safe working environment.

Sex workers' eligibility for protection under the right to occupational health and safety is outlined in Appendix A.

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[41] Bjørndahl, *supra* note 1, p.41
[42] Jari Kuosmanen, "Attitudes and perceptions about legislation prohibiting the purchase of sexual services in Sweden", (2011) 14:2 European Journal of Social Work 247, p.254
[43] Swedish Institute, *supra* note 1, p.34

1.5 Health-related civil and political rights

1.5.1 The right of participation

As Appendix B describes, the right to health includes a right to participate in the process by which health-affecting decisions are made. Yet sex workers—the very people whose health is most affected by prostitution laws—have often been given a minimal input role in public debates around those laws.

- The Swedish National Board of Health and Welfare writes, "Virtually all women engaged in prostitution who were informants for this study (regardless of standpoint) perceive difficulties with being considered, heard, and correctly interpreted in public debate, which is also reported by sellers of sexual services in other interview-based studies."[44]
- Swedish sex workers' views were also largely ignored in the legislative process by which clients were criminalised: "Nor were the views of prostitutes taken into consideration except where they confirmed the victim-oriented mainstream discourse".[45]
- When the Rhode Island Senate Judiciary Committee conducted hearings into whether indoor prostitution should be criminalised, six of the ten committee members—including the Chair—left before the sex workers' turn to speak.[46]

This pattern has already emerged in the Republic of Ireland:

- In 2010, officials from the Irish Department of Justice, Equality and Law Reform visited Sweden on a "fact-finding" mission to examine the outworking of the law that criminalises clients. The mission did not include meeting with any Swedish sex workers to learn about how the law has affected them.[47]
- In November 2012, the Joint Oireachtas Committee on Justice, Defence and Equality made a repeat fact-finding visit to Sweden. The exclusion of Swedish sex workers from the itinerary was also repeated.[48]
- Between December 2012 and February 2013, the Oireachtas Committee held several hearings on the subject of prostitution law reform. The large majority of those invited to give their views were members of the Turn Off the Red Light campaign. Only near the end of the process were sex workers allowed to participate.[49]

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[44] Eriksson and Gavanas, *supra* note 6, p.49.

[45] Arthur Gould, "The Criminalisation of Buying Sex: The Politics of Prostitution in Sweden" (2001) 30 *Journal of Social Policy* 437, pp.447 and 452.

[46] "Sex workers testify at Senate hearing on prostitution bill" *Providence Journal* 17 September 2009, *http://www.projo.com/news/content/PROSTITUTION_BILL_06-19-09_UIEPAKU_v59.3cd847f.html* [Accessed 16 July 2011], reproduced at *http://swoplv.wordpress.com/2009/06/22/ri-sex-workers-testify-at-senate-hearing-on-prostitution-bill/#more-1277* [Accessed 25 October 2013]. The bill to outlaw indoor prostitution was subsequently passed.

[47] Department of Justice and Equality, reply to author's Freedom of Information request (20 May 2011)

[48] Houses of the Oireachtas Communication Unit, "Justice Committee Delegation to Visit Finland and Sweden" (12 November 2012), *http://www.oireachtas.ie/parliament/mediazone/pressreleases/name-13480-en.html* [Accessed 27 October 2013]

[49] "'Escort' web firm hits out at RTE sex work expose" *Sunday Independent* 17 February 2013, *http://www.independent.ie/irish-news/escort-web-firm-hits-out-at-rte-sex-work-expose-29076081.html* [Accessed 25 October 2013]

- A member of the Committee subsequently dismissed the sex workers' testimony to a local newspaper, saying "one has to always be suspicious that they are being put up to it".[50]
- When the Committee finally published its recommendations in June 2013, the views of the sex workers who contributed to the consultation process were remarkably under-emphasised. Instead, the report is dominated by the opinions of academics and NGOs—most of whom took a contrary view to that espoused by the active sex workers (that is, those who will be affected if the law is adopted).[51]

Such inattentiveness to sex workers' concerns not only breaches the participatory element of their right to health, but has other more practical drawbacks:

- The less closely the law reflects sex workers' operational needs, the less likely they are to comply with it.[52]
- Limiting sex workers' input into the policy process may also contribute to their disempowerment and increase their stigmatisation, and could have adverse impacts on health promotion and HIV prevention.[53]

1.5.2 The right to autonomy

The right to autonomy has an obvious parallel with the right to occupational health and safety. The evidence cited in this submission suggests that many sex workers feel their health would be better protected if they had—for example—more time to screen clients, or more control over their working environment. A law that denies them the measures they consider desirable or necessary in the interests of their health will also deny them their right to autonomous health-related decision-making.

2. Can the right to health justify client criminalisation?

This section will address the health-based arguments sometimes made in support of client criminalisation.

2.1 The claim that prostitution is incompatible with health

This claim can be divided into two sub-arguments:

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[50] "Review reveals shocking details on prostitution" *Clare Champion* 21 March 2013, *http://www.clarechampion.ie/?option=com_content&view=article&id=13665:review-reveals-shocking-details-on-prostitution&catid=41:politics&Itemid=60* [Accessed 3 July 2013], reproduced at *http://nothing-about-us-without-us.com/review-reveals-shocking-details-on-prostitution-clarechampion-ie-22-03-13/* [Accessed 27 October 2013]

[51] Houses of the Oireachtas Joint Committee on Justice, Defence and Equality, *Report on hearings and submissions on the Review of Legislation on Prostitution* (June 2013), *http://www.oireachtas.ie/parliament/media/committees/justice/1.Part-1-final.pdf* [Accessed 25 October 2013].

[52] Alison Arnot, *Legalisation of the sex industry in the state of Victoria, Australia: The impact of prostitution law reform on the working and private Lives of women in the legal Victorian sex industry* (Masters Research thesis, University of Melbourne Department of Criminology, 2002) *http://repository.unimelb.edu.au/10187/954* [Accessed 27 October 2013] p.110

[53] Diskrimineringsombudsmannen (Discrimination Ombudsman of Sweden), "Yttrande över "Förbud mot köp av sexuell tjänst. En utvärdering 1999–2008, SOU 2010:49" (Diskrimineringsombudsmannen, 2010), *http://www.do.se/sv/Om-DO/Remissvar/2010/Yttrande-over-Forbud-mot-kop-av-sexuell-tjanst-En-utvardering-1999-2008-SOU-201049/* [Accessed 27 October 2013]

2.1.1 Prostitution as an inherent risk

Supporters of client criminalisation may argue that the risks of prostitution exist regardless of the legal framework. Violence, HIV/STI and mental ill-health affect sex workers in legal as well as illegal sectors; legal sex workers still suffer the effects of stigmatisation.

While this is undoubtedly true, sex work is not unique in this respect. Fatalities are relatively high in the agricultural sector;[54] construction workers frequently miss work due to injury;[55] work-related illness (including mental ill-health) is common among social care workers.[56] Any one of these jobs could be deemed intrinsically hazardous. Their social value relative to prostitution may be a matter for debate, but that is not relevant to their status as high-risk occupations. Yet it is inconceivable that measures aimed at minimising health and safety risks to those workers would be rejected because of the inherent dangers they face.

As outlined in Appendix B, international law makes no such distinction as regards entitlement to the right to health. Sex workers have the same right as Assembly members and staff to the highest attainable standards of health. They should not need to exit the industry to have access to that right.

2.1.2 Prostitution as violence against women

Many feminists, in particular, conceptualise sex work as violence against women.[57] Prostitution is considered intrinsically damaging, and sex workers who claim to have escaped harm—or who ascribe the harm to the illegality of their work—are essentially said to be suffering from false consciousness.

This view rejects sex workers' right to take the steps they consider necessary to improve their health, insisting instead on its own idea of what sex workers need (which usually amounts to no less than exiting the sex trade entirely).[58] Harm is said to derive from the exchange of sex for money itself, rather than from any injury or illness sustained in the act. But if no injury or illness has been sustained, and no psychological damage can be detected, how can the "harm" be proven? To enshrine this position into law is to introduce measures which could lead to *demonstrable* harms in an attempt to avert merely *theorised* harms. It is an ideological, not evidence-based, form of law-making.

Furthermore, the "prostitution as violence against women" framework may itself contribute to the harms that sex workers face:

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[54] Health and Safety Authority, *Summary of Workplace Injury, Illness and Fatality Statistics 2011–2012* (Health and Safety Authority, 2013) *http://www.hsa.ie/eng/Publications_and_Forms/Publications/Corporate/stats_report_11_12.pdf* [Accessed 27 October 2013], p.27

[55] *Ibid*, p.11

[56] *Ibid*, p.12

[57] It is not clear where male sex workers fall into this framework.

[58] This point is well illustrated by the challenge to Canada's prostitution laws in *Bedford v Canada,* [2010] ONSC 4264: when the case was heard before the provincial court of first instance, notable violence against women theorists such as Melissa Farley testified in favour of retaining those sections of the Criminal Code that may, as outlined above, have the effect of placing sex workers at heightened risk of violence.

- It defines all (female) sex workers as victims, an imposed status of weakness which is clearly stigmatising.
- In this way, it may contribute to the perception of sex workers as easy targets for abuse—and encourage those inclined to commit more tangible forms of violence. The portrayal of sex workers as, for example, unable to reject client demands may give succour to those clients who believe that once they have paid their money they are entitled to demand what they want.
- Sex workers' negotiating position relative to clients and brothel managers may also be diminished when they are perceived as the weaker party to the transaction.[59]
- Theorists from this perspective frequently oppose harm reduction measures aimed at sex workers and their clients, arguing that they encourage or legitimise prostitution.[60]
- The stigmatisation exacerbated by this framework may make it more difficult for sex workers to leave the trade, due to negative reactions from others who learn of their past.[61]

2.2 The claim that criminalisation may improve public health

It has been argued that client criminalisation will lead to better public health outcomes by reducing the overall amount of prostitution.[62] However, it has not been demonstrated that any form of criminalisation has this effect:

- A number of studies of the effects of prohibitory laws have concluded that "criminal sanctions do not eradicate or reduce the extent of prostitution".[63]
- Others note a reduction in the amount of *street* prostitution, but suggest that the industry may have merely moved indoors.[64]

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[59] Barbara Sullivan, "Rethinking Prostitution" in *Transitions: New Australian Feminisms* (Sydney: Allen & Unwin, 1995).

[60] See for example "Aiding and abetting the slave trade" *The Wall Street Journal* 27 February 2003, reproduced at *http://www.uri.edu/artsci/wms/hughes/abetting_slave_trade.pdf* [Accessed 25 October 2013]. The opposition to targeted HIV prevention measures, described above, is another example.

[61] Joint United Nations Programme on HIV/AIDS and Inter-Parliamentary Union, *Handbook for Legislators on HIV/AIDS, Law and Human Rights: Action to Combat HIV/AIDS in View of its Devastating Human, Economic and Social Impact* (UNAIDS, 1999) *http://www.ipu.org/PDF/publications/aids_en.pdf* [Accessed 27 October 2013] p.56

[62] See for example Julie Bindel and Liz Kelly, *A critical examination of responses to prostitution in four countries: Victoria, Australia; Ireland; the Netherlands; and Sweden* (Child and Woman Abuse Studies Unit, London Metropolitan University, 2003), *http://www.glasgow.gov.uk/CHttpHandler.ashx?id=8843&p=0* [Accessed 27 October 2013], p.26

[63] Kay Daniels, "St Kilda voices" in *So Much Hard Work: Women and Prostitution in Australian History* (Sydney: Fontana/Collins, 1984) p.335, cited in Marcia Neave, "Prostitution laws in Australia: Past history and current trends" in *Sex Work and Sex Workers in Australia* (Sydney: University of New South Wales Press, 1994). See also, Federal/Provincial Territorial Working Group on Prostitution, *Report and Recommendations in Respect of Legislation, Policy and Practices Concerning Prostitution Related Activities* (Department of Justice Canada, 1998) *http://www.walnet.org/csis/reports/consult.rtf* [Accessed 27 October 2013], p.62; Alan Collins and Guy Judge, "Differential enforcement across police jurisdictions and client demand in paid sex markets" (2010) 29 European Journal of Law and Economics 43; Marina Della Giusta, "Simulating the impact of regulation changes on the market for prostitution services," (2010) 29 European Journal of Law and Economics 1; John Lowman and Chris Atchison: "Men who buy sex: A survey in the greater Vancouver Regional District" (2006) 43 Canadian Review of Sociology and Anthropology 281; Phil Hubbard, "Community action and the displacement of street prostitution: Evidence from British cities" (1998) 29 Geoforum 269, pp. 283–84.

[64] Stridbeck, *supra* note 11, p.53; Eriksson and Gavanas, *supra* note 6, p.63; Riksförbundet för Homosexuellas, Bisexuellas och Transpersoners Rättigheter, *supra* note 32, p.9; Marcia Neave, "The failure of prostitution law reform" (1988) 21 Australian and New Zealand Journal of Criminology 202, p.205; Samuel Cameron and Alan

- The often-made claim that prostitution has declined in Sweden is difficult to sustain on close examination. The 2010 Skarhed report, which serves as the usual source of this claim, is in fact rather cautious in its findings: "All of the above indicates that since the ban against the purchase of sexual services went into effect, street prostitution has been halved, and the Internet has arisen as an important contact interface for prostitution, but that there is no definite information as to the extent of Internet-based prostitution and that there is no indication that other forms of indoor prostitution have increased. There is no information from people working in the field to indicate that they have perceived an increase in prostitution activities. Because this type of activity is typically dependent on some form of advertising in order for contacts with clients to occur, it is unlikely that there would be any extensive type of prostitution that is completely unknown.

  "Altogether, this means that we can feel somewhat secure in the conclusion that prostitution as a whole has *at least not increased* in Sweden since 1999."[65]

- With "no definite information" about the extent of online prostitution, it is difficult to understand how any secure conclusion can be reached as to the scope of that sector; while the most that can be said about other forms of indoor prostitution is that no increase has been detected. This is not a basis for any definitive assertion about the size of Sweden's indoor sex industry—especially in view of the dearth of research into these sectors.

- Skarhed herself acknowledges this: "Compared with street prostitution, however, the extent of Internet prostitution is harder to verify and assess. Even if ads and offers of sexual services are checked and followed up, it is often difficult to assess to what degree they represent the actual supply of sexual services for money. One ad and one telephone number may refer to several people providing sexual services, but it is even more common that several ads and phone numbers come from one single prostitute. Ads may also remain online after the operations have ceased.

  "When it comes to indoor prostitution in which contact is made at restaurants, hotels, sex clubs or massage parlors, the available information on the extent to which this occurs is limited. We have not been able to find any in-depth studies of these forms of prostitution in the past decade."[66]

- While the report does cite figures relating to street prostitution, the assumption of causality is problematic. The data, which were compiled by sex worker outreach groups in Sweden's three largest cities of Stockholm, Gothenburg and Malmö, show a decrease from 726 street-based sex workers in 1998—the year before client criminalisation was introduced—to 296 in 2008.[67] However, the law's relationship to this apparent decline is far from certain: "The Department of Criminology at Stockholm University states that such marked changes in activities (50 percent decline) are rarely seen in the criminological literature. This raises a question of whether the reported changes are 'too good', and this observation would need to be discussed if the figures are used to exemplify the success of the ban. Secondly, the effects of the ban vary largely between

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Collins, "Estimates of a model of male participation in the market for female heterosexual prostitution services" (2003) 16 European Journal of Law and Economics 271, p.273.

[65] Swedish Institute, *supra* note 1, p.28 (emphasis added)

[66] *Ibid*, p.19

[67] *Ibid*, p.20

the three cities, which also needs to be discussed. And thirdly, a longer time series before the introduction of the ban would have been needed since the 1998 figures might have been an exception, an 'outlier'. Others have pointed out that the estimated numbers of street workers have been declining since the late 1970's, suggesting that any observed decline since the Act—if there is one—is part of a much longer trend. Furthermore, this trend is not a specifically Swedish phenomenon … but an international one."[68]

- Sweden's 2012 submission to UNAIDS admits the uncertainty around the size of the Swedish sex industry: "Estimates of the number of people who buy and sell sex in Sweden vary widely and are hard to confirm since the practice is mostly hidden and initiated primarily through the Internet or by telephone. Although street prostitution does occur it is assumed to account for only a fraction of total prostitution."[69]

- Even the street sector statistics measure only the numbers of *people* involved in on-street sex work; they do not measure the number of *transactions* that sex workers engage in. If, as has been suggested in Norway,[70] a loss of income forces sex workers to take on more clients, should not that too be calculated as an increase in prostitution—perhaps one sufficient to balance or even overcome any decrease as measured by the number who leave the industry?

- Recent enforcement of the Republic's soliciting law against clients also suggests that the main effect is one of dispersal, rather than actually reducing the incidence of prostitution. Some time after a high-profile "sting" operation in Limerick which led to the prosecution of 27 men who tried to buy sex from an undercover Garda, a local newspaper reported that "prostitutes are now operating in new areas of the city".[71]

Even if an overall reduction could be established, however, criminalising clients in the name of "public health" would still be impermissible from a human rights perspective, in light of the adverse health effects described earlier in this submission. To do so would pursue public health goals at the expense of individual sex workers' right to health—in contravention of established principles of human rights law. This is discussed further under Part A3, "Limitations to Protected Rights" in Appendix A.

3. The decriminalisation alternative

This submission will conclude by briefly presenting an alternative legal framework that appears to better protect sex workers' right to health. The public health bodies listed in Appendix B unanimously favour a decriminalisation approach: one in which neither the seller nor buyer of sex is criminalised, and sex work is regarded as a form of labour entitled to the same protections as other employment sectors. The 2012 joint report of the UNDP, UNFPA

[68] Dodillet and Östergren, *supra* note 1, p.8 (internal citations omitted)
[69] Smittskyddsinstitutet (Swedish Institute for Communicable Disease Control), *Global AIDS Response Progress Report 2012* (Smittskyddsinstitutet, 2012) *http://www.unaids.org/en/dataanalysis/knowyourresponse/countryprogressreports/2012countries/ce_SE_Narrative_Report.pdf* [Accessed 27 October 2013] p.28
[70] Bjørndahl, *supra* note 1, p.40
[71] "Prostitute sting operation to be stepped up" *Limerick Post* 26 September 2012, *http://www.limerickpost.ie/2012/09/26/prostitute-sting-operation-to-be-stepped-up/* [Accessed 20 October 2013]

and UNAIDS, *Sex Work and the Law in Asia and the Pacific*, clearly sets out the health-promoting benefits of this approach:

> "Evidence from the jurisdictions in the region that have decriminalized sex work (New Zealand and New South Wales) indicates that the approach of defining sex work as legitimate labour empowers sex workers, increases their access to HIV and sexual health services and is associated with very high condom use rates. Very low STI prevalence has been maintained among sex workers in New Zealand and New South Wales, and HIV transmission within the context of sex work is understood to be extremely low or nonexistent. In decriminalized contexts, the sex industry can be subject to the same general laws regarding workplace health and safety and anti-discrimination protections as other industries."[72]

Research into New Zealand's 2003 decriminalisation law has revealed generally favourable outcomes for sex workers' health and safety:

- In a 2007 study, 93.8% of the sex workers surveyed agreed that they had health and safety rights under the 2003 Act.[73]
- 64% said they felt "more able to refuse" a client since enactment of the law,[74] perhaps due to its explicit provision for their right to refuse any client or service.[75]
- The percentage who "felt that they had to accept a client when they didn't want to" was also significantly lower than in a study carried out four years before the law change.[76]
- Unlike their Nordic counterparts, New Zealand sex workers are encouraged to carry condoms; indeed, the Prostitution Reform Act obliges their use.[77] 62.5% of those surveyed said they had cited this law as a strategy with clients reluctant to use condoms.[78]
- The study also interviewed Six Medical Officers of Health working as "inspectors" under the law, with a remit to inspect brothel premises for compliance and respond to complaints. Despite some reservations, most felt the law had brought about actual health and safety improvements.[79]
- Positive mental health outcomes have also been noted: the study found that New Zealand sex workers consider their new rights to be "mentally enabling, allowing them to feel supported and safe".[80]

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[72] John Godwin, *Sex Work and the Law in Asia and the Pacific: Laws, HIV and human rights in the context of sex work* (Bangkok: United Nations Development Programme, 2012), p.6

[73] Gillian Abel, Lisa Fitzgerald and Cheryl Brunton, *The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers: Report to the Prostitution Law Review Committee* (University of Otago, 2007), *http://www.otago.ac.nz/christchurch/otago018607.pdf* [Accessed 27 October 2013] p.139

[74] *Ibid*, p.116

[75] Prostitution Reform Act 2003 (New Zealand) s.17

[76] Abel *et al*, *supra* note 73, p.117: percentages dropped from 53% to 44% in the street sector, 58% to 45% in the managed sector and 63% to 38% among independent indoor workers.

[77] Prostitution Reform Act 2003 (New Zealand) s.9

[78] Abel *et al*, *supra* note 73, p.124. This strategy was employed by approximately two-thirds of indoor sex workers but just under a third of street workers. However, the latter statistic does not mean that street workers are more likely to agree to sex without condoms: 66.7% chose "Refuse to do job" as a response to a reluctant client, compared to 56.6% of managed and 62.8% of private indoor workers. Multiple answers were possible.

[79] *Ibid*, p.157

[80] *Ibid*, p.13

- Stigmatisation remains an issue, but there are indications that this too has been lessened: many sex workers indicated that they felt more "legitimate" under the law,[81] and that relations with police had improved.[82]
- While this study did not directly investigate pimping, one of its findings does shed an interesting light on the question of whether decriminalisation benefits those who profit from others' prostitution. New Zealand law applies a strict regulatory regime to "managed" brothels, but allows premises shared by up to four self-employed sex workers to operate outside these requirements. These premises are known as small owner-operated brothels, or SOOBs. Although a number of managed brothels opened in the immediate wake of decriminalisation, many closed down within a few years—citing competition from sole operators and SOOBs.[83] This suggests that, far from promoting pimping, decriminalisation may enable sex workers to assert control of their own labour.
- For those who do opt for the managed sector, the wider range of legal choices at their disposal strengthens their negotiating position relative to brothel management—a factor that promotes better working conditions.[84]

[81] *Ibid*, pp.139–40
[82] *Ibid*, p.164
[83] Prostitution Law Review Committee, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington: New Zealand Ministry of Justice, 2008) pp.38, 93.
[84] Gillian Abel, *Decriminalisation: A Harm Minimisation and Human Rights Approach to Regulating Sex Work* (Doctor of Philosophy Thesis, University of Otago Department of Public Health and General Practice, 2010) *http://myweb.dal.ca/mgoodyea/Documents/CSWRP/CSWRPANZ/Gillian%20Abel%20PhD.pdf* [Accessed 27 October 2013] pp.243, 320

Appendix A: The right to health in international law

This submission is grounded in the following two essential elements of the right to health in international law:

1. States are, as a general principle, precluded from adopting policies that impede the enjoyment of the highest attainable standard of health.
2. No group of people can be categorically excluded from this right.

The international legal framework from which these elements are derived is set out below.

A1. The general scheme of the international right to health

The right to health is protected by a number of international law binding instruments and non-binding agreements to which the UK and Ireland are party. These include (but are not limited to) the following:

- The Constitution of the World Health Organization defines the right to health as the "enjoyment of the highest attainable standard of health … without distinction of race, religion, political belief, economic or social condition".[85]
- Article 12 of the International Covenant on Economic, Social and Cultural Rights guarantees "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".[86] This has been interpreted by the Committee on Economic, Social and Cultural Rights, the Covenant's monitoring body, not as "a right to be *healthy*"[87] but rather as "an inclusive right extending … to the underlying determinants of health", including, *inter alia*, "healthy occupational and environmental conditions".[88] States are therefore obliged to "undertake actions that create, maintain and restore the health of the population".[89]
- Articles 11-13 of the Convention on the Elimination of All Forms of Discrimination against Women recognise health as one of a number of rights guaranteed "on a basis of equality of men and women",[90] including the equal "right to protection of health and to safety in working conditions"[91] and the equal right to access health care services.[92]
- The Declaration and Programme of Action arising from the World Conference on Human Rights in Vienna in 2003 speaks of the special onus on states to "[c]reate and maintain adequate measures at the national level, in particular in the fields of education, health and social support, for the promotion and protection of the rights of persons in vulnerable sectors of their populations".[93]
- Resolution 1989/11 of the Commission on Human Rights states that "non-discrimination in the field of health should apply to all people and in all circumstances".[94]

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[85] Constitution of the World Health Organization 1946, Preamble
[86] International Covenant on Economic, Social and Cultural Rights 1966, art.12
[87] Committee on Economic, Social and Cultural Rights, *General Comment No. 14, the right to the highest attainable standard of health* (UN document E/C.12/2000/4, 11 August 2000) para. 8
[88] *Ibid*, para. 11
[89] *Ibid*, para. 37
[90] Convention on the Elimination of All Forms of Discrimination against Women 1979 art.11(1)
[91] *Ibid*, art.11(1)(f)
[92] *Ibid*, art.12(1)
[93] Vienna Declaration and Programme of Action 1993, para. 24
[94] UN Commission on Human Rights Resolution 1989/11 Non-Discrimination in the Field of Health, para. 2

Because the right to health is not a "right to be healthy", it is not unfulfillable merely because a person might suffer ill-health despite any preventive measures taken. The right to the highest attainable standard of health "presupposes a reasonable, not an absolute, standard"[95]; it is contextual by definition, and applies to those in risky environments no less than to others.

A2 Key concepts in the right to health applicable to client criminalisation

This sections set out the international legal framework surrounding the specific aspects of the right to health discussed in this submission.

A2.1 Freedom from violence

The right to freedom from violence is an essential component of the right to health. The Committee on Economic, Social and Cultural Rights (CESCR) makes this link explicitly in the following excerpts from its General Comment on the Right to Health:

- A "wider definition of health … takes into account such socially-related concerns as violence".[96]
- The International Covenant on Economic, Social and Cultural Rights (ICESCR) imposes a specific state obligation to "take measures to protect all vulnerable or marginalized groups of society … in the light of gender-based expressions of violence".[97]
- The obligation to protect the right to health is violated by "the failure to protect women against violence or to prosecute perpetrators".[98]

A2.2 Sexual health

- A working definition of "sexual health" was devised at an international consultation organised by the World Health Organization and the World Association of Sexology in 2002: "Sexual health is a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled".[99]
- The CESCR implicitly recognises sexual health as encompassed within Article 12. In its General Comment 14, it declares that "States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health."[100]

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[95] Virginia Leary, "The right to health in international human rights law" (1994) 1 *Health and Human Rights* 25, p.33
[96] Committee on Economic, Social and Cultural Rights, *supra* note 87, para. 10
[97] *Ibid*, para. 35
[98] *Ibid*, para. 51
[99] World Health Organization, *Defining sexual health: report of a technical consultation on sexual health, 28–31 January 2002, Geneva* (World Health Organization, 2006) http://www.who.int/reproductivehealth/publications/sexual_health/defining_sexual_health.pdf [Accessed 27 October 2013] p.5. It should be noted that this does not represent an official WHO definition of "sexual health".
[100] Committee on Economic, Social and Cultural Rights, *supra* note 87, para. 34

- Article 12(2) of the ICESCR requires States parties to take steps necessary for "[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases."[101] HIV/STI may be considered such a disease for those working in the sex industry.
- General Comment 14 suggests a number of other ways in which sex workers' sexual health is protected by Article 12. These include certain negative duties, under which states parties are prohibited from hindering the attainment of sexual health by women and other disadvantaged categories: "States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons … to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs.[102]
- The General Comment also sets out a list of core obligations under Article 12, which include "to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable and marginalized groups".[103]
- Another core obligation is "to provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them".[104] This suggests that parties to the ICESCR must actively engage with sex workers to assist their efforts at STI protection and treatment.

A2.3 Mental ill-health

As noted in Part A1 of this Appendix, Article 12 of the ICESCR explicitly identifies mental health as a key element of the right to health.

A2.4 Occupational health and safety

- According to the CESCR, the ICESCR imposes obligations on states "to adopt measures against environmental and occupational health hazards" and to develop "a coherent national policy to minimize the risk of occupational accidents and diseases".[105]
- Article 7(b) of the ICESCR additionally sets out a right to "safe and healthy working conditions".[106]
- In the International Labour Organization's Occupational Safety and Health Convention 1981, health is defined to include "the physical and mental elements affecting health which are directly related to safety and hygiene at work."[107]
- The ILO Convention also obliges states to "prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment".[108]

Sex workers cannot be excluded from the Convention for the following reasons:

[101] International Covenant on Economic, Social and Cultural Rights 1966 art 12.2
[102] Committee on Economic, Social and Cultural Rights, *supra* note 87, para. 34
[103] *Ibid*, para. 43(a)
[104] *Ibid*, para. 44(d)
[105] *Ibid*, para. 36
[106] International Covenant on Economic, Social and Cultural Rights 1966, art.7(b).
[107] Occupational Safety and Health Convention 1981 (ILO 155), art.3(e).
[108] *Ibid*, art.4.2.

- Articles 1 and 2 of the Convention state that it "applies to all branches of economic activity" and "to all workers".[109]
- Analogous protections for the self-employed (which would include sex workers operating independently) are set out in the ILO's 1981 Occupational Safety and Health Recommendation.[110]
- The ILO has elsewhere confirmed that it regards sex workers as encompassed within the category of "worker".[111]

A2.5 Health-related civil and political rights

Although a separate international covenant exists for rights categorised as "civil and political" rather than "economic, social and cultural", it has long been recognised that human rights are "indivisible and interdependent and interrelated".[112] Examples of their interdependency relevant to this submission include the following:

A2.5.1 The right of participation

- The CESCR recognises "the right to participation of the population in all health-related decision-making at the community, national and international levels" as an "important aspect" of the Article 12 right to health.[113]
- "Informed opinion and active co-operation on the part of the public" are deemed essential in the World Health Organization Constitution.[114]
- The Alma-Ata Declaration of the 1978 International Conference on Primary Health Care speaks of the "right and duty to participate individually and collectively in the planning and implementation of their health care".[115]

A2.5.2 The right to autonomy

- Neither the ICESCR nor General Comment 14 explicitly sets out a right to autonomy in health-related decision making. However, such a right may be inferred from one of the state duties recognised by the CESCR, namely, "supporting people in making informed choices about their health".[116] This suggests that states must not only promote the dissemination of health information, but must also allow individuals to use that information to make their own health-related decisions.
- The Declaration adopted at the Fourth World Conference on Women refers to "the right of all women to control all aspects of their health".[117]

A3. Limitations to protected rights

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[109] *Ibid*, arts 1-2
[110] Occupational Safety and Health Recommendation 1981 (ILO 164), arts 1–2
[111] In its "Corrigendum to 'HIV and the Law: Risks, Rights & Health' by the Global Commission on HIV and the Law", the ILO states: "The ILO Recommendation concerning HIV and AIDS and the World of Work, 2010 (No. 200) is applicable to all workers. Sex workers are not excluded from its scope of application." *http://www.ilo.org/aids/Whatsnew/WCMS_191720/lang--en/index.htm* [Accessed 28 October 2013]
[112] Vienna Declaration and Programme of Action 1993, para. 5
[113] Committee on Economic, Social and Cultural Rights, *supra* note 87, para. 11
[114] Constitution of the World Health Organization 1946, Preamble
[115] Alma-Ata Declaration (International Conference on Primary Health Care, 6–12 September 1978), para. IV
[116] Committee on Economic, Social and Cultural Rights, *supra* note 87,para. 37
[117] Beijing Declaration of the Fourth World Conference on Women 1995, para. 17

- While the ICESCR allows for limitations to all its protected rights, these must be "compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society".[118]
- States may not impose greater limitations than the ICESCR allows.[119]
- The CESCR interprets the above two clauses to mean that limitations to fundamental rights in the interest of public health must be "strictly necessary for the promotion of the general welfare", must be "the least restrictive alternative" available and should be "of limited duration and subject to review".[120]
- Thus, while a public health objective is *capable* of justifying limitations on individual rights, those limitations are subject to a necessity and proportionality requirement. This suggests that a state must aim to ameliorate the adverse public health impacts of prostitution in a manner that also promotes the health of those whom it cannot deter from sex work.
- If doing both proves impossible, and there are compelling grounds to prioritise public health over individual health, then—and only then—can it do so.[121]
- However, it must do so through means that *genuinely* advance public health. This suggests a high evidential threshold for any measures intended to improve public health through restrictions on individual rights.[122]
- Furthermore, it must aim to remove the infringement on individual rights as soon as the public health objective is achieved.

[118] International Covenant on Economic, Social and Cultural Rights 1966, art.4
[119] *Ibid*, art.5.1
[120] Committee on Economic, Social and Cultural Rights, *supra* note 87, paras 28–29
[121] Lawrence Gostin and Jonathan M. Mann, "Towards the development of a human rights impact assessment for the formulation and evaluation of public health policies" (1994) 1 Health and Human Rights 59, p.74. Outlining the conditions for a human rights-compliant limitation on individual rights in the interest of public health, the authors state as follows: "To determine the least restrictive alternative, non-coercive approaches should first be considered; if noncoercive approaches are insufficient, gradual exploration of more intrusive measures are permissible where clearly necessary."
[122] As Gostin and Mann (*ibid*) stress at p.77: "The risk to the public must be *probable*, not merely speculative or remote." (emphasis in original)

Appendix B: The perspective of the global health and human rights sector

The position advanced in this submission is shared by a growing number of bodies in the global health and human rights sector. The following are among those who have criticised laws that criminalise payment for sexual services:

- **The World Health Organization**: "Laws that directly or indirectly criminalize or penalize sex workers, their clients and third parties, and abusive law enforcement practices, stigma and discrimination related to HIV and sex work can undermine the effectiveness of HIV and sexual health programmes, and limit the ability of sex workers and their clients to seek and benefit from these programmes".[123]

- **The Global Commission on HIV and the Law**: "Since its enactment in 1999, the [Swedish] law has not improved—indeed, it has worsened—the lives of sex workers".[124]

- **Médécins du Monde**: "MdM rejette tout projet de pénalisation des clients qui relègue plus encore les personnes se prostituant dans des zones de non-droit. C'est un réel enjeu de santé publique et de respect des droits fondamentaux."[125] [Author's translation: "MdM reject any plan to penalise clients which relegates even more sex workers into zones of lawlessness. It is a real issue of public health and of respect for fundamental rights."]

- **The UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health**: "Effective interventions around the health of sex workers and clients should also consider shared responsibility and client behaviour; this is increasingly possible in an environment where clients are not criminalized for using the services of sex workers."[126]

- **The UN Development Programme (UNDP), the UN Population Fund (UNFPA) and the Joint UN Programme on HIV/AIDS (UNAIDS):** "To enable sex workers to fully enjoy rights to health and safety in the workplace requires decriminalization. Decriminalization of sex work requires the repeal of: (a) laws explicitly criminalizing sex work or clients of sex workers…"[127]

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[123] World Health Organization, *Prevention and treatment of HIV and other sexually transmitted infections for sex workers in low- and middle-income countries: Recommendations for a public health approach* (Geneva: World Health Organization, 2012), p.16

[124] Judith Levine, *Global Commission on HIV and the Law: Risks, Rights and Health* (United Nations Development Programme, 2012) *http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf* [Accessed 25 October 2013] p.38

[125] Médecins du Monde, "Médecins du Monde réclame l'abrogation de la loi sur le racolage public" (March 2013), *http://www.medecinsdumonde.org/Presse/Communiques-de-presse/France/Medecins-du-Monde-reclame-l-abrogation-de-la-loi-sur-le-racolage-public* [Accessed 20 October 2013]

[126] Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover* (UN document A/HRC/14/20, 27 April 2010) para. 50

[127] Godwin, *supra* note 72, p.36