Client Criminalisation and Sex Workers' Right to Health

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In recent years, Ireland has seen the emergence of a well-organised campaign to introduce legislation that criminalises the purchase, but not the sale, of sexual services. Commonly known as the Swedish model after the country that pioneered this approach,[1] the proposal for client criminalisation has received support from a wide variety of Irish political parties, trade unions and non-governmental organisations.[2] In June 2013 the Joint Oireachtas Committee on Justice, Defence and Equality recommended such legislation as one of a number of proposals aimed at tackling the Irish sex industry.[3]

But while a domestic consensus has seemingly formed in favour of client criminalisation, global health and human rights bodies have increasingly taken a contrary position: that *neither* party to a commercial sex transaction should be criminalised, at least where the parties are adults and the exchange takes place on a voluntary basis. Those who have criticised laws that criminalise sex workers[4] and their clients include the World Health Organization,[5] the

[1] The offence of purchase of sexual service is defined as obtaining "a casual sexual relation in return for payment". Penal Code (Sweden) s.6(11), official translation at *http://www.government.se/sb/d/3926/a/47455* [Accessed 20 October 2013]

[2] As of writing, the so-called Turn Off the Red Light campaign consisted of 66 civil society organisations. Turn Off the Red Light, "Who Are We?", *http://www.turnoffthe redlight.ie/about/whos-involved/* [Accessed 20 October 2013]

[3] Joint Oireachtas Committee on Justice, Defence and Equality, "Joint Committee recommends law banning the purchase of sexual services" 27 June 2013, *http://www.oireachtas.ie/parliament/mediazone/pressreleases/name-17366-en.html* [Accessed 20 October 2013]

[4] "The term 'sex worker' is used to refer to all adults who sell or exchange sex for money, goods or services (e.g. transport). It is used to refer to people who sell or exchange sex even if they do not identify as sex workers, or consider the activity to be 'work'. The term is used to refer to sex workers including consenting female, male, and transgender people who receive money or goods in exchange for sexual services, either regularly or occasionally. Sex workers include consenting young people who are eighteen years or older. ... The terms 'prostitution' and 'prostitute' have negative connotations and are considered by advocates of sex workers to be stigmatizing." 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.ix

[5] 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

Global Commission on HIV and the Law,[6] Médécins du Monde,[7] the United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health[8] and, in a 2012 joint report, the United Nations Development Programme (UNDP), the United Nations Population Fund (UNFPA) and the Joint United Nations Programme on HIV/AIDS (UNAIDS).[9]

This article will set out the international legal basis for this alternative consensus among actors in the international health and human rights sectors. It will argue against client criminalisation from a human rights perspective, focusing on sex workers' right to health. After a brief introduction to the right to health in international law, it will set out various elements of the right to health that are implicated in the proposal to criminalise sex workers' clients. Using examples from research in countries that penalise the purchase of sex—whether directly, as in Sweden, Norway, Fiji, and parts of the United States, or indirectly through soliciting or "kerb crawling" laws as in Ireland, Canada and the United Kingdom—it will show how these laws may jeopardise the health of sex workers in a number of ways, impairing their right to health under international law. It will then consider and rebut the argument that client criminalisation actually promotes the right to health, showing this to rest on unsupportable ideological assumptions and flawed interpretations of human rights law. Finally, it will briefly examine an alternative model—that of New Zealand, in which neither sex workers nor their clients are criminalised, and sex work is treated as a form of labour.

The Right to Health in International Law

The right to health is guaranteed by a number of instruments of both hard and soft law. Hard law includes treaties to which state parties have agreed to be legally bound under the principle of *pacta sunt servanda* ("agreements must be kept") codified in the Vienna Convention on the Law of Treaties.[10]

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[6] 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

[7] 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]

[8] 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

[9] Godwin, *supra* note 4, pp.23, 36

[10] Vienna Convention on the Law of Treaties 1969, art.26. The binding nature of a treaty should not be confused with its enforceability: the duty of compliance under

Soft law may be defined as "nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct."[11] While soft law instruments create no obligations of their own, they may reflect a consensus on the meaning of those already found in treaty law, or may serve as evidence of an *opinio juris* (acceptance of legal obligation) ultimately leading to the emergence of customary rules.[12] Customary rules themselves are a form of hard law, as they are "normally binding upon all members of the world community."[13]

The Constitution of the World Health Organization (WHO), a soft law instrument, defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[14] It then goes on to define 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."[15] In this formulation, the right to health is the right to be as healthy as one can possibly be.

While the WHO Constitution does not have binding power, its influence can be seen on the framing of the right to health in the International Covenant on Economic, Social and Cultural Rights, a hard law instrument ratified by Ireland in 1989. Article 12 of the Covenant guarantees "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[16] This was subsequently expanded on by the Committee on Economic, Social and Cultural Rights, the Covenant's monitoring body. In its General Comment 14 on the Right to Health, the Committee interpreted Article 12 not as "a right to be *healthy*"[17] but rather as "an inclusive right extending ... to the underlying determinants of health," including, *inter alia*, "healthy occupational and environmental conditions."[18] States parties to the Covenant are therefore obliged, according to the Committee, to "undertake actions that create, maintain

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the Vienna Convention exists in the international sphere irrespective of the treaty's status in domestic law, or the mechanisms available to enforce it. See the judgment of Fennelly J in *Kavanagh v Governor of Mountjoy Prison* [2002] I.E.S.C. 13 at 43 (acknowledging that an agreement may be binding in international law without a corresponding domestic obligation).

11 Andrew T. Guzman and Timothy L. Meyer, "International Soft Law" (2010) 2(1) Journal of Legal Analysis 171, p.174

12 Dinah Shelton, "Normative Hierarchy in International Law" (2006) 100(2) American Journal of International Law 291, p.320

13 Antonio Cassese, *International Law*, 2nd edn (Oxford: Oxford University Press, 2005), p.157

14 Constitution of the World Health Organization 1946, Preamble

15 *Ibid*

16 International Covenant on Economic, Social and Cultural Rights 1966, art.12

17 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

18 *Ibid*, para.11

and restore the health of the population."[19] Although the pronouncements of human rights treaty monitoring bodies have only the status of soft law, they are nonetheless influential and have been regarded, in some cases, as authoritative.[20]

Other human rights agreements explicitly ground the right to health in a right to equal treatment and non-discrimination, affirming the Covenant's promise of a right that belongs to "everyone." The Convention on the Elimination of All Forms of Discrimination against Women, a binding treaty to which Ireland acceded in 1985, recognises health as one of a number of rights guaranteed "on a basis of equality of men and women."[21] It includes the equal "right to protection of health and to safety in working conditions"[22] and the equal right to access health care services.[23] Later soft law instruments have sought to extend these protections to all disadvantaged groups: the Declaration and Programme of Action arising from the World Conference on Human Rights in Vienna in 1993, which has been endorsed by the UN General Assembly,[24] 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."[25] Resolution 1989/11 of the UN Commission on Human Rights takes perhaps the broadest equality-based approach of all, stating that "non-discrimination in the field of health should apply to all people and in all circumstances."[26]

While this is a necessarily brief (and non-comprehensive) overview, it should be sufficient to reach two critical conclusions regarding states' duties to safeguard the right to health. The first is that states are, as a general principle, precluded from adopting policies that impede the enjoyment of the highest attainable standard of health. The second is that no group of people can be categorically excluded from the right. These twin premises form the backdrop to this article's contention that legislation to criminalise sex workers' clients may breach Ireland's obligations vis-à-vis the right to health in international law.

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[19] *Ibid*, para.37

[20] Dinah Shelton, "The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies" in *Coexistence, Cooperation and Solidarity* (Leiden: Martinus Nijhoff, 2011), pp.553–575

[21] Convention on the Elimination of All Forms of Discrimination against Women 1979 art.11(1)

[22] *Ibid*, art.11(1)(f)

[23] *Ibid*, art.12(1)

[24] UN General Assembly Resolution 48/121 World Conference on Human Rights 1993, para.2

[25] Vienna Declaration and Programme of Action 1993, para.24

[26] UN Commission on Human Rights Resolution 1989/11 Non-Discrimination in the Field of Health, para.2

Key Concepts in the Right to Health and their Application to Client Criminalisation

Although no treaty explicitly recognises the rights of those who sell sex outside the contexts of coercion and trafficking, sex workers can nonetheless be easily accommodated within the international legal framework as set out above. This section will identify five key concepts in the right to health with application to sex work: freedom from violence, sexual health, mental health, occupational health and safety, and health-related civil and political rights. After situating each concept within the international right to health, it will show how client criminalisation may undermine sex workers' enjoyment of that element of the right.

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 makes this link explicitly, stating that a "wider definition of health...takes into account such socially-related concerns as violence."[27] The Committee finds in the Covenant 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."[28] It further states that the obligation to protect the right to health is violated by "the failure to protect women against violence or to prosecute perpetrators."[29]

No *direct* link has been proven between client criminalisation and the rate of violence against sex workers. 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;[30] however, these figures are not directly comparable, as the first relates solely to the previous three years while the latter reflects lifetime experience. Surprisingly, no research appears to have been carried out in Sweden on this specific subject, and anecdotal reports are contradictory.[31] Nonetheless, there are a number of ways in which the

[27] Committee on Economic, Social and Cultural Rights, *supra* note 17, para.10

[28] *Ibid*, para.35

[29] *Ibid*, para.51

[30] 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

[31] An official Swedish government evaluation concluded that predictions that the law would "increase the risk of 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=attachment Duplicator_1_attachment* [Accessed 27 October 2013] p.32. However, in reviewing a

law may foster an environment of greater vulnerability to violence—or hinder action against those who commit it. These include deterring sex workers from engagement with police, encouraging risk-taking to avoid police, interfering with their mechanisms to screen out dangerous clients, increasing the number of clients who are dangerous relative to those who are not, impeding their ability to safely negotiate with clients and diminishing their independence. Each will be described in turn below.

Fear of Engagement with Police

Where selling sex is illegal, sex workers are reluctant to report assaults for fear of being charged with prostitution-related offences. In interviews conducted with Dublin-based sex workers after public soliciting of prostitution was outlawed,[32] nearly all those who said they would not go to police if attacked cited this risk as a reason.[33] Eliminating this fear is an aim often cited by advocates of client criminalisation, who simultaneously call for repeal of the crime of soliciting as applied to people who *sell* sex.[34]

In Norway, however, where no soliciting law existed before 2009,[35] 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,[36] 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.[37] The 2012 City of Oslo report states that sex workers

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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

[32] Criminal Law (Sexual Offences) Act 1993 (1993 No. 20) s.7

[33] Ann Marie O'Connor, *Women Working in Prostitution: Towards a Healthier Future: Second Report Prepared for EUROPAP and the Eastern Health Board (Women's Health Project)* (1996), *http://www.drugsandalcohol.ie/5616/1/2030-023Women.pdf* [Accessed 20 October 2013] p.18

[34] Turn Off the Red Light campaign, *Submission to the Joint Oireachtas Committee on Justice, Equality and Defence on the Discussion Document of Future Direction of Prostitution Legislation* (31 August 2012) *http://www.turnofftheredlight.ie/wp-content/uploads/2012/09/TORL-Joint-Submission-.pdf* [Accessed 20 October 2013] p.1

[35] s.202a of the General Civil Penal Code (Norway) [hereinafter Norwegian Penal Code] introduced the offence of purchasing sexual services. Prior to this, neither sex worker nor client was criminalised.

[36] Pro Sentret, "About us" *http://prosentret.no/en/om-oss/* [Accessed 20 October 2013]

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

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."[38] Meanwhile, a revealing statement by Stockholm's Detective Superintendent Jonas Trolle suggests that the Swedish police do not perceive their role as allies, either: "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."[39]

In Norway, this relationship has also been adversely affected by a crackdown on landlords who rent premises where prostitution occurs. A police operation (remarkably named "Operation Homeless") aims at strengthening enforcement of a Penal Code provision that targets landlords who allow prostitution on their rented premises, with a penalty of up to five years' imprisonment.[40] The fear of eviction due to "Operation Homeless" has reportedly deterred flat-based sex workers from alerting police to crimes against them—and may have the knock-on effect of encouraging commission of those crimes, as the perpetrators know they are unlikely to be reported.[41]

Notably, some supporters of client criminalisation in Ireland have also called for a change in the law to make sex workers' landlords easier to prosecute. In its Submission to the Joint Oireachtas Committee on Justice, Equality and Defence advocating the criminalisation of men who pay for sex, Ruhama, one of the NGOs leading the Turn off the Red Light campaign, additionally wrote:

> While most landlords are tricked into renting out apartments which are then used as brothels, there are however some landlords renting out properties to women, knowing they will be used as brothels ... there needs to be a lower burden of proof so that landlords do not use the defence of not being aware of how their property was being used.[42]

This proposal was endorsed by the Oireachtas Committee on Justice, Defence, and Equality, whose June 2013 recommendations include the introduction of "an offence of recklessly permitting a premises to be used for the purposes of prostitution."[43]

Of course, a ban on purchasing sex need not lead inevitably to a crackdown on landlords—or to police targeting of sex workers on other

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[38] Bjørndahl, *supra* note 30, p.38

[39] "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]

[40] Norwegian Penal Code, *supra* note 35, s.202

[41] Bjørndahl, *supra* note 30, p.42; see also pp.31, 37 and 41

[42] Ruhama, *Submission to the Joint Oireachtas Committee on Justice, Equality and Defence: Review of Legislation on Prostitution 2012, http://www.ruhama.ie/easyedit/files/dec12fullsubmissiontooireachtas%20Word.pdf* [Accessed 20 October 2013], p.28

[43] Joint Oireachtas Committee on Justice, Defence and Equality, *supra* note 3

grounds. It would be possible, notwithstanding the Oireachtas Committee's recommendation, to criminalise clients without making further legislative changes. The Irish police could also take a less antagonistic approach to enforcement. However, as long as Gardaí have a mandate to stop sex work from occurring, those whose income depends on it will have a strong incentive to avoid them.

Risks Taken to Avoid Police

The actions that sex workers take to avoid police may also put them at risk of violence. A common example involves street workers moving from a patrolled location to one where they are less likely to be detected—often, an industrial or otherwise isolated area. A substantial body of evidence suggests that enforcement of Canada's anti-soliciting law[44] has this dispersal effect, which is often followed by an increase in violent crime against sex workers (although a causal link cannot be definitively established).[45] Even if the new area is not particularly isolated, a heightened risk may exist due to less familiarity with surroundings, or needing to work later at night when detection is less likely.[46] Displacement may also have the effect of isolating sex workers from each other, making it difficult to share information on dangerous clients.[47]

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[44] s.213(1)(c) of the Criminal Code (Canada) makes it an offence to communicate in public for the purpose of prostitution. In December 2013, Canada's Supreme Court unanimously held that this provision, by criminalising steps that sex workers could take to reduce their risk of violence, breaches their right to security of the person under s.7 of the Canadian Charter of Rights and Freedoms: *Canada v Bedford* [2013] S.C.C. 72. Two further sections of the Criminal Code—s.210, outlawing most indoor prostitution, and s.212(1)(j), prohibiting living on the avails of prostitution—were struck down on the same grounds. However, as the Court suspended its declaration of invalidity for one year, all three laws remain in force while Parliament considers its legislative response.

[45] House of Commons (Canada), *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws—Report of the Standing Committee on Justice and Human Rights; Report of the Subcommittee on Solicitation Laws* (Parliament of Canada, 2006) *http://www.parl.gc.ca/Content/HOC/Committee/391/SSLR/Reports/RP2610157/391_JUST_Rpt06_PDF/391_JUST_Rpt06-e.pdf* [Accessed 27 October 2013] p.62; 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] pp.9 and 59. See also *Bedford v Canada* [2010] O.N.S.C. 4264 paras 150–154 citing Department of Justice (Canada), *Street Prostitution: Assessing the Impact of the Law: Synthesis Report* (Ottawa: Department of Justice, 1989)

[46] Tracey Sagar, "Tackling on-street sex work: Anti-social behaviour orders, sex workers and inclusive inter-agency initiatives" (2007) 7(2) Criminology and Criminal Justice 153, p.157

[47] House of Commons (Canada), *supra* note 45, pp.63–64

These issues do not arise only where sex workers themselves are criminalised: the client's fear of arrest may also divert prostitution into isolated areas. Describing the effect of police crackdowns, a New England sex worker says: "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."[48]

This risk appears consistently in the literature from other countries where the purchase of sex has been criminalised. 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 wooded areas, isolated stairwells and office premises, where clients do not risk discovery."[49]

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."[50] The 2012 City of Oslo report additionally found:

> 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.[51]

Enforcement of Ireland's current soliciting law against clients may have already had some dispersal effect: 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."[52] While there are no reports thus far of resulting violence, there are clearly grounds for concern about increased vulnerability, if the targeting of sex workers' clients has prompted them to seek out more hidden locations where they will not be detected by police.

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[48] 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

[49] 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

[50] 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

[51] Bjørndahl, *supra* note 30, pp.34–35

[52] "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]

Interference with Effective Screening Mechanisms

Criminal laws may also inhibit sex workers' ability to screen out potentially dangerous clients. Canada's anti-soliciting provision has been criticised as pressurising sex workers to move into private locations quickly and perhaps before they have had sufficient time to evaluate the client—for such factors as whether he appears to be drunk or unstable, or has been reported by other sex workers as a "bad date."[53] Irish sex workers have similarly complained that they must make more hasty decisions under the soliciting law: "You used to look out for clients, now you're looking out for the police as well. You'll jump into the first car that stops. You can't concentrate on two things at once."[54]

These effects have also been noted where only clients are criminalised. The "kerb-crawling" provision in English law[55] has been said to cause pressure on sex workers to get into clients' cars more quickly.[56] In Sweden, researchers have found that sex work now involves a "lightning decision" in which street-based workers simply get into the first car that stops for them,[57] while in Norway the pressure to reach agreement quickly is reported to have "increased considerably after the criminalization of the purchasing of sex."[58]

Increase in Proportion of Dangerous Clients

Advocates of client criminalisation support the measure on the premise that it will reduce prostitution by reducing the "demand" element. However, it appears to be mainly the non-violent clients that criminalisation deters—with little effect on the dangerous ones. According to the 2012 City of Oslo report:

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[53] House of Commons (Canada), *supra* note 45, p.64

[54] O'Connor, *supra* note 33, p.18

[55] s.1 of the Sexual Offences Act 1985 (c.44) (UK) defined "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." This Act was repealed in its entirety by the Policing and Crime Act 2009 (c.26) (UK), which created the offence of soliciting a person "in a street or public place ... for the purpose of obtaining [the solicited person's] sexual services as a prostitute." (s.19)

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

[57] 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]

[58] Bjørndahl, *supra* note 30, p.39

> 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. These are often "average men." A common assumption is that fewer men from this category will purchase sexual services now that prostitution has been criminalized since this type of customer is law-abiding. They will refrain from purchasing sex due to the new Act. These customers are described as the easiest to serve.
>
> 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 to buy sexual services but because they want to abuse them.[59]

Similar effects from client-targeting measures have been reported in England[60] and Sweden.[61] While it is yet to be clearly established what factors distinguish clients who respond to deterrence strategies from those who do not, two possibilities might be suggested. The first is that people with violent tendencies are generally less risk-averse than others,[62] making the threat of prosecution less likely to influence their behaviour. It may also be that a person willing to risk the serious penalties for bodily harm offences would have little fear of arrest on a lesser prostitution charge.

For whatever reason, such measures may inadvertently put sex workers at greater risk by decreasing the proportion of "safe" clients relative to violent clients—and thus increasing the likelihood that any given client will turn out to be dangerous. The Oslo report goes on to say:

> 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.[63]

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[59] *Ibid*, p.37

[60] 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)

[61] Stridbeck, *supra* note 57, pp.12–13

[62] Anthony Mawson, "Reinterpreting Physical Violence: Outcome of Intense Stimulation-seeking Behaviour" (1999) 6 Academic Emergency Medicine 863

[63] Bjørndahl, *supra* note 30, p.37

This has serious implications for the health and safety rights of sex workers under criminal laws that aim to reduce demand by targeting clients.

Interference with Client Negotiations

Another common safety measure is negotiating prices and services at the start of an interaction with a client. Having "set prices" is a common strategy by which sex workers assert control over a potential transaction.[64] However, fear of arrest may lead them to omit this vital step,[65] and allow the client to name the service he wants and the price he is willing to pay for it. Violence may result if a dispute subsequently arises over price or services.[66]

The client's fear of arrest can also 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 often are alone with the client when the final agreement is made, because conflict can more easily arise about what has been agreed upon ... .[67]

This effect may seem paradoxical: the criminalisation of only one party to a transaction might intuitively be expected to benefit the other party. Such logic, however, overlooks the imbalance that may already exist between the parties. For those engaged in survival sex work[68] in particular, the need to sell sex may outweigh the "need" of the client to buy it—and in

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

[65] House of Commons (Canada), *supra* note 45, p.65

[66] John Lowman, "Violence and the Outlaw Status of (Street) Prostitution in Canada" (2000) 6 Violence Against Women 987, p.1004; Tamara O'Doherty, "Criminalization and Off-Street Sex Work in Canada" (2011) 53 Canadian Journal of Criminology and Criminal Justice 217, p.227

[67] Bjørndahl, *supra* note 30, pp.39–40

[68] There is no universally-agreed definition of "survival sex work." It is used here to refer to prostitution which is engaged in as an alternative to starvation, theft, deportation or other unacceptable options, rather than out of a genuine preference over other income-generating activities.

those circumstances, the seller can ill-afford to seek to extract advantages from the buyer's criminalised status. It is entirely understandable, even predictable, that a sex worker in already desperate straits would negotiate with a client on his terms if the only practical alternative is losing the client entirely. The diminution of the client base through criminalisation is likely only to magnify this effect.

Diminished Independence

One of the most frequently-made, and arguably most persuasive, arguments for client criminalisation is the need to free sex working women from the control of "pimps." It is therefore ironic that criminalising clients may actually *increase* sex workers' reliance on pimps. In its 2004 investigation into the outworking of the law in Sweden, the Norwegian Ministry of Justice and the Police found that "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."[69]

In relation to indoor prostitution, the same report stated, "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."[70]

This effect has also been acknowledged by the Swedish National Board of Health and Welfare, which 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.[71]

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. The City of Oslo report states:

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[69] Stridbeck, *supra* note 57, p.52 (capitalisation as in original)
[70] *Ibid*, p.53
[71] Eriksson and Gavanas, *supra* note 49, pp.47–48

> 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.[72]

Finally, the law may make it easier for exploitative pimps to avoid justice: the Norwegian Ministry report found that "clients no longer provide tip-offs about pimps, for fear of being arrested themselves."[73]

These reports do not necessarily indicate an increase in violence against sex workers. The "pimp–prostitute" relationship is not inevitably a violent one.[74] However, the potential for abuse and exploitation is clearly heightened where an already-vulnerable population is made more dependent on persons operating outside the law.

Sexual Health

The Committee on Economic, Social and Cultural Rights implicitly recognises sexual health as encompassed within the right to health under Article 12 of the Covenant. 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."[75]

"Sexual health" is not defined in the General Comment. However, a working definition 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,

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[72] Bjørndahl, *supra* note 30, p.39

[73] Stridbeck, *supra* note 57, p.19

[74] Chris Bruckert and Tuulia Law, *Beyond Pimps, Procurers and Parasites: Mapping Third Parties in the Incall/Outcall Sex Industry* (University of Ottawa Faculty of Social Sciences, 2013) *http://www.socialsciences.uottawa.ca/gis-msi/eng/documents/ManagementResearch.pdf* [Accessed 20 October 2013]

[75] Committee on Economic, Social and Cultural Rights, *supra* note 17, para.34

> 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.[76]

While all elements of this definition are relevant to sex workers, this article will address the physical aspects of sexual health, specifically those relating to sexually-transmitted infection (STI) including HIV/AIDS. This is an obvious risk for full service sex workers,[77] making STI a key issue in their sexual health. Article 12(2) of the Covenant requires States parties to take steps necessary for "[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases."[78]

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.[79]

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."[80] There should be little dispute that sex workers fall under this rubric. 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."[81] This suggests that states parties must actively engage with sex workers to assist their efforts at STI protection and treatment.

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[76] 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."

[77] The term "full service sex worker" is sometimes used within the sex industry to distinguish those who engage in activities involving genital contact (such as intercourse and oral sex) from other sex workers, such as exotic dancers or practitioners of bondage and sadomasochism, who do not typically have genital contact with their customers.

[78] International Covenant on Economic, Social and Cultural Rights 1966, art.12.2

[79] Committee on Economic, Social and Cultural Rights, *supra* note 17, para.34

[80] *Ibid*, para.43(a)

[81] *Ibid*, para.44(d)

As infection can be transmitted through full service sex work, STI might be considered merely an occupational hazard, irrespective of the legal status of prostitution. It has been argued, however, that the illegality of sex work "may itself be an HIV risk factor"[82]—with similar implications for other sexually-transmitted infections. As will be shown below, this risk may also be present where only those who pay for sex are criminalised: a ban on only the purchase of sex may hinder sex workers' access to health services, deter their use of condoms and place them at greater risk of contracting STI through violence.

Obstacles to Accessing Health Services

Outreach to persons in high-risk categories is an essential element of HIV prevention[83] and is also important in addressing other aspects of sex workers' health. However, sex workers can be difficult to reach where their status is illegal. UNAIDS states that where sex work is illegal and punishable, the secrecy surrounding it makes HIV and STI prevention and treatment programs "nearly impossible to implement."[84] Criminalisation risks alienating sex workers from available services, and deterring them from seeking information and education on safer sex.[85]

While there may seem little reason for this to occur where only buying sex is criminalised, it has been identified as an effect of the law by NGOs in Norway's HIV/AIDS sector. In their contribution to Norway's 2010 UNAIDS submission, the NGOs said, "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 ..."[86] The NGOs added that the prohibition on purchasing sex "makes it increasingly difficult to reach sex workers with prevention work and information."[87] An increased feeling of

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[82] Blankenship and Koester, *supra* note 48, p.549

[83] World Health Organization, *Priority interventions: HIV/AIDS prevention, treatment and care in the health sector*, 2nd edn (Geneva: World Health Organization, 2010), p.4

[84] Joint United Nations Programme on HIV/AIDS, *Sex work and HIV/AIDS: UNAIDS technical update* (UNAIDS 2002) *http://data.unaids.org/publications/IRC-pub02/jc705-sexwork-tu_en.pdf* [Accessed 27 October 2013] p.8

[85] *Ibid*

[86] Helsedirektoratet, *supra* note 50, p.95. The term "harm reduction" was developed in the context of mainly intravenous drug use to describe measures aimed primarily at alleviating negative outcomes for continuing users, as opposed to measures aimed primarily at reducing or deterring use. In the sex work context it may refer to, for example, promotion of greater condom use, "ugly mugs" schemes which facilitate sex workers' sharing of information about dangerous clients, or, according to some views, decriminalisation itself. See Linda Cusick, "Widening the Harm Reduction Agenda: From Drug Use to Sex Work" (2006) 17 International Journal of Drug Policy 3

[87] Helsedirektoratet, *supra* note 50, p.102

stigmatisation on the part of sex workers may have also adversely affected their interaction with health services. This will be discussed further below.

Deterrents to Condom Use

Condoms are recognised by the World Health Organization as having "an 80% or greater protective effect against the sexual transmission of HIV and other STIs."[88] They are therefore essential tools for protecting sex workers' sexual health. Criminal laws, however, can create barriers or disincentives to their use. As will be shown below, this may occur when condoms are used as evidence of prostitution, by hindering sex workers' ability to negotiate condom use, or because of opposition to HIV prevention efforts specifically targeted at clients.

1. Condoms as evidence of prostitution

Where sex work is illegal, police often treat possession of condoms as evidence of prostitution. This can have the effect of deterring sex workers from carrying condoms, increasing the likelihood that they will engage in unprotected sex with a client.[89]

This tactic may also be used in jurisdictions where only buying sex is illegal. Johannes Eriksson of 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*."[90] In its 2010 submission to UNAIDS, Norway's Directorate of Health acknowledged similar 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."[91]

The NGOs from Norway's HIV/AIDS sector who contributed to the UNAIDS submission likewise alleged that condoms are now used as evidence of prostitution.[92]

As with the police practices described above, this is a consequence that could—at least in theory—be avoided under an Irish sex purchase ban.

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[88] World Health Organization, "Condoms for HIV Prevention" *http://www.who.int/hiv/topics/condoms/en/* [Accessed 27 October 2013]

[89] Acacia Shields, *Criminalizing Condoms: How Policing Practices Put Sex Workers and HIV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe* (Open Society Foundations, 2012) *http://www.opensocietyfoundations.org/sites/default/files/criminalizing-condoms-20120717.pdf* [Accessed 27 October 2013] pp.18–22

[90] 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)

[91] Helsedirektoratet, *supra* note 50, p.36

[92] *Ibid*, p.94

Indeed, some US jurisdictions have recently announced that they will end the practice of using condoms as evidence of prostitution, even while retaining their criminal penalties for buying and selling sex.[93] However, the effects of those decisions on the ground have yet to be seen. While condoms can be excluded as evidence in prosecutions, it is another matter for the police to disregard them entirely. Irish law already allows the Garda Síochána to act on the basis of "reasonable cause to suspect" that a person is loitering for the purpose of prostitution;[94] the courts have been relatively flexible in their interpretation of "reasonable cause," not requiring that any material on which it is based be admissible in evidence.[95] Should client criminalisation be enacted and Gardaí placed under renewed pressure to prevent prostitution, it seems likely that the heavy enforcement expected of them would expand, rather than narrow, the types of evidence they would deem to give rise to reasonable cause for suspicion.

2. Barriers to condom negotiation

Researchers in the United States, where both buying and selling sex are widely prohibited, have found that criminal laws reduce sex workers' "bargaining power" over clients reluctant to use condoms.[96] Other evidence suggests that client criminalisation alone may promote unprotected commercial sex. This has been attributed to a decrease in clients, with a consequent loss of income (which makes requests for unsafe sex more difficult to refuse)[97] and increased competition among workers.[98] According to the City of Oslo report:

> 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

[93] "NY Prosecutors Condemn Confiscating Condoms as Evidence of Prostitution" JD Journal 8 June 2013, *http://www.jdjournal.com/2013/06/08/ny-prosecutors-condemn-confiscating-condoms-as-evidence-of-prostitution/#* [Accessed 20 October 2013]

[94] Criminal Law (Sexual Offences) Act 1993 (1993 No. 20) s.8(1)

[95] See *DPP v O'Driscoll* [2010] I.E.S.C. 42 for a concise summary of "reasonable cause" in Irish law.

[96] Blankenship and Koester, *supra* note 48, p.550

[97] *Ibid*; Eriksson, *supra* note 90, para.5; Stridbeck, *supra* note 57, p.12 citing Socialstyrelsen, *Kännedom om Prostitution 2003* (Socialstyrelsen, 2004); Östergren, *supra* note 57; Campbell and Storr, *supra* note 60; Pro Sentret, *supra* note 37, p.57

[98] Stridbeck, *supra* note 57, 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

> 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.[99]

In Fiji, which criminalised both the purchase and sale of sex in 2009, a report by the International HIV Research Group at the School of Public Health and Community Medicine, University of New South Wales, 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' term .... Fear of losing a client is an incentive to comply with a client's wishes for sex without a condom.[100]

The actual impact on sex workers' health is difficult to measure. The only available statistics are those recorded by Oslo's Pro Sentret, whose latest annual report reveals no particular pattern: since 2008, the year before client criminalisation, the STI prevalence rate among sex workers has increased for some types of infections but has decreased for others.[101] Nonetheless, for any *individual* sex worker, a greater likelihood of engaging in unprotected sex will clearly correspond with a greater likelihood of contracting an infection spread by unprotected sex. It is for this reason that UNAIDS, in its Guidance Note on HIV and Sex Work, stresses the importance of policies enabling sex workers to "assert control over their working environments and insist on safer sex."[102]

3. Opposition to targeted HIV prevention measures

Where criminal laws have been enacted to deter prostitution, HIV prevention measures targeting sex workers and their clients may meet resistance for being seen as contradicting this aim. In a parallel with the controversies

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[99] Bjørndahl, *supra* note 30, p.40

[100] 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

[101] Pro Sentret, *Året 2012*, (Pro Sentret, 2012) *http://prosentret.no/?wpfb_dl=574* [Accessed 20 October 2013], p.24

[102] Joint United Nations Programme on HIV/AIDS, *UNAIDS Guidance Note on HIV and Sex Work*, (Geneva: UNAIDS, 2012), p.4

over needle exchange programmes for injecting drug users, distribution of condoms to sex workers has been opposed in Sweden on the grounds that it is incompatible with the country's "zero tolerance" approach to sex work.[103] According to the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights, Sweden's criminal law has also been implicated in the cancellation of client-targeted HIV prevention measures.[104]

In its Joint Oireachtas Committee submission, Ruhama argued that male clients of sex workers should be targeted only as part of a scheme aimed at men generally:

> Recommendations for education of men in changing attitudes to condom use are to be welcomed, but should not, and arguably **cannot** be restricted to sex buyers. Such initiatives must (and generally do) target all men who are sexually active, who can be classed as "potential buyers." The UNFPA Broad Activity Achievement report, referencing the work of UNAIDS is clear that this is the approach taken, rather than initiatives for actual acknowledged sex buyers. The logistics of 'engaging' sex buyers as a separate cohort is not feasible—especially as the majority are married and unlikely to engage as a part of this categorised group.[105]

No specific passage from the UNFPA Broad Activity Achievement Report is referenced in support of this assertion. In fact, one of that report's "Lessons learned" suggests exactly the opposite: "Working with clients is insufficiently addressed. While scarce resources should not be drawn away from service provision for sex workers efforts to increase the health seeking behaviour of clients and that reinforce the need for clients to take responsibility for their own sexual behaviour are important."[106]

Nor is this the approach taken by UNAIDS according to its most recent Guidance Note on HIV and Sex Work, which states that "[s]pecific education campaigns must be developed with and for clients."[107] Programmes targeting sex work clients qua clients are also recommended in the Irish Department of Health's Action Plan for implementation of HIV and AIDS Education

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[103] 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

[104] *Ibid*, p.2

[105] Ruhama, *supra* note 42, p.15

[106] United Nations Population Fund, *2010–2011 UNAIDS UBW: United Nations Population Fund (UNFPA) Broad Activity Achievement Report*, (UNFPA, 2012) *http://www.unaids.org/en/media/unaids/contentassets/documents/document/2012/ubw2010-2011/UNFPA_2010-2011BAReport.pdf* [Accessed 27 October 2013], p.16

[107] Joint United Nations Programme on HIV/AIDS, *supra* note 102, p.14

and Prevention Plan 2008–2012[108] and in the World Health Organization guidelines.[109] Thus, if Ireland adopts this element of Ruhama's proposals for client criminalisation, it will run counter to both Irish and international best practice on preventing HIV/AIDS among sex workers' clients—with self-evident implications for the sexual health of sex workers themselves.

Violence and STI

This article has outlined above the possibility that client criminalisation may promote violence against sex workers. If true, that in itself would increase their susceptibility to infection: violence against sex workers is associated with an increased likelihood of HIV and STI acquisition.[110] This is unsurprising, as rape rarely takes place with a condom,[111] and can cause injuries that facilitate STI and HIV transmission.[112] Thus, the right to be free from violence and the right to sexual health are intersecting rights, and the breach of one through client criminalisation may impair the other—even in the absence of any other of the adverse effects described in this article.

Mental Health

Mental health is a key element of the right to health, and is explicitly identified as such in Article 12 of the Covenant. A number of factors may contribute to mental ill-health among sex workers. These can include experiences before, in and outside prostitution; adverse interactions with the law; feelings about their involvement in the sex industry; genuine occupational hazards; and risks posed or heightened by the illicit status of their work. It is often difficult to separate these factors, and many studies on the subject fail to even try.[113] Nevertheless, there are a number

[108] The Education and Prevention Sub-Committee of the National AIDS Strategy Committee, *HIV and AIDS Education and Prevention Plan 2008–2012*, (Dublin: Government Publications, 2008), p.49

[109] Catrin Evans, *Toolkit for targeted HIV/AIDS prevention and care in sex work settings*, (Geneva: World Health Organization, 2005), pp.7, 14

[110] Kate Shannon et al., "Prevalence and structural correlates of gender based violence among a prospective cohort of female sex workers" (2009) 339 British Medical Journal 2939, *http://www.bmj.com/content/339/bmj.b2939* [Accessed 27 October 2013]

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

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

[113] For example, one study regularly cited by advocates of the Swedish model found signs of Post-Traumatic Stress Disorder (PTSD) in 68% of the sex workers surveyed. However, the same study also reveals very high levels of childhood trauma and "current or past homelessness," and fails to consider the possible contribution of these factors to the PTSD levels recorded. Melissa Farley, Anne Cotton and Jacqueline

of ways in which criminalisation of sex workers *or* their clients appears to play some role. As set out below, mental ill-health may occur as a result of other adverse effects of criminalisation, or due to the stigmatisation of sex workers which, it will be argued, is likely to increase even if only their clients are criminalised.

Ill-health Effects from other Adverse Consequences of Criminalisation

The adverse consequences described elsewhere in this article may have knock-on effects for sex workers' mental health. For example, a clear association has been found between violence against sex workers and mental ill-health.[114] The ongoing risk of exposure to HIV/STI may also have mental health implications.[115] Logically, it follows that, any law which increases the risk of violence or infection will also increase the risk of mental ill-health. By the same token, a link has 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.[116] This again demonstrates the intersecting nature of these elements of the right to health, and the multiple risks posed to sex workers by legislation that may impair any of those elements.

Stigmatisation

The perception of selling sex as a deviant behaviour creates a powerful stigma against sex workers. Goffman defines stigma as "an undesired differentness"[117] in a person, by which the person is "reduced in our minds from a whole and usual person to a tainted, discounted one."[118] It has been described as the single biggest issue facing sex workers—even those who operate legally.[119]

Lynne et al., "Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder" (2003) 2 Journal of Trauma Practice 33

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

[115] 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

[116] 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]

[117] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity*, (New York: Touchstone, 1986), p.5

[118] *Ibid*, p.15

[119] Sharon Pickering, Jane Maree Maher and Alison Gerard, *Working in Victorian Brothels: An Independent Report Commissioned by Consumer Affairs Victoria*

A Canadian study on the mental health of sex workers has found a clear link between criminalisation, stigmatisation and poor mental health:

> A large part of their relatively poor mental health had to do with the negative manner in which the sex trade is depicted in our society. The illegalities of the sex trade and its dishonourable public reputation tended to negatively affect how workers feel about themselves and what they did for a living.[120]

However, stigmatisation's adverse effects may not be limited to mental health. It is implicated in violence against sex workers, by suggesting their lives are less valuable and that they are appropriate targets for abuse.[121] "Anti-prostitution" rhetoric by media, politicians and community activists may lead to an increase in violent or harassing behaviour against sex workers.[122] It may also encourage a view on the part of police that attacks on sex workers do not merit investigation, as they "cannot be raped"[123] or are otherwise not worth protecting. Sex workers themselves may then come to accept the view that violence is just "part of the job."[124] This too echoes Goffman, who writes that when the stigmatised person is denied respect by others, "he echoes this denial by finding that some of his own attributes warrant it."[125]

Reluctance to report violence is a logical consequence of this denial. It can also "lead to a sense of hopelessness and reduce their desire to take care of themselves, including protecting against HIV."[126] Judgmental attitudes of health care providers can hinder access to health care services, by leading sex workers to withhold important lifestyle information from their health care provider, or simply not return.[127]

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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

120 Cecilia Benoit and Alison Millar, *Dispelling Myths and Understanding Realities: Working Conditions, Health Status and Exiting Experiences of Sex Workers*, (University of Victoria, 2001), *http://www.hawaii.edu/hivandaids/Working%20Conditions,%20Health%20Status%20and%20Exiting%20Experience%20of%20Sex%20Workers.pdf* [Accessed 27 October 2013], p.70

121 House of Commons (Canada), *supra* note 45, p.20

122 Lowman, *supra* note 66, p.1004

123 Joshua M. Price, "Violence Against Prostitutes and a Re-evaluation of the Counter-public Sphere" (2001) 34 Genders, *http://www.genders.org/g34/g34_price.html* [Accessed 27 October 2013], para.20

124 Antonia Quadara, "Sex Workers and Sexual Assault in Australia: Prevalence, Risk and Safety" (2008) 8 Australian Centre for the Study of Sexual Assault Issues 1, p.22

125 Goffman, *supra* note 117, p.5

126 Blankenship and Koester, *supra* note 48, p.554

127 Jacqueline Lewis and Frances Shaver, *Safety, security and the well-being of sex workers: A report submitted to the House of Commons Subcommittee on Solicitation Laws (SSLR)*, (University of Windsor, 2006), *http://web2.uwindsor.ca/courses/sociology/matticka/star/pdfs/safety_and_security_report_final_version.pdf* [Accessed 20 October 2013], p.55

There are strong indications that the stigma against sex workers has increased in Sweden and Norway since the laws against buying sex were enacted—notwithstanding the fact that only the client is criminalised. 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. 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.[128]

In Sweden, public opinion about the people who sell sex seems to have hardened since the criminalisation of buyers. In a study carried out 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, and nearly a decade after the law's enactment, the public was again asked its views about outlawing the sale of sex. This time, in response to the question "Should the sale of sex be prohibited by law?," 49.4% of men and 66% of women answered "yes".[129] 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.

Indeed, the remarks of some Swedish officials indicate that stigmatisation may be a feature, not a bug, of the law. One example is Detective Superintendent Jonas Trolle's comment, cited above,[130] that Sweden deliberately makes life "difficult" for sex workers. Another is found in 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

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[128] Bjørndahl, *supra* note 30, p.41

[129] 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

[130] BBC News, *supra* note 39

> 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.[131]

This view of stigmatisation as a positive effect of the law has been criticised by Sweden's Discrimination Ombudsman, the National Board of Health and Welfare and the Federation for Lesbian, Gay, Bisexual and Transgender Rights, the latter arguing that it runs contrary to the goal of harm reduction.[132]

Occupational Health and Safety

The right to health includes a right to occupational health and safety. Among the Covenant's positive duties, as identified by the Committee on Economic, Social and Cultural Rights, are obligations "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."[133] Article 7(b) of the Covenant additionally sets out a right to "safe and healthy working conditions."[134]

In the International Labour Organization's Occupational Safety and Health Convention 1981, ratified by Ireland in 1995, health is defined to include "the physical and mental elements affecting health which are directly related to safety and hygiene at work."[135] The Convention 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."[136]

The evidence in this article suggests that client criminalisation 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.

It might be argued that if a state does not recognise an income-generating activity as "work", it has no duty to treat those involved as "workers" by protecting their occupational health.[137] However, the logic behind this

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131 Swedish Institute, *supra* note 31, p.34

132 Dodillet and Östergren, *supra* note 31, pp.23–24

133 Committee on Economic, Social and Cultural Rights, *supra* note 17, para.36

134 International Covenant on Economic, Social and Cultural Rights 1966, art.7(b)

135 Occupational Safety and Health Convention 1981 (ILO 155), art.3(e)

136 *Ibid*, art.4.2

137 A similar issue arose in a recent South African case which considered a sex worker's

argument is difficult to sustain in jurisdictions where providing sex for payment is not a crime. If a state has—albeit perhaps with reluctance and discouragement—accepted that one can legally earn income from providing sexual services, is it not then obliged to protect the health and safety of those who do?

The ILO Convention suggests that it is. By its text, the Convention "applies to all branches of economic activity" and "to all workers."[138] The ILO has elsewhere confirmed that it regards sex workers as encompassed within the category of "worker."[139] Analogous protections for the self-employed, meanwhile, are set out in the ILO's 1981 Occupational Safety and Health Recommendation.[140] Thus, whether working for themselves or under management, sex workers must be enabled to operate within OHS conditions to exercise this aspect of their right to health under international law.

Health-Related Civil and Political Rights

It has long been recognised that human rights are "indivisible and inter-dependent and interrelated,"[141] notwithstanding the existence of separate international covenants for those categorised as "civil and political" and those categorised as "economic, social and cultural." That the former are essential for full enjoyment of the latter will now be illustrated with

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right to compensation for unfair dismissal in light of the illegality of selling sex in the jurisdiction. Her claim was initially rejected but subsequently upheld on appeal, on the basis that the constitutional protection against unfair labour practices trumps the common law rule against enforcement of illegal contracts: *Kylie v Commission for Conciliation, Mediation and Arbitration* 2010 (4) S.A. 383 (Labour Appeal Court). However, the Court was careful to emphasise that its decision did not mean that sex workers have the full range of employment rights. For a strong criticism of this ruling, see Kobolo Selala, "The Enforceability of Illegal Employment Contracts According to the Labour Appeal Court: Comments on *Kylie v CCMA* (2010) 4 S.A. 383 (LAC)" (2011) 14 Potchefstroom Electronic Law Journal 207, *http://www.saflii.mobi/za/journals/PER/2011/17.pdf* [Accessed 25 October 2013]. A comparison might also be drawn to undocumented immigrants, who are also often excluded from occupational protection because of their "illegal" status; see Robert Guthrie and Michael Quinlan, "The Occupational Safety and Health Rights and Workers' Compensation Entitlements of Illegal Immigrants: An Emerging Challenge" (2005) 3 Policy and Practice in Health and Safety 41. Sex workers, of course, are often undocumented migrants as well

[138] Occupational Safety and Health Convention 1981 (ILO 155), arts 1-2

[139] 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]

[140] Occupational Safety and Health Recommendation 1981 (ILO 164), arts1–2

[141] Vienna Declaration and Programme of Action 1993, para.5

the examples of two health-related civil and political rights: the right of participation and the right to autonomy. It will be seen that client criminalisation involves the denial of both these rights to sex workers, with consequent adverse implications for their right to health.

The Right of Participation

An "important aspect" of Article 12, according to the Committee on Economic, Social and Cultural Rights, is the "participation of the population in all health-related decision-making at the community, national and international levels."[142] "Informed opinion and active co-operation on the part of the public" are likewise deemed essential in the Preamble to the World Health Organization Constitution.[143] This aspect of the right to health is also recognised in the Alma-Ata Declaration of the 1978 International Conference on Primary Health Care, which speaks of persons' "right and duty to participate individually and collectively in the planning and implementation of their health care."[144]

Thus, the right to health includes a right and a duty 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."[145]

Swedish sex workers' views were also largely ignored in the legislative process by which client criminalisation was enacted, according to one researcher who examined newspaper and journal reports covering the public and political debate: "Nor were the views of prostitutes taken into consideration except where they confirmed the victim-oriented mainstream discourse."[146] Similarly, when the Rhode Island Senate Judiciary Committee conducted hearings into whether indoor prostitution should be criminalised, six of the ten committee members—including the Chairman—left before the sex workers' turn to speak.[147]

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142 Committee on Economic, Social and Cultural Rights, *supra* note 17, para.11

143 Constitution of the World Health Organization 1946, Preamble

144 Alma-Ata Declaration (International Conference on Primary Health Care, 6–12 September 1978), para.IV

145 Eriksson and Gavanas, *supra* note 49, p.49

146 Arthur Gould, "The Criminalisation of Buying Sex: The Politics of Prostitution in Sweden" (2001) 30 Journal of Social Policy 437, p.452

147 "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://*

This pattern has already appeared in Ireland. In 2010, officials from the 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.[148] In November 2012, the Joint Oireachtas Committee on Justice, Defence and Equality made a repeat fact-finding visit to Sweden; the omission of sex workers from the itinerary was also repeated.[149]

Between December 2012 and February 2013, the Oireachtas Committee held several hearings with Irish NGOs and academics on the subject of prostitution law reform. The large majority of those invited were members of the Turn Off the Red Light campaign, and only near the end of the process were sex workers allowed to participate.[150] A member of the Oireachtas 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."[151] 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 references to academics and NGOs—most of whom took a contrary view to that espoused by the active sex workers.[152]

Such inattentiveness to sex workers' concerns not only breaches the participatory element of their right to health, but has a more practical drawback: the less closely a legal framework reflects sex workers' operational needs, the less likely they are to comply with it.[153] Limiting

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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

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

149 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]

150 "'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]

151 "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]

152 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]

153 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

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.[154]

The Right to Autonomy

Neither the Covenant 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 Committee on Economic, Social and Cultural Rights, namely, "supporting people in making informed choices about their health."[155] 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 goes even further, referring to "the right of all women to control all aspects of their health."[156]

The right to autonomy has an obvious parallel with the right to occupational health and safety. The research cited in this article 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 has the effect of denying 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. Indeed, such a law would breach that right irrespective of whether their health is *actually* adversely affected by its implementation.

Can the Right to Health Justify Client Criminalisation?

This section will consider whether the right to health can be used in support of criminalisation of sex workers' clients, notwithstanding the foregoing evidence. Two potential grounds for this argument will be examined: first, that sex work itself is incompatible with the right to health, and secondly that client criminalisation would advance the right to health through a *public health* objective of reducing the amount of prostitution in society.

Department of Criminology, 2002), *http://repository.unimelb.edu.au/10187/954* [Accessed 27 October 2013], p.110

154 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]

155 Committee on Economic, Social and Cultural Rights, *supra* note 17, para.37

156 Beijing Declaration of the Fourth World Conference on Women 1995, para.17

The Claim that Prostitution is Incompatible with Health

The first ground would reject an underlying premise of this article, namely, that the legislative framework in which sex workers operate can play a significant role in their ability to achieve the highest attainable standard of health. This argument itself might take one of two forms.

Prostitution as an Inherent Risk

Supporters of client criminalisation may argue that the risks outlined in this article would exist regardless of the legal framework around prostitution. 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 the degree of risk may depend on a number of factors, there is little doubt that this is true as a general statement. However, sex work is not unique in this respect. Fatalities are relatively high in the agricultural sector;[157] construction workers frequently miss work due to injury;[158] work-related illness (including mental ill-health) is common among social care workers.[159] 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.

More fundamentally, this argument misconstrues the nature of the right to health itself. As it is not a "right to be healthy", it is not unfulfillable merely because a worker might suffer ill-health in spite of any preventive measures taken. The right to the highest attainable standard of health "presupposes a reasonable, not an absolute, standard;"[160] it is contextual by definition, and applies to those in risky occupations no less than to others.

Prostitution as Violence against Women

A variation on this argument is provided by feminists who conceptualise sex work itself as violence against women.[161] This position sees sex work

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[157] 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

[158] *Ibid*, p.11

[159] *Ibid*, p.12

[160] Virginia Leary, "The right to health in international human rights law" (1994) 1 Health and Human Rights 25, p.33

[161] Gendered language is nearly always used by these theorists, notwithstanding the existence of male sex workers. See, for example, Sheila Jeffreys, *The Idea of*

as inherently hazardous irrespective of any *quantifiable* risks—prostitution itself is the danger, with invariable harms for those involved in it; "Let me be clear. I am talking to you about prostitution per se, without more violence, without extra violence, without a woman being hit, without a woman being pushed. Prostitution in and of itself is an abuse of a woman's body."[162]

In this view, a woman is harmed simply by the act of trading sex for money. The damage is inseparable from the act itself, and is not dependent on any physiological consequences or even her own self-awareness of harm. Sex workers who claim to have escaped such negative effects—or who ascribe them to their work's illicit status—are essentially said to be suffering from false consciousness, the Marxist concept by which exploited groups accept the societal framework in which their exploitation is justified.[163]

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).[164] In doing so, it denies their right to autonomy in health decisions—and does so on essentially ideological grounds. While adherents of this view point to data on the extent of ill-health in the sex industry, the premise of their argument is that these data merely reflect certain *manifestations* of the harm intrinsic to prostitution itself. But if no physical injury or illness has been sustained, and no psychological damage can be detected, how can the harm be proved? In rejecting legal measures which could avert demonstrable harms on the basis of *theorised* harms, this approach sets a precedent which anti-feminist ideologues might be only too happy to exploit.[165]

Furthermore, the "prostitution as violence against women" framework may itself contribute to the harms that sex workers face. It defines all "prostituted women"[166] as victims, an imposed status of weakness which clearly has the power to stigmatise sex workers (including those who

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Prostitution, (Melbourne: Spinifex, 1997), p.242: "I suggest that prostitution constitutes a variety of *male* sexual violence towards women." (emphasis in original)

162 Andrea Dworkin, "Prostitution and Male Supremacy" (1993) 1 Michigan Journal of Gender and Law 1, p.3

163 Jeffreys, *supra* note 161, pp.128–160

164 This point is well illustrated by the challenge to Canada's prostitution laws in *Bedford v Canada, supra* note 45: 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.

165 For example, anti-abortion groups have begun using the rhetoric of "protecting" women from the purported harms of this practice. See Reva Siegel, "The Right's reasons: Constitutional conflict and the spread of woman-protective antiabortion argument" (2007–2008) 57 Duke Law Journal 1641

166 Anti-prostitution feminists believe this terminology reflects the position of those in the sex trade—whom they consider to be largely passive victims of the exploitative acts of others. See, for example, Jeffreys, *supra* note 161, p.330

do not self-define in that way). In doing so, it may also 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[167] may give succour to those clients who believe that once they have paid their money they are entitled to demand what they want.[168] 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.[169] Theorists from this perspective frequently oppose harm reduction measures aimed at sex workers and their clients, arguing that they encourage or legitimise prostitution.[170] Finally, 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.[171]

Neither of these arguments, then, provides sufficient foundation for criminalising the purchase of sex. The first would redefine the right to health in a manner that puts it out of active sex workers' reach, whereas the Covenant explicitly describes it as a right of everyone. The second would enshrine in law an unfalsifiable premise derived from a particular ideological perspective, directly affecting persons who may not share that perspective and perhaps causing them manifest harms. It is difficult to see how any human right, let alone the right to health, could be invoked to defend such a policy.

Public Health through Criminalisation?

The second health-based ground would justify client criminalisation in expectation of it leading to better *public* health outcomes by reducing the overall amount of prostitution.[172] However, it has not been demonstrated

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[167] Dworkin, *supra* note 162, p.6: "He can do anything he wants"

[168] Turn Off the Red Light campaign, *Submission to the Joint Oireachtas Committee*, (31 August 2012), *http://www.turnofftheredlight.ie/wp-content/uploads/2012/09/TORL-Joint-Submission-.pdf* [Accessed 25 October 2013] notes at p.4 this attitude on the part of some clients

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

[170] 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.

[171] 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

[172] See for example Julie Bindel and Liz Kelly, *A critical examination of responses to prostitution in four countries: Victoria, Australia; Ireland; the Netherlands; and*

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."[173] Others note a reduction in the amount of *street* prostitution, but suggest that the industry may have merely moved indoors.[174]

The claim that Sweden has seen a decrease in prostitution since client criminalisation is regularly made (and, at least in the Irish media, rarely challenged), but it 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.
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> 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.[175]

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

[173] K. Daniels, "St Kilda voices" in *So Much Hard Work: Women and Prostitution in Australian History* (Sydney: Fontana/Collins, 1984) p.335, cited in M. 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, *supra* note 45, 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

[174] Stridbeck, *supra* note 57, p.53; Eriksson and Gavanas, *supra* note 49, p.63; Riksförbundet för Homosexuellas, Bisexuellas och Transpersoners Rättigheter, *supra* note 103, 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 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

[175] Swedish Institute, *supra* note 31, p.28 (emphasis added)

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 of the industry; 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, as Skarhed herself acknowledges:

> 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.[176]

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.[177] However, as researchers Susanne Dodillet and Petra Östergren pointed out in a 2011 conference paper which comprehensively examined the available literature, 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 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

[176] *Ibid*, p.19
[177] *Ibid*, p.20

> 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.[178]

Notably, not all Swedish government bodies share Skarhed's willingness to draw conclusions about the extent of Sweden's sex trade. In its most recent Progress Report to UNAIDS, the Swedish Institute for Communicable Disease Control stated:

> 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.[179]

With no available data on the indoor sector, it seems impossible to sustain claims that the law has actually reduced the amount of prostitution in Sweden. Furthermore, 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 the Oslo report seems to suggest,[180] a loss of income has forced 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?

Even if an overall reduction could be established, however, criminalising clients in the name of "public health" would still be impermissible in light of the adverse health effects outlined earlier in this article. 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. While the Covenant 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,"[181] and states may not impose greater limits than the Covenant allows.[182] The Committee on Economic, Social and Cultural Rights interprets these 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."[183]

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[178] Dodillet and Östergren, *supra* note 31, p.8 (internal citations omitted)

[179] 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

[180] Bjørndahl, *supra* note 30, p.40

[181] International Covenant on Economic, Social and Cultural Rights 1966, art.4

[182] *Ibid*, art.5.1

[183] Committee on Economic, Social and Cultural Rights, *supra* note 17, paras 28–29

Thus, while a public health objective is *capable* of justifying limitations on individual rights, those limitations are subject to a necessity and proportionality requirement. What this suggests is that a state must aim to ameliorate the adverse public health impacts of prostitution in a manner that also promotes the health of those 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.[184] However, it must do so through means that *genuinely* advance public health, and must aim to remove the infringement on individual rights as soon as the public health objective is achieved.

Client criminalisation seems unlikely to meet this high threshold. There has been little consideration of its impact on the rights of individual sex workers, or of whether less restrictive methods were available. The "least restrictive" argument is undermined by the fact that public health-promoting measures, including non-coercive means to deter sex work, are already in place in many jurisdictions.[185] Finally, the public health benefits of criminalising clients are in any case highly speculative, given the evidential gap noted above.[186]

Of course, to even debate this question is to overlook one very simple fact: "the public" is made up of individuals. Thus, any policy with adverse consequences for individual health will have some—even if slight—negative impact on public health.[187] There may be times when a choice must be made, but the preferable approach from both a health-based and rights-based perspective is to treat the two as complementary and interrelated. This was recognised by UNAIDS in its 2006 consolidated guidelines on HIV/AIDS and human rights, which stated, "Public health objectives can

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[184] 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 non-coercive approaches are insufficient, gradual exploration of more intrusive measures are permissible where clearly necessary."

[185] Programmes to assist sex workers who wish to "exit" prostitution are explicitly promoted and funded by many governments, irrespective of its legal status. See Pat Mayhew and Elaine Mossman, *Exiting Prostitution: Models of Best Practice*, (Wellington: New Zealand Ministry of Justice, 2007)

[186] As Gostin and Mann (*supra* note 184) stress at p.77: "The risk to the public must be *probable*, not merely speculative or remote." (emphasis in original)

[187] This point is made in Benjamin Mason Meier and Larisa M. Mori, "The highest attainable standard: Advancing a collective human right to public health" (2005–2006) 37 Columbia Human Rights Law Review 101. Although the authors initially define public health as referring "to the obligations of a government to fulfil the collective rights of its peoples to health. Rather than focusing on the health of individuals, public health focuses on the health of societies" (p.121), they go on to note at p.137 that "the individual and public components of health rights are not mutually exclusive but rather are interdependent."

best be accomplished by promoting health for all, with special emphasis on those who are vulnerable to threats to their physical, mental or social well-being. Thus, health and human rights complement and mutually reinforce each other in any context."[188]

Can Alternative Approaches Promote the Right to Health?

If client criminalisation is not an effective means of protecting sex workers' right to health, what other policy approaches might succeed? The public health actors listed at the start of this article unanimously favour a decriminalisation approach: one in which neither the seller nor buyer of sex is criminalised, and sex work is regarded as work, that is, as a form of labour entitled to the same protections as other employment sectors. The 2012 joint report of the UNDP, UNFPA 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.[189]

Research into New Zealand's 2003 decriminalisation law has revealed generally favourable outcomes for sex workers' health and safety. In a 2007 study by the Department of Public Health and General Practice, University of Otago, 93.8% of the sex workers surveyed agreed that they had health and safety rights under the 2003 Act.[190] 64% said they felt "more able to refuse" a client since enactment of the law,[191] perhaps due to its explicit

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[188] Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights: 2006 Consolidated Version*, (Geneva: UNAIDS, 2006), p.77

[189] Godwin, *supra* note 4, p.6

[190] 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

[191] *Ibid*, p.116

provision for their right to refuse any client or service.[192] 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.[193]

Unlike their Nordic counterparts, New Zealand sex workers are encouraged to carry condoms; indeed, the Prostitution Reform Act obliges their use.[194] 62.5% of those surveyed said they had cited this law as a strategy with clients reluctant to use condoms, although there was wide variation in this response between industry sectors.[195]

The Otago 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.[196]

Positive mental health outcomes have also been noted; the Otago study found that New Zealand sex workers consider their new rights to be "mentally enabling, allowing them to feel supported and safe."[197] Stigmatisation remains an issue, but there are indications that this too has been lessened: in the qualitative element of the Otago research, many sex workers indicated that they felt more "legitimate" under the law,[198] and that relations with police had improved.[199]

While the Otago study did not investigate pimping,[200] 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 had closed down within a few years—citing competition from sole operators and SOOBs.[201] This

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192 Prostitution Reform Act 2003 (New Zealand) s.17

193 Abel *et al*, *supra* note 190, 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.

194 Prostitution Reform Act 2003 (New Zealand) s.9

195 Abel *et al*, *supra* note 190, 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.

196 *Ibid*, p.157

197 *Ibid*, p.13

198 *Ibid*, pp.139–40

199 *Ibid*, p.164

200 *Ibid*, p.122. Respondents were not asked directly whether they had a pimp, either before or after the law. However, they were asked who they would confide in about a bad sex work experience, with "pimp/manager" one of more than a dozen possible

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.[202]

There are, of course, some difficulties with comparing these findings to the evidence from Sweden and Norway. Buying sex was never illegal in New Zealand; the prior legal framework against which 2003's reforms are measured was one in which sex workers themselves were criminalised. Cultural factors unique to each country may also influence the manifestation of the risks outlined in this article, and how the various prostitution actors—sex workers, their clients, "pimps" or managers, social services, the State—respond to them. Nonetheless, there seems no escaping the conclusion that New Zealand sex workers perceive the laws under which they operate in a far more positive light than their Swedish and Norwegian counterparts, at least with regard to the health and safety issues arising. Yet the Oireachtas Justice Committee undertook no fact-finding mission to New Zealand. It is difficult to see how Ireland can meet its Covenant obligation to protect the health of the "vulnerable and marginalized group" of sex workers if serious consideration is not given to the legal framework that that group itself seems to have found to be the healthiest option.

Conclusion

Client criminalisation has been presented as a human rights-based approach: its advocates frame their arguments in the language of concern for women in the sex industry, and for equality of the sexes generally. But the right to health has received inadequate and superficial consideration in the Irish discourse. There has been some discussion of the violence and general mental ill-health affecting sex workers, but little serious discussion of the possibility that the proposed law could actually promote these adverse effects. The other health issues described in this article—sexual health, stigma, occupational health and safety, the right to autonomy in health-related decision making and the right to participate in shaping the laws that affect one's health—have featured little if at all in the debate.

options. This option was selected by 17.8% of street workers, 8.2% of managed and 3.7% of private indoor workers.

[201] 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

[202] 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

If Ireland is to meet its obligations in international law, it cannot simply ignore the apparent adverse impacts of legislation it considers adopting. Sex workers are as entitled as the rest of the population to a right to health that is real and not illusory. Irrespective of our views about the industry they operate in, we should be extremely cautious about introducing a legal framework that is likely to impair that right.