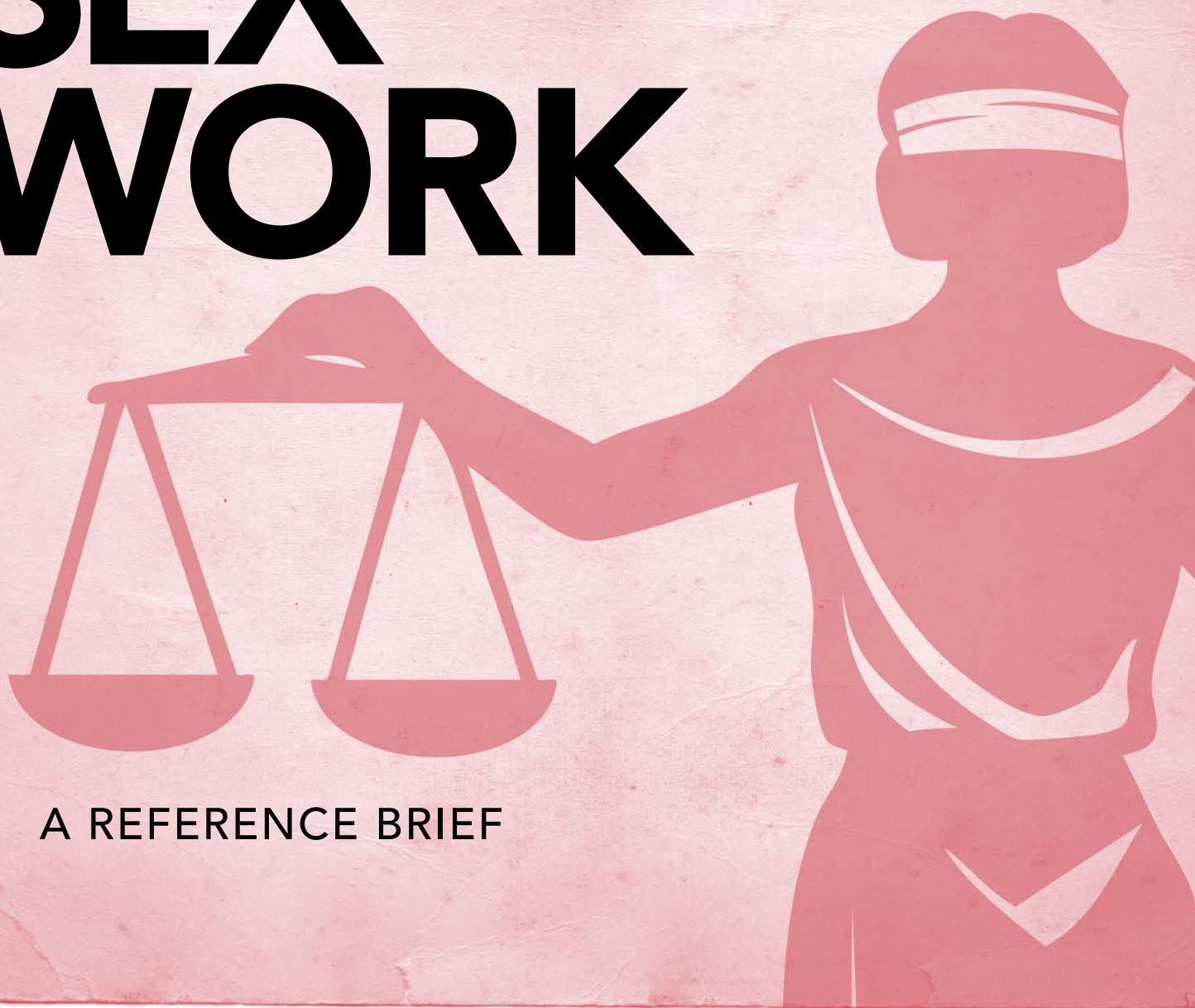


**LAWS AND POLICIES
AFFECTING**

SEX WORK



A REFERENCE BRIEF



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Sex workers are adults who receive money or goods in exchange for sexual services, either regularly or occasionally.¹ A sex worker can be male, female, or transgender. In most countries, sex work and activities associated with it are criminal acts.²

Criminal law is generally a society's strongest expression of disapproval of an action, to be reserved for the most heinous misdeeds. United Nations leaders and other experts have questioned the application of harsh criminal laws to sex work. They note that criminalization impedes sex workers' ability to negotiate condom use with their clients and may force them to work in hidden or remote places where they are more vulnerable to violence.³ Police abuse and extortion of sex workers both in and out of detention is facilitated when sex work is criminalized.⁴ Sex workers who are regarded as criminals often face abusive or judgmental treatment in health services and cannot enjoy the benefits of social services or of regulations that protect other workers.

The purpose of this reference brief is to clarify terms and illustrate examples of alternatives to the use of criminal law as a response to sex work. Understanding the range of legislative and policy options for responding to sex work is critical to establishing policies consistent with respecting, protecting, and fulfilling the human rights of sex workers. Laws and policies on sex work should be based on the best available evidence about what works to protect health and rights. They should optimize sex workers' ability to realize the right to due process under the law, the right to privacy, the right to form associations, the right to be free of discrimination, abuse, and violence, and the right to work and to just and favorable conditions of work. Sex workers should have a meaningful role in the design, implementation, and monitoring of the laws and policies that affect them.

- 1 For more information, see Open Society Foundations (2007). What are key terms related to sexual health and human rights for LGBT and sex workers? Health and Human Rights: A Resource Guide. Available at http://www.equalpartners.info/Chapter5/ch5_6Glossary.html.
- 2 UNAIDS, Global Network of People Living with HIV, et al. (2010). Making the law work for the HIV response. Available at http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20100728_HR_Poster_en-1.pdf.
- 3 See, e.g., UN General Assembly. The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS): Report of the Secretary-General. Human Rights Council, 16th session. UN doc. no. A/HRC/16/69, 20 Dec. 2010.
- 4 K Shannon and J Csete. Violence, condom negotiation and HIV/STI risk among sex workers. *Journal of the American Medical Association* 2010; 304(5):573-74; UNAIDS Advisory Group on HIV and Sex Work. Report of the UNAIDS Advisory Group on HIV and Sex Work. Geneva, 2011, available at http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/20111215_Report-UNAIDS-Advisory-group-HIV-Sex-Work_en.pdf.

- 5 G Ekberg. The Swedish law that prohibits the purchase of a sexual service: Best practices for prevention of prostitution and trafficking in human beings. *Violence Against Women* 2004; 10:1187-1218.
- 6 Joint United Nations Programme on HIV/AIDS (UNAIDS). *Guidance note on HIV and sex work*. Geneva, 2009. Available at http://data.unaids.org/pub/BaseDocument/2009/jc1696_guidance_note_hiv_and_sexwork_en.pdf

OPTIONS FOR LAW AND POLICY

In most countries, the government's stated goal with respect to sex work is **abolition** – that is, to abolish sex work altogether. This goal is also sometimes stated as **prohibition** – eliminating sex work by ensuring that it is strictly forbidden. There is no evidence to suggest that abolition can be achieved, but many countries pursue it nonetheless. Abolitionist policies are often driven by strong moral judgments about the undesirability of sex work in society. Governments have tried to abolish sex work by imposing criminal penalties on sex workers, their managers, and people who own or run brothels.

Some governments strive for abolition by pursuing a corollary goal – to **end demand for sex work**. This goal may be pursued by imposing criminal penalties on clients of sex workers. A few countries seek to end demand for sex work as part of a stated goal to **protect sex workers from exploitation**, especially women sex workers. Some proponents of this goal see sex work as inherently exploitative or victimizing.⁵ Many sex worker organizations oppose this view, seeing sex work as work that people can undertake without being victims. There is no evidence from any country that eliminating demand for sex work is achievable.

The HIV epidemic has led some countries to pursue the policy goal of **minimizing adverse health consequences of sex work**. Sex workers' health may not be the main concern behind this policy goal; it may be that protecting clients and their regular (unpaid) sexual partners weighs more strongly in the minds of policymakers. Still, these policies, depending on how they are pursued, may improve sex workers' access to condoms and their capacity to ensure condom use with their clients.

The Joint United Nations Programme on HIV/AIDS (UNAIDS) also recommends that **ensuring universal access to comprehensive HIV services for sex workers** should be a central component of policies related to sex work.⁶

Underlying policy goals are not always clearly stated by governments, and some policies of a given country can seem to be conflicting. For example, some countries have laws that are abolitionist in spirit, but they have adopted measures to protect sex workers and their clients from HIV. Nonetheless, sex work laws currently in force in many countries are outdated and do not account for the imperative of addressing HIV.

LEGAL AND POLICY TOOLS AND APPROACHES

To achieve their goals with respect to sex work, governments have applied a range of tools and approaches. This section discusses the following approaches: **criminalization, decriminalization, and legalization.**

CRIMINALIZATION AND USE OF NON-CRIMINAL LAWS

Criminalization means applying criminal law and criminal prohibitions to sex work or to some aspects of sex work. In some countries, paid sexual transactions themselves are designated as criminal acts in the law. Often, however, criminal law prohibits activities related to sex work, including solicitation,⁷ living off of the earnings of sex work, brothel-keeping,⁸ procuring or communicating for the procurement of sexual services, and facilitating the act of prostitution by providing information or assistance.⁹ Criminal laws may target sex workers themselves, their clients or managers, or people who own or run brothels. Countries with abolitionist goals often have laws that criminalize several aspects of sex work. Criminal law usually carries with it harsh penalties that can include long prison sentences as well as fines. In most societies, having a criminal record can be a permanent mark that undermines a person's ability to get a job and may disqualify him or her from receiving public assistance.

Criminal law targeting sex work is often accompanied by the use of administrative law—often municipal bylaws—to achieve prohibitionist or other goals. In some jurisdictions, arrests of sex workers under the terms of these non-criminal statutes are more frequent than criminal arrests. Sex workers may be charged with non-criminal offenses such as loitering, vagrancy, impeding the flow of traffic, congregating for the purposes of prostitution,¹⁰ public indecency, or disorderly behavior.¹¹ Administrative offenses do not generally entail prison sentences, but they may carry heavy fines and other non-custodial penalties. In some jurisdictions, police have the authority under criminal or municipal law to confiscate condoms from sex workers or to regard possession of condoms as probable cause that the possessor engages in sex work, practices that are counterproductive from a public health perspective. In 2010, a civil society coalition in the U.S. state of New York, for example, launched a campaign to change state law to limit the police's ability to use condoms as evidence of prostitution.¹²

- 7 Botswana, like a number of countries, criminalizes solicitation for prostitution and knowingly living on the earnings of prostitution in its penal code. Cited in J Arnott and A-L Crago, *Rights Not Rescue: A Report on Female, Male, and Trans Sex Workers' Human Rights in Botswana, Namibia, and South Africa* (New York: Open Society Foundations, 2009), 27.
- 8 Under Canadian law for example, the exchange of sex for remuneration is not directly prohibited but it is illegal to keep a "bawdy house," to procure someone for prostitution, to live on the "avails of prostitution," and to communicate in public for the purposes of prostitution. G Betteridge, Legal Network report calls for decriminalization of prostitution in Canada, *HIV/AIDS Policy & Law Review* 10, no. 3 (2005): 11-13.
- 9 Legal Assistance Centre, *Whose Body Is It: Commercial Sex Work and the Law in Namibia* (Austrian Development Corporation, 2002), <http://www.lac.org.na/projects/grap/Pdf/commsex.pdf>.
- 10 For example in Washington D.C. it is "unlawful for a person to congregate in a group of 2 or more persons" in a "prostitution-free zone" if police officers "reasonably believe" that that group is congregating for the "purpose of prostitution." DC Official Code § 22-2731, paragraph (d)(1).
- 11 Arnott and Crago, *op.cit.*, p 22.
- 12 S Baskin. Testimony on condoms as evidence to the New York City Council Immigration Committee, 6 May 2011, New York.

- 13 For example, a group of 23 sex workers in Macedonia were arrested and forcibly tested for HIV and other sexually transmitted diseases. Seven were later charged with “transmitting infective diseases” when they were found to be living with hepatitis C. [Interview with Marija Tosheva, HOPS, Macedonia April 1, 2009]
- 14 Until June 2011, sex workers in New Orleans, Louisiana (U.S.) were charged with felonies under an anti-sodomy law dating back to 1805. If convicted, they were registered as sex offenders for 10 years, which restricts where they can live and be employed. Jordan Flaherty, *Her crime? Sex work in New Orleans*, *Colorlines*, January 13, 2010, <http://www.colorlines.com/article.php?ID=673>.
- 15 Botswana’s Immigration Act prohibits “any prostitute, or any person, male or female, who lives or has lived on... the earnings of prostitution” from entering the country.
- 16 India’s Immoral Traffic (Prevention) Act (1956) criminalizes solicitation, prostitution within 200 yards of a public space, living off the earnings of prostitution, and brothel keeping. Available at http://ncpcr.gov.in/Acts/Immoral_Traffic_Prevention_Act_%28ITPA%29_1956.pdf
- 17 N Thrupkaew. The crusade against sex trafficking. *The Nation* 5 Oct. 2009.
- 18 Ekberg, op.cit.
- 19 Canadian HIV/AIDS Legal Network. New Zealand and Sweden: Two models of reform (information sheet). Toronto, 2005. Available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=199>.
- 20 A Gould. The criminalization of buying sex: The politics of prostitution. *Journal of Social Policy* 2001; 30(3):437-456. This debate also occurred at a time of public concern across western Europe that migrants from Eastern Europe and elsewhere were swelling the numbers of people in sex work. Decriminalization of sex work was seen by some as neutralizing an important tool in controlling the number of migrants without “legitimate” jobs. Some observers cited the overlap between sex work and illicit drug use and saw criminalization of sex work as a way to strengthen control of drugs in the sex industry. See Gould, p 451; D Kulick. Sex in the new Europe: The criminalization of clients and Swedish fear of penetration. *Anthropological Theory* 2003; 3(2):199-218, esp. p 214.
- 21 D Kulick, *ibid*.
- 22 Canadian HIV/AIDS Legal Network (New Zealand and Sweden), op.cit. and Kulick, op.cit.
- 23 G Fouché. Sex ban puts us at greater risk, *Guardian* (UK), 27 May 2009. Available at <http://www.guardian.co.uk/society/2009/may/27/prostitution-norway>.
- 24 United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. §§ 7601-7682 (2003)

Sex workers may also be arrested and detained under laws that have no specific reference to sex work, such as those criminalizing the transmission of HIV and other infectious diseases¹³ or sodomy or so-called “unnatural offenses” laws.¹⁴ Immigration law can include provisions specifically targeting sex workers,¹⁵ and anti-trafficking laws that confuse the issues of trafficking and prostitution can also effectively criminalize sex work.¹⁶ Sex worker organizations, especially in Asia, have reported human rights abuses associated with anti-trafficking “raid and rescue” operations in places where there was no clear evidence of trafficking.¹⁷

In pursuit of its goal to end demand for sex workers and protect women sex workers from exploitation, Sweden passed a law in 1998 that criminalizes customers of sex workers with fines or imprisonment for a maximum of six months (see Box 1).¹⁸ Under the terms of this law, selling sex is not a crime.

BOX 1

Criminalizing the Purchasers of Sexual Services: Does It Meet Stated Goals?

In 1998, the Swedish government passed a law that criminalizes the purchase of sexual services, thus turning the teeth of the criminal justice system away from sex workers and toward their clients.¹⁹ At the time, many in Sweden advanced a pragmatic argument for decriminalization of sex work, which was becoming a more dominant policy view in some parts of Western Europe. However, lawmakers were swayed by arguments that all sex work is a form of exploitation and violence against women.²⁰

While rigorous enforcement of the law following its introduction may have reduced the number of street-based sex workers in the short term, there is no evidence that the law has reduced the number of sex workers over time.²¹ The law came into force at about the same time many sex workers were moving their operations indoors thanks to the use of the internet, and indoor sex workers are very hard to count. Several reports indicate that the sex workers who still work on the streets are faced with a greater risk of violence and abuse than before the law. With fewer and possibly more desperate clients on the street, sex workers are less likely to be able to assess the safety of clients, and these clients are generally less inclined to use condoms.²² In spite of little evidence that the law has achieved its stated goals, Norway passed a similar law in 2009, and other countries have considered similar measures.²³

The U.S. law authorizing the President’s Emergency Plan for AIDS Relief (PEPFAR) restricts funding for programs that support sex workers—a reflection of the United States’ prohibitionist approach toward sex work.²⁴ While not a form of criminalization, this law limits the assistance that sex workers and sex worker organizations can receive and contributes to their marginalization.

CRIMINALIZATION AND DEPENALIZATION

Decriminalization of sex work means removing criminal penalties that apply to sex work or aspects of sex work. Depenalization, according to one expert body, refers to removing custodial (prison) sentences as penalties, though fines, probation, community service, and non-custodial sentences may still be applied as criminal penalties, and a person may still have a criminal record if convicted.²⁵ There is not widespread consensus on this distinction, however. Many authors use “decriminalization” and “depenalization” interchangeably.

Decriminalization of sex work is not the same as making it legal. If sex work or some elements of it are decriminalized, governments may still choose to define these acts as infractions of civil or administrative law. Decriminalization, however, is an expression of a government’s or a society’s view that sex work should not be punished by the harshest penalties and that sex workers should not be cast as criminals.

In recent years, the most sweeping example of decriminalization by national law is New Zealand’s Prostitution Reform Act of 2003. The law explicitly states that its intent is at once to decriminalize prostitution undertaken by persons over the age of 18 years and to “safeguard the human rights of sex workers and protect them from exploitation,” as well as to pursue public health goals.²⁶ The law requires that all efforts be made to ensure the use of condoms in sex work, whether in brothels or otherwise, but infractions of those rules are not criminal offenses (articles 8 and 9). The law explicitly states that sex workers are covered under the government’s 1992 law on health and safety in the workplace (article 10). It also created a Prostitution Law Review Committee to evaluate the impact of the law, including monitoring the number of sex workers in the country, and mandated that the Review Committee would include sex workers as members (article 43; see Box 2).

BOX 2

New Zealand’s Decriminalization of Sex Work and Rights of Sex Workers

New Zealand’s experience in decriminalizing sex work has attracted international attention, not least because of the thoughtful follow-up to decriminalization that was built into the law. The establishment of a Prostitution Law Review Committee is an unusual example of government investment in evidence to inform policy and policy follow-up. The major 2008 report of this Committee, five years after the law came into effect, is an impressive independent assessment of many facets of the law’s impact.²⁷ Among its findings is that the number of people in sex work did not increase after the passage of the law, as some had feared.²⁸ In addition, some sex workers surveyed by the Committee reported that they could for the first time turn to the police if they experienced problems with clients.²⁹ More than 60 percent of sex workers surveyed said that following the passage of the law, they felt more empowered to refuse a difficult or potentially difficult client.³⁰ Sex workers are still pursued by police in some locations under municipal bylaws, but these infractions are generally not punishable by imprisonment.

- 25** European Monitoring Centre for Drugs and Drug Addiction. *Illicit drug use in the EU: Legislative approaches*. Lisbon, 2005.
- 26** Parliament of New Zealand, *Prostitution Reform Act*, Public act no. 28, 27 June 2003, article 3. Available at [URL]
- 27** Government of New Zealand. *Report of the Prostitution Law Review Committee on the operation of the Prostitution Reform Act of 2003*. Wellington, NZ, 2008. Available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>
- 28** *Ibid*, pp 40-41.
- 29** *Ibid*, pp 57-58.
- 30** *Ibid*, p 14.

- 31 C Healy, HIV and the decriminalization of sex work in New Zealand, *HIV AIDS Policy Law Review* 11, no. 2/3 (2006): 73-74. Workcover NSW, *Health and Safety Guidelines for Brothels* (Sydney: Workcover NSW and NSW Health Department, 2001).
- 32 C Harcourt, J O'Connor, S egger et al. The decriminalisation of prostitution is associated with better coverage of health promotion programs for sex workers. *Australian and New Zealand Journal of Public Health* 2010; 34(5):482-486.
- 33 Nevada statute NRS 244.345, Dancing halls, escort services, entertainment by referral services and gambling games or devices; limitation on licensing of houses of prostitution (amended as of 2001). Available at <http://www.leg.state.nv.us/NRS/NRS-244.html#NRS244Sec345>.
- 34 BG Brents and K Hausbeck. State-sanctioned sex: Negotiating formal and informal regulatory practices in Nevada brothels. *Sociological Perspectives* 2001; 44(3):307-332.
- 35 C Mgbako and LA Smith. Sex work and human rights in Africa. *Fordham International Law Journal* 2011; 33(4):1178-1220.
- 36 EE Foley and R Nguer. Courting success in HIV/AIDS prevention: the challenges of addressing a concentrated epidemic in Senegal. *African Journal of AIDS Research* 2010; 9(4):325-336.
- 37 *Ibid.*, p 330.
- 38 *Ibid.*, p 331.
- 39 *Ibid.*, p 327.
- 40 Mgbako and Smith, *op.cit.*, p 1212.

The Australian state of New South Wales has also decriminalized sex work. In New South Wales and New Zealand, sex workers have been able to work with government to develop occupational safety and health guidelines for sex work,³¹ something that is difficult where criminal law is applied. Sex workers in these jurisdictions have good access to HIV prevention materials and supplies, such as condoms and lubricants, and the rate of transmission of HIV between sex workers and their clients is low. A 2010 study in three Australian cities concluded that sex workers in legal, licensed brothels had better access to condoms, lubricants, and health services than those in other circumstances.³²

LEGALIZATION AND REGULATION

In a few places, sex work (or sex work under certain circumstances) has been made legal and brought under a regulatory regime in the way that tobacco and alcohol, for example, are controlled in many countries. Jurisdictions that choose legal and regulated sex work are likely to do so on public health grounds. They often use such tools as licensing and regular inspections in brothels and other sex work venues. Legalization and regulation sometimes include mandatory medical checks for sex workers in licensed brothels or entertainment venues.

A notable case of legalization and regulation—because it occurs in a highly prohibitionist country—is sex work in designated legal brothels in the U.S. state of Nevada. Nevada state law allows counties with fewer than 400,000 residents (thus excluding the county that is home to Las Vegas) to license and regulate brothels.³³ Nevada's brothels are generally in isolated rural areas. Condoms are mandatory, and participating counties require that sex workers be tested for certain sexually transmitted diseases at regular intervals.³⁴

In the West African country of Senegal, women over the age of 21 may register and work legally as sex workers if they submit to periodic medical examinations and carry a record of their registration and their medical exams.³⁵ Senegal first instituted legalized sex work in the 1960s to curb the spread of STIs. While Senegal has been praised for its response to HIV, including being able to monitor and offer services to a visible population of sex workers, an apparently large number of sex workers prefer not to register and work clandestinely.³⁶ Registered sex workers have complained that the registration system announces them as sex workers in unduly public ways. When sex workers register to work legally, their files are sent to the police, which facilitates harassment, abuse, and extortion by the police, according to sex workers.³⁷ The fear of this abuse is one factor that keeps women from registering as legal workers; others include not wanting their families and friends to know they are sex workers and the difficulty of removing one's name from sex work registration if one leaves the sex trade.³⁸ Male and transgender sex workers are not allowed to register and, like other unregistered sex workers, may be working clandestinely and thus difficult to reach with health programs and condoms. The fact that registration is not attractive for many women or possible for men may be contributing to a reported increase in HIV incidence in at-risk populations in Senegal.³⁹ In addition to heavy regulations on legal sex work, Senegal retains criminal penalties for solicitation, brothel ownership, and procuring sex work.⁴⁰

Germany legalized sex work in 2002, replacing a quasi-criminal law regime under which sex work was unevenly prosecuted.⁴¹ Since then, the government removed the requirement for biweekly medical examinations of sex workers, finding that most sex workers sought care and prevention services voluntarily. German police officials have stated that legalizing sex work enables them to focus on more serious crimes that may occur in the “red light” districts.⁴² Registered sex workers are eligible for unemployment insurance and other social benefits in Germany, but many choose not to register because registration also entails paying taxes.⁴³

BOX 3

A Note on 100% Condom-Use Programs (CUP)

Whether sex work is criminalized or partly or wholly decriminalized or legalized, some governments have taken measures to mandate condom use in paid sex transactions. Often these take the form of 100% condom-use programs (CUP), which exist in Thailand, Cambodia, China, Mongolia, Vietnam, Laos, and Burma, among other countries.⁴⁴ These programs usually cover indoor sex or entertainment establishments and consist of a mandate—communicated to managers, clients, and sex workers alike—that condoms be used in all sexual transactions in these venues. Police or health inspectors monitor these venues in most cases. While evaluations have shown that these programs usually do result in greater use of condoms, sex worker organizations have objected to the repressive way in which many such programs are implemented, including giving police great latitude to publicize the identity of sex workers charged with condom infractions and forcing sex workers to undergo medical tests.⁴⁵ Sex worker organizations have not hesitated to point out that the solidarity of sex worker collectives is a better way to reach 100%, or virtually 100%, condom use without police repression.⁴⁶

41 S Loewenberg. Fears of World Cup sex trafficking boom unfounded. *Lancet* 2006; 368(9530): 105-06.

42 *Ibid.*

43 *Ibid.*

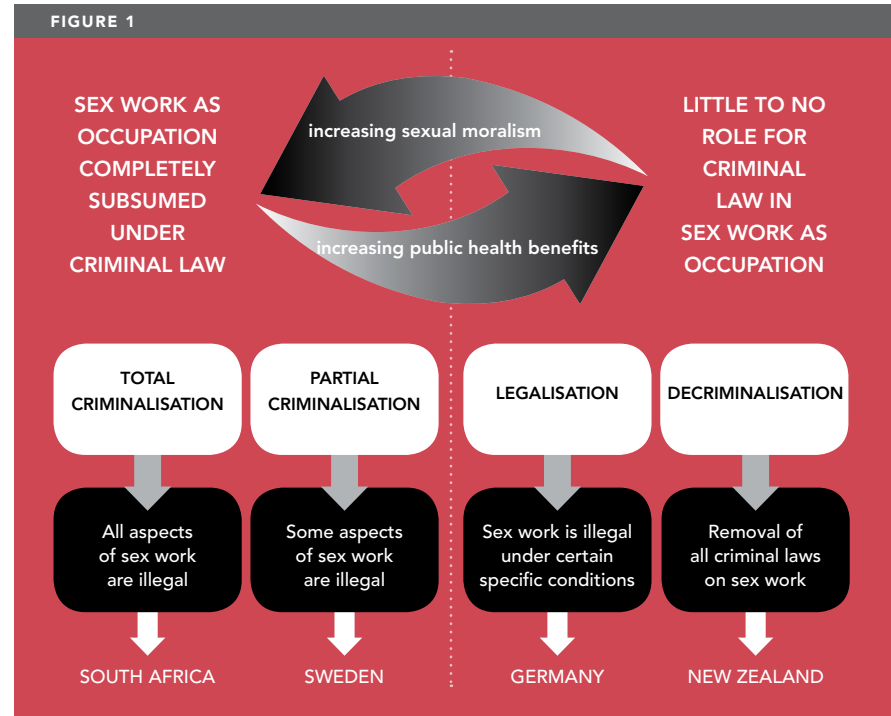
44 W Rajanapithayakorn. The 100% condom use programme in Asia. *Reproductive Health Matters* 2006; 14(28):41-52.

45 See, e.g., Global Working Group on HIV and Sex Work Policy, 2007. Draft reworking of the UNAIDS Guidance Note on HIV and Sex Work, April 2007 (available at <http://sexworkpolicy.files.wordpress.com/2007/09/final-response-to-unfpa-safer.pdf>); B Loff, C Overs and P Longo. Can health programmes lead to mistreatment of sex workers? *Lancet* 2003; 361:1982-3.

46 See Jana et al., *op.cit.*

CONCLUSION

Health policy experts have developed a popular diagram that illustrates legal regimes for sex work as being along a spectrum from greater to lesser use of criminal sanctions. According to the diagram, greater criminal sanctions equates with lesser public health benefits and greater sexual moralism (see Figure 1).



Source: M Richter, MF Chersich, F. Scorgie et al. Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail. *Globalisation and Health* 2010; 6(1), 6:1
<http://www.globalizationandhealth.com/content/6/1/1>.

While this diagram does not fully describe the overlapping and sometimes contradictory policies that may co-exist in a given location, it is a good depiction of the approaches available to policymakers and the trade-offs that are likely to figure in policy debates. It is essential that governments invest in generating evidence to understand the impact on health and human rights of the sex work laws and policies on their books. With evidence of that kind, with awareness of the human rights obligations to which they are already committed, and with the meaningful participation of sex workers, policymakers can make decisions that optimize the health and human rights of sex workers, their families, and their communities.

The purpose of this reference brief is to clarify terms and illustrate examples of alternatives to the use of criminal law as a response to sex work. Understanding the range of legislative and policy options for responding to sex work is critical to establishing policies consistent with respecting, protecting, and fulfilling the human rights of sex workers. Laws and policies on sex work should be based on the best available evidence about what works to protect health and rights. They should optimize sex workers' ability to realize the right to due process under the law, the right to privacy, the right to form associations, the right to be free of discrimination, abuse, and violence, and the right to work and to just and favorable conditions of work. Sex workers should have a meaningful role in the design, implementation, and monitoring of the laws and policies that affect them.

