**HIV Ireland**

**Submission to the Review of Part 4 of the Criminal Law (Sexual Offences) Act 2017**

*Decriminalization...reduces the risk of HIV infection, with modelling studies suggesting that decriminalizing sex work could avert 33-46% of HIV infections over 10 years*.[1] [UNAIDS, Global Aids Update 2020]

## 1. About HIV Ireland

HIV Ireland is a community based non-governmental organisation that provides a range of services and supports to people living with HIV and which advocates on behalf of people living with HIV. Formed in 1987 as the Dublin AIDS Alliance, HIV Ireland has also developed programmes and initiatives on sexual health education and preventative strategies to reduce the contraction and transmission of HIV. Since its establishment HIV Ireland has consistently engaged in policy development and in campaigning on issues relating to HIV, sexual health and the promotion of human rights and equality for people living with HIV. HIV Ireland has also been involved in programmes and strategies aimed at increasing public awareness and understanding of HIV – its causes, its consequences, and the stigma associated with HIV and AIDS.

### Our Vision

To contribute towards a significant reduction in the incidence and prevalence of HIV in Ireland and towards the realisation of an AIDS-free generation.

### Our Mission

Advocating for individuals living with HIV, preventing new HIV infections and combating HIV-related stigma and discrimination.

### Our Objectives

- To work towards reducing the prevalence of HIV in Ireland through effective prevention strategies.
- To increase public awareness and understanding around HIV and AIDS and to reduce the stigma and discrimination connected with HIV and AIDS.
- To improve the quality of life for people living with HIV through quality evidence-based support and advocacy services.

[1] K. Shannon et al., 'Global epidemiology of HIV among female sex workers: influence of structural determinants', *The Lancet,* 385(9962), 2015, p. 55-71.

*HIV Ireland is grateful to Ms Pia Janning for her work in compiling this submission and briefing paper.

- To enhance the promotion of broader sexual health objectives through education and training and through health promotion projects/campaigns in line with national policy.
- To inform and to influence policy around issues concerning HIV prevention and sexual health and relating to the lives of people living with HIV.
- To enhance the organisational effectiveness and efficiencies of HIV Ireland.

## 2. Introduction

HIV Ireland welcomes the opportunity to make this submission as part of the Review of Part 4 of the Criminal Law (Sexual Offences) Act 2017. As an organisation dedicated to preventing new HIV transmissions among vulnerable populations, we have repeatedly raised concerns about the purpose and impact of the legislation on the human rights of sex workers and, in particular, their ability to protect themselves against the risk of exposure to HIV.

As has been noted, "[t]he burden of HIV does not fall equally across all populations. In all countries, HIV disproportionately affects certain key populations" including sex workers.[2]

Research conducted between 2011 and 2018, found that:

> The magnitude of the relationship between the legal status of sex work and individual HIV infection is highest among individuals in fully criminalized settings, followed by setting where the legal status of selling sex is not specified. These results are consistent with prior findings from ecological studies and highlight how laws serve as a structural determinant that contribute to individual-level health outcomes.[3]

In reviewing Part 4 of the Criminal Law (Sexual Offences) Act 2017, HIV Ireland calls for particular attention to be paid to the impact of current legislative provisions on the health of sex workers, including the transmission of HIV and STIs.

We call on Ms. Butler, as Independent Expert of the Review process to ensure that the voices of sex workers and their advocates feature prominently throughout the review and reflected in the final report. We look forward to engaging positively with the Review to highlight what we view as serious gaps in health and human rights compliance within the legislation.

While this review does not consider in detail the impact of COVID-19, it is important to note at the outset the particular vulnerabilities of sex workers during the pandemic, particularly in certain legislative contexts.

[2] The Global Fund, Technical Brief, 'Addressing sex workers, men who have sex with men, transgender people, people who use drugs, and people in prison and other closed settings in the context of the HIV epidemic', Geneva, 2017, p. 5.
[3] C. Lyons et al., 'The role of sex work laws and stigmas in increasing HIV risks among sex workers' Nature Communications, vol.11, 2020, p. 773.

As UNAIDS recently reported:

> Sex workers all over the world are reporting increased discrimination and harassment, with reports of punitive crackdowns against sex workers resulting in raids on homes, compulsory COVID-19 testing, and arrests and threatened deportation of migrant sex workers."[4]
>
> Where any aspect of sex work is criminalized, sex workers lack legal protections against violence, discrimination and abuse. Not recognizing sex workers as legitimate workers also denies them the basic health and social safety nets provided to other workers, an exclusion that is particularly harmful during economic downturns and COVID-19 lockdowns.[5]

**PART 1**

## 1. HIV in Ireland - Overview, trends, prevention

HIV is a virus that attacks the body's immune system. The immune system is made up of different cells that protect and defend our bodies from germs and infections. HIV attacks the CD4 cells in the immune system, (also known as T-cells), these are vital for mounting our bodies immune response. Having HIV means the body is less able to fight off sickness and infections. AIDS is the fourth stage of the HIV infection. A person is said to have AIDS when their immune system has become so weak it can no longer fight off diseases with which it could normally cope. People can live with HIV for years without any signs and symptoms. Not every person with HIV will go on to develop AIDS.

New (provisional) data from the Health Protection Surveillance Centre indicates that for the third year in a row, the number of newly notified HIV cases in Ireland continues to climb (536 in 2019 – the highest on record) with a corresponding increase in the rate of diagnoses (11.3 per 100,000 of the population).[6] Data published weekly by the HPSC suggests a similar upward trajectory in 2020 with notified cases appearing to match or exceed the figure for the same period last year. While there are a number of reasons that contribute to rising rates of HIV, this trend stands in stark contrast to most other EU Member States where rates have continued to fall.

Data from 2018 estimates that there are currently 7,200 people living with HIV in Ireland with approximately 10% of those undiagnosed.[7] Of cases notified in 2018, 79% of persons were male and 21% were female.[8] In addition, five cases of transmission were recorded among trans people.

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[4] UNAIDS, Global Aids Update 2020,'Seizing the Moment: Tackling entrenched inequalities to end epidemics', Geneva, 2020, p. 20.
[5] *Ibid,* p. 157.
[6] Health Protection Surveillance Centre (HPSC), 'HIV Infection in Ireland', 2020. Available at: <https://www.hpsc.ie/a-z/hivandaids/> (Last accessed: 10 September 2020).
[7] Health Protection Surveillance Centre (HPSC), 'HIV in Ireland, 2018 - Annual Epidemiological Report', Dublin, 2019, p.4.
[8] *Ibid,* p.6.

In addition, 79% of new diagnoses were recorded among people aged 25 to 39, with a further 7% of cases reported among people aged between 15 to 24. More than half of diagnoses in 2018 (56%) related to men who have sex with men, with almost one third (31%) accounted for by heterosexual transmission.[9] Among all diagnoses in 2018 (where information was available), 34% presented with late infection, including 19% with advanced HIV infection. Groups with the highest proportion presenting late were: females; those aged 40 years and older; those born in sub-Saharan Africa; those living outside HSE East; and people who inject drugs (PWID).[10]

Medical advances in the treatment of HIV since the late 1990s means that anyone living with HIV who adheres to an effective treatment regime (Antiretroviral therapy - ART) and who has attained viral suppression cannot pass on HIV through sexual intercourse. Currently approximately 89-90% of people living with HIV in Ireland are aware of their HIV status, a further 88% of those are reported to be on ART with 95% of those achieving viral suppression.

Advances in medicine have also seen the introduction of drugs which, when taken either before (Pre Exposure Prophylaxis - PrEP) or after (Post Exposure Prophylaxis - PEP) sexual intercourse are highly effective in preventing adherents from acquiring HIV. In 2019, the Government introduced a national PrEP programme to provide PrEP free of charge to persons who met the criteria for increased vulnerability to HIV.[11] The criteria for men who have sex with men to qualify for free PrEP (including trans men who have sex with men and trans women who have sex with men) are clearly prescribed and include engaging in condomless anal sex, previously contracting an STI, participating in chemsex, etc. In order to qualify for PrEP, a heterosexual men women and man must be considered by a specialist STI doctor to be at a large risk of contracting HIV through sex.[12] No specific reference is made in the criteria to sex work, prostitution or to persons engaging in sex work.

The planned rollout of the national PrEP programme in 2020 has been severely impacted by the onset of the COVID-19 pandemic and the closure or restriction of many HIV and STI clinical services during the COVID-19 period.[13]

[9] *Ibid.*
[10] *Ibid,* p.17.
[11] Press release, 'Taoiseach and Ministers for Health announce HIV PrEP programme', 10 October 2019. Available at: <https://www.gov.ie/en/press-release/taoiseach-and-ministers-for-health-announce-hiv-prep-programme/> (Last accessed: 10 September 2020)
[12] Sexualwellbeing.ie, 'How to Get PrEP'. Available at: <https://www.sexualwellbeing.ie/sexual-health/prep/how-to-get-prep/> (Last accessed: 10 September 2020).
[13] HIV Ireland, 'Public Sexual Health Service Restrictions', 2020. Available at: https://www.hivireland.ie/wp-content/uploads/Restricted-Public-Sexual-Health-Services.pdf (Last accessed: 10 September 2020).

## 2. International policy and strategic initiatives

When reviewing Part 4 of the Criminal Law (Sexual Offences) Act 2017, international and national policy and strategic initiatives as well as recommendations from international bodies should be considered.

### Fast-Track Cities

The Fast-Track Cities initiative is a global partnership between cities and districts around the world. The initiative has four core partners: the International Association of Providers of AIDS Care (IAPAC); the Joint United Nations Programme on HIV/AIDS (UNAIDS); the United Nations Human Settlements Programme (UN-Habitat); and the City of Paris.

Launched on World AIDS Day 2014, the initiative today includes more than 300 cities and districts that are committed to attain the UNAIDS 90-90-90 targets by 2020: 90% of all people living with HIV will know their HIV status; 90% of all people with diagnosed HIV infection will receive sustained antiretroviral therapy (ART); and 90% of all HIV-diagnosed people receiving sustained ART will achieve viral suppression.

The fourth, and equally important, target is achieving Zero Stigma and Discrimination.

Mayors, politicians and other city and district officials designate their cities as Fast-Track Cities by signing the Paris Declaration, which outlines a set of commitments to achieve the initiatives objectives. Grounded in the principle of data transparency, the initiative includes a Fast-Track Cities Global Web Portal that allows cities to report on their progress against the fast-track and other targets.

Ireland signed the Paris Declaration in 2019, pledging to place our cities on a fast-track to end AIDS by 2030. Dublin, Cork, Limerick and Galway are now on the fast-track to end AIDS by 2030. Additional funding was announced to further expand community HIV testing, raise awareness about the benefits of treatment, including a new Pre-Exposure Prophylaxis (PrEP) programme, as well as public campaigns on stigma reduction, including the U=U campaign (undetectable equals untransmittable), and promotion of the new PrEP programme.

### UNAIDS

Evidence shows that the prevalence of HIV is 12 times higher among sex workers than among the general population.[14] UNAIDS, in its "Guidance Notes on HIV and Sex Work" aims to provide a coordinated human rights-based approach to promoting universal access to HIV prevention, treatment, care and support in the context of adult sex work.[15] As noted by UNAIDS, in order to

[14] UNAIDS, 'The GAP Report 2014', Geneva, 2014. Available at: <https://www.unaids.org/sites/default/files/media_asset/06_Sexworkers.pdf> (Last accessed: 10 September 2020).
[15] UNAIDS, 'Guidance Notes on HIV and Sex Work', Geneva, 2012.

effectively protect sex workers from HIV, the realities of sex workers must be recognised and sex workers must be enabled to protect themselves from the risk of HIV transmission. [16]

UNAIDS has specifically highlighted that "end demand" initiatives such as criminalising the purchase of sex do not "reduce sex work or HIV transmission, or improve the quality of life of sex workers."[17] On the contrary such laws make sex workers more vulnerable, as outlined throughout this submission. Moreover, end demand initiatives are often characterised by generally negative attitudes towards sex workers and clients and add to the neglect of evidence-informed HIV prevention programmes and services. Furthermore, such attitudes can encourage law enforcement officials to enforce laws in such a way that makes sex workers more vulnerable to HIV for example by using condoms as evidence of involvement in sex work.[18]

In its 2020 Global Aids Update, UNAIDS highlights how laws and policies targeted at discouraging or criminalising individual behaviour "such as sex work… can legitimize stigma and give license to discrimination and harassment. This isolates people who are particularly high risk of acquiring HIV and hinders them from accessing the services they need, further elevating their risk of infection".[19]

UNAIDs recommends "that criminal laws and punitive policies around sex work, which are barriers to universal access to HIV prevention, treatment and care, should be removed and that supportive policies should be enacted to empower and 'protect sex workers and their clients, including safe sex during sex work'".[20]

**World Health Organisation**

The World Health Organisation (WHO) in its guidance on the prevention and treatment of HIV and STIs in sex workers, has specifically called on all countries to work towards the decriminalisation of sex work as well as making health services available, accessible and acceptable to sex workers based on the principles of avoidance of stigma, non-discrimination and the right to health.[21]

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[16] *Ibid,* Annex 2, p. 8.
[17] *Ibid.*
[18] *Ibid.*
[19] UNAIDS, Global Aids Update 2020, 'Seizing the Moment: Tackling entrenched inequalities to end epidemics', Geneva, 2020, p.132.
[20] *Supra* note 15.
[21] WHO, 'HIV Prevention, Diagnosis, Treatment and Care for Key Populations, Consolidated Guidelines', Geneva, 2014; WHO, 'Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries', Geneva, 2012. Available at: <https://apps.who.int/iris/bitstream/handle/10665/128049/WHO_HIV_2014.8_eng.pdf?sequence=1> and <https://apps.who.int/iris/bitstream/handle/10665/77744/WHO_HIV_2012.19_eng.pdf;jsessionid=8F1E7FEE785F92928BAE3A9F76779B47?sequence=> (Last accessed: 10 September 2020).

## Sustainable Development Goals

The Sustainable Development Goals (SDGs), adopted by all UN Member States in 2015, constitute a universal call to action to end poverty, protect the planet and improve lives.[22]
Built on the premise of "leave no-one behind" the 17 Goals address a number of different issues.

Goal 3 of the SDGs, "Good Health and Well-being", sets a number of specific targets, including ending the AIDS epidemic by 2030.[23] At an international level, UNAIDs has drawn particular attention to the need to address the underlying determinants of health and associated vulnerabilities of those living with HIV in order to end the AIDS epidemic.[24] Thus the achievement of SDG 3 is reliant on, and interconnected with progress on a number of other SDGs, including but not limited to:

Goal 1: Ending Poverty, including economic empowerment and social protection;
Goal 5: Achieving Gender Equality, including gender discrimination, violence and harmful practices;
Goal 8: Promoting Economic Growth, including safe and secure work environments that facilitate access to HIV services, particularly those in informal employment including sex workers;
Goal 10: Reducing Inequality, including protection against discrimination and stigma which is a key contributor towards HIV prevalence among key populations and is linked to lower access to healthcare; and
Goal 16: Promoting peaceful and inclusive societies, including a recognition that exclusion, stigma, violence and discrimination fuel HIV.

## International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR), was ratified by Ireland in 1989, thereby agreeing to respect, protect and fulfil the rights within it. Article 12 specifically recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. In its General Comment No. 22, the UN Committee on Economic, Social and Cultural Rights (CESCR), which monitors implementation of ICESCR, specified that Article 12 includes the right to sexual and reproductive health (recognised as distinct but referred to as one).[25] Sexual health is defined as a "state of physical, emotional, mental and social well-being in relation to sexuality."[26]

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[22] For more information see: <https://www.un.org/sustainabledevelopment/development-agenda/> (Last accessed: 10 September 2020).
[23] For more information see <https://www.who.int/sdg/targets/en/> (Last accessed: 10 September 2020).
[24] For more information see < https://www.unaids.org/en/AIDS_SDGs> (Last accessed: 10 September 2020).
[25] UN Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the right to sexual and reproductive health (UN Doc. E/C.12/GC/22), Available at: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11> (Last accessed: 10 September 2020).
[26] WHO, "Sexual health, human rights and the law", 2015, sect. 1.1.

In its General Comment, CESCR outlines the need for states to reform laws that impede on the right to sexual and reproductive health, including laws that criminalise consensual sexual activity between adults and which create legal barriers impeding access to sexual and reproductive health services.[27]

As noted by CESCR, the right to sexual and reproductive health "includes the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning ones body and sexual and reproductive health."[28]

The right to sexual and reproductive health also includes a number of underlying determinants of health including but not limited to: safe and healthy working conditions; protection from violence and discrimination as well as other human rights violations that have a negative impact on the enjoyment of sexual and reproductive health.

CESCR also makes specific reference to the social determinants, often defined in law and policy, that impact on the enjoyment of the right to health. This includes discrimination and marginalisation of specific groups and the Committee highlights the multiple discrimination experienced by certain groups, including those living with HIV/AIDS. CESCR outlines the requirement on states to address these social determinants as manifested in laws, institutional arrangements and social practices that prevent individuals from enjoying their right to sexual and reproductive health.[29]

The legislation as it currently stands, is contrary to evidence and recommendations from international bodies such as UNAIDS and undermines the achievement of the SDGs and strategic initiatives such as Fast-Track Cities by compounding the marginalisation and stigma experienced by sex workers. It also fails to respect, protect and fulfil the right to the highest attainable standard of health under Article 12 of ICESCR and underlying determinants of health, as outlined throughout this submission, including the creation of unsafe work environments and the disempowerment of sex workers, by pushing their work into clandestine environments. This in turn has further consequences in terms of increasing the vulnerability of sex workers to violence, discrimination and stigma and a reluctance to access HIV and STI testing and treatment services, negatively impacting on the right to sexual health.

## 3. National policy and strategic initiatives

### Healthy Ireland: A Framework for Improved Health and Wellbeing 2013-2025

The Framework sets out a vision of " a healthy Ireland where everyone can enjoy physical and mental wellbeing to their full potential, where wellbeing is valued and supported at every level of

[27] *Supra* note 25, paras. 40, 57.
[28] *Ibid,* para. 5.
[29] *Ibid,* para. 8.

society and is everyone's responsibility".[30] One of the number of goals within the strategy is to "[r]educe health inequalities". Frameworks of Action within the Strategy include but are not limited to: Partnerships and Cross-Sectoral Work and Empowering People and Communities. The need for partnerships including with the voluntary sector and strategies to empower vulnerable groups are noted in this regard.[31] Given the health inequalities and vulnerabilities experienced by sex workers, relevant policies and strategies arising out of, and informed by, the Healthy Ireland Framework, should duly consider the experiences and needs of sex workers. An example of such a strategy is the National Drugs Strategy.

**National Drugs Strategy**

Reducing Harm, Supporting Recovery: A health-led response to drug and alcohol use in Ireland 2017-2025 sets out the Government strategy to address harm caused by substance misuse and details a number of key actions to be delivered. As noted in the strategy, it aims to take an "integrated public health approach to substance misuse". The Healthy Ireland Framework provides an "over-arching context" for the development of the strategy which "underlines the need for a whole-of-Government response to the socio-economic, cultural and environmental risk factors contributing to the causes of substance misuse".[32] In preparing the Strategy an evidence review conducted and report considered trends in data considered specific sub-populations including sex workers. The Strategy makes specific reference to sex workers when acknowledging the diversity evident among drug users and specific groups with more complex needs. In its strategic action to improve the capacity of services to accommodate the needs of people who use drugs and alcohol from specific communities, the Strategy specifically references sex workers and notes this will be delivered by "[f[ostering engagement with representatives of these communities, and/or services working with them, as appropriate."[33]
This strategic action is also referenced in the Second National Intercultural Health Strategy 2018-2023 in the context of policy developments relevant to intercultural health.[34]

**Connecting for Life: Ireland's National Strategy to Reduce Suicide 2015-2020**

The National Strategy to Reduce Suicide 2015-2020, sets out a vision of an "Ireland where fewer lives are lost to suicide, and where communities and individuals are empowered to improve their mental health and wellbeing".[35] A number of Goals and Outcomes are outlined including: reduced suicide in the whole population and amongst specified target groups; and reduced rate of presentations of self-harm in the whole population and amongst specified target groups.[36] The

[30] Department of Health, 'Healthy Ireland: A Framework for Improved Health and Wellbeing, 2013-2025', p.5.
[31] *Ibid,* pp. 8, 24.
[32] Department of Health, 'Reducing Harm, Supporting Recovery: A health-led response to drug and alcohol use in Ireland, 2017-2025' , p.7
[33] *Ibid,* Strategic Action 2.1.27.
[34] HSE, 'Second National Intercultural Health Strategy 2018-2023', Annex 2.
[35] HSE, 'Connecting for Life: Ireland's National Strategy to Reduce Suicide 2015-2020', p.4.
[36] *Ibid.*

Strategy, includes reference to a number of priority groups with potentially increased vulnerability and risk of suicidal behaviour, including sex workers.

**National Sexual Health Strategy**

The National Sexual Health Strategy 2015-2020, is the first of its kind in Ireland as it is the first time a coordinated approach has been developed at national level to address sexual health and wellbeing and to reduce negative sexual health outcomes.
The Strategy makes specific reference to groups who are at particular risk of and/or vulnerable to experiencing negative sexual health outcomes. This includes sex workers.[37] The report also highlights targeted supports required for vulnerable groups such as migrants to improve sexual health and wellbeing. With regard to increased risk of STIs and HIV, gay, bisexual and men who have sex with men who do not identify as gay or bisexual are noted.[38]

Significant focus is placed on the prevention and treatment of HIV and STIs in the Strategy but only one mention is made of sex workers. Further, there is no specific acknowledgement or reference to the fact that those already at increased risk or more vulnerable to negative sexual health outcomes can experience an even greater disadvantage if they engage in sex work. This includes for example, members of the LGBTI+ community, men who have sex with men (MSM), and migrants. As noted by Amnesty, "[g]roups most affected by discrimination and inequality are frequently over-represented in sex work."[39]

**LGBTI+ Inclusion Strategy**

The LGBTI+ Inclusion Strategy was launched in 2019 and runs until 2021. The Strategy is centered around a number of thematic pillars including:

- Visible and included;
- Treated equally;
- Healthy; and
- Safe and supported.

It sets out a range of actions under each pillar aimed at improving the lives of LGBTI+ people in Ireland. In relation to the thematic pillar "Healthy" actions include but are not limited to:

- Healthcare providers and practitioners are trained to understand the identities and needs of their LGBTI+ patients and to avoid making heteronormative assumptions;

[37] Department of Health, 'National Sexual Health Strategy 2015-2020', p. 39.
[38] *Ibid,* p. 31.
[39] Amnesty International Policy on State Obligations to Respect, Protect and Fulfil The Human Rights of Sex Workers, 2016, p. 5. Available at: <https://www.amnesty.org/download/Documents/POL3040622016ENGLISH.PDF> (Last accessed: 10 September 2020).

- Health policy takes consideration of the needs of all population groups including the LGBTI+ community;
- Sexual health services are adequately resourced and available throughout Ireland including in rural locations; and
- The LGBTI+ community, particularly the MSM (men who have sex with men) population are made aware of the risks of contracting HIV and other STIs and of the importance of regular testing.

However, no reference is made in the LGBTI+ Inclusion Strategy of LGBTI+ sex workers. Thus, the Strategy fails to take account of healthcare needs of LGBTI+ sex workers, despite this cohort of the population making up a significant number of sex workers. This includes training of health care providers, availability and accessibility of health services for sex workers, and access to information for sex workers around HIV/STIs.

While some relevant national policy and strategy takes into consideration sex workers as a specific group, there appears to be a lack of consistency in approach. With the National Sexual Health Strategy due for review in 2021, the LGBTI+ Inclusion Strategy running until 2021, and the Criminal Law (Sexual Offences) Act 2017 currently being reviewed, a timely opportunity exists to draw greater linkages between legislative and policy provisions that impact on sexual health outcomes in Ireland. Inter-departmental collaboration is encouraged in order to adopt a holistic approach in this regard. Specific attention should be paid to the vulnerabilities to negative sexual health outcomes, specifically in relation to HIV and STIs, faced by those who engage in sex work.

**PART 2**

Legislation that aims to protect those offering sexual services and that criminalises the purchase of sexual services.

### 1. National Legislation - Part 4 Criminal Law (Sexual Offences) Act 2017

The Criminal Law (Sexual Offences) Act which came into force in February 2017, contains provisions which criminalise the purchase of sex but not the sale of sex as well as increasing penalties for sex workers who work together under brothel keeping laws.[40] When introduced, these provisions purported to target the demand on prostitution and the wider exploitation associated with prostitution, including trafficking of persons for prostitution.[41] However, evidence derived internationally demonstrates the potential damaging impact of the Nordic Model, upon which the legislation is based.

[40] The Criminal Law (Sexual Offences) Act 2017, Available at: <http://www.irishstatutebook.ie/eli/2017/act/2/enacted/en/htmlhttp://www.irishstatutebook.ie/eli/2017/act/2/enacted/en/html> (Last accessed: 10 September 2020).
[41] Department of Justice and Equality, Press Release, "New laws on Sexual Offences take effect from today - Fitzgerald", 27 March 2017, Available at: <http://www.justice.ie/en/JELR/Pages/PR17000103> (Last accessed: 10 September 2020).

## 2. The Nordic Model

The criminalisation of the purchase of sex is often presented as a human rights-based approach, protecting those offering sexual service. In reality however, such a model can lead to the violation of numerous human rights of sex workers, including as noted by Amnesty International, "violations of the right to housing, the right to security of person, the right to equal protection of the law, the right to health, the right to non-discrimination and the right to privacy".[42]

Specifically, such laws, can create conditions that lead to adverse health outcomes for sex workers and impact on their enjoyment of the right to the highest attainable standard of health under international human rights law.

As highlighted by UNAIDS in its 2020 Global Aids Update:

> The criminalization of the clients of sex workers...has been repeatedly shown to have negative effects for sex workers in terms of their safety, health and overall living conditions. Where any aspect of sex work is criminalized, sex workers lack legal protections against violence, discrimination and abuse...Where sex work is criminalized-either through the criminalization of the sex worker or the client- the threat of harassment by police and arrest drives sex workers to operate in isolated locations, disrupting peer support networks and service access and limiting risk reduction opportunities.[43]

In its 2016 report, HIV Ireland highlighted evidence suggesting the Nordic Model "is leading to a more adverse environment for sex workers in terms of their ability to protect themselves against the risk of exposure to HIV/AIDS".[44] This is supported by research and evidence collated in HIV Ireland's recently published report "Sex workers lives under the law: A community engaged study of health and justice in Ireland"[45], in which research on the Nordic context reveals criminalising sex purchase impedes sex workers' ability to manage risks and access health supports[46] placing them at greater risk of gender-based violence and exploitation because they cannot manage their work conditions.[47] This increases the likelihood of condom non-use, acquisition of sexually transmitted infections including HIV acquisition and transmission.[48] Moreover, where governments criminalise sex work-related activities they de-prioritise harm reduction measures for sex workers including condom distribution and ongoing outreach. In Sweden, where sex

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[42]Amnesty International, 'The Human Cost of "Crushing" the Market: Criminalization of Sex Work in Norway', 2016, p. 8. Available at: <https://www.amnesty.org/download/Documents/EUR3640342016ENGLISH.PDF> (Last accessed: 10 September 2020).

[43] *Supra* note 4, 158. L. Platt et al., 'Associations between sex work laws and sex workers' health: a systematic review and meta-analysis of quantitative and qualitative studies', *PLOS Med*., 15(12), 2018.

[44] HIV Ireland, 'Potential impact of the Swedish model on rates of HIV/AIDS among sex workers and their access to healthcare', Dublin, 2016, p.29.

[45] Dr. K. McGarry and Dr. P. Ryan, "Sex worker lives under the law: A community engaged study of access to health and justice in Ireland", Dublin, 2020.

[46] J. Visser et al., (2004) 'Policies towards the sex industry in Europe: new models of control' in S. Day and Ward H.(eds.) 'Sex Work, Mobility and Health in Europe' London; Y. Svanström (2004) 'Criminalizing the john- a Swedish gender model? In J. Outshoorn (ed.) *The Politics of Prostitution: Women's Movements, Democratic States and the Globalisation of Sex Commerce,* Cambridge: Cambridge University Press. Pp. 225-244.

[47] *Supra* note 44.

[48]Supra note 44. A. Krusi et al, 'Criminalization of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada-a qualitative study', *BMJ Open*, vol. 4, 2014, pp.1-10;

purchase is illegal, the state fails to provide sex workers with appropriate harm reduction and support services.[49]

Furthermore, research conducted in 2019 which reviewed the impact of the sex purchase ban in Northern Ireland and was the only jurisdiction to have baseline data for comparative purposes pre-law change[50], found that 'none of the foundational claims of the Nordic model can be supported'.[51] The research found that the assumption that sex purchase laws would reduce demand was unfounded and that, on the contrary, supply of sexual services have in fact increased following the implementation of the law. The research also found the implementation of this law to be problematic given how police face difficulties in detecting offences. It was also found that, while violence incidence had not increased, there were increases in anti-social, nuisance and abusive behaviours directed to sex workers in the aftermath of the law change.[52]

Moreover, Nordic style model legal frameworks can conflate consensual and non-consensual sex and frame client criminalisation as a primary tool in a state's anti-trafficking measures. Such policies have a negative impacts on other (non-trafficked) groups affected by such laws and as has been noted, "immaterialise considerations of social justice for sex workers as well as legislation and policies that promotes their welfare and social inclusion".[53]

Current legislation can create unintended risks for vulnerable groups such as victims of trafficking, in failing to address the root causes of trafficking and creating the risk of criminalising victims of trafficking. Equally, in criminalising the purchase of sex as a measure to combat trafficking, the legislation is negatively impacting on sex workers, in various ways as outlined below. Human trafficking and sexual exploitation require a robust legislative response while ample evidence demonstrates that sex workers would be better protected under a legislative regime that fully decriminalises both the sale and purchase of sex.

## PART 3

### 1. Sex workers and access to sexual health services in Ireland

Under international human rights law, states have an immediate obligation to "repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine [an] individual's or particular group's access to sexual and reproductive health facilities, services, goods and information".[54]

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[49] D. Kulick, 'Four Hundred Thousand Swedish Perverts', GLQ: a journal of Lesbian and Gay Studies, vol. 11(2), 2005, pp.2015-235; S. Hubbard et al, 'Regulating sex work in the EU: prostitute women and the new spaces of exclusion', Gender, Places & Culture, vol. 15(2), 2008, pp. 137-152.
[50] S. Huschke et al, 'Research into Prostitution in Northern Ireland', Department of Justice Northern Ireland, Belfast, 2014.
[51] E. Ellison et al, 'A Review of the Criminalization of Paying for Sexual Services in Northern Ireland, Queens University Belfast, School of Law, 2019, p. 164.
[52] *Ibid.*
[53] J. Levy, 'Racism, xenophobia and hegemonic masculinity: The Nordic model of criminalizing the purchase of sex' in S. Fitzgerald and K. McGarry (eds) *Realising Justice for Sex Workers: An Agenda for Change,* London, Rowman & Littlefield, 2018, p. 9.
[54] *Supra* note 25, para. 49(a).

Furthermore, the UN Committee on Economic, Social and Cultural Rights (CESCR) has confirmed that states must ensure that sex workers have access to the full range of sexual and reproductive health care services.[55]

In Ireland, it is clear that barriers are perceived to exist when it comes to the protection of sex workers, including protection of health and access to comprehensive health care.

Sex workers perceive the current legislation as exacerbating the stigma they are exposed. In turn, stigma is reported to be a key factor in non-disclosure of sex work. This creates an environment where sex workers feel compelled to develop strategies to hide their involvement in sex work, which in turn increases stress and contributes to negative health outcomes.[56] Numerous international studies suggest that non-disclosure of involvement in sex work to health service professionals is a barrier to accessing comprehensive health care.[57]

Participants in the recently published research study by HIV Ireland, expressed a reluctance to disclose their experience of sex work with a range of health professionals and that this hindered their ability to receive holistic care.[58]

> I don't like the subterfuge; I can't go to my GP and say 'test me there I'm doing this job' … I could never go to my GP. And my GP is very open-minded, I just wouldn't want her to know. I have come here [sexual health clinic] once when they did have a doctor for the testing, that was fantastic, but I got an awful grilling. It was before I ever came to the meetings here, it was oh… I felt dirty afterwards, I got a serious grilling like. I didn't tell them I was a sex worker, I had to make up a big lie, 'oh I've discovered my boyfriend's been unfaithful' and I gave them a false name, everything was false. And they did the tests and the tests were fine, it's the subterfuge that I don't like (Daisy, Cork).

HIV Ireland's research shows that the reluctance to disclose their experience of sex work, leads to participants of the study deploying a range of strategies to negotiate their sexual health screening, resulting in deficient medical care. [59]

> I mean while I was living in Ireland, I go back to England for a sexual health check, because I'm in rural Mayo, and the only STD clinic is in Castlebar, Mayo General. And I'm not going to go to a general hospital in Castlebar for an STD check because I would see… I'm not going to… In England there's STD clinics, most of them have worked with sex workers

[55] *Supra* note 25, para. 32.
[56] L. Lazarus et al., 'Occupational stigma as a primary barrier to health care for street-based sex workers in Canada', Culture, Health & Sexuality, vol. 14(2), 2012, p. 140; C. Benoit et al., 'Prostitution Stigma and its Effects on the Working Conditions, Personal Lives, and the Health of Sex Workers', *The Journal of Sex Research*, vol. 55(4-5), 2018, pp.457-471.
[57] *Ibid.* M. Slabbert et al., 'Sexual and reproduction health outcomes among female sex workers in Johannesburg and Pretoria, South Africa: Recommendations for public health programmes', *BCM Public Health*, vol. 17(3), 2017, pp.17-27.
[58] *Supra* note 45, p. 63.
[59] *Supra* note 45, p. 64.

> before, you just say you're a sex worker, they say fine, bla bla bla, but here… I go back to England (Freya, Galway).
>
> I've never gone because it's public, down to the Victoria Hospital, which is the state public service. And everybody's in there, it's public, anybody with an STI gets recommended in there, and I know the woman running the clinic, I can't go there. So no, there is definitely a shortage, I mean I'll pay for the service. Now I know there's a place in Patrick's Street who do it. I think there's not enough testing, there's not enough… outside of Dublin anyway (Daisy, Cork).

The current model also creates perceived unintended risks to particularly vulnerable groups.

> There's also the intersection of what you're bringing up about being trans, or just being LGBT anyway, and being queer, or being migrant, or being disabled in some way, and you add sex work to any of those things, and you're already receiving stigma for something that's a part of who you are, that you cannot change at all, anywhere you turn to for help, they're going to be judging you for who you are, and what you do. And so you're just that much more endangered. And there's a massive intersection as well with people who are in sex work for those reasons. (Piper, Dublin)[60]

Research has a indicated that certain groups can also be particularly fearful of disclosure such as transgender sex workers, out of fear that it may negatively impact subsequent medical or therapeutic interventions they may need[61] as well as migrants out of fear of deportation and asylum seekers as they are afraid that their applications may be delayed.

> [T]here is a lot of migrant women involved in sex work that are just … that don't get themselves checked out as much as they should do … because they're afraid that if any hint of them being involved in sex work gets out, their applications might get delayed, they might get stuck in DP [Direct Provision] for even longer. (Cassandra, Galway)[62]

In New Zealand, where sex work has been decriminalised since 2003, research has found increasing levels of disclosure to GPs after decriminalisation of sex work.[63] It was also been found that most sex workers were accessing their GP for both general health (91.8%) and sexual health (41.3%).[64] Local sexual health centers were the second most popular services utilized with one-quarter of participants stating it was their preferred option. Improved sex worker health outcomes have also been reported in New Zealand, with 87% of all survey participants having a regular doctor and with private sex workers less likely to report that they felt pressured to accept a client when they did not want to.[65]

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[60] *Supra* note 45, p. 76.
[61] Oliveira 2018, p. 20.
[62] *Supra* note 45, p. 73.
[63] G.M. Abel, A decade of decriminalization: sex work 'down under' but not underground, *Criminology & Criminal Justice, vol. 14 (5),* 2014, p. 36.
[64] *Ibid.*
[65] G. Laverack and A. Whipple, 'The sirens' song of empowerment: a case study of health promotion and the New Zealand Prostitutes Collective', Global Health Promotion, 17 (1), 2010, p.37.

In reviewing Part 4 of the Criminal Law (Sexual Offences) Act 2017, it is imperative to consider the impact that the current legislative provisions are having on access to sexual health services for sex workers in Ireland and negative sexual health consequences as detailed further below. Furthermore, public policy interventions relating to sexual health must reflect the experiences and meet the needs of sex workers and ensure adequate training is provided to health professionals in this regard. Special attention should be paid to particular groups such as trans, migrants and asylum seekers, reflecting social changes in Ireland and the diversification of the country's population.

## 2. Sex workers and HIV

In its recently published report, UNAIDS reports that, globally, a majority (62%) of new adult HIV infections in 2019 were among key populations and their sexual partners. These populations—which include sex workers, people who inject drugs, prisoners, transgender people, and gay men and other men who have sex with men—constitute small proportions of the general population, but they are at elevated risk of acquiring HIV infection, in part due to discrimination and social exclusion.[66]

### Women

UNAIDS estimates that the risk of HIV infection among female sex workers globally is 30 times that of women in the general population.[67] While no specific data providing a disaggregation of gender categories among sex workers is available for Ireland, the most recently available statistics on newly notified cases of HIV indicate that one in five (21%) newly notified diagnoses are among women (including trans women).[68]

Furthermore, in its Global AIDS Update for 2020, UNAIDS estimates 45–75% of adult female sex workers are assaulted or abused at least once in their lifetime, while mechanisms for reporting abuse or accessing services for survivors of violence, including sexual and reproductive health and HIV services, are often blocked due to the criminalization of sex work and related stigma and discrimination.[69]

### Gay, bisexual and other men who have sex with men (GBMSM)

It has been noted that significant successes have been achieved in reducing HIV transmission and AIDS-related deaths among gay, bi and other men who have sex with men particularly in Australia, North America and western Europe. High levels of condom use, adherence to PrEP

[66] *Supra* note 4, p. 46.
[67] *Supra* note 4, p.197.
[68] *Supra* note 7, p. 6.
[69] *Supra* note 4, p. 138. KN. Deering, et al., 'A systematic review of the correlates of violence against sex workers' *Am J Public Health,* vol. 104(5), pp. 42-54.

and viral suppression have been shown to enable GBMSM to protect their own health and that of their sexual partners. However, in cases of GBMSM engaging in sex work, there is mounting evidence to suggest significantly poorer outcomes regarding increased vulnerability of GBMSM sex workers to HIV and other STIs.

A 2015 observational study by clinical researchers in The Netherlands among male sex workers (n = 212), female sex workers (n = 801) and in men having sex with men who did not report being paid for sexual contacts (MSM, n = 2703) found that male sex workers tested positive for STI (including HIV) in 40% of the consultations while 9 % of female sex workers and 14% of MSM tested similarly positive.[70] In addition, a new HIV infection was found in 8 % of the consultations of male sex workers. Researchers further observed that even after correction for age, ethnicity, known HIV positivity and behavioural variables, male sex workers are at an increased risk for one or more new STIs than female sex workers and other MSM.

**Trans and non-binary people**

There is little, if any, data documenting the experience of trans and non-binary[71] sex workers in Ireland or the incidence and prevalence of HIV among members of the trans community. Globally, it is estimated that transgender people are at 49 times the risk of acquiring HIV than the cisgender population.[72] Data from a global perspective indicates that approximately 19% of trans women are living with HIV.[73] Data from Latin America and the Caribbean show that HIV prevalence is much higher among trans women sex workers than among cis male and cis female sex workers.[74]

**Migrants**

The link between migration and sex work, including increased vulnerability of migrant sex workers to HIV, has been acknowledged at an international level.[75] In her 2016 paper, Elena Lam succinctly highlights the challenges faced by migrant sex workers including differing experiences of policing, legal and social frameworks, due to differences in race, gender, language barriers, class and immigration status. These factors, Lam notes, not only impact on access to resources, information, networks and protection, but also on power dynamics and rights.[76] Migrant sex workers, particularly those who cross borders (both legal and illegally) often become the targets

[70] A. Verhaegh-Haasnoot et al., *BMC Infect Dis*. 15, 2015, p. 291.
[71] Transgender here refers to an umbrella term for trans women, trans men, gender non-conforming, gender fluid, non-binary and other assignations commonly associated with being transgender.
[72] UNAIDS, Prevention Gap Report, 2016, p.9 https://www.unaids.org/sites/default/files/media_asset/2016-prevention-gap-report_en.pdf
[73] *Supra* note 14, p. 219.
[74] UNAIDS, 'Prevention GAP Report 2016', Geneva, p. 9. Available at: <https://www.unaids.org/sites/default/files/media_asset/2016-prevention-gap-report_en.pdf> (Last accessed: 10 September 2020).
[75] Avert.org, 'Sex workers, HIV and AIDS', 2020. Available at: <https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/sex-workers> (Last accessed: 10 September 2020).
[76] E. Lam, 'The Birth of Butterfly - Bringing Migrant Sex Workers' Voices into the Sex Workers' Rights Movement', *Global Network of Sex Work Projects - Research for Sex Work*, Issue 15, June 2016, p.1.

of law enforcement, (police and immigration officers), are racialised and do not have immigration status. Beside criminalisation of sex work, migrant sex workers may face additional surveillance, racial profiling, arrest, detention, deportation and other restrictions on mobility that may be imposed by criminal, immigration and trafficking laws.[77]

While there is no specific data on migrant sex workers in Ireland, findings from a 2009 report mapping migrant sex work in the European Union indicated that as many as 70% of sex workers in 'old EU Member States' (EU15) were migrants, with only 15% in 'New EU Member States (EU10).[78] Data on the rate of newly notified cases of HIV including among migrants is available from the Health Protection Surveillance Centre.[79]

In its recently published report on the experience of sex workers of the law criminalising the purchase of sex in Ireland, participants noted the additional barriers faced by migrant sex workers given the often precarious nature of their immigration status. Researchers noted how some sex workers are perceived to be more vulnerable to the marginalising effects of the current law, such as migrant, LGB, trans and intersex sex workers, and are fearful of trusting organisations tasked with advocating for their rights.

> Which is exactly how the situation is, migrants are terrified of the law, and will hide, and it's really difficult to reach out. We've heard criticism about not reaching out to more marginalised communities, but people don't have any idea how hard it is to, because migrant communities, and LGBT communities, and the intersex communities are very tight and they protect each other, because who is going to trust an organisation in this situation, it's insane (Laura, Dublin).

The authors note that for migrant sex workers who participated in the study, becoming invisible in order to manage their sex work and their status is part of the context of structural violence in which they operate in Ireland. This, the report concludes, corroborates the view that the evidence emerging from sex workers in countries where the sex purchase ban operates goes against what proponents of the ban lauded in terms of how it protects sex workers from harm by criminalising demand.[80]

**Asylum seekers who engage in sex work**

Civil society organisations in Ireland have reported asylum seekers engaging in sex work within the Direct Provision system for a range of reasons. This includes those who struggle to make

[77] *Ibid.*
[78] R. Andrijasevic, 'Sex Workers and Migration, Europe', *The Encyclopedia of Global Migration*, 2013.
[79] *Supra* note 7.
[80] *Supra* note 45, p.38.

ends meet on the weekly allowance they receive as well as women who have previously experienced coercion, abuse, violence and exploitation by men.[81]

Anecdotal evidence suggests that a perceived unintended risk of current legislation includes the reluctance of asylum seekers engaging in sex work from accessing health care services due to a fear that this may have repercussions for the processing of their asylum application.

Further research is required into the issues faced by those in the asylum system that engage in sex work, such as access to sexual health services and the potential negative sexual health consequences, including the prevention and treatment of HIV and STIs. The particular barriers faced by asylum seekers in accessing such services should be considered in the context of the review of Part 4 of the Criminal Law (Sexual Offences) Act 2017.

The experience of vulnerable and marginalised groups identified above, who often face increased barriers to accessing services, seeking support and engaging with authorities due to specific and sometimes intersectional, personal characteristics, makes clear the need to consider the sexual health risks and outcomes, under the current legislation, for different cohorts of people who engage in sex work.

### 3. Impact of the law on sex workers' sexual health

It is clear that the safety and well-being of persons engaged in sex work is impacted by current legislation.

HIV Ireland's recently published report finds that sex workers are limited in how they manage health risks in a context where they must work covertly in order to avoid detection. Research also indicates negative social changes in the offering and purchase of sexual services, largely due to the fact the sex workers must work alone, in a way that impacts them by putting them at greater risk.

#### Safe Sex

As reported by UNAIDS in its 2020 Global Aids Update, "[m]any countries are not achieving the very high levels of condom use during paid sex that are required to reduce new HIV infections decisively among sex workers, clients and their other sexual partners: only 56 of 99 countries with recent data from sex worker surveys showed that at least 80% of respondents reported condom use at last paid sex."[82]

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[81] AkidwA, Submission to the Joint Oireachtas Committee on Justice & Equality: Direct Provision and International Protection Application Process, 31st May 2019. Available at: <https://www.akidwa.ie/wp-content/uploads/2019/06/190531-AkiDwA-Direct-Provision-submission-web-version.pdf> ( Last accessed: 10 September 2020).

[82] *Supra* note 4, p. 197.

In one particular study, research participants identified forced unprotected sex, condoms coming off and breaking to be the main risk to their health. Where participants worked in collective establishments they felt that unprotected sex would be less likely where the "rules of the house" would be known and that purchasers would more likely seek unsafe sex from street workers.[83]

This is significant in the context of the Criminal Law (Sexual Offences) Act which prohibits sex workers from working collectively, thus forcing many to work in unsafe environments and on their own.

Participants in HIV Ireland's research, felt that as sex workers the law had created an environment which encouraged clients' demand for more unsafe sex creating a more widespread expectation. The disappearance of regular clients after high publicised brothel raids left sex workers more vulnerable to accept clients they would have previously declined over a health concern or potential risk of aggression or violence.

> They are having to offer bareback because some clients have gone away or do go away when there's a raid, but people still need to make money, so some people start offering bareback. (Kate, Galway)[84]

Research participants frequently reported that many clients did not have adequate sex education or were indifferent to risks including HIV and STIs, thus making it difficult to negotiate with clients at times and exacerbating the issue of unsafe sex.

> And again, back to clients not caring about their own health problems, not caring about their own wellbeing, because they're not educated enough about sex to know what diseases you can get, and how they contract these diseases. And they'll take liberties, and rip off condoms you know, and make sure that they break or something, so we're at high, high risk of lots of things, besides HIV (Gina, Dublin).[85]

Coercion was another reason identified by research participants that prevented female sex workers from accessing sexual health services or negotiating safe sex with clients.

> If you're working for a pimp there's no time for this kind of discussion, for checking your blood. So, when you come in Ireland to working, you are starting at 11, you finish at 12, maybe you have half an hour to go to the shop and come back, and you have to work. And if you have any problem, go back in your home, and you can check everything that you want in your country. This is what's happening. (Lena, Cork).

Migrants have been identified as being particularly vulnerable in their ability to negotiate safer sex with clients and access health care. This can include being hampered by a lack of information in

[83] T. Sanders, 'A continuum of risk: The management of health, physical and emotional risks by female sex workers', *The Sociology of Health and Illness*, vol. 26(5), 2004, pp.557-574.
[84] *Supra* note 45, p. 70.
[85] *Supra* note 45, p. 69.

their native language. A history of violence has also been found to hinder engagement with health services and to act as a barrier to condom use.[86]

**Violence and barriers to accessing justice**

The prevalence of violence effecting sex workers has been demonstrated across legal context.[87] In turn, research has demonstrated the association between violence and HIV risks, "such as inconsistent condom use, difficulty in condom negotiation, recent condom failure, client condom refusal, and high client volume."[88]

Recent research[89] has found that:

> [T]he relationship between physical violence and HIV varies by legal context, with an increased association in criminalized settings. Increased legal restrictions on sex work has been shown to move activities to more hidden settings to avoid detection by uniformed officers, alongside increased vulnerability to violence and HIV risk behaviours such as unprotected sex.[90] Even when enforcement efforts prioritize clients or third parties, violence affecting sex workers persists.[91]

In its 2016 policy on sex work, Amnesty International calls for states to "[e]nsure that sex workers are entitled to equal protection under the law and access to justice, and are not excluded directly or in practice from the practice of anti-discrimination, labour, health and safety and other laws."[92]

In HIV Ireland's research, many participants across different focus groups spoke about their constraint in implementing effective risk management strategies with clients given their marginal status under the law, seen as further diminishing sex workers' power in interactions.

Sex workers have found sex working has been riskier and more dangerous since the criminalisation of sex purchase. This correlates with findings of research conducted on the experiences of sex workers in Northern Ireland following the implementation of the sex purchase ban there.[93]

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[86] M. R. Decker et al., 'Gender-based violence against female sex workers in Cameroon: prevalence and associations with sexual HIV risk and access to health services and justice', *Sex Transm Infect*, 92, 2016, pp. 602-3.
[87] *Supra* note 3.
[88] Supra note 86, pp. 599–604. S. Y., Choi et al., 'Client-perpetuated violence and condom failure among female sex workers in southwestern China' *Sex. Transm. Dis*. 35, 2008, pp. 141–146. M.R. Decker et al., 'Violence victimisation, sexual risk and sexually transmitted infection symptoms among female sex workers in Thailand' *Sex. Transm. Infect.* 86, 2010, pp. 236–240.
[89] *Supra* note 3.
[90] Shannon, K. et al. Structural and environmental barriers to condom use negotiation with clients among female sex workers: implications for HIV prevention strategies and policy. *Am. J. Public Health,* 99, 2009, pp. 659–665.
[91] A. Prangnell, et al., Workplace violence among female sex workers who use drugs in Vancouver, Canada: does client-targeted policing increase safety?, *J. Public Health Policy* 39, 2018, pp. 86–99.
[92] *Supra* note 39, p. 11.
[93] *Supra* note 51.

Participants in HIV Ireland's research spoke about their experience of being vulnerable due to the need to work alone and to avoid detection. They described the precarity of managing work without a friend for support and how having this deterrent as part of their risk management repertoire is no longer an option.[94] Similarly, the sex purchase ban in Northern Ireland has been shown to increase the risk of victimisation of sex workers as there is no one to assist them in the event that they are attacked or assaulted by a client.[95] The majority of sex workers surveyed as part of the review of the sex purchase ban in Northern Ireland (63%) felt that working with a colleague/friend would make them feel safer.

> But it is scary that you can't work with someone, and it can be as simple as being able to say "there's somebody else here." Just being able to say "there's somebody else here" can sometimes be enough to deter somebody from doing something. When I worked in other places, and we were working alone, we would sometimes just put a television on to make it seem like there was somebody in the other room, even though there wasn't. Like put the television on, shut the door, be like "oh there's someone in the back room", and then if they got near the room they would hear the television so they would think that. But now there's no… I can't say that anymore, it's not a threat anymore. (Piper, Galway)

While challenging the discourse around victimisation of sex workers, participants acknowledged the particular vulnerability of migrants.[96]

> The manner in which clients feel they can deal with me in particular, with all of us sex workers, but me in particular from my background or whatever, has worsened. I have never in my life, like there are the old time-wasters, and then there are the new ones, and they are out here… you can almost smell them getting high off this idea that you're this tiny weak victim or whatever, and they just have zero respect. (Cassandra, Galway).

Perceived barriers clearly exist to the protection of sex workers under the current legislation. Many of HIV Ireland's research participants reported a reluctance in reporting violence or harms to the authorities. One participant noted that "there's no place to go if you're hurt".[97] This reluctance came from the belief that sex workers would not be treated equally under the law. Thus, the reality for many sex workers under the current legislation is that where they have been subjected to violence or sexual assault they do not seek help from authorities or legal redress as they feel they would not receive equal treatment or be entitled to equal protection.

Reluctance to engage with authorities after an incidence of violence can also include engagement with health services, thus negatively impacting on the sexual health of sex workers. One research participant outlined her experience of being raped and in the aftermath feeling unable to report

[94] *Supra* note 45, p. 50.
[95] *Supra* note 51, p.160.
[96] *Supra* note 45, p. 48.
[97] *Supra* note 45, p. 46

the incident to authorities or to inform health services of what had happened to her in order to receive the appropriate care.

> Well when that thing happened to me I was afraid, I didn't go to the police because I didn't know the consequence so I prefer to stay at home. The next day I went to the health centre. So I was waiting to receive help, but I didn't, well not enough, so maybe if we start to say what we are doing and the people don't judge it could be better. But it's society, so we can't change their minds, the way they think about us. But I really don't know what is better now. I just want to have support now to the community, and then the institutions and police. (Lola, Dublin)

HIV Ireland's research found that migrant sex workers face particular barriers in accessing justice. The need to remain invisible in order to conceal their sex work and their migrant status means they are less likely to report violence.[98]

The manner in which sex workers are silenced and denied justice is a recurring theme in research on contexts where sex work is criminalized and where Nordic style "sex purchase" laws operate.[99]

> ... they allow this group in society to feel so scared, to feel so vulnerable, and marginalised, and thrown away, and ostracised, that this group would do anything, literally anything, to avoid the consequences of having to go to the police, of being found out. So many people live absolutely horrible lives, not because of what they do, but because they don't have any protection when anything happens, unlike any other group in society. (Laura, Dublin)

In 2019, Australia's Northern Territory decriminalised sex work, recognising it as work. The Northern Territory's Sex Industry Act 2019 and amendments to relevant legislation remove punitive police registration, provide industrial protections, securing the rights to health and access to justice. As reported by UNAIDS in its 2020 Global Aids update, a strong partnership approach was taken between Government, sex workers, sex work organisations and other relevant stakeholders.

While current legislation in Ireland purports to protect sex workers, it is in fact negatively impacting on the safety and wellbeing of sex workers in a number of different ways which must be addressed in reviewing Part 4 Criminal Law (Sexual Offences) Act 2017. This includes the greater difficulties experienced in negotiating safe sex as well as the perceived barriers to reporting incidences of violence to the authorities and accessing justice. Combined with a fear of engaging openly with health services this can have serious implications for the health and wellbeing of sex workers and

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[98] *Supra* note 45, p.9.

[99] J. Levy, 'Sweden's abolitionist discourse and law: effects on the dynamics of Swedish sex work and on the lives of Sweden's sex workers', *Criminal Crim Justice*, vol. 14(5), 2014, pp. 593-607. *Supra* note 53. *Supra* note 41; L. Platt et al., 'Associations between sex work laws and sex workers' health: A systematic review and meta-analysis of quantitative and qualitative studies', *PLoS Med*, vol. 15(12), 2018;
B. Brooks-Gordon et al, 'Justice and Civil Liberties on Sex Work in Contemporary International Human Rights Law', *Social Sciences*, vol. 9(4), 2020.

thus their right to the highest attainable standard of health under international human rights law.[100] Regard should be had for the specific barriers faced by certain groups who engage in sex work, such as migrants.

As has been done in jurisdictions such as Australia, a partnership approach must be taken between Government, sex workers and other relevant stakeholders in reviewing current legislation, ensuring that those the legislation purports to protect are central to the review and that that their needs and rights are at the forefront of discussions.

### 4. Impact on sexual health promotion/prevention of HIV/STIs

Research points to concerning impacts on the safety and well-being of sex workers in a number of ways, due to the covert nature of sex work activities under current legislation, which exposes sex workers to additional health risks and negative health outcomes and undermines their right to the highest attainable standard of health.

#### Condom use

Evidence indicates that the criminalisation of sex work directly undermines global HIV prevention efforts.[101] This includes police confiscating and citing the carrying of condoms as evidence of sex work which creates a disincentive to their use and places sex workers at greater risk.[102]

#### Screening clients

Research has shown that criminalisation regimes imped and lead to rushed negotiations with clients where there is limited time to screen potential clients or to discuss safer sex.[103] Participants in HIV Ireland's research also commented on the difficulty of screening potential clients in particular when working alone.[104]

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[100] Article 12 International Covenant on Economic, Social and Cultural Rights.
[101] See *Supra* note 15, Annex 3; Global Commission on HIV and the Law, 'Risks, Rights and Health', 2012; UNAIDS, UNFPA, UNDP, 'Sex Work and the Law in Asia and the Pacific', 2012; UNDPA, UNFPA, APNSW, SANGRAM, 'The Rights(s) Evidence: Sex, Violence and HIV in Asia- A Multi-country Qualitative Study', 2015.
[102] *Supra* note 42; Amnesty International, 'Harmfully isolated: Criminalizing sex work in Hong Kong', 2016; Amnesty International, 'Outlawed and abused: Criminalizing sex work in Papua New Guinea', 2016. See also Open Society Foundations, 'Criminalizing Condoms, How policing practices put sex workers and HIV services at risk in Kenya, Namibia, Russia, South Africa, the United States and Zimbabwe', 2012; Human Rights Watch, 'Sex Workers at Risk: Condoms as Evidence of Prostitution in Four U.S. Cities', 2012; M.H.Wurth et al., 'Condoms as Evidence of Prostitution in the United States and the Criminalization of Sex Work', *Journal of the International AIDS Society*, 2013.
[103] L. Platt et al., 'Associations between sex work laws and sex workers' health: A systematic review and meta-analysis of quantitative and qualitative studies', *PLoS Med*, vol. 15(12), 2018.
[104] *Supra* note 45, p. 74.

## HIV Prevention & STI treatment

### HIV/STI Testing

The covert nature and stigma associated with sex work in Ireland negatively impacts on sex workers accessing sexual health care for STI and HIV testing and treatment as outlined above. With regard to HIV prevention access to Pre Exposure Prophylaxis (PrEP) and Post Exposure Prophylaxis (PEP) is particularly relevant.

### Pre Exposure Prophylaxis

Pre Exposure Prophylaxis (PrEP) is a medication which can be taken by those who are HIV-negative in order to reduce the chance of contracting HIV from having unprotected sex or from sharing needles or other equipment to inject or use drugs. PrEP has been shown in many studies to be safe and highly effective at preventing HIV. It stops HIV from establishing itself inside the body and when taken correctly has been found to be approximately 99% effective. PrEP is available from approved services in Ireland and as of 4 November 2019 is free of charge to those who meet the clinical eligibility criteria for PrEP.[105]

Greater awareness about the role of PrEP as an option for sex workers in managing health risks is required. Appropriate health intervention practices are needed in this regard as well as an approach that focuses on the right to harm reduction of sex workers. Current legislation impedes such an approach by negatively impacting access to sexual health services and information for sex workers.

### Post Exposure Prophylaxis

Post Exposure Prophylaxis (PEP) is an emergency course of medication that aims to prevent HIV acquisition following a recent sexual, or needle stick, exposure to HIV.

PEP is a 28-day course of anti-HIV medication that can prevent HIV establishing itself in the person's bloodstream. It must be taken within 72 hours of the possible exposure to HIV. PEP is available in many sexual health/STI clinics as well as in a number of Hospital Emergency Departments and is available free of charge. PEP is not made readily available to all and in order to receive it a medical assessment will be carried out first upon which the attending doctor will decide whether PEP should be given. This, it is important to provide clear information on the incident that occurred which may have exposed the person to HIV.

Current legislation can have serious health implications, including in the context of HIV prevention. This includes impeding sex workers from accessing PEP as they may be reluctant to engage with services or feel that they cannot be honest with their doctor about their work. This has resulted in

[105] For more information see HIV Ireland website. Available at: <https://www.hivireland.ie/hiv/prevention/prep-2/> (Last accessed: 10 September 2020).

sex workers being denied access to PEP. where for example, they are seen as a heterosexual person who has engaged in unsafe sex.

In HIV Ireland's report, a research participant described what she encountered after an unsafe sexual encounter and her attempt to persuade medical staff to prescribe her Post Exposure Prophylaxis (PEP).[106]

> I went to the hospital the next day, and I was nervous to say that I was a sex worker, so I didn't say anything, I just said that I had unsafe sex. But it was a really bad experience. I didn't realise he take off the condom, ..... I asked for PEP, and they say to me, that the situation wasn't enough to have PEP, so they said no, because it was heterosexual, so they didn't give it to me. (Lola, Dublin)

Participants felt that medical staff needed to be trained appropriately and should not act as gatekeepers to accessing PEP.

> This is what it comes down to again, it's the lack of education. As a woman, if she feels she's been exposed to a virus, does it matter what her sexual thing is? If she knows that she slept with somebody dodgy, whatever the circumstances, it's got nothing to do with anything else in my opinion.
> (Gina, Dublin).

Furthermore, participants felt that if they were able to tell medical staff that they were sex workers PEP would be more available to them.

> But imagine if she had felt like "I can just tell them I'm a sex worker", they would have been like "boom, here you go..." (Lee, Dublin)

It is evident that current legislation is negatively impacting on the health and wellbeing of sex workers in terms of sexual health promotion and prevention of HIV and STIs. Full decriminalisation of sex work would pave the way for greater focus on harm reduction for sex workers including access to relevant information, better training of medical professionals and law enforcement officials and the creation of an environment where sex workers can engage openly with medical professionals ensuring they receive the health care they require.

## Part IV

### 1. Conclusion

[106] *Supra* note 45, p. 67.

The criminalisation of the purchase of sex is often presented as a human rights-based approach, protecting those offering sexual services. However, in reality such a model can lead to the violation of sex workers' human rights, including the right to the highest attainable standard of health under international human rights law. Numerous international bodies have found that legislative models which criminalise the purchase of sex are not fit for purpose.

The Criminal Law (Sexual Offences) Act 2017, as outlined in this submission, fails to adequately protect those engaged in sex work. International and national research together with testimonies from sex workers themselves, show that the criminalisation of sex purchase negatively impacts on the sexual health of sex workers by: creating barriers to accessing sexual health services including HIV and STI testing and treatment; undermining the ability to engage honestly with health professionals; limiting the ability to negotiate and engage in safe sex; and hampering the ability to screen clients. This in turn undermines the safety and well-being of those engaged in sex work.

Furthermore, the law as it currently stands in Ireland, forces sex workers to work in more precarious conditions and alone, putting them at greater risk. The legislation also impacts on access to justice for sex workers who experience violence or sexual assault, thus creating barriers to their protection. Further, current legislation can create particular risks for certain groups such as transgender, migrants and asylum seekers.

Moreover, policy and strategic initiatives aimed at improving sexual health and the lives of certain groups such as members of the LGBTI+ community fail to take into account the correlation between such policies, strategic initiatives and the issue of sex work.

## 2. Recommendations:

In order to ensure that Ireland's legislative framework governing the sale or purchase of sexual services, fully protects the rights, safety and wellbeing of sex workers including in relation to sexual health and the prevention of HIV, HIV Ireland urges the Review Committee to adopt the following recommendations:

- Fully decriminalise sex work in order to respect, protect and fulfil the right to the highest attainable standard of health of sex workers.

- In reviewing Part 4 of the Criminal Law (Sexual Offences) Act 2017, take into account the negative impact that current legislative provisions are having on sexual health including:

    - Access to sexual health services for sex workers such as HIV and STI testing and access to PrEP and PEP;
    - The ability to engage openly and honestly with health professionals;
    - The ability to engage in safe sex; and

- The ability to screen clients.

- Consider the detrimental effects that current legislative provisions are having on access to justice for sex workers

- Ensure that the voices of sex workers and their advocates feature prominently throughout the review.

- Consider the sexual health risks and outcomes, under the current legislation, for different cohorts of people who engage in sex work, including:
  - Women;
  - Gay, bisexual and other men who have sex with men (GBMSM);
  - Trans and non binary people;
  - Migrants; and
  - Asylum seekers.

- Ensure that the need for a robust legislative and policy response to combat sexual exploitation and human trafficking is not conflated with the need to protect those who voluntarily engage in sex work.

- With the National Sexual Health Strategy due for review in 2021, the LGBTI+ Inclusion Strategy running until 2021, and Part 4 of the Criminal Law (Sexual Offences) Act 2017 currently being reviewed, a timely opportunity exists to consider sexual health/outcomes for sex workers in Ireland in a holistic manner. In order to achieve this, there should be greater inter-departmental collaboration on policy formulation, strategy development/implementation and legislative frameworks.