



# HARMFULLY ISOLATED

CRIMINALIZING SEX WORK IN HONG KONG

AMNESTY  
INTERNATIONAL



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**Cover photo:** Tourists stroll through the red light district in Hong Kong, 10 January 2012.  
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# GLOSSARY

## ENGLISH

**CISGENDER PERSON** Individuals whose gender expression and/or gender identity accords with conventional expectations based on the physical sex they were assigned at birth. In broad terms, “cisgender” is the opposite of “transgender”.

**CRIMINALIZATION OF SEX WORK** The process of prohibiting sex work and attaching punishment or penalties through criminal laws. This includes laws that punish that selling or buying of sex and the organization of sex work (for example laws against keeping a brothel; promotion of ‘prostitution’; renting premises for the purposes of ‘prostitution’; living off the proceeds of sex work; and facilitating sex work through the provision of information or assistance).

It also refers to other laws not specific to sex work which are either applied in a discriminatory way against people involved in sex work, and/or have a disproportionate impact on sex workers which can in practice work as a *de facto* prohibition. Such laws could include those on vagrancy, loitering. Similarly immigration laws can be applied in a discriminatory way against sex workers as a *de facto* prohibition on sex work by migrants and the criminalization of irregular (sometimes called “illegal”) entry or residence may give rise to – or exacerbate – the penalization of sex work by migrants, as engaging in this type of work may make them more visible and liable to being targeted by state authorities.

**DECRIMINALIZATION OF SEX WORK** The removal or repeal of the above-mentioned criminalization measures. It does not refer to the decriminalization of human trafficking, forced labour or any other exploitative practices; violence against sex workers; rape and sexual abuse; or the sexual exploitation and abuse of children.

**GENDER IDENTITY** Refers to a person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism. (See definition of “transgender” below.)

**GENDER EXPRESSION**

Refers to the means by which individuals express their gender identity. This may or may not include dress, make-up, speech, mannerisms and surgical or hormonal treatment.

**SEX WORK**

The exchange of sexual services between consenting adults for some form of remuneration – money or goods – with the terms agreed between the seller and the buyer.

**SEX WORKERS**

Adults (persons who are 18 years of age and older) of all genders who receive money or goods in exchange for the consensual provision of sexual services, either regularly or occasionally. For the purposes of this report, it includes those who sell sex but may not necessarily identify as “sex workers”.

**THIRD PARTIES**

Individuals who assist with facilitating the sale and purchase of sex. Distinctions are often made between exploitative third parties and those who provide support services to sex workers (for example, security guards, secretaries, advertisers) at their request.

**TRANSGENDER OR TRANS PEOPLE**

Individuals whose gender expression and/or gender identity differs from conventional expectations based on the physical sex they were assigned at birth. A transgender woman is a woman who was assigned the male sex at birth but has a female gender identity; a transgender man is a man who was assigned the female sex at birth but has a male gender identity. Not all transgender individuals identify as male or female; transgender is a term that includes members of third genders, as well as individuals who identify as more than one gender or no gender at all. Transgender individuals may or may not choose to undergo gender reassignment treatment.

**PENALIZATION**

The use of other laws, policies and administrative regulations that have the same intent or effect as criminal laws in punishing, controlling and undermining the autonomy of people who sell sex, because of their involvement in sex work. These measures include, but are not limited to, the imposition of fines, detention for the purposes of “rehabilitation”, deportation, loss of child custody, disentitlement from social benefits, and infringement on rights to privacy and autonomy.

**LEGALIZATION**

In this context, the introduction of laws, policies or administrative regulations to specifically regulate sex work, as distinct from other employment sectors.

**HUMAN TRAFFICKING**

The Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention Against Transnational Organized Crime (also known as the UN Trafficking Protocol) provides the internationally accepted definition of trafficking as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other means of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation.” Human trafficking, including in to the sex sector, is not the same as sex work.

**COMPENSATED  
DATING**

This typically involves a client exchanging money or gifts for companionship and, occasionally, sexual acts.

**SISTER**

A local term sometimes used by female sex workers to refer to other female sex workers.

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# 1. EXECUTIVE SUMMARY



## CASE STUDY: MEI-LING INTERVIEWED 27 JANUARY 2015

Mei-Ling moved to Hong Kong from mainland China in 2010 to join her husband. To pay for medication for her two elderly parents, she initially found work in a restaurant and then as a masseuse. These jobs were physically demanding. At the suggestion of some friends, she decided to try sex work. In her first week engaging in sex work, an undercover officer approached her on the street and asked to buy sex from her. They went to her flat, where he arrested her. Several officers searched the flat after her arrest and seized condoms and tissues to use as evidence.

The police took Mei-Ling to the Tai Po station. “I was not informed of my rights,” she told Amnesty International. “My mobile was taken away from me. I was kept there for 15 hours – there were two officers non-stop asking me questions. One officer was nice; the other was very mean.

“They showed me a statement. Some parts of it were true, but others were untrue. The statement said that I approached the police – but it was the police who approached me. They said I was soliciting the police, but I was soliciting another person [before the undercover officer approached her]. The officers asked me to sign [the statement] but I didn’t want to sign it.”

The officers threatened to call her husband, a civil servant, and her daughter if she did not sign the statement. “I didn’t want them to find out,” she said. “The nice officer told me I could change the statement later – he said he would help me do an appeal. He said that if I deny the charge, I can just defend myself later in court. He told me that because I’m a Hong Kong resident, it would not be a problem for me, because one-to-one service is not illegal.” Mei-Ling was told she could not call her teenage daughter to tell her where she was until the statement had been signed and was not given a copy of her statement.

She was charged with solicitation, and she denied the charge when she appeared in court. “I thought the court would be fair – I had confidence in the court – but not anymore. I was very disappointed because the police swore [an oath to tell] the truth – but [what they said] wasn’t the truth.”

Beginning to cry, she continued: “I was very angry because at that time, my husband was not giving me enough money for living – my mother and father were very ill and I needed money for medicine. But the judge said ‘you’re not acting responsibly towards your family – you’re supposed to know the result of doing this kind of work.’”

She told Amnesty International that she felt powerless to challenge the police account of the events that led to her arrest. “I couldn’t make any complaint because there were no witnesses – and the statement was so perfect. In the court, my lawyer asked the police to describe what I was wearing, and they couldn’t. But even after such a big mistake, the court believed the police, so making a complaint would be useless.”

Mei-Ling was found guilty of solicitation and sentenced to four months in prison. “I’m still very angry with the police,” she said. “The court also made me very angry – the court judged me not responsible towards my family, and I was given the most serious punishment.”



## **POLICE MISUSE OF LAWS AND POWERS TO SET UP, PUNISH AND ABUSE SEX WORKERS**

The policing of sex work in Hong Kong is particularly problematic. Some sex workers complained that police demand free sexual services from them. In some instances, the officers involved appeared to be engaging in acts of extortion; sex workers report that these officers had demanded sex as the price of not arresting them.

In addition, the police force's acknowledged practice of allowing undercover officers to engage in "body contact with sex workers", including "the receipt of masturbation service", in the course of carrying out investigations is a likely source of many of these complaints. Such practices serve little if any investigatory purpose and unquestionably bring the Hong Kong police into disrepute.

Groups working with sex workers also report that police use entrapment to entice sex workers to engage in acts that authorities then interpret as violating one or more laws.

Solicitation is one example. Because solicitation is understood to mean acts that take place in public places, many sex workers initially offer sex and discuss payment by text messages, through the WhatsApp mobile telephone service, or similar means of communication. In such cases, police may convince sex workers to verbally repeat the terms of the transaction in public, arresting those who do so. In other cases, police officers themselves initiate the transaction by offering to purchase sex.

Another tactic is to ask a sex worker to call a second sex worker to join them to perform sexual services. Sex work is not illegal when carried out by one sex worker in an individual apartment, but when two or more sex workers work together, police consider the apartment to be a "vice establishment", or brothel, in violation of the law.

In addition, sex workers and their advocates frequently reported that police obtain confessions through coercion or deception. For example, Amnesty International heard accounts that police officers had threatened to report sex workers to their spouses, parents or children if they did not confess. Sex workers and their advocates also told us that police mislead sex workers about the consequences of their confessions, coercing them to sign statements while withholding the fact that an admission of guilt would likely lead to imprisonment.

Police routinely seize condoms as evidence even though condoms and related HIV prevention services are essential to the realization of the right to health. Law enforcement practices should not interfere with sex workers' right to protect their health; in particular, condoms should not be treated as evidence of a crime.

## **SPECIFIC ABUSES AGAINST TRANSGENDER SEX WORKERS**

Transgender sex workers are routinely subjected to a host of abusive practices. Upon arrest, they are regularly forced to undergo intrusive and humiliating full-body searches. For transgender women whose identity documents do not match their gender identity, these searches are undertaken by male officers. Most transgender women detainees are initially sent to male detention centres and then transferred to a special unit for detainees with mental illnesses. Prisons do not usually allow transgender detainees to continue hormone treatment, with potentially serious consequences for their health.

## **HOW SEX WORK IS CRIMINALIZED IN HONG KONG**

The act of selling sex is not itself illegal in Hong Kong, and many sex workers are careful to operate in ways that comply with the law.

**“[T]he regulatory framework adopted in Hong Kong is a prohibition in all but the narrowest sense.”**

Nga Yan Cheung, *Accounting for and Managing Risk in Sex Work: A Study of Female Sex Workers in Hong Kong*, Ph. D. thesis, University of London, 2011, [hereinafter *Accounting for and Managing Risk in Sex Work*] p. 54

Nevertheless, many of the activities associated with sex work are illegal. Sex workers can be prosecuted for soliciting customers, for sharing premises with other sex workers, and for living off the proceeds of prostitution. In practice, as one scholar has observed, “the regulatory framework adopted in Hong Kong is a prohibition in all but the narrowest sense”.<sup>1</sup> Those who work on the street are at particular risk of arrest because they are easy to identify and have difficulty operating without violating the prohibition on solicitation.

Many sex workers in Hong Kong are migrants or from mainland China and must obtain permits to work in Hong Kong. Migrants and people from mainland China cannot lawfully engage in sex work in Hong Kong; all migrant sex workers are in “breach of condition of stay”, a criminal offence under the Immigration Ordinance. In fact, such charges for breach of conditions of stay may well be the primary means by which sex workers are criminalized in Hong Kong.

## **ABUSES BY CLIENTS**

The available data suggests that sex workers are much more likely to be victims of crime than other marginalized groups in Hong Kong. Theft of mobile phones and money, non-payment for services, and armed robbery are the most commonly experienced abuses by sex workers. Sex workers also report that some customers refuse to use condoms or force them to engage in acts they did not agree to – non-consensual sexual conduct that in many instances constitutes rape. In some cases, sex workers have been physically assaulted by clients and even killed.

Sex workers attribute their vulnerability to the “vice establishment” and solicitation provisions in Hong Kong law. The “vice establishment” provision means that sex workers must work on their own, increasing their insecurity. And the prohibition on solicitation means that sex workers, particularly those who work on the street, must often make quick decisions about whether to accept a client.

When sex workers are the victims of crime, they are unlikely to seek help from the police. Sex-worker organizations told Amnesty International that police are unlikely to follow up on reports from sex workers; instead, when sex workers do try to report crimes, police typically blame them or insult them.

As the Hong Kong Crime Prevention Bureau confirmed to Amnesty International, a police officer has no discretion not to arrest an irregular migrant. This applies to all irregular migrants, but disproportionately affects migrant sex workers, all of whom would be automatically considered irregular migrants and in breach of conditions of stay.

## **HOW WE CONDUCTED OUR RESEARCH**

This report forms part of the research conducted to develop Amnesty International’s policy on protecting the human rights of sex workers. In addition to desk-based research on studies from around the world, further in-country research was conducted in Argentina, Hong Kong, Norway and Papua New Guinea. While this report focuses on the legal and policy frameworks that affect the human rights of sex workers, a number of human rights abuses featured prominently in the testimonies of sex workers, including police ill-treatment and abuse of authority, the discriminatory treatment of migrant sex workers and those from mainland China, and the high levels of stigma and discrimination faced by transgender sex workers.

Amnesty International spoke with more than 40 key stakeholders, including sex workers, advocates, anti-trafficking and other non-governmental organizations (NGOs), senior police officials and other government officers. Amnesty International calls on Hong Kong to repeal all laws that are used to prosecute and punish sex workers or criminalize related aspects of sex work, including the offences of solicitation, operating a “vice establishment”, and living off the proceeds of sex work. The Hong Kong authorities should also expressly prohibit coercive police conduct, whether in the course of ordinary policing or as part of undercover operations, and should not use immigration enforcement as a de facto means of criminalizing sex work.

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<sup>1</sup> Nga Yan Cheung, *Accounting for and Managing Risk in Sex Work: A Study of Female Sex Workers in Hong Kong*, Ph. D. thesis, University of London, 2011, [hereinafter *Accounting for and Managing Risk in Sex Work*] p. 54.

## **CONCLUSION AND RECOMMENDATIONS**

The sex workers we interviewed for this report had numerous suggestions for changes in law and enforcement practices that would make them feel safer and afford them a measure of dignity. Repeal of the laws against solicitation and managing a “vice establishment” was high on their lists.

At a minimum, they called for police to stop using these laws to target individual sex workers, particularly through methods that amount to entrapment and coercive means of obtaining confessions. Sex workers are also particularly aggrieved by the Hong Kong police force’s policy of allowing undercover officers to receive “masturbation service” in some cases as part of their investigation. Sex workers see this policy as permission for police to obtain free sexual services either in lieu of, or in the course of, arresting them.

Additional recommendations appear at the end of this report.

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# 2. METHODOLOGY

This report is based on five weeks' field research conducted in Hong Kong by researchers from Amnesty International in December 2014, January 2015 and April 2016. The research team was supported by a research assistant based at Amnesty International's country office in Hong Kong and worked closely with the director and staff of the Hong Kong office.

Amnesty International staff conducted sixteen in-depth interviews with people who sell sex (twelve women including two who identified as transgender women, and four males) in the offices of NGOs working with sex workers or by phone. Two of these people did not describe themselves as sex workers, but engaged in online compensated dating, one being a male who was 17 years of age. Interviews were conducted in English, or where necessary, in Cantonese with the assistance of translators.

In addition, we reviewed the details of cases of 35 sex workers as provided by non-governmental organizations working in this area (Action for REACH OUT, JJJ Association, Midnight Blue, Teen's Key and Zi Teng). Sex workers that we spoke with came from diverse backgrounds and identities and worked in a variety of ways, including on the streets, in one person apartments, from nightclubs, in massage parlours or online through compensated dating sites.

Amnesty International also interviewed more than 40 others including police officers and other government officials, outreach workers, advocates, representatives of anti-trafficking organizations and other NGOS, academics and lawyers.

Amnesty International met with the Crime Prevention Bureau of the Hong Kong Police Force in January 2015 and again in April 2016.

The names and identifying details of the sex workers with whom we met and other individuals working with sex workers who asked not to be identified, have been withheld to protect their privacy and safety. We use pseudonyms throughout for all sex workers mentioned in the report. All those interviewed were informed of the purpose of the interview, its voluntary nature, and the ways in which the information would be used. All interviewees provided verbal consent to be interviewed. All were told that they could decline to answer questions and could end the interview at any time.

We are particularly grateful to the sex workers who spoke with us and to Action for REACH OUT, JJJ Association, Midnight Blue, Teen's Key and Zi Teng. We are also grateful to the many academics, lawyers and others who met with us and shared their research and case files with us. Finally, we appreciate the willingness of the Crime Prevention Bureau to meet with us at length and answer our questions.

# 3. SEX WORK IN HONG KONG

Hong Kong has a long history of using the law to regulate the conditions under which sex can be sold. Occupied by the British in 1841 and declared a British colony in 1843, it became in 1857 the first British-controlled jurisdiction to enact an ordinance requiring the registration of brothels and the compulsory medical examination of the women who worked there.<sup>2</sup>

This approach – the regulation of prostitution in the name of controlling contagious disease – was quickly emulated in most other British colonies and in Britain itself.<sup>3</sup> In Hong Kong and elsewhere, these laws were controversial from the start, of limited medical efficacy, and widely ignored; nevertheless, elements of this system operated in Hong Kong until 1935.<sup>4</sup>

Today, the sale of sex is not illegal in Hong Kong – unlike in mainland China, where all aspects of sex work, including the solicitation, sale and purchase of sex, are illegal under various laws.<sup>5</sup>

As is true elsewhere in the world, the majority of sex workers in Hong Kong are women. They work in individual apartments, on the street, from bars and nightclubs and in massage parlours.

Sex work by men is more hidden. Programme staff with Midnight Blue told Amnesty International: “Most [male sex workers] serve male customers; most are gay. They don’t want to be identified among their neighbours. They have no advertisements on their doors. Most put ads on the internet or in newspapers.”<sup>6</sup> Male sex workers tend to be from mainland China and generally in their late teens or early 20s, according to Dr William Wong, a medical doctor who has published extensively on sex work in Hong Kong.<sup>7</sup>

Lo Lam Wai, a programme officer at Midnight Blue who works with transgender sex workers, told Amnesty International: “Transgender sex workers are mostly working on the street, especially in places like Central and Wan Chai, areas where there are many bars. Most are coming from other countries in Southeast Asia.”<sup>8</sup>

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<sup>2</sup> An Ordinance for Checking the Spread of Venereal Diseases, No. 12 of 1857 (Colony of Hong Kong 24 November 1857), in G.E. Eyre and W. Spottiswoode, *The Ordinances of Hong Kong*, 1866, pp. 163-69. See also E.J. Eitel, *Europe in China: The History of Hongkong from the Beginning to the Year 1892*, 1895, p. 331 (describing the measure as “the first attempt by a British legislature to grapple with and control the evils arising from prostitution”); H. Lethbridge, ‘Prostitution in Hong Kong: A Legal and Moral Dilemma’ in *Hong Kong Law Journal*, vol. 8 (1978), p. 153.

<sup>3</sup> See P. Levine, *Prostitution, Race, and Politics: Policing Venereal Disease in the British Empire*, 2003, pp. 37-59.

<sup>4</sup> See P. Levine, *Prostitution, Race, and Politics: Policing Venereal Disease in the British Empire*, 2003, pp. 126-27.

<sup>5</sup> See Human Rights Watch, *Swept Away: Abuses against Sex Workers in China*, 2014, pp. 14-20.

<sup>6</sup> Interview with Law Kwun Kit, Midnight Blue, Hong Kong, 17 December 2014.

<sup>7</sup> Interview with Dr William Wong, 17 December 2014.

<sup>8</sup> Interview with Lo Lam Wai, Midnight Blue, 17 December 2014.

Younger women and men who engage in what is known as “compensated dating” often on an occasional basis – typically find clients online.<sup>9</sup>

Most sex workers engage in sex work voluntarily, choosing sex work over other possible ways of making a living because the economic returns are higher than for other kinds of work that are available to them. In addition, those who are migrants, or from mainland China, often regard sex work as offering good opportunities to travel.<sup>10</sup>

Although sex work remains significantly more lucrative than other potential sources of income for many, the past few years have seen a decrease in many sex workers’ earnings. “Business is not so good the last few years – really bad in the past two or three years. Now three or four customers is a good day [for a sex worker],” said Cherry Chui, a programme officer with Action for REACH OUT, a group that works with sex workers in Hong Kong. “A lot of customers go to China now – it’s less expensive, there are more choices, there are more girls, different services.”<sup>11</sup>

### 3.1 VENUES FOR SEX WORK

Sex workers in Hong Kong work in a variety of settings:

- The sale of sex from individual apartments, often called “one-woman brothels” (*jat-lau-jat-fung*, 一樓一鳳), is not itself illegal in Hong Kong, although many of the activities associated with sex work contravene Hong Kong law. JJJ Association, which works with women sex workers who work from individual apartments, reports that sex workers in this category are between 25 and 65 years of age. “Thirty-something to 40-something is the major group,” reports Sherry Hui from JJJ Association.<sup>12</sup> Some male sex workers also work from individual apartments.
- Those who work on the street are often migrant women or transgender individuals from the Chinese mainland or from the Philippines, Thailand and other countries.<sup>13</sup>
- Women may operate as sex workers out of bars or nightclubs to find their clients. These sex workers are usually migrants who have entered Hong Kong on visas, including entertainment visas, as domestic workers, or on tourist visas. It is widely believed that criminal gangs control some of the bars and nightclubs where these sex workers are based, although it is difficult to confirm to what extent that is the case.<sup>14</sup>
- Sex workers, both men and women, also operate in some massage parlours.<sup>15</sup>

In addition, so-called “compensated dating” often involves the sale of sex. Those who engage in compensated dating tend to be younger than other sex workers. “They do not necessarily identify as sex workers,” a Midnight Blue staff member noted.<sup>16</sup> Lam Po Yee, a staff member with Teen’s Key, a group that works with women under the age of 25, explained: “It’s not only sex, but being together, pretending to be the

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<sup>9</sup> See for example, Tak Yan Lee and D.T.L. Shek, ‘Compensated Dating and Juvenile Prostitution in Early Adolescents in Hong Kong’ in D.T.L. Shek, R.C.F. Sun and C. Ma (eds.), *Chinese Adolescents in Hong Kong: Family Life, Psychological Well-Being, and Risk Behaviour*, 2014, pp. 173-200; J.C.M Li, ‘Adolescent Compensated Dating in Hong Kong: Choice, Script and Dynamics’ in *International Journal of Offender Therapy & Comparative Criminology* (2013).

<sup>10</sup> Zi Teng, *A Survey of Mainland Migrant Sex Workers in Four Major Chinese Cities*, 2013; interview with Sherry Hui, 18 December 2014.

<sup>11</sup> Interview with Cherry Chui, programme officer, Action for REACH OUT, Hong Kong, 20 January 2015.

<sup>12</sup> Interview with Sherry Hui, executive officer at JJJ Association, 17 December 2014.

<sup>13</sup> R. Emerton, K.J. Laidler, and C.J. Petersen, ‘Trafficking of Mainland Chinese Women into Hong Kong’s Sex Industry: Problems of Identification and Response’ in *Asia-Pacific Journal on Human Rights and the Law*, vol. 2 (2007), [hereinafter R. Emerton et al, ‘Trafficking of Mainland Chinese Women’] p. 61-62.

<sup>14</sup> Interview with sex workers and Cherry Chui, programme officer, Action for REACH OUT, Hong Kong, 20 January 2015.

<sup>15</sup> Zi Teng, *The sex trade industry in Hong Kong: A call for activism and transformation*, ND, available at: [www.ziteng.org.hk/platform/pfc03\\_ehtml](http://www.ziteng.org.hk/platform/pfc03_ehtml).

<sup>16</sup> Interview with Law Kwun Kit, Midnight Blue, 17 December 2014.

client's girlfriend. Many work part-time, in their free time. They don't want the stigma of being labelled sex workers."<sup>17</sup>

## 3.2 THE NUMBER OF SEX WORKERS

There are no reliable estimates of the total number of sex workers in Hong Kong. A widely cited estimate by the Hong Kong Department of Health put the number of sex workers in Hong Kong at 200,000 in the year 2000, but that estimate was based on a single newspaper article from 1993<sup>18</sup> and has been questioned by researchers.<sup>19</sup> In late November 2014, in a response to a question by the Honourable Kenneth Leung, a Member of the Legislative Council, Secretary for Security Lai Tung-kuok stated: "The Police do not have any estimation of the current number of sex workers in Hong Kong."<sup>20</sup>

In 2011, one scholar estimated the total population of women working in single-sex-worker apartments at 1,500.<sup>21</sup> A more recent estimate by Zi Teng suggests that Hong Kong has about 2,000 single-sex-worker apartments in use by women sex workers.<sup>22</sup>

A 2007 news report estimated that there were around 1,500 male sex workers in Hong Kong.<sup>23</sup>

Other groups Amnesty International met with in December 2014 and January 2015 place the total number of sex workers in Hong Kong at just above 10,000. That estimate accords with a 2006 figure by Hong Kong's Working Group on HIV Prevention.<sup>24</sup>

## 3.3 REASONS FOR ENGAGING IN SEX WORK

"There are a whole range of people coming for different reasons, entering into different types of sex work," according to Dr William Wong, who has published extensively on sex work in Hong Kong.<sup>25</sup> Nevertheless, the most common motivation appears to be that sex work offers higher pay for fewer hours of work than other activities.

Mei-Ling, a woman from mainland China, told Amnesty International that she switched from performing massages to sex work because it was less physically demanding and offered the potential of higher earnings. "Chinese massage is very physically demanding. My fingers hurt," she said, showing Amnesty International's researcher her calloused hands, with swollen joints on the thumb and index finger of her right hand. "At the time, my relationship was not good – my husband would not give me money for living, my father had heart disease, my mother had back disease, and I needed money for medicine."<sup>26</sup>

Jane, a sex worker from Thailand, had a similar set of motivations for taking up sex work on a full-time basis. She told Amnesty International, "I became a sex worker for financial reasons. Now I can make 1,000 to 1,200 [Hong Kong] dollars [US\$130 to 155] per day. As a waitress I used to earn 8,000 dollars [US\$1,030] per month. I used to work part-time as a sex worker and part-time in other jobs like being a waitress or a

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<sup>17</sup> Interview with Lam Po Yee, Teen's Key, 18 December 2014.

<sup>18</sup> B. Cook, '2,000 Housewives in Sex Industry' in *South China Morning Post*, 3 May 1993.

<sup>19</sup> Michael Kam Tim Chan, King Man Ho and Kuen Kong Lo, 'A Behaviour Sentinel Surveillance for Female Sex Workers in the Social Hygiene Service in Hong Kong (1999–2000)' in *International Journal of STD and AIDS*, vol. 31 (2002), pp. 815–20.

<sup>20</sup> Government of Hong Kong, 'LCQ6: Measures to combat and prevent visitors from overstaying and measures to protect sex workers', 26 November 2014, available at [www.info.gov.hk/gia/general/201411/26/P201411260728.htm](http://www.info.gov.hk/gia/general/201411/26/P201411260728.htm)

<sup>21</sup> Nga Yan Cheung, *Accounting for and Managing Risk in Sex Work*, p. 19.

<sup>22</sup> Lana Lam, 'Risky Business: Sex Workers Walk a Blurred Line in the Streets of Wan Chai' in *South China Morning Post*, 9 November 2014.

<sup>23</sup> Sherry Lee, 'Union Fights for Rights of Men Lured into Sex Work' in *South China Morning Post*, 11 November 2007, available at [www.scmp.com/article/615208/union-fights-rights-men-lured-sex-work](http://www.scmp.com/article/615208/union-fights-rights-men-lured-sex-work)

<sup>24</sup> Working Group on HIV Prevention for Commercial Sex Workers and their Clients, Community Forum on AIDS and Hong Kong Advisory Council on AIDS, *Report of Community Assessment and Evaluation of HIV Prevention for Commercial Sex Workers and Their Clients in Hong Kong 2006*, 2006.

<sup>25</sup> Interview with Dr William Wong, 17 December 2014.

<sup>26</sup> Interview with Mei-Ling, 27 January 2015.

dancer in a bar. Now I'm a full-time sex worker. It is much better – now I make more money and I'm less tired. In the bar it was tiring because I would have to drink and dance.”<sup>27</sup>

Leah, a sex worker who has a minor physical disability, said that her disability and discrimination in other employment impacted on her decision to do sex work. She told Amnesty International, “My injury has seriously affected my life. If not for the injury, I would not have done sex work. If no injury, I would have come to Hong Kong to work in a restaurant.” Leah is aware she is entitled to claim a disability support pension, but prefers to be independent and work to support herself. Disability discrimination continues to affect her within sex work, and she said sometimes clients try to negotiate a lower price when they know of her disability, “Sometimes they ask for a lower price because of my [disability]. I try to say I will give you 50% off the first time (150HKD) and if you find the service good you can come again and pay full price.”<sup>28</sup>

Similarly, a study by Dr Wong and other researchers found that “financial considerations”, whether “urgent and dire economic circumstances” or the opportunity to receive higher earnings than were available in the factories and service industry in China, were the primary factor influencing many Chinese women from the mainland to enter Hong Kong to engage in sex work.<sup>29</sup>

Sex worker support groups told us that these reasons are the ones they typically hear from sex workers. “I hear many sisters [women] say they enter sex work to broaden their horizons and because they can earn money by themselves. It's a way for them to finally have the ability to do something, earn some money, see more of the world instead of being trapped in their homes. But still there are some sisters who have to deal with emotional problems because they are working in sex work. That's about what society expects of them, because of the pressures from society,” Sherry Hui explained.<sup>30</sup>

### 3.4 SEXUAL HEALTH AND ACCESS TO SERVICES

In principle, health services are open to sex workers, although non-residents must pay modest fees to use these services. But the most marginalised sex workers, such as migrant and street-based sex workers, may not be able to afford these fees, putting them at greater risk of sexually transmitted infections.<sup>31</sup>

“The government provides sexual health services free of charge for all residents of Hong Kong, anybody who has a Hong Kong ID card. There's a social hygiene clinic run by the Department of Health. It provides testing, and all results are free of charge,” Dr. Wong told Amnesty International. “However, those from mainland China are not entitled to these services.” He told Amnesty International that there was a charge, approximately 700 Hong Kong dollars (US\$90), for tests and an equivalent charge to get the results: “That's a lot of money for street sex workers.”<sup>32</sup>

Many studies suggest a relatively high rate of condom use in transactions involving local women sex workers,<sup>33</sup> but lower in transactions involving migrant women sex workers.<sup>34</sup> Similarly, condom use among

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<sup>27</sup> Interview with Jane, Hong Kong, 23 January 2015. One US dollar was worth approximately 7.75 Hong Kong dollars at the time of writing. All US dollar amounts given in this report use that exchange rate

<sup>28</sup> Interview with Leah, 13 April 2016.

<sup>29</sup> W.C.W. Wong, E. Holroyd et al, “‘One Country, Two Systems’: Sociopolitical Implications for Female Migrant Sex Workers in Hong Kong’ in *BMC International Health and Human Rights*, vol. 8 (2008), p. 13.

<sup>30</sup> Interview with Sherry Hui, 18 December 2014.

<sup>31</sup> W.C.W. Wong, A. Gray et al, ‘Patterns of Health Care and Health Behaviors Among Street Sex Workers in Hong Kong’ in *Health Policy*, vol. 77 (2006), pp. 140-148.

<sup>32</sup> Interview with Dr. William Wong, 17 December 2014.

<sup>33</sup> See, for example, J.T. Lau, H.Y. Tsui and S.P. Ho, ‘Variations in Condom Use by locale: A Comparison of Mobile Chinese Female Sex Workers in Hong Kong and Mainland China’ in *Archives of Sexual Behavior*, vol. 36, 2007; J.T. Lau and H.Y. Tsui, ‘Behavioral Surveillance Surveys of the Male Clients of Female Sex Workers in Hong Kong: Results of Three Population-Based Surveys’ in *Sexually Transmitted Diseases*, vol. 8 (2003), pp. 620-28 (study indicated 75% condom use).

<sup>34</sup> See, for example, J.T. Lau, H.Y. Tsui, S.P. Ho, E. Wong, and X. Yang, ‘Prevalence of Psychological Problems and Relationships with Condom Use and HIV Prevention Behaviors Among Chinese Female Sex Workers in Hong Kong’ in *AIDS Care*, vol. 22 (2010), pp. 659-68 (inconsistent condom use common: 51% of Chinese female sex workers reported use with clients, 23% with one-night sex partner, and 73% with boyfriends); J.T. Lau, W.D. Cai et al, ‘Psychosocial Factors in Association with Condom Use During Commercial Sex Among



male sex workers is reported to be the norm.<sup>35</sup> More generally, public health studies have found a low prevalence of sexually transmitted infections and low rates of sex without a condom among women sex workers in Hong Kong.<sup>36</sup> But sex workers sometimes report being forced to engage in acts that they did not agree to, including unprotected sex. The risk of such abuses appears to be higher among younger, less-experienced and/or migrant sex workers. (These and other abusive practices by clients are discussed in Chapter 5.)

A 2007 study in which 293 women sex workers from mainland China working in Hong Kong were interviewed found that 55.6% had had an induced abortion. Just over half (52%) of these induced abortions were performed in registered clinics. Sex workers who had not used a condom the last time they had sex with a client, or who said that they would agree not to use a condom if they were paid more, were more likely to have had an induced abortion.<sup>37</sup>

### 3.5 THE CRIMINALIZATION OF SEX WORK

Sex work is frequently said to be legal in Hong Kong. That is true in principle if it is carried out in individual, private apartments, without any advertising or solicitation. “It’s not illegal for an individual to work as a sex worker as long as the person is a Hong Kong resident whose conditions of stay aren’t restricted,” said Kendy Yim, executive director of Action for REACH OUT.<sup>38</sup>

However, many activities that are associated with sex work are prohibited by law. These include soliciting “for an immoral purpose” and “loitering for the purposes of solicitation” “advertising for prostitution”, running a “vice establishment” of two or more people, letting premises or permitting their use as a “vice establishment” or for “habitual prostitution,” and “living off the proceeds of prostitution”.<sup>39</sup>

Many of these provisions are only loosely defined. Kendy Yim notes, for example: “The law on solicitation just says ‘immoral purpose’. The courts interpret this as meaning sex work. The one who is held responsible is the one who initiates the transaction. Usually the one who is charged is the sex worker. Even if the police officer initiates the dialogue, they’ll just give statements that ‘fit’ the charge against the sex worker.”<sup>40</sup> Fines of up to 100,000 Hong Kong dollars (US\$12,900) and imprisonment of up to six months are possible outcomes for this charge, although the fine is usually much lower in practice.

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Migrant Male Sex Workers Living in Shenzhen, Mainland China Who Serve Cross-Border Hong Kong Male Clients’ in *AIDS Behaviour*, vol. 13 (2009), pp. 939-48 (29.1% of migrant male sex workers surveyed had had unprotected anal intercourse with Hong Kong male clients in the previous month).

<sup>35</sup> Interview with Travis S.K. Kong, associate professor, University of Hong Kong, 23 January 2015. Male sex workers in mainland China also report routinely using condoms, at least after they begin sex work, but not in non-commercial intimate relationships and not always with regular clients. See T.S.K. Kong, ‘Risk Factors Affecting Condom Use Among Male Sex Workers Who Serve Men in China: A Qualitative Study’ in *Sexually Transmitted Infections*, vol. 84 (2008), pp. 444-48.

<sup>36</sup> M. Kam and T. Chan et al, ‘A Behaviour Sentinel Surveillance for Female Sex Workers in the Social Hygiene Service in Hong Kong (1999-2000)’, *International Journal of STDs & AIDS*, 2002, Vol. 13, pp.815-820; D.K. Chan, S.F. Cheung et al, ‘Identifying the Psychosocial Correlates of Condom Use by Female Sex Workers in Hong Kong’ in *AIDS Care*, vol. 16 (2004), pp.530-539; S.Y.P. Choi, K.L. Chen and Z.Q. Jiang, ‘Client Perpetrated Violence and Condom Failure Among Female Sex Workers in South Western China’ in *Sexually Transmitted Diseases*, vol. 35 (2008), pp.141-146; E. Holroyd and W.C.W. Wong et al, ‘Environmental Health and Safety of Chinese Sex Workers: A Cross-Sectional Study’ in *International Journal of Nursing Studies*, vol. 45 (2008), pp. 932-941; J.T.F. Lau and J. Thomas, ‘Risk Behaviours of Hong Kong Male Residents Travelling to Mainland China: A Potential Bridge Population for HIV Infection’ in *AIDS Care*, vol. 13 (2001), pp.71-81; J.T.F. Lau and H. Y. Tsui, ‘HIV/AIDS Behavioural Surveillance Surveys of the Cross-Border Sex-Worker Population in Hong Kong from 1997 to 2001’ in *Sexually Transmitted Diseases*, vol. 30 (2003), pp.827-834; J.T.F. Lau and H. Y. Tsui, ‘Behavioral Surveillance Surveys of the Male Clients of Female Sex Workers in Hong Kong: Results of Three Population-Based Surveys’ in *Sexually Transmitted Diseases*, vol. 30 (2003), pp.620-628; W.C.W. Wong and Y.T. Wun, ‘The Health of Female Sex Workers in Hong Kong: Do We Care?’ in *Hong Kong Medical Journal*, vol. 9 (2003), pp.471-473.

<sup>37</sup> J.T. Lau and L.W. Mui et al, ‘Prevalence of Induced Abortion and Associated Factors among Chinese Female Sex Workers in Hong Kong’ in *Journal of Sex and Marital Therapy*, vol. 33 (2007), pp. 19-29.

<sup>38</sup> Interview with Kendy Yim, executive director, Action for REACH OUT, 17 December 2014.

<sup>39</sup> Crimes Ordinance §§139-147A (Hong Kong).

<sup>40</sup> Interview with Kendy Yim, 17 December 2014.

Reviewing these provisions, one scholar observes:

**“Although in theory selling sex is not a crime in itself, in practice [sex workers] are subject to prosecution. For example, street work is ultimately illegal because loitering or soliciting in a public place for the purpose of prostitution is an offence under the law of Hong Kong. Moreover, sex workers can never share a working place with another woman; if she does, one of them will be charged with keeping a brothel, control over prostitutes or living on the earnings of the prostitution of others. In other words, the regulatory framework adopted in Hong Kong is a prohibition in all but the narrowest sense.”<sup>41</sup>**

Sex work in Hong Kong is de facto criminalized by the wide range of limitations on the operational aspects of sex work. In practice, it is policed by the authorities who perceive their role as seeking out and punishing sex workers who break the law. The legal framework in Hong Kong does nothing to address the concerns of sex workers about their safety and fuels the stigma and discrimination that sex workers face.

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<sup>41</sup> Nga Yan Cheung, *Accounting for and Managing Risk in Sex Work*, p. 54.

# 4. POLICING OF SEX WORK

Even though the sale of sex is not illegal in Hong Kong, authorities go to considerable lengths to investigate and prosecute sex workers on solicitation and “vice establishment” charges. In addition, as this chapter details, migrant sex workers are routinely prosecuted for immigration violations; indeed, charges for breaching conditions of stay may well be the primary means by which sex work is criminalized in Hong Kong, since many sex workers are migrants.

Groups that work with sex workers told Amnesty International that larger police operations typically focus on one type of sex work at a time. In February 2014, for example, police conducted operations to find and arrest male sex workers who work in massage parlours, according to *Midnight Blue*.<sup>42</sup> Lawyers told us that they periodically see 10 to 20 sex workers brought to court at the beginning of the week after a police operation during the weekend.<sup>43</sup>

Some 4,039 people from mainland China, were arrested on immigration offences related to suspicion of doing sex work in 2014.<sup>44</sup> About 3,800 sex workers were arrested in similar operations in the whole of 2013.<sup>45</sup> While the number of people arrested is increasing, the number of people prosecuted and convicted dropped to 578 and 573 respectively in 2014.<sup>46</sup> In addition, the length of imprisonment increased from around 6 weeks to up to 18 months.<sup>47</sup> Amnesty International requested updated figures from the Hong Kong Police Force on 15 April 2016 for similar charges in 2015, but has not received a response.<sup>48</sup>

Some sex workers report that police demand money or, more frequently, sexual services from them in lieu of arrest. It is difficult to verify such reports, and in some instances where such extortion does occur, it may be committed by private individuals who are pretending to be police officers. But the police force’s acknowledged practice of allowing undercover officers to engage in “body contact” with sex workers, including “the receipt of masturbation service” in some cases, is a likely source of many of these complaints.<sup>49</sup>

Undercover police officers often engage in behaviour that is entrapment. We heard frequent reports that police officers charged sex workers for solicitation even though the officer, rather than the sex worker,

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<sup>42</sup> Interview with *Midnight Blue*, 17 December 2014.

<sup>43</sup> Interview with lawyer, Hong Kong, 26 January 2015.

<sup>44</sup> Coconuts Hong Kong, ‘Over 4000 mainlanders arrested for unlawful prostitution’, 6 February 2015, available at <http://hongkong.coconuts.co/2015/02/06/over-4000-mainlanders-arrested-unlawful-prostitution-2014>

<sup>45</sup> Lana Lam, ‘Risky Business: Sex Workers Walk a Blurred Line in the Streets of Wan Chai’ in *South China Morning Post*, 9 November 2014.

<sup>46</sup> Coconuts Hong Kong, ‘Over 4000 mainlanders arrested for unlawful prostitution’, 6 February 2015, available at <http://hongkong.coconuts.co/2015/02/06/over-4000-mainlanders-arrested-unlawful-prostitution-2014>

<sup>47</sup> Coconuts Hong Kong, ‘Over 4000 mainlanders arrested for unlawful prostitution’, 6 February 2015, available at <http://hongkong.coconuts.co/2015/02/06/over-4000-mainlanders-arrested-unlawful-prostitution-2014>

<sup>48</sup> Interview with Senior Superintendent Lee Wai-Man, 15 April 2016.

<sup>49</sup> SEE PART 4.2: RECEIPT OF SEXUAL SERVICES AS AN INVESTIGATORY TECHNIQUE, BELOW.

initiated the exchange and offered to purchase sex. In other cases, sex workers report that police induce them to break the solicitation or vice-establishment laws – for example, by asking them to repeat or renegotiate the terms of service upon meeting them in a public place after discussing these terms online, or convincing two sex workers to come to a single apartment. “They do this all the time. It’s been a widespread practice for many years,” one lawyer told Amnesty International. “They see sex work as an unnatural act, so they think they can do whatever they want.”<sup>50</sup>

Police also obtain confessions through coercion or deception. Amnesty International heard accounts of police threatening to report sex workers to their spouses, parents or children or telling sex workers that they would be held at the police station indefinitely if they did not admit guilt. Some police officers mislead sex workers about the consequences of their confessions, telling them that they would be free to go if they signed statements, even though an admission of guilt could well result in detention.

Police routinely fail to inform sex workers, particularly those who are migrants, of their rights upon arrest. Notification of rights is an essential due process protection, and the failure of police to ensure that suspects are informed of their rights facilitates false confessions and other abusive practices.

Condoms are routinely seized as evidence in solicitation and vice-establishment investigations, even though access to condoms and related HIV prevention services are an essential part of the right to the highest attainable standard of health and a crucial means for women to realize their right to control their reproductive and sexual health. Law enforcement practices should not interfere with sex workers’ rights to protect their health. In particular, as the United Nations Joint Programme on AIDS (UNAIDS) has emphasized: “Condoms must be readily available for sex workers and their clients.”<sup>51</sup>

Transgender sex workers are regularly subjected to intrusive and humiliating full-body searches. Where their identity documents do not match their gender identity, the police conducting the search are assigned on the basis of the identity documents, meaning that male officers undertake body searches of most transgender women who are detained. Most transgender detainees are sent initially to male detention centres and then transferred to a special unit for detainees with mental illness. Moreover, prisons do not routinely allow transgender detainees to continue hormone treatment, with potentially serious consequences for their health.

Sex workers rarely make official complaints about abusive practices. For example, Mei-Ling, who said that police pressured her into signing an inaccurate statement, said: “I thought I could not make a complaint because it would be useless.” She added: “In the court, my lawyer asked the police to describe what I was wearing, and they couldn’t. But even after such a big mistake, the court believed the police, so making a complaint would be useless.”<sup>52</sup>

## 4.1 EXTORTION FOR MONEY OR SEXUAL SERVICES

Sex worker organizations and defence lawyers report that some police officers (or people claiming to be police officers) demand money or, more commonly, sexual services from sex workers. Sometimes money or sexual services are extorted in exchange for not arresting the sex worker; in other cases, sex workers say that police take their money or receive “free sex” and then charge them.

Because they are working irregularly, migrant sex workers are more vulnerable to such acts of extortion and other abuses at the hands of police. For example, JJJ Association told Amnesty International of an incident that a sex worker reported in January 2013. The sex worker told JJJ Association that a police officer was investigating a crime on the sixth floor of her building, which houses numerous one-woman apartments, and descended to the fifth floor in order to obtain sexual services. The sex worker told him that the price was 500 Hong Kong dollars (US\$65), but he said that he had only 300 dollars (US\$39). He put his handcuffs on the table, which the sex worker interpreted as an attempt to intimidate her. But because she was a Hong Kong resident, she was not afraid. She challenged him, saying: “If I am illegal, please arrest me.” Eventually the

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<sup>50</sup> Interview with lawyer, Hong Kong, 15 January 2015.

<sup>51</sup> UNAIDS, *Guidance Note on HIV and Sex Work*, p. 12.

<sup>52</sup> Interview with Mei-Ling, 27 January 2015.

officer paid the full price. In JJJ Association's assessment, if the sex worker had not been a Hong Kong resident, "she would not have been able to protect her rights."<sup>53</sup>

In another case, a sex worker reported that in 2013, a police officer came to her apartment. "He said, 'I am going to check your documents'. After I showed him my identification, he put his gun on the table with \$20 HKD underneath, he said 'do you want to provide service?', so I provided a [sexual] service. The normal payment for this service is \$300 – 500 HKD."<sup>54</sup> Staff at Zi Teng have received similar reports from sex workers.<sup>55</sup>

Sex workers do not always know for certain whether someone who claims to be a police officer actually is one if for example they are not in uniform or do not show police identification, and sex worker organizations acknowledge that some acts of extortion are committed by individuals who are posing as police officers. Nevertheless, we heard from several defence lawyers that their clients complained of abuses of this type by police officers who then arrested them. If these accounts are accurate, this means that some of these abuses are committed by police officers.

Sex workers who work on the street are particularly likely to experience acts of extortion by police, although other sex workers are also sometimes subject to extortion, according to reports by Action for REACH OUT and Zi Teng. For example, in a 2012 survey of 200 sex workers conducted by Action for REACH OUT, 10% of respondents said they had been threatened or blackmailed by police or individuals claiming to be police.<sup>56</sup>

In addition, a lawyer noted that sex workers from mainland China are more likely to be targeted by police. "If the defendants are mainlanders, they're the more usual victims. The police know if they're mainlanders, they'll plead guilty instead of fighting the case to the end."<sup>57</sup>

The lawyer added: "Some of these women may have a good case to defend. They certainly have complaints about police abuse, that when they are taking action, they're accustomed to receive this kind of [treatment]. The sex workers will just put this to one side, this kind of complaint. They just want to be sent back home as soon as possible."<sup>58</sup>

Sex workers rarely make official complaints, however. The same lawyer explained: "Even a defendant who is really angry with the police and who insists on going to trial will find it very difficult to persuade the court that these abuses happen. It's very much one against one, the defendant against the police. It's really not easy to win a case for these few mainlanders who do want to go to trial."<sup>59</sup>



#### **POLICE OFFICER CONVICTED FOR ABUSE OF OFFICE AFTER THREATENING A SEX WORKER**

In January 2016, a police officer was convicted for abuse of public office after he refused to pay a sex worker and then threatened to prosecute her for breach of immigration conditions if she did not flee within hours. The police officer was charged with misconduct in public office and was sentenced to 20 months in prison. District Court Judge Joseph To Ho-sing noted that the officer committed a serious offence in

<sup>53</sup> Interview with Sherry Hui, 23 January 2015.

<sup>54</sup> Interview with Lily by phone, 13 April 2016.

<sup>55</sup> Interview with staff at Zi Teng, Hong Kong, 22 January 2015.

<sup>56</sup> See Ernest Kao, 'More Sex Workers Report Abuse by Police, Survey Finds' in *South China Morning Post*, 17 December 2012, available at [www.scmp.com/news/hong-kong/article/1107100/more-sex-workers-report-being-abused-police](http://www.scmp.com/news/hong-kong/article/1107100/more-sex-workers-report-being-abused-police)

<sup>57</sup> Interview with lawyer, 26 January 2015.

<sup>58</sup> Interview with lawyer, 26 January 2015.

<sup>59</sup> Interview with lawyer, 26 January 2015.

failing to enforce the law, taking benefits from an ‘offender’ and threatening her afterwards.<sup>60</sup>

The sex worker testified that she was intimidated, threatened and scared into providing sexual services to the police officer. However, the court suggested that the sex worker should have been prosecuted for immigration offences, rather than treated as victim of a serious crime.

## 4.2 RECEIPT OF SEXUAL SERVICES AS AN INVESTIGATORY TECHNIQUE

Some of these accusations that police officers are receiving “free sex” likely arise out of the practice of supervisors authorizing officers to engage in “body contact” in the course of their investigation.

When Amnesty International met with senior police officers from the Crime Prevention Bureau, they acknowledged that bodily contact might take place in the course of investigating crimes relating to sex work. These senior officers told us that undercover police have strict guidelines about what they can and cannot do in the course of an investigation. “Oral sex and intercourse are not allowed,” said Brian Lowcock, the chief superintendent of police for the Organized Crime and Triad Bureau: “They need approval for other bodily contact.” He explained that, in general, the undercover officer should not allow bodily contact to include masturbation, “but it depends on the situation because you might need to get to a certain stage”. When asked, Brian Lowcock clarified that such contact would only be justified in vice-establishment cases, not in solicitation cases. He explained that chief inspectors approve operations, and officers must complete a debriefing form after each operation.<sup>61</sup>

These descriptions of the policies are consistent with Hong Kong’s 2007 Police Guidelines on Undercover Anti-Vice Operations. Those guidelines include the following:

**“In collecting evidence of illegal vice activities, where for evidential/operational reasons the circumstances necessitate that an operative receives some form of sexual service in order to maintain his cover, the operative may need to have body contact with the sex worker.**

**“However, the integrity and personal safety of the officers involved must be accorded the highest priority. It is emphasised that sexual intercourse, oral sex and any forms of body contact with girls under 16 years of age, are strictly forbidden in all circumstances. In respect of other bodily contact, the following guidelines apply:**

- a) The contact is genuinely necessary in order to achieve the objective of the operation. Once the objective is achieved, the body contact should cease. The undercover operative will have to justify his action if he allows any sexual contact to take place before initiative arrest action.
- b) Body contact may be required in some long-term operations, but such operations are limited in number and will therefore form exceptions rather than the rule; and
- c) Where it is anticipated that the receipt of masturbation service is genuinely necessary to achieve the objective of the operation, the operative must obtain approval from a Senior Superintendent of Police (SSP) before the operation.”<sup>62</sup>

<sup>60</sup> South China Morning Post, ‘Policeman who threatened prostitute prostitute into fleeing Hong Kong after refusing to pay \$200 for sex jailed, 21 January, available at [www.scmp.com/news/hong-kong/law-crime/article/1903602/policeman-who-threatened-prostitute-fleeing-hong-kong-after](http://www.scmp.com/news/hong-kong/law-crime/article/1903602/policeman-who-threatened-prostitute-fleeing-hong-kong-after)

<sup>61</sup> Interview with Crime Prevention Bureau, 26 January 2015.

<sup>62</sup> Legislative Council, *Report of the Subcommittee on Police’s Handling of Sex Workers and Searches of Detainees*, 2009, Appendix V: Summary of the Police’s Guidelines on Anti-vice Operations, paras. 4-5 (emphasis in original), available at [www.legco.gov.hk/yr09-10/english/panels/se/papers/se1201cb2-310-e.pdf](http://www.legco.gov.hk/yr09-10/english/panels/se/papers/se1201cb2-310-e.pdf)

Writing in 2006, and assessing the policies in use prior to the above Police Guidelines coming into force in 2007, Professor Simon Young wrote:

**“We believe the practice of undercover agents receiving sexual services is generally unnecessary (or can otherwise be avoided) for proving prostitution-related offences in Hong Kong. The practice carries with it the risk that the agent may commit various criminal offences. Aggressive police tactics, which induce the commission of an offence, may potentially halt a prosecution. Even where the practice is passive and not illegal, it is probably considered unethical police conduct by international standards, particularly when it is unnecessary or done repeatedly before an arrest is made. To safeguard its reputation, it is highly recommended that the Hong Kong Police Force adopt a clear policy against this practice by its undercover agents.”<sup>63</sup>**

Despite senior officials’ assurance that sexual contact is limited to manual masturbation and is not used in investigating solicitation cases, Amnesty International heard accounts from sex workers and lawyers that indicated a less strict interpretation of these policies in practice. “The police will make use of this chance to receive sexual services free of charge,” one lawyer told Amnesty International, adding: “I’ve received a number of these kinds of complaints.”<sup>64</sup> A shadow report submitted to the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) in 2014 by the Hong Kong Women’s Coalition on Equal Opportunities observed: “Police officers, during undercover operations, are allowed to solicit sex workers to perform certain sexual services including masturbation (which is in the end unpaid) to ‘collect evidence’ for prosecution.”<sup>65</sup>

For the charge of “solicitation”, which is a verbal act, bodily contact between an investigating officer and a sex worker is not required. As a lawyer observed: “The law does not require them to go that far, to go up to the premises. An exchange of conversation is enough already.”<sup>66</sup>

More generally, it is clear that these investigatory techniques are open to abuse, are not strictly necessary to establish the elements of any of the common “prostitution-related” offences in the Crimes Ordinance, and damage the reputation of the police force. Assessing these techniques, the Hong Kong Women’s Coalition on Equal Opportunities concluded: “The law enforcement process is discriminatory and exploitative.”<sup>67</sup>

## 4.3 ENTRAPMENT

**“...basically it is always the police officer who is believed, and the sex worker who is not.”**

Interview with Cherry Chui of Action for REACH OUT, 20 January 2015

Amnesty International heard frequent complaints that police initiate transactions with sex workers, for example by asking if they offer sexual services, and take other actions to induce sex workers to break the law. Because the sale of sex is itself not unlawful in Hong Kong, police must establish that the elements of solicitation or other crimes associated with the sale of sex are met before arresting and referring a sex worker for prosecution. In many of the cases described by individual sex workers, defence lawyers and groups that work with sex workers, it was individual police officers themselves, rather than the sex workers, that appeared to commit the crime of solicitation.

Amnesty International also heard reports that some police officers attempt to induce sex workers to violate the provision of the Crimes Ordinance that forbids the use of premises by more than one person for sex work.

<sup>63</sup> Professor Simon Young, ‘Memorandum for Elaine Lam, Zi Teng’, 3 April 2006, p. 1.

<sup>64</sup> Interview with lawyer, 26 January 2015.

<sup>65</sup> Hong Kong Women’s Coalition on Equal Opportunities, *Submission of Hong Kong Shadow Report to CEDAW Committee on the implementation of CEDAW in Hong Kong*, [hereinafter *Shadow Report to CEDAW Committee*] September 2014, p. 14-15.

<sup>66</sup> Interview with lawyer, 26 January 2015.

<sup>67</sup> *Shadow Report to CEDAW Committee*, p. 14-15.

Hong Kong law does not recognize entrapment as a general defence, and evidence obtained through entrapment is normally admissible in court.<sup>68</sup> Nevertheless, as Simon Young notes in a legal memorandum prepared for the organization Zi Teng, entrapment by public officials – as distinct from entrapment by private actors, such as undercover journalists – can jeopardize a criminal investigation.<sup>69</sup>

Entrapment is difficult to establish, however. The leading case in England and Wales, a 2001 House of Lords judgment, sets forth the standard that would likely be applied by the Hong Kong courts in determining whether the prosecution for the offence could go forward. That case required that police do more than present the defendant with an opportunity to commit a crime, but that their conduct amounts to inciting or instigating it.<sup>70</sup> One solicitor described the effect of the House of Lords judgment in these terms: “If the police conduct preceding the commission of the offence was no more than might have been expected by others in the circumstances this would not constitute entrapment.”<sup>71</sup>

Solicitation generally involves a person inviting another to commit an act, and in the case of a police officer approaching a sex worker and initiating a discussion about purchasing sexual services, it could be argued that the police officer has done more than merely creating the opportunity to commit a crime, and has in fact instigated it.

In either case, the tendency of the courts in Hong Kong, as elsewhere, to treat police testimony as inherently more reliable than that of the accused is a substantial barrier in practice to raising such an objection to prosecution. As Cherry Chui of Action for REACH OUT observed: “The girls who work on the street know that their statement won’t be trusted.”<sup>72</sup>

But these cases do illustrate how easy it is for individual officers to step over the line. In many of the cases described to Amnesty International, it is difficult to see how a solicitation charge could be sustained if the full facts were available to the prosecutor and court. And even if these practices do not amount to entrapment by public officials, they damage the reputation of the Hong Kong police.

## SOLICITATION

Amnesty International heard several accounts indicating that police have arrested sex workers and charged them with solicitation even though the exchanges were initiated by the undercover officers – that is, when the officers themselves, rather than the sex workers, solicited the sale of sex.



### SKY, A TRANSGENDER SEX WORKER, DESCRIBES HER ARREST IN DECEMBER 2012:

I was selling sex on the streets as a transgender sex worker. This was in Wan Chai, on Lockhart Road. There are lots of trans sex workers selling sex there.

The police officer pretended to be a client, and he approached me. He started talking to me, saying things like, ‘Hello, how are you?’ He asked where I was

<sup>68</sup> See *Chung Chung Ching*, 1984 Cr App No 546, at 6 (Roberts CJ) (“incitement by an agent provocateur to another to commit an offence does not absolve that other person from criminal responsibility”), adopting the rule of the House of Lords’ decision in *R. v Sang* (AC 402), House of Lords (1980). See also M. Jackson, *Criminal Law in Hong Kong*, 2003, pp. 381-83; S. Bronitt, ‘Entrapment, Human Rights and Criminal Justice: A Licence to Deviate?’ in *Hong Kong Law Journal*, vol. 29 (1999), p. 216.

<sup>69</sup> “If the undercover agent goes beyond providing a mere opportunity to commit the offence and has in fact induced the accused to commit the offence, the agent may be found to have entrapped the accused and the prosecution is liable to be stayed.” See Simon Young memorandum (citing *R v Looseley* (1 WLR 2060), House of Lords (2001)). In England and Wales, where there continues to be no defence of entrapment, it is nevertheless “considered to be an abuse of court process for agents of the state to lure citizens into committing illegal acts and then seek to prosecute them for doing so. State-created entrapment of this sort will result in a stay of proceedings.” See D. Sleight, ‘The Law Regarding Entrapment’ in *The Law Society Gazette*, 24 June 2010, available at [www.lawgazette.co.uk/law/the-law-regarding-entrapment/55972.fullarticle](http://www.lawgazette.co.uk/law/the-law-regarding-entrapment/55972.fullarticle)

<sup>70</sup> *R v Looseley* 1 WLR 2060, House of Lords (2001).

<sup>71</sup> D. Sleight, ‘The Law Regarding Entrapment’ in *The Law Society Gazette*, 24 June 2010.

<sup>72</sup> Interview with Cherry Chui, 20 January 2015.



from. I told him I was from mainland China. He asked me why I wasn't in a bar instead of standing outside. I told him I wasn't good with English.

The policeman asked me to go have a drink together with him. I asked the man if he wanted a massage service. The policeman asked me how much; what is the price for a massage. Then the policeman took me to a hotel. He said we were going to his room.

We got in the elevator and started to go up to the third floor. At first I did not realize there was another person in the elevator. There was another police officer in the elevator with us. When it stopped on the third floor, both police officers identified themselves. They said, 'We are the police,' and they arrested me. They told me not to move. They started to question me right there. They asked me if I was Chinese or a foreigner. They asked where I was from, questions of that type. Then the policeman said: 'You stop talking'. They called other people to come, and they took me to the police station.<sup>73</sup>

Based on Sky's account, she was arrested and charged with solicitation on the basis of a conversation in which she never explicitly offered a sexual service. As a matter of law, it is by no means clear that her mention of a massage is sufficient to support a charge that she had solicited the undercover officer to purchase sex from her.

But even if it were, she did not initiate the conversation: "The night I was arrested, it was that first policeman who approached me. But in court the police record was saying that I approached the police. But the policeman was the one who approached me while I was standing on the street."<sup>74</sup>

Queen, a woman from Hong Kong who engages in occasional compensated dating, described the circumstances of her arrest for solicitation in 2013, when she was 19:

**"There was an undercover police [officer] who reached me through WhatsApp [a mobile phone messaging application]. They asked if I would [provide a] 'service,' with school uniform. I said no. We talked about where to meet. The police pointed me where to meet. When I arrived there were other police there who arrested me."**<sup>75</sup>

Mei-Ling, a sex worker from mainland China, told Amnesty International that she was approached by an undercover police officer in June 2012 after he saw her approach a potential client. The undercover officer initiated a conversation with her, and the two went back to her apartment. When they arrived at her apartment: "He asked me to undress — he was urging me to undress, but I asked him to wait. He didn't want to wait, and he said I am a police officer and arrested me."<sup>76</sup> In her case, although she had indeed solicited another potential client, she was not arrested and ultimately convicted for that particular act of solicitation; instead, she was arrested and charged with soliciting the undercover officer even though, by her account, he initiated the conversation between them.

In another example, a lawyer described to Amnesty International a case she had handled recently:

**"I had a case where the police charged a woman with solicitation after they'd met in a restaurant and were standing outside on the pavement. The first time they had a conversation about sexual services was in the restaurant, but then the policeman had her repeat the conversation on the pavement. That policeman was a foreigner, and the defendant was from the Philippines. The conversation took place in Wan Chai. It was really a trap. What I heard from the defendant was that the policeman kept talking to her, kept asking her to sell sexual services. That fact wasn't reflected in the police case. When the case was presented in court, it was presented the other way around [as if the woman had initiated the conversation about sexual services]. In the end, the woman pled guilty."**<sup>77</sup>

<sup>73</sup> Interview with Sky, 27 January 2015.

<sup>74</sup> Interview with Sky, 27 January 2015.

<sup>75</sup> Interview with Queen, 21 January 2015.

<sup>76</sup> Interview with Mei-Ling, 27 January 2015.

<sup>77</sup> Interview with lawyer, 26 January 2015.

Another sex worker said she was approached by an undercover police officer while she was checking messages on her phone. She did not see him until he asked her if she would provide sexual services. When she brought him to her apartment, he arrested her.<sup>78</sup>

Other lawyers told Amnesty International of similar cases: “Solicitation means anywhere outside. Under the law, a sex worker can never negotiate outside her own apartment,” one defence lawyer explained, adding that the police officer sometimes asks the sex worker to repeat the price or other arrangements of the offer to sell sex when they are in a public place.<sup>79</sup>

Such accounts are typical, reports Cherry Chui of Action for REACH OUT. “It is the police who initiate the [transaction], but they say it is the sex worker,” she explained. “The court sees the police as reliable witnesses. There was one case four or five years ago where the judge believed the sex worker, but that was a special case – a good duty lawyer and a very junior police officer who gave contradictory evidence. But basically it is always the police officer who is believed, and the sex worker who is not.”<sup>80</sup>

Amnesty International heard similar reports from other groups that work with sex workers. “In undercover operations, it is always the police who ask for services first,” a staff member with Zi Teng told us.<sup>81</sup>

When we asked senior police officials about such reports, chief superintendent Brian Lowcock replied:

**“For solicitation, the main way we do it is to have a decoy police officer. Usually the officer is on the street in Yau Ma Tei or Mong Kok. The officers walk the streets where sex workers are. The mama-san [brothel manager] or sex worker approaches, offers sexual services, discusses the price and the types of services to be offered. The officer is then taken up to a hotel room or other apartment where the actual sexual service is provided.”<sup>82</sup>**

Later in our interview, Brian Lowcock added, “We can’t start the conversation. We simply walk on the street and stand around, look around. Usually the officers will be approached quickly. Honestly, they do not have to do anything to indicate that they are looking for sex workers.”<sup>83</sup>

### **MANAGING A “VICE ESTABLISHMENT”**

Police may use similar tactics to induce sex workers to fall foul of the requirement that they must work alone. Kendy Yim, the executive director of Action for REACH OUT, told Amnesty International: “The police will set up the girl. An undercover cop will ring the bell and ask her to invite another girl to have a threesome. This becomes a vice establishment, and she’s charged with managing a vice establishment.”<sup>84</sup>

Amnesty International heard similar accounts from other groups: “The police will use two undercover officers to make sure there are two sex workers in the apartment,” reported Law Kwun Kit of the organization Midnight Blue.<sup>85</sup>

A defence lawyer suggests that simply sharing premises should not be interpreted as violating the prohibition on managing a “vice establishment”:

**“I have come across cases where some of these sex workers want to protect themselves, so they share premises, but they’re really working on their own. So this is a grey area in the law. Strictly speaking they are working on their own, so it’s not illegal. To prove that they are violating the provision on managing a vice establishment, the prosecution needs to prove that someone managed the premises. But now the law is quite wide in application.**

**“I had a case of two women. They didn’t really know each other; they were just sharing premises. There are two rooms in the premises. Most of the things in the premises were separately used by them, but there was just one**

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<sup>78</sup> Interview with Sparrow, 13 April 2016.

<sup>79</sup> Interview with lawyer, 15 January 2015.

<sup>80</sup> Interview with Cherry Chui, 20 January 2015.

<sup>81</sup> Interview with Zi Teng staff, 22 January 2015.

<sup>82</sup> Interview with Crime Prevention Bureau, 26 January 2015.

<sup>83</sup> Interview with Crime Prevention Bureau, 26 January 2015.

<sup>84</sup> Interview with Kendy Yim, 17 December 2014.

<sup>85</sup> Interview with Law Kwun Kit, 17 December 2014.

**kitchen and one toilet. Both are being charged with management. But there's no enterprise managing the premises.**

**"From the legal angle it's not that satisfactory. But the police will try to use the shared kitchen and shared toilet to establish management.**

**"This is not the kind of thing the legislation was intended to catch. When we bring these cases to court, the judges tend to think that the legislative intent was to stop all these kinds of sexual services. So they are more prone to accept the prosecution's view instead of taking a restrictive stance in applying this offence."<sup>86</sup>**

"Vice establishment" charges can readily be brought against massage parlours and similar businesses that have several employees and in many cases a manager. In some cases, police use an approach similar to that used with sex workers who operate out of individual apartments: "A police officer will go into a massage parlour. These usually have several individual rooms. So one of the officers will go into one and request sexual services. He'll add, 'Can one of your colleagues see my friend?' Then they'll [charge] the guy [the sex worker] for managing a vice establishment," a lawyer told Amnesty International.<sup>87</sup>

Investigations into such businesses may also involve several visits by undercover police officers. In the cases described to Amnesty International, these undercover officers generally ask if sex is for sale; in effect, they solicit a sexual transaction.

For example, Jimmy, a sex worker operating in a massage parlour, told Amnesty International that when he was arrested in 2014, he realized that a client who had come to his parlour for a massage several months earlier was in fact an undercover police officer. "The man told me that he had just broken up with his boyfriend. He asked if I could help him. He asked me whether sexual services were available." On that occasion, Jimmy did not agree to provide sexual services. The man received a massage and then asked for Jimmy's contact information so that he could arrange another appointment.

The man returned to Jimmy's massage parlour, together with a colleague, three months later. After the colleague went into a room with one of Jimmy's co-workers, the co-worker returned to the front of the premises to complain that the man was aggressively demanding sexual services.

A group of about ten police officers arrived at the massage parlour during this discussion. They told Jimmy that they were searching the premises as a suspected "vice establishment". When they found condoms, lubricant and sex toys in several of the rooms, they arrested Jimmy and three others in the massage parlour.<sup>88</sup> (The use of condoms as evidence in "vice establishment" and solicitation cases is discussed later in this chapter.)

Based on Jimmy's account, it is not clear that police had any reasonable grounds to search the massage parlour: the undercover officer asked on two occasions to buy sex, but neither Jimmy nor his co-worker claims to have agreed. Instead, Jimmy's case suggests that the undercover officer attempted to induce the employees to sell sex. Indeed, it may well be that it was only after the search of the premises that police had the first evidence that the sale of sex might occur in the massage parlour.

## **4.4 OBTAINING CONFESSIONS THROUGH COERCION OR DECEPTION**

Sex workers told Amnesty International that police sometimes use clearly improper tactics to obtain a confession, for instance by threatening to report their alleged crimes to spouses or other family members. For example, Mei-Ling, a sex worker, said that police threatened to call her husband and daughter to tell them of her arrest unless she signed a confession.<sup>89</sup> Betty, was taken to hospital after she sustained injuries after she was beaten in a raid at the massage parlour where she worked in May 2015. She said that the police tried to encourage her to sign a confession while she was still in hospital. When she refused, they

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<sup>86</sup> Interview with lawyer, 26 January 2015.

<sup>87</sup> Interview with lawyer, 15 January 2015.

<sup>88</sup> Interview with Jimmy, 22 January 2015.

<sup>89</sup> Interview with Mei-Ling, 27 January 2015.

called her family – without her consent – to try and persuade her to sign it. She did not sign the statement, and eventually the charges against her were dropped. She is now pursuing a complaint against the police for her treatment during the arrest.<sup>90</sup>

We also heard numerous accounts from sex workers and NGOs that police at times filed reports containing false statements, for example that sex workers engaged in solicitation in public or operated in groups. In some cases, sex workers sign written statements that are inaccurate, sometimes because they do not understand what they are signing, and sometimes because they do not feel free to object to the inaccuracies.

In addition, several of the accounts we heard suggested that police misled sex workers about the consequences of their confessions. For example, Brad, arrested in 2011 for carrying false identification, told Amnesty International: “The police were talking as though it was a very minor case, not a big deal, like they were just asking for information. They were telling me the sentence would probably be just a fine, and then I’d be able to leave... When I was before the judge, I was still thinking it was a minor case. I couldn’t imagine it would be a long sentence.” Brad was sentenced to one year’s imprisonment and was released after eight months.<sup>91</sup>

Queen told Amnesty International that she was both misled by police about the potential gravity of the charge she faced and tricked into signing an inaccurate statement when she was arrested for solicitation in 2013:

**“I was sent to the police station and asked to make a statement. I was kept by the police for nine hours. They took it in turn to question me. They did not inform me of my rights. I asked for a lawyer. They said it’s not necessary, it’s not a big deal. I was not feeling well that day, and in the end just signed the statement.**

**“When Teen’s Key [a group that works with women under the age of 25] helped me later, they saw that the signed written statement was not actually what I had said; in reality the police had initiated [sexual services], but the statement said that I had.”<sup>92</sup>**

Such accounts are common, according to reports by organizations that work with sex workers. “Police make people sign false confessions,” said Cherry Chui of Action for REACH OUT.<sup>93</sup>

Cherry Chui noted that this practice was facilitated by the fact that sex workers who are not from Hong Kong may not be able to understand the written statement. “Many from the mainland can’t read traditional Chinese characters,” she told Amnesty International.<sup>94</sup>

Sex workers also report that in some cases police threaten them with longer periods of detention at the police station if they do not sign the statements. As a result, some agree to statements even when they know that the written documents are not an accurate report of what occurred. “If they don’t sign they have to spend 24 hours at the police station,” Cherry Chui told Amnesty International.<sup>95</sup>

In some cases, police threaten to arrest others who have no involvement in sex work. According to one defence lawyer: “The police might try to threaten the girl by going in and saying they’ll arrest her cleaning lady. They’ll use that as a threat: ‘If you don’t admit to sex work, I will charge the cleaning lady for living off the earnings of prostitution [of others],’ they might say”.<sup>96</sup>

As a matter of international law, the right not to be compelled to incriminate oneself or confess guilt<sup>97</sup> includes a prohibition on coercion. The Human Rights Committee, the UN body of independent experts elected by states to monitor the implementation of the International Covenant on Civil and Political Rights (ICCPR), has stated that the prohibition on coerced confessions requires “the absence of any direct or

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<sup>90</sup> Interview with Betty, 15 April 2016.

<sup>91</sup> Interview with Brad, 27 January 2015.

<sup>92</sup> Interview with Queen, 21 January 2015.

<sup>93</sup> Interview with Cherry Chui, 20 January 2015.

<sup>94</sup> Interview with Cherry Chui, 20 January 2015.

<sup>95</sup> Interview with Cherry Chui, 20 January 2015.

<sup>96</sup> Interview with lawyer, 15 January 2015.

<sup>97</sup> Article 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR).art. 14(3)(g).

indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt”.<sup>98</sup>

Courts in some jurisdictions have limited the use of evidence obtained through highly coercive deception, for example, when police tell a suspect that a loved one will be arrested unless a suspect confesses or that a confession could save a loved one’s life.<sup>99</sup>

There is little question that many of the deceptive tactics employed by the Hong Kong police are coercive. Sex workers may be told that unless they confess to a crime, they will be reported to spouses and other family members or detained indefinitely at the police station. Police sometimes threaten to arrest others unless the suspect confesses. Police may also misinform suspects about the seriousness of the charges they face. As discussed in the next section, police routinely fail to inform sex workers of their rights when they are arrested. Adding to these pressures, Hong Kong police subject suspects to lengthy periods of interrogation; we heard estimates from sex workers that ranged from five to nine hours.

These and other tactics, particularly in combination, can violate the right to a fair trial, including an individual’s right to remain silent and the right not to be compelled to incriminate oneself.

## 4.5 FAILURE TO INFORM SUSPECTS OF THEIR RIGHTS

**“The police said, ‘You’d better admit you’re guilty, otherwise we will keep you in detention in the police station.’”**

Interview with Sky, 27 January 2015

False confessions and other abusive practices are facilitated by the routine failure of police to inform suspects of their rights in any meaningful way upon arrest. These omissions appear to be particularly common when police arrest migrants.

Jimmy was arrested in early 2014 on charges of managing a “vice establishment”. He reported to Amnesty International that he was not told that he could make changes to the written statement taken by police: “They didn’t tell me I could change the statement when I signed it.” He said that he had asked the police officers who took his statement to include his report that one of the undercover police officers had demanded sex from a massage parlour employee. “They refused to put this in the oral evidence I gave. They said it was irrelevant. They said it was a personal matter, and they didn’t put it down in the statement.”<sup>100</sup>

Jimmy is a Hong Kong resident and he already knew some, but not all, of his rights upon arrest. Even so, the police did not fully inform him of his rights. “The police told me I had the right to keep silent; whatever I said would become evidence in court. They didn’t tell me I could call anybody,” he recounted. After he had been interrogated for several hours, he asked to telephone his sister. “I couldn’t remember her phone number, so I asked to look for it in my contacts list in my phone. The police had taken my phone when I arrived at the station. They told me they couldn’t let me have the phone back to look for the number, but

<sup>98</sup> Human Rights Committee General Comment 32, UN Doc. CCPR/C/GC/32 (2007) para. 41; see also para. 60, which states, “To ill-treat persons against whom criminal charges are brought and to force them to make or sign, under duress, a confession admitting guilt violates both article 7 of the Covenant prohibiting torture and inhuman, cruel or degrading treatment and art 14, paragraph 3(g) prohibiting compulsion to testify against oneself or confess guilt.” See also: Committee against Torture Concluding Observations: Mongolia, UN Doc. CAT/C/MNG/CO/1 (2010) para. 18; *Cabrera-García and Montiel Flores v Mexico*, Inter-American Court (2010), para 166; African Commission on Human and Peoples’ Rights Concluding Observations: Benin (2009), para. 50; *Othman v United Kingdom*, European Court of Human Rights (2012), paras 264-267; and *Gäfgen v Germany*, European Court of Human Rights, Grand Chamber (2010), para. 168: “The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.”

<sup>99</sup> See for example, *People v Thomas*, No. 18 (N.Y. 20 February 2014), available at <http://www.nycourts.gov/ctapps/Decisions/2014/Feb14/18opn14-Decision.pdf>

<sup>100</sup> Interview with Jimmy, 22 January 2015.

they said I could tell them my password and they would use it to pull up my sister's number." He gave the police his password, and they retrieved his sister's telephone number for him.<sup>101</sup>

Sex workers who are migrants or from mainland China receive almost no explanation of their rights, Amnesty International heard. For example, Sky, a transgender sex worker, told Amnesty International that police did not say anything to her about her rights. Sky told us: "In the police station in Wan Chai, the police there told me that I was required to admit that I was guilty. The police there said, 'You'd better admit you're guilty, otherwise we will keep you in detention in the police station'."<sup>102</sup>

Brad's description of his arrest in 2011 for being in possession of a fake identification card was similar. "In the police station when I was questioned, nobody asked me whether I needed a lawyer. They were pressuring me to admit to being guilty. They didn't use violence to force me to admit that I was guilty. But they were using a lot of pressure to make this happen." When asked by Amnesty International whether he was informed that he had the right to remain silent, Brad replied: "I had no idea. I didn't realize that. They just made me feel I had to admit that I was guilty."<sup>103</sup>

Similarly, Mei-Ling, arrested for solicitation in June 2012, also told us that she was not informed of her rights upon arrest.<sup>104</sup>

Cherry Chui, of Action for REACH OUT, said that these experiences were the norm for sex workers: "People are almost never informed of their rights at the [police] station. The women are given a list of their rights at the end, as they're leaving."<sup>105</sup> The Hong Kong Women's Coalition on Equal Opportunities noted in its 2014 shadow report to the CEDAW Committee:

**"Some sex workers reported physical/verbal assault by the police or immigration officers upon arrest and questioning. These sex workers are being deprived of their basic human rights, such as the right to remain silent; right to legal representation, right to a fair investigation by requesting for an interpreter, right to have toilet breaks and rest during questioning, and the right to refuse signing the cautioned statements."**<sup>106</sup>

These reports are supported by the findings of an Action for REACH OUT survey of 73 sex workers conducted in 2005. The survey found that when sex workers were arrested by police, they were not always informed of the reasons for their arrest or of their rights to remain silent; to make phone calls to friends, relatives or lawyers; to request an interpreter if needed; to request a break during questioning; or to refuse to sign confessions.<sup>107</sup>

Notification of rights upon arrest is a basic and essential element of the right to a fair trial: in order to exercise one's rights, one must know that they exist. International standards unambiguously require that an individual be informed of their rights on arrest and told how they can avail themselves of those rights.<sup>108</sup> These rights include the right to notify others of their arrest; the right to legal counsel; the right to challenge the lawfulness of detention; the right not to incriminate oneself, including the right to remain silent; and the right to complain about ill-treatment. An individual who is arrested must also, as a matter of due process, be informed of any additional rights they have under domestic law.

The failure to notify arrested sex workers of their rights is particularly significant given the complexity of Hong Kong's laws on sex work. The sex workers and organizations interviewed by Amnesty International gave varying and often materially inaccurate descriptions of Hong Kong's laws relating to sex work. Sex workers who are migrants or from mainland China were particularly likely to misunderstand the law. Similarly, a social worker for young women sex workers observed in December 2014 that many of those accessing social

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<sup>101</sup> Interview with Jimmy, 22 January 2015.

<sup>102</sup> Interview with Sky, 27 January 2015.

<sup>103</sup> Interview with Brad, 27 January 2015.

<sup>104</sup> Interview with Mei-Ling, 27 January 2015.

<sup>105</sup> Interview with Cherry Chui, 20 January 2015.

<sup>106</sup> *Shadow Report to CEDAW Committee*, pp. 14-15.

<sup>107</sup> Action for REACH OUT, *A Survey on Hong Kong Police's Attitudes Towards Sex Workers*, July 2005, p. 14.

<sup>108</sup> See, for example, Principles 13 and 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Guidelines 2 §42(c) and 3 §43(i) of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

services “were under the impression that that the police had an absolute right to arrest them for being a sex worker”.<sup>109</sup>

## 4.6 CONDOMS AS EVIDENCE

**“Condoms, both male and female, are the single most effective available technology to reduce the sexual transmission of HIV and other sexually transmitted diseases. Condoms must be readily available for sex workers and their clients, either free or at low cost, and conform to global quality standards... harassment by law enforcement officers reduces the ability of sex workers to negotiate condom use; governments and service provider should address such factors to maximize the impact of condom programming focused on sex work.”**

UN Guidance Note on HIV and Sex work<sup>110</sup>

Defence lawyers told Amnesty International that in “vice establishment” cases, police will commonly seize all physical evidence that might support the charges. “Physical evidence includes nearly everything connected with the provision of sexual services: condoms, lubricant, cream, tissue boxes, towels, everything,” one lawyer told Amnesty International, adding that police typically search for and seize all of these items in cases where they are bringing vice-establishment charges.

For example, Jimmy, the male sex worker mentioned above who was arrested at the massage parlour where he worked, told Amnesty International that police searched the premises and seized condoms and lubricant they found in several of the massage rooms. Jimmy said that he sometimes spent the night on the premises. “I didn’t realize that my personal property could become evidence against me,” he said, referring to some of the condoms and lubricant at the massage parlour. “I wasn’t aware that these things could become evidence that I was offering sexual services.”<sup>111</sup>

Condoms are also used as evidence in solicitation cases. “For soliciting, they will often rely on condoms also,” the lawyer told Amnesty International.<sup>112</sup> For instance, Mei-Ling, the sex worker mentioned above who was charged with solicitation, reported: “The police found condoms and tissue paper under my bed, and they used it as evidence.”<sup>113</sup>

When NGOs have urged police not to use condoms as evidence, authorities have said in response that they regard condoms as “supporting” rather than primary evidence, according to information received by Amnesty International. “That’s a very subtle difference,” observed Dr William Wong. “The police are still saying, ‘Why do you have these condoms?’ In practice that can create barriers to condom use.” Asked what

<sup>109</sup> Wing Man Yip, ‘Don’t Be So Quick to Condemn ‘Immoral’ Young Sex Workers’, *South China Morning Post*, 12 December 2014, available at [www.scmp.com/comment/insight-opinion/article/1661371/dont-be-so-quick-condemn-immoral-young-sex-workers](http://www.scmp.com/comment/insight-opinion/article/1661371/dont-be-so-quick-condemn-immoral-young-sex-workers)

<sup>110</sup> UNAIDS, *Guidance Note on HIV and Sex Work*, p. 12.

<sup>111</sup> Interview with Jimmy, 22 January 2015.

<sup>112</sup> Interview with lawyer, 26 January 2015.

<sup>113</sup> Interview with Mei-Ling, 27 January 2015.

he would recommend as police practice, he replied: “Ideally, from a public health perspective, they would ignore the presence of condoms. That would help for HIV prevention.”<sup>114</sup>

In fact, when Amnesty International spoke with senior police officials, they did not make a distinction between primary and supporting evidence. In relation to a vice-establishment investigation, they said: “Relevant evidence includes tissues, towels, KY jelly. These are also relevant to the soliciting charge. Condoms are part of the evidence collected. We acknowledge the public interest in promoting condom use, but it is also part of our duty to collect sufficient evidence.”<sup>115</sup>

These practices appear to have dissuaded some sex workers from routinely carrying condoms. For instance, the organization Midnight Blue reports that some male sex workers are now reluctant to have condoms and lubricant in their possession. This is particularly true of those who work in massage parlours, where police raids in early 2014 included the seizure of condoms and lubricants found on the premises.<sup>116</sup>

In a number of countries, condoms are used as evidence by the police to harass or criminalize sex workers, creating additional health risks by discouraging condom use.<sup>117</sup> Evaluating the use of condoms as evidence in four cities in the USA, Human Rights Watch observed:

**“The use of any type of evidence must be determined by weighing the potential harm that occurs from its use and the benefits provided. In legal systems everywhere, categories of potentially relevant evidence are excluded as a matter of public policy, with laws excluding testimony regarding a rape victim’s sexual history providing but one of many examples. Law enforcement efforts should not interfere with the right of anyone, including sex workers, to protect their health. The value of condoms for HIV and disease prevention far outweighs any utility in enforcement of anti-prostitution laws.”<sup>118</sup>**

Access to condoms and related HIV-prevention services is an essential part of the right to the highest attainable standard of health. The International Covenant on Economic, Social and Cultural Rights obliges state parties to take steps “necessary for... the treatment, prevention and control of epidemic... diseases,” including HIV.<sup>119</sup> The Committee on Economic, Social and Cultural Rights has interpreted this provision to require “the establishment of prevention and education programmes for behaviour-related health concern such as sexually transmitted diseases, in particular HIV”.<sup>120</sup>

International law also protects the right of women to control their reproductive and sexual health. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides that all women have the right “to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights”.<sup>121</sup>

Law enforcement must be consistent with these and other international human rights obligations. UNAIDS recommends: “Criminal law should not impede provision of HIV prevention and care services to sex workers and their clients.”<sup>122</sup>

The use of condoms as evidence in criminal investigations is not consistent with these standards.

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<sup>114</sup> Interview with Dr William Wong, 17 December 2014.

<sup>115</sup> Interview with Crime Prevention Bureau, 26 January 2015.

<sup>116</sup> Interview with Midnight Blue, 17 December 2014.

<sup>117</sup> 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, available at [www.opensocietyfoundations.org/reports/criminalizing-condoms](http://www.opensocietyfoundations.org/reports/criminalizing-condoms); M. Bhattacharjya et al, *The Right(s) Evidence – Sex Work, Violence and HIV in Asia: A Multi-Country Qualitative Study*, 2015.

<sup>118</sup> Human Rights Watch, *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four U.S. Cities*, 2012, pp. 3-4. Officials in New York, one of the cities profiled in the Human Rights Watch report, announced in May 2014 that police would limit the use of condoms as evidence of sex work. See Katie McDonough, ‘New York City Cops Will Stop Using Condoms as Evidence (But Only in Certain Cases)’, in *Salon*, 13 May 2014, available at

[www.salon.com/2014/05/13/new\\_york\\_city\\_cops\\_will\\_stop\\_using\\_condoms\\_as\\_evidence\\_against\\_sex\\_workers\\_but\\_only\\_in\\_certain\\_cases/](http://www.salon.com/2014/05/13/new_york_city_cops_will_stop_using_condoms_as_evidence_against_sex_workers_but_only_in_certain_cases/)

<sup>119</sup> Article 12 of the International Covenant on Economic, Social and Cultural Rights. China confirmed on its resumption of sovereignty over Hong Kong that the Covenant would apply to Hong Kong.

<sup>120</sup> Committee on Economic, Social and Cultural Rights General Comment 14, UN Doc. E/C.12/2000/4 (2000) para. 16.

<sup>121</sup> Article 16(1)(e) of CEDAW. China has confirmed that CEDAW applies to the Hong Kong Special Administrative Region.

<sup>122</sup> UNAIDS, *International Guidelines on HIV and Human Rights*, para. 21(c).



## 4.7 ELECTRONIC COMMUNICATIONS AS EVIDENCE

Police in Hong Kong have used personal communications in solicitation cases, according to reports received by Amnesty International. According to these accounts, police have searched for communications sent by email, text message and through private messaging on social media channels, even though these kinds of communications are not considered public communications, meaning that discussions between sex workers and clients by these means do not constitute solicitation. Nevertheless, police regard such communications as “supporting evidence” of a crime. Midnight Blue has heard reports from male sex workers, for example, that after they were arrested, police seized their home computers to search for evidence of sex work.<sup>123</sup>

## 4.8 ABUSES AGAINST TRANSGENDER SEX WORKERS

Police routinely subject sex workers to body searches once they are charged and before they are sent to a detention centre to await trial. For transgender sex workers, this practice means that the body search will be done by a male police officer if the sex worker’s identification card gives the sex worker’s gender as male, regardless of their gender identity.

“There’s a lot of groping and mockery,” reported one lawyer who has represented transgender sex workers.<sup>124</sup> This is particularly likely for sex workers who have begun hormone therapy but have not had gender reassignment surgery, meaning that they may have female secondary sex characteristics and male genitalia.<sup>125</sup>

When Amnesty International asked police about the practice of using male officers to search transgender people, the superintendent of police for the Crime Prevention Bureau, Frank Kwok Yik-man, explained: “Our policy is to take action on the basis of gender indicated on the ID card. We can only base it on what it says on his ID card.”<sup>126</sup> The senior superintendent of police for Crime Wing Support, Wai-man Lee, added:

**“The basic thing is that we have to go by what’s on the ID card. But we are aware that some people have had the operation done, or partly done. We are aware of this. We are aware that they may feel embarrassed. We have tight procedures on conducting a body search. We allow them to find an appropriate adult – a friend, a social worker – to come to the police station to witness the search. Even if they can’t find one, we try to help them to find somebody. We try our best. We have strict procedures. We only do what we need to investigate [and so may not conduct a full body search] unless there’s reason to believe the person has drugs or dangerous paraphernalia, things they could use to hurt themselves. It’s not all that often that we’d go to a full search.”<sup>127</sup>**

Nevertheless, full body searches for transgender sex workers appear to be the norm rather than the exception, according to reports by defence lawyers and Midnight Blue. If police policies do allow an individual who is subjected to a body search to request the presence of a social worker or friend, reports suggest that police do not routinely inform transgender sex workers of that possibility.

Transgender women who are sex workers are initially sent to male detention centres. “The police say that if their ID card shows the gender as male, they must be sent to the male prison. For those from Thailand and the Philippines, it is very difficult to change gender on identity documents, even if they have undergone an operation. And the police still examine their bodies. The police say these are their instructions, but I think this is violence,” said Lo Lam Wai, programme officer at Midnight Blue.<sup>128</sup>

She explained the procedures that the detention centres follow:

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<sup>123</sup> Interview with Midnight Blue, 17 December 2014.

<sup>124</sup> Interview with lawyer, 15 January 2015.

<sup>125</sup> Interview with Lo Lam Wai, Midnight Blue, 17 December 2014.

<sup>126</sup> Interview with Crime Prevention Bureau, 26 January 2015.

<sup>127</sup> Interview with Crime Prevention Bureau, 26 January 2015.

<sup>128</sup> Interview with Lo Lam Wai, 17 December 2014.

**“If they are sent to the male prison, their hair is cut very short. Their hair is very important to them. If you cut their hair, you cut their gender... We have one case of a transgender sex worker who didn’t eat anything after the prison cut her hair. A few days later she tried to commit suicide.”<sup>129</sup>**

After this suicide attempt, prison officials were more responsive to Midnight Blue’s requests that transgender detainees should not have their hair cut upon admission. According to an October 2014 letter from Correction Services, the decision whether to cut the hair of transgender women will be made on a case-by-case basis, according to the assessment of the resident doctors, psychologists, or psychiatrists.<sup>130</sup> This guidance stops short of ending the practice of routine cutting of hair for transgender detainees, and Midnight Blue reports that some transgender detainees still have their hair cut upon admission.<sup>131</sup>

In most cases, transgender detainees are eventually transferred to the Siu Lam Psychiatric Centre. “That’s because they say that being transgender is a gender identity disorder,” Lo Lam Wai explained.<sup>132</sup>

If held on immigration charges, such as a breach of conditions of stay, “they’re held in a single small room with a toilet, no windows. They need to stay in that room for more than one week. They get 10 minutes each day out of that room to take a shower,” said Lo Lam Wai. Summarizing her conversations with immigration officials, she said: “They say they worry that the transgender detainees will be harassed if they are held in the male section, and that the women’s section isn’t suitable for them. They say [detaining] them alone is for their own good.”<sup>133</sup> She estimates that 30 to 40 transgender sex workers have been arrested and detained in this way over the past two years.

In addition, Hong Kong’s prisons are reluctant to provide hormone therapy to transgender detainees. Lo Lam Wai spoke of the case of a transgender woman from the Philippines who was arrested in June 2014. She had been taking hormone therapy for six years, and the denial of the therapy during her six months in detention was having serious effects on her health. Amnesty International researchers read a letter that she had written to Midnight Blue in December 2014, in which she complained of hair loss, muscle pain, nerve pain, mood swings and nausea.<sup>134</sup> In March 2016, she was finally allowed to resume hormone therapy.<sup>135</sup>



#### **ANITA, TRANSGENDER SEX WORKER, DESCRIBES HER TREATMENT IN PRISON<sup>136</sup>**

Anita sells sex on the street has been sent to prison twice for solicitation. She has also spent some time in immigration detention. After her first arrest, in 2007, she was charged with solicitation and for working illegally and was sentenced to 15 months in prison, serving only 10 months.

*“A customer took me to the hotel, but when I got to the hotel it was not the real customer, it was a policeman. They brought me to the police station. After, I went to court and was sentenced to prison for 10 months.”*

<sup>129</sup> Interview with Lo Lam Wai, 17 December 2014.

<sup>130</sup> Letter from Correctional Services, 5 October 2014.

<sup>131</sup> Interview with Lo Lam Wai, 19 January 2015.

<sup>132</sup> Interview with Lo Lam Wai, 17 December 2014. In Hong Kong, transgender people who wish to have their gender legally recognized and be issued with identification reflecting their gender identity must undergo sterilization and gender reassignment surgeries. One of the preconditions for surgery is a diagnosis of “gender dysphoria”, a mental health diagnosis. This limits access to legal gender recognition to those individuals who wish to undergo – and can access – this diagnosis and treatment. Individuals who do not want to or cannot undergo this treatment are forced to choose between their human rights to health and to recognition before the law. For more comprehensive exploration on the human rights principles surrounding legal gender recognition see: Amnesty International, *The state decides who I am: Lack of recognition for transgender people* (Index: EUR 01/001/2014)

<sup>133</sup> Interview with Lo Lam Wai, 17 December 2014.

<sup>134</sup> Interview with Lo Lam Wai, 19 January 2015.

<sup>135</sup> Interview with Midnight Blue, 14 April 2016.

<sup>136</sup> Interview with Anita, 14 April 2016.

*“At the time I had short hair, I did not have any boobs [and was not taking] hormones, so I was sent to the men’s prison, but in a single person cell. After I was released from prison, I was sent to immigration detention for 65 days.”*

At the time Anita did not identify herself as transgender, but she was treated as a gay prisoner, and placed in a separate room.

When she was arrested for solicitation in 2012 Anita was living as a woman, had been on hormone therapy for some months and was planning her gender assignment surgery. She was detained for 10 months, spending 6 months on remand in prison and then being transferred to Siu Lam (a psychiatric centre) for 4 months. The prison authorities wanted to cut her hair and not provided hormones while in prison.

*“They arrested me again and I asked that they do not cut my hair because I had long hair. They put me in the male prison for 6 months on remand. I fought that they cut my hair. I was told [by Corrections Officials] if you don’t cut your hair, maybe you will need to stay here for a long time. I went to court many times, but the judge said he could not order corrections not to cut my hair. [For] every transgender person they cut their hair. Even if I still don’t want, they will cut my hair.”*

Anita showed Amnesty International a copy of a medical report dated 22 November 2012, highlighting the distress that she would be in if incarcerated and not able to continue hormone therapy:

*“She identifies as female, presents as female (within the constraints imposed by incarceration), wishes to be accepted as female, is uncomfortable with her male sexual characteristics (both primary and secondary), takes a hormone medication, is pleased with the bodily changes they have brought to her body, is distressed by the effect on her body of being deprived of hormones during the period of detention, takes great pride in her long hair, greatly fears the prospect that it might be cut if she were to be imprisoned, and wishes in the future to have gender affirmation surgeries, for both genitals and breasts.*

*...In the event of incarceration, I am of the view that steps will need to be taken to safeguard, to the extent possible, her emotional health and physical well-being. I fear if she is placed in a male facility she will be highly vulnerable for obvious reasons... I fear if she is deprived hormonal treatment for the period of imprisonment, and her body is allowed to masculinise again, she may suffer great distress; distress that will continue well beyond her date of release. In event that her hair is cut short she will undoubtedly suffer a great indignity. It may be argued that each of these courses of action would constitute cruel, degrading and humiliating treatment.”*

A programme officer at Midnight Blue acknowledged there have been some changes since high profile cases on the treatment of transgender detainees in prison. Since 2015, on a case by case the authorities have allowed transgender women not to have their hair cut in prisons. However the practice of placing gay or transgender detainees in isolation or in solitary cells, and placing transgender detainees in psychiatric facilities continues. These practices makes gay and transgender detainees easily identifiable to others, potentially making them more vulnerable to abuses.<sup>137</sup> In addition, placing transgender persons in solitary cells can amount to torture or ill treatment if used as a form of punishment, in pretrial detention, for prolonged periods or indefinitely.<sup>138</sup>

<sup>137</sup> Interview with Sin Man Hon Eric of Midnight Blue, 14 April 2016.

<sup>138</sup> UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 January 2016, A/HRC/31/57, paras 22 and 35.

Since 2011, there have been at least 35 transgender women detained in prisons in Hong Kong, with 24 being detained in the male prison, and 8 in the women's prison (those who are post-operative). Only two persons have received hormones. Around 20 have been able to avoid having their hair cut since September 2013, but 12 (including 2 post-operative transgender women) have still been forced to have their hair cut.<sup>139</sup>

Police claim they are developing policies around gay and transgender people in detention, but did not share a copy of their policy with us and did not say when this would be finalized.<sup>140</sup>

## “They ask lots of questions: ‘Why are you dressed like that?’”

Interview with Lo Lam Wai, 17 December 2014

Transgender individuals report intrusive practices in other contacts with authorities. For example, Lo Lam Wai reports that transgender persons who come to Hong Kong are subjected to lengthy questioning by immigration authorities if their appearance does not match the gender listed on their identity documents.

### INTERNATIONAL STANDARDS ON THE TREATMENT OF TRANSGENDER PEOPLE IN PRISONS

It is well-known that prison cultures can be particularly brutal for transgender people. For example, in a 2010 report the UN Special Rapporteur on torture reflected on the strict hierarchy that frequently exists within detention settings and how those at the bottom of the hierarchy often include transgender persons who suffer double or triple discrimination as a result.<sup>141</sup> The Special Rapporteur also highlighted the increased rates of physical and sexual abuse that transgender women face in detention if placed within the general prison population in men's prisons.<sup>142</sup>

Everybody has the right to humane treatment and to freedom from violence and other forms of abuse while in detention.<sup>143</sup> To secure these rights, the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, developed by a group of human rights experts in 2006, call on states to ensure that placement in detention avoids further marginalizing people on the basis of their gender identity.<sup>144</sup> The principles also call on states to provide adequate access to medical care, including access to hormonal or other therapy<sup>145</sup> and to ensure that any protective measures “involve no greater restriction of their rights than is experienced by the general prison population”.<sup>146</sup>

Although many jurisdictions take an approach similar to that of Hong Kong,<sup>147</sup> some are adopting practices that are more in line with the Yogyakarta Principles. For example, the Scottish Prison Service's Gender Identity and Gender Reassignment Policy, adopted in 2014, provides that searches be conducted by staff “in accordance with the social gender in which they are living. Where the person in custody's social gender is unclear, the person in custody must be asked which gender they wish to be searched by and their answer

<sup>139</sup> Interview with Sin Man Hon Eric of Midnight Blue, 14 April 2016.

<sup>140</sup> Interview with Lee Wai-man, Senior Superintendent of Police, 15 April 2016.

<sup>141</sup> Report of the Special Rapporteur on torture, UN Doc. A/HRC/13/39/Add.5 (2010) para. 231

<sup>142</sup> Report of the Special Rapporteur on torture, UN Doc. A/56/156 (2001) para. 23.

<sup>143</sup> See Article 10 of the ICCPR; Basic Principles for the Treatment of Prisoners, para. 1 (“All prisoners shall be treated with the respect due to their inherent dignity and value as human beings”); Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (“All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person”).

<sup>144</sup> Principle 9(A) of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.

<sup>145</sup> Principle 9(B) of the Yogyakarta Principles.

<sup>146</sup> Principle 9(D) of the Yogyakarta Principles.

<sup>147</sup> In many jurisdictions of the USA, for example, “the placement of transgender inmates often occurs under prison regulations that essentially ignore the possibility of transgender individuals' existence.” See ‘Classification and Housing of Transgender Inmates in American Prisons’ in *Harvard Law Review*, vol. 127 (2014), p. 1748. See also R. Faithful, ‘Transitioning Our Prisons Toward Affirmative Law: Examining the Impact of Gender Classification Policies on U.S. Transgender Prisoners’ in *Modern American*, vol. 5 (2009), pp. 3, 7–8; D. Rosenblum, “Trapped” in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism’ in *Michigan Journal of Gender and Law*, vol. 6 (2000), pp. 499, 530.

recorded and the... search conducted accordingly.”<sup>148</sup> The policy cautions that “the genital appearance of a transgender person in custody must not be used to determine which gender of Prison Officer should search them”.<sup>149</sup>

In addition, a key principle of the Scottish Prison Service’s policy is that “[t]he accommodation provided must be the one that best suits the person in custody’s needs and should reflect the gender in which the person in custody is currently living”.<sup>150</sup> To implement this principle, the policy notes:

**“A female-to-male person in custody living permanently as a man without genital surgery should be allocated to a male establishment. However, if he requests to be allocated to a female establishment due to high level of concern about sexual assault risk in a male establishment, then he should be kept out of association until an urgent case conference responds in detail to his request.**

**“A male-to-female person in custody living permanently as a woman without genital surgery should be allocated to a female establishment. She should not be automatically regarded as posing a high sexual offence risk to other people in custody and should not be subject to any automatic restrictions of her association with other people in custody.”<sup>151</sup>**

In England and Wales, a prison service instruction notes that: “An establishment must permit prisoners who consider themselves transsexual and wish to begin gender reassignment to live permanently in their acquired gender.”<sup>152</sup> The instruction includes guidance on where transgender prisoners should be housed:

**“A male to female transsexual person with a gender recognition certificate may be refused location in the female estate only on security grounds – in other words, only when it can be demonstrated that other women with an equivalent security profile would also be held in the male estate. In such circumstances she will be considered a female prisoner in the male estate and must be managed according to PSD 4800 Women Prisoners.**

**“A female to male transsexual person with a gender recognition certificate may not be refused location in the male estate. This is because there are no security grounds that can prevent location in the male estate.”<sup>153</sup>**

Prior to the adoption of this instruction, the UK High Court in 2009 ordered the transfer of a male-to-female transgender prisoner from a men’s facility to one for women.<sup>154</sup>

In the USA, the District of Columbia Department of Corrections adopted a policy on transgender inmate housing in 2009 that was “one of the [USA’s] first policies allowing transgender inmates to be housed according to their gender identity”.<sup>155</sup> The US state of Illinois requires a psychiatrist to evaluate transgender inmates individually, making a case-by-case determination on placement.<sup>156</sup>

In Canada, in January 2015 the Ontario Correctional Service announced revised policies for the admission, placement and classification of transgender inmates.<sup>157</sup> Under Ontario’s revised policies:

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<sup>148</sup> Scottish Prison Service, Gender Identity and Gender Reassignment Policy for Those in Our Custody, 2014, [hereinafter Scottish Prison Service policy] §3.1 (hubdown searches), §3.7 (body searches), §6.5 (searching).

<sup>149</sup> Scottish Prison Service policy, §6.5.

<sup>150</sup> Scottish Prison Service policy, §1.3.

<sup>151</sup> Scottish Prison Service policy, §6.4 (accommodation).

<sup>152</sup> UK Ministry of Justice, National Offender Management Service, ‘The Care and Management of Transsexual Prisoners’, PSI 07/2011, 2 March 2011, §3.2.

<sup>153</sup> UK Ministry of Justice, National Offender Management Service, ‘The Care and Management of Transsexual Prisoners’, PSI 07/2011, 2 March 2011, §§4.3, 4.4.

<sup>154</sup> See *R (AB) v The Secretary of State for Justice and the Governor of HMP Manchester*, [2009] EWHC 2220 Admin. See also D. Hewitt, ‘Transsexuals in Prison’ in *The Custodial Review*, available at [www.custodialreview.co.uk/Transsexuals\\_in\\_Prison-a-135.html](http://www.custodialreview.co.uk/Transsexuals_in_Prison-a-135.html)

<sup>155</sup> B. Schwartzapfel, ‘Fixing Corrections’ in *The Advocate*, 13 November 2009, available at [www.advocate.com/society/transgendered/2009/11/13/fixing-corrections](http://www.advocate.com/society/transgendered/2009/11/13/fixing-corrections)

<sup>156</sup> See A. Flowers, ‘A Decade in the Making: Revamped Policy Evaluates Transgender Prisoners in Illinois’, 29 May 2013, available at [www2.illinois.gov/idooc/news/IDOCintheNews/Documents/2013/Transgender.pdf](http://www2.illinois.gov/idooc/news/IDOCintheNews/Documents/2013/Transgender.pdf)

<sup>157</sup> See D. Vincent, ‘Revised Policy Will Determine Where Transgender Inmates Housed in Ontario’ in *The Star* (Toronto), 26 January 2015, available at [www.thestar.com/news/canada/2015/01/26/revised-policy-will-determine-where-transgender-inmates-housed-in-ontario.html](http://www.thestar.com/news/canada/2015/01/26/revised-policy-will-determine-where-transgender-inmates-housed-in-ontario.html); K. Kirkup, ‘Ontario’s Welcome Move on Rights Shows Reality of Trans People in Prisons’ in *The Globe and Mail* (Toronto), 26 January 2015,

- Inmates must be placed in an institution “appropriate to their self-identified gender or housing preference” unless there are overriding health or safety risks that require otherwise.
- “[W]herever possible and subject to inmate preferences” inmates will be integrated into the general population, and not isolated. Under the previous policy, transgender inmates were often kept in segregation.
- The option for transgender inmates to be searched by a male or female guard, or both, now extends to frisks (clothed searches). Under the earlier policy, this option applied only to strip searches.
- Transgender detainees will also be referred to by their preferred names and gender pronouns in verbal communication as well as in written documents.

Federal courts in the USA have begun to uphold the right of transgender inmates to continued hormone treatment on the basis that the physical and psychological harm an individual suffers when treatment is abruptly cut off constitutes “deliberate indifference”, in violation of the US constitution’s prohibition on cruel and unusual punishment.<sup>158</sup> In February 2015, in response to a lawsuit, the US Department of Defense approved hormone treatment for the prisoner and former intelligence analyst Chelsea Manning.<sup>159</sup>

The policy of the US Bureau of Prisons (which does not have authority over military prisons in the USA, including the one where Chelsea Manning is held) is to provide transgender inmates with hormone therapy if medical professionals determine, after thorough medical and mental health evaluations, that hormone therapy will “promote the physical and mental stability of the patient”, using “current, accepted standards of care” as “a reference for developing the treatment plan”.<sup>160</sup> The policy goes on to state that “[t]reatment options will not be precluded solely due to level of services received, or lack of services, prior to incarceration”.<sup>161</sup>

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available at [www.theglobeandmail.com/globe-debate/ontarios-welcome-move-on-rights-shows-reality-of-trans-people-in-prisons/article22638122/](http://www.theglobeandmail.com/globe-debate/ontarios-welcome-move-on-rights-shows-reality-of-trans-people-in-prisons/article22638122/)

<sup>158</sup> See *Battista v Clarke*, 645 F.3d 449 (1st Cir. 2011); *De'Lonta v Angelone*, 330 F.3d 630 (4th Cir. 2003); *South v Gomez*, 211 F.2d 1275 (9th Cir. 2000). In addition, Wisconsin’s highest court overturned a state law that prevented transgender prisoners from receiving transgender-related medical care while incarcerated, finding that gender identity disorder was a “serious medical need” for purposes of the Eighth Amendment. See *Fields v Smith*, 712 F. Supp. 2d 830 (E.D. Wis. 2010), supplemented (July 9, 2010). See also *Brown v Zavaras*, 63 F.3d 967, 969-70 (10th Cir. 1995) (which found that gender dysphoria is a serious medical need requiring treatment under Eighth Amendment); *White v Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) (which found that transsexualism constitutes serious medical need). For other cases reaching similar conclusions, see, for example, Susan Bendlin, “Gender Dysphoria in the Jailhouse: A Constitutional Right to Hormone Therapy?” *Cleveland State Law Review*, vol. 61 (2013), p. 957, <http://engagedscholarship.csuohio.edu/clevstlrev/vol61/iss4/5> (viewed 19 February 2015); *A Jailhouse Lawyer’s Manual*, 8th ed. (New York: Columbia Human Rights Law Review, 2009), ch. 30, [http://www3.law.columbia.edu/hrlr/jlm/Chapter\\_30.pdf](http://www3.law.columbia.edu/hrlr/jlm/Chapter_30.pdf) (viewed 19 February 2015); Human Rights Watch, “Transgender Prisoners, Identity, and Detention: Policy Recommendations,” 1 March 2006, p. 7 n. 18.

<sup>159</sup> See T. Vanden Brook, ‘Military Approved Hormone Therapy for Chelsea Manning’ in *USA Today*, 13 February 2015, available at [www.usatoday.com/story/news/nation/2015/02/12/chelsea-manning-hormone-therapy/23311813/](http://www.usatoday.com/story/news/nation/2015/02/12/chelsea-manning-hormone-therapy/23311813/)

<sup>160</sup> US Department of Justice, Federal Bureau of Prisons, Program Statement 6301.01, Patient Care (3 June 2014), §30 (inmates with gender identity disorder).

<sup>161</sup> US Department of Justice, Federal Bureau of Prisons, Program Statement 6301.01, Patient Care (3 June 2014), p. 42.

# 5. IMMIGRATION AS A MEANS OF PROHIBITING SEX WORK

Under the “one country, two systems” framework, Hong Kong is a special administrative region of China, with a high degree of autonomy regarding its political, legal and health systems, as well as its immigration and visa policies.<sup>162</sup> The Hong Kong Immigration Ordinance defines an “immigrant” as a person who is not a Hong Kong permanent resident. People from mainland China also require permits in order to enter and remain in Hong Kong.

An academic study reported in 2007 that 97% of women arrested in Hong Kong for suspected involvement in sex work came from mainland China.<sup>163</sup> Migrant sex workers in Hong Kong come from Thailand, India, Malaysia, Mongolia, the Philippines, Russia, Singapore, Uzbekistan, Vietnam and even as far as Colombia.<sup>164</sup>

According to a recent study by Zi Teng, “trafficking in persons” as defined in international instruments does not appear to be commonplace among sex workers from mainland China.<sup>165</sup> Historians who have examined migrant sex workers in Hong Kong, as well as in cities in mainland China, have similarly concluded that the majority of women sex workers have historically been migrants motivated by economic gain.<sup>166</sup>

The conflation of migrant sex work with trafficking is problematic because it leads to human rights abuses against sex workers, particularly migrant sex workers, whilst at the same time failing to provide the support needed to victims of trafficking. Stigmatising all migrant sex workers as ‘victims of trafficking’, denies them equal protection of human rights, including rights to liberty and security of the person, autonomy and privacy. The definition of ‘trafficking’ under Hong Kong laws is not consistent with international legal standards, as outlined in the below section on trafficking.

Anyone who is not a permanent resident of Hong Kong requires a work visa to legally work in Hong Kong. It is not possible for a migrant to lawfully engage in sex work in Hong Kong; work visas are not issued for employment in sex work, and tourist visas and visitor visas do not allow the holder to work.<sup>167</sup> All migrant sex

<sup>162</sup> W.C.W. Wong, E. Holroyd et al, “One Country, Two Systems”: Socio political Implications for Female Migrant Sex Workers in Hong Kong’ in *BMC International Health and Human Rights*, vol. 8 (2008), p. 13.

<sup>163</sup> R. Emerton et al, ‘Trafficking of Mainland Chinese Women’ p. 61-62.

<sup>164</sup> R. Emerton et al, ‘Trafficking of Mainland Chinese Women’, p. 61.

<sup>165</sup> Zi Teng, *A Survey of Mainland Migrant Sex Workers in Four Major Chinese Cities*, 2014. (On file with Amnesty International).

<sup>166</sup> A. Chin, *Bound to Emancipate: Working Women and Urban Citizenship in Early Twentieth-Century China and Hong Kong*, 2012; A. Chin, ‘The Management of Women’s Bodies: Regulating *Mui Tsai* and Prostitutes in Hong Kong under Colonial Rule, 1841–1935’ in *E-Journal on Hong Kong Cultural and Social Studies*, vol. 1 (2002); G. Hershatter, *Dangerous Pleasures: Prostitution and Modernity in Twentieth-Century Shanghai*, 1997.

<sup>167</sup> R. Emerton et al, ‘Trafficking of Mainland Chinese Women’, p. 64.

workers, are therefore in “breach of condition of stay”, a criminal offence under the Immigration Ordinance, and liable for a fine and a two-year prison sentence.<sup>168</sup> In addition, those who enter irregularly may be charged with more serious offences under the Immigration Ordinance, such as remaining in Hong Kong without authority, using forged or altered documents, and using another person’s identity documents.<sup>169</sup> The Crime Prevention Bureau informed Amnesty International that under some circumstances, the police might recommend not prosecuting sex workers for immigration offences, but that the final decision is at the discretion of the Department of Justice.<sup>170</sup>

Migrant sex workers are liable to be prosecuted even if they are not found to be engaging in sex work. In Hong Kong, everyone above the age of 15 is required to carry identification, and police officers can demand proof of identification if they have a reasonable suspicion that the person has committed an offence under the Immigration Ordinance.<sup>171</sup>

The vulnerability to arrest of sex workers who are migrants or from mainland China may render them fearful of engaging with any local authorities or NGOs. Some sex work advocacy groups have found it challenging to reach migrant sex workers. For instance, Sherry Hui from JJJ Association said that women who do sex work without Hong Kong identification cards are too afraid to contact anyone, including her organization. JJJ Association conducts door-to-door outreach services to reach different kinds of sex workers in one-woman apartments, but many migrant women sex workers will not open their doors.<sup>172</sup>

Sex workers who are migrants or from mainland China may also be less likely to report crimes committed against them, for fear of being arrested themselves. One study states that:

**“In reporting abuses against themselves, [women migrant sex workers] draw attention to themselves, generating the possibility that they will be punished for the [Immigration Ordinance] crimes. The punishments for such crimes are severe, and include heavy fines, imprisonment ranging from three to fifteen months, and repatriation: for those arrested in police crackdowns for immigration offences, there is the possibility that they can be repatriated without trial, ‘blacklisted’ and refused re-entry to Hong Kong. The severity of these punishments, along with their public visibility, leave [women migrant sex workers] vulnerable to abuse on a number of fronts.”<sup>173</sup>**

Similarly, Jessica Li concludes that “to avoid being arrested for breaching the condition of stay, sex workers who hold visitor visas are less likely to report their victimization to the police”.<sup>174</sup>

This assessment is supported by Amnesty International’s field research. Sherry Hui from JJJ Association said that some irregular migrants do not report crimes to the police because they do not have Hong Kong identity cards.<sup>175</sup> Staff from Zi Teng went further, saying: “No migrant sex worker is willing to call police – they will call Zi Teng, or the brothel, for help. How can we persuade a migrant sex worker to come to the police station, because they will arrest her, so how can these women provide [the police] with information?”<sup>176</sup>

Indeed, the Crime Prevention Bureau indicated that when someone in breach of their conditions of stay reports a crime, the police have no discretion to say “I’ll take your report, now you can leave”. According to the Crime Prevention Bureau, the officer would be obliged to arrest that individual.<sup>177</sup>

A sex worker who is a migrant or from mainland China will receive a more severe penalty than a Hong Kong resident if they breach the same provisions of the Crimes Ordinance for sex work, because a non-resident is

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<sup>168</sup> Immigration Ordinance, §41.

<sup>169</sup> R. Emerton et al, ‘Trafficking of Mainland Chinese Women’, p. 65.

<sup>170</sup> Interview with Crime Prevention Bureau, 26 January 2015.

<sup>171</sup> Interview with Crime Prevention Bureau, 26 January 2015.

<sup>172</sup> Interview with Sherry Hui, 23 January 2015.

<sup>173</sup> W.C.W. Wong, E. Holroyd et al, “One Country, Two Systems”: Sociopolitical Implications for Female Migrant Sex Workers in Hong Kong’ in *BMC International Health and Human Rights*, vol. 8 (2008), p. 13.

<sup>174</sup> J.C.M. Li, ‘Violence Against Chinese Female Sex Workers in Hong Kong: From Understanding to Prevention’ in *International Journal of Offender Therapy and Comparative Criminology*, vol. 57, 2013, p. 625.

<sup>175</sup> Interview with Sherry Hui, 23 January 2015.

<sup>176</sup> Interview with Zi Teng staff, 22 January 2015.

<sup>177</sup> Interview with Crime Prevention Bureau, 26 January 2015.



more likely to also be charged for having breached the Immigration Ordinance. A lawyer explained to Amnesty International that the additional charge of breach of conditions of stay comes along with an immediate custodial sentence. She said that for a Hong Kong resident woman facing the first charge of soliciting, the penalty is not usually an immediate custodial sentence, whereas a sex worker from mainland China will immediately receive a two-month sentence, even if she has pled guilty to the charge. In the cases that go to court, the lawyer explained, substantially more than 90% of women from mainland China will plead guilty regardless of the circumstances.<sup>178</sup> Similarly, as Cherry Chui of Action for REACH OUT observed, a Hong Kong resident found guilty of solicitation will usually pay a fine if it is her first offence, but a migrant sex worker will usually be jailed.<sup>179</sup> Indeed, a Hong Kong resident told Amnesty International that when he was charged with managing a “vice establishment”, which is a relatively serious offence, he was released on bail and required to report periodically to the police.<sup>180</sup>

## 5.1 ANTI-TRAFFICKING EFFORTS

Amnesty International found some evidence that the use of immigration laws to punish sex workers also potentially impedes the identification and provision of support to victims of trafficking for the purposes of sexual exploitation.

The US Department of State observed in its 2015 Trafficking in Persons report that the Hong Kong authorities “have never prosecuted or convicted traffickers for subjecting victims to forced labor, despite numerous reports of forced labor abuses perpetrated against migrant domestic workers”.<sup>181</sup> At the same time, the report noted:

**“The government did not consistently screen women arrested for prostitution or immigration violations to determine if they were trafficking victims. Although officials identified 26 potential victims, they did not refer them or provide them with protective services, unlike in 2013.”**

US State Department 2015 Trafficking in Persons Report

While noting some positive developments in 2014, including training 500 front-line police officers and immigration officials on trafficking, the US Department of State’s trafficking report goes on to observe:

**“It remained unclear if law enforcement screening procedures identified any victims among high-risk populations, such as foreign migrants, domestic workers, and mainland Chinese and foreign women arrested for prostitution. Potential victims, some of whom were arrested, were only considered for protective services in consultation with the Department of Justice. Under Hong Kong law, trafficking victims can be punished for committing immigration violations, and NGOs reported victims often plead guilty to this charge to be deported expeditiously. Officials reported having a policy in place to encourage victims to participate in the investigation and prosecution of traffickers. However, they did not allow victims to work while participating in trials that were sometimes lengthy, thus deterring victims from cooperating with authorities. As a result, many victims opted to repatriate immediately or were deported.”**

As the authors of a January 2015 *Lancet* article note:

**“Trafficking occurs in sex work as it does in other types of labour. However, the issue of trafficking in sex work has been singled out, its scale and potential for harm frequently misstated or exaggerated to bolster anti-**

<sup>178</sup> Interview with lawyer, 26 January 2015.

<sup>179</sup> Interview with Cherry Chui, 20 January 2015.

<sup>180</sup> Interview with male sex worker (name withheld), January 2015.

<sup>181</sup> US Department of State, *Trafficking in Persons Report*, 2015, available at [www.state.gov/documents/organization/243559.pdf](http://www.state.gov/documents/organization/243559.pdf), pp. 180-181.

prostitution arguments, inflame public opinion, and justify repressive and counterproductive police action. Conflation of sex work with trafficking leads not only to difficulties with definition and harm to sex workers on the ground, but also to conflicts that undermine HIV prevention.”<sup>182[1]</sup>

**“The Hong Kong government has developed a highly standardized system, in order to quickly process and punish migrant women who enter Hong Kong to engage in sex work. The study indicates that this system impedes the effective identification of trafficking victims, and threatens to eclipse Hong Kong’s duties to trafficking victims. It is submitted that the Hong Kong Authorities should accord greater priority to the identification of trafficking victims, and prioritize a human rights approach in their anti-trafficking laws and policies.”**

R. Emerton et al, ‘Trafficking of Mainland Chinese Women’, pp.37-38

In its most recent concluding observations on China, the CEDAW Committee expressed concern at the lack of comprehensive anti-trafficking legislation in Hong Kong and called on the state to “[c]onsider extending the applicability of the Palermo Protocol [UN Anti-trafficking Protocol] to Hong Kong, China, and adopt comprehensive anti-trafficking legislation”.<sup>183</sup> The UN Anti-Trafficking Protocol definition of trafficking includes the acquisition of persons by means of fraud, deception or coercion for the purpose of exploitation, including “exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery”.<sup>184</sup>

<sup>182</sup> Richard Steen et al., “Trafficking, Sex Work, and HIV: Efforts to Resolve Conflicts,” *The Lancet*, vol. 385 (10 January 2015), p. 94.

<sup>183</sup> CEDAW Committee Concluding Observations: China, UN Doc. *CEDAW/C/CHN/7-8*, 2014 para. 57(d).

<sup>184</sup> Art. 3(b), the UN Anti-Trafficking Protocol.

# 6. CRIMES AND OTHER ABUSES BY CLIENTS

Sex workers in Hong Kong are often the victims of crime and other abuses by clients. Professor Simon Young, from the Law Faculty at the University of Hong Kong, told Amnesty International that during six years serving on a parole board he saw “a lot of sex workers who were victims of crime – they were very vulnerable.”<sup>185</sup> Sherry Hui from JJJ Association told Amnesty International that sex workers come to her organization describing a range of abuses: “We always see many cases of armed robbery, theft, sometimes clients leaving without paying, blackmail, even some bodily violence.”<sup>186</sup>

The incidence of crimes against sex workers is difficult to measure precisely, but available data indicates that sex workers are much more likely to be victims of crime than other people in Hong Kong. Hong Kong is a remarkably safe city; with a population of more than 7 million people, in 2014 the Hong Kong Police Force recorded 27 murders and 309 robberies.<sup>187</sup> By contrast, according to a 2014 report by Zi Teng, 77 of 100 women sex workers surveyed in Hong Kong had been the victims of crime during the course of their work.<sup>188</sup> Among those 77 women, the most commonly experienced crimes and other abuses were ‘theft’ (77%),<sup>189</sup> non-payment (47%), ‘robbery’ (38%), customers ‘refusing’ to use condoms (36%), being ‘asked’ to pay ‘protection fees’ (22%) and physical assault (14%).<sup>190</sup> Zi Teng told Amnesty International that the organization receives at least one report a week of a crime or other form of abuse committed by a client.<sup>191</sup> Similarly, since 2010, JJJ Association has been tracking the numbers and types of crimes and other abuses by clients reported by sex workers working in individual apartments. In 2014 alone, JJJ Association received 117 reports of such abuses, with the most commonly experienced crimes being theft (38 reports), non-payment (22), robbery (14) and blackmail (7).<sup>192</sup> Likewise, at least one academic study has underlined that sex workers in Hong Kong are at a higher risk of being victims of violence than members of the general population.<sup>193</sup>

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<sup>185</sup> Interview with Simon Young, 20 January 2015. Professor Young clarified that he was making these remarks in his personal capacity and was not speaking on behalf of the Post-Release Supervision Board on which he served.

<sup>186</sup> Interview with Sherry Hui, 18 December 2014.

<sup>187</sup> Hong Kong Police Force, ‘Crime Statistics Comparison’, 2015, available at [www.police.gov.hk/ppp\\_en/09\\_statistics/csc.html](http://www.police.gov.hk/ppp_en/09_statistics/csc.html)

<sup>188</sup> Zi Teng, *A Survey of Mainland Migrant Sex Workers in Four Major Chinese Cities*, 2014, p. 9.

<sup>189</sup> “Robbery” – Cantonese 打劫 – means that the person, who may be armed, plunders the property in front of the sex worker. “Theft” – Cantonese 小偷 – means that the person steals the sex worker’s property by stealth; the sex worker does not know what has happened until the property is discovered missing.

<sup>190</sup> Zi Teng, *A Survey of Mainland Migrant Sex Workers in Four Major Chinese Cities*, 2014, p. 53.

<sup>191</sup> Interview with Zi Teng staff, 22 January 2015.

<sup>192</sup> Interview with Sherry Hui, 23 January 2015.

<sup>193</sup> J.C.M. Li, ‘Violence against Chinese Female Sex Workers in Hong Kong: From Understanding to Prevention’ in *International Journal of Offender Therapy and Comparative Criminology*, vol. 57, 2013, p. 621.

## “Sex workers can’t work in pairs, only in an isolated situation.”

Sherry Hui of JJJ Association, 17 December 2014

According to researchers and sex-worker advocacy groups, the vice-establishment provision<sup>194</sup> – which forbids the presence of more than one sex worker per apartment – exacerbates sex workers’ vulnerability to a number of abuses. Because of this rule, “personal safety is a huge concern,” Kendy Yim, executive director of Action for REACH OUT, told Amnesty International. “Hong Kong laws don’t allow sex workers to hire anyone else to provide protection.”<sup>195</sup> Likewise, Sherry Hui, executive officer at JJJ Association, explained: “All the crimes experienced by sex workers happen because there is only one person in the apartment. If there were more than one person, they would be safer.”<sup>196</sup>

Furthermore, a woman sex worker who worked in her own apartment told one researcher how the provision makes her vulnerable to theft: “They know that we usually stay in the apartment for the whole day by ourselves, which means we must have kept the money with us.”<sup>197</sup> Sex workers who work in individual apartments report feeling unsafe because they cannot work together without violating the law. “Sex workers can’t work in pairs, only in an isolated situation,” explained Sherry Hui of JJJ Association.<sup>198</sup>

One academic study reported that sex workers from mainland China did not see themselves as more vulnerable because of their place of origin; instead they attributed their vulnerability to the fact that they worked alone.<sup>199</sup>

In addition, those who engage in compensated dating may be more vulnerable than other sex workers to abuses by clients. “They don’t consider themselves sex workers, and they take fewer precautions compared to other sex workers. They tend to think of clients as friends,” a staff member with Teen’s Key told Amnesty International. For this reason, they may be less inclined to ask clients to use condoms, and they may go to their clients’ homes instead of meeting in places they know to be safe. “This is dangerous,” she added. “Some are beaten by clients. Some are raped by clients.”<sup>200</sup>

Sex workers who must work alone and in private to avoid criminal prosecution may be more vulnerable to abuse by clients, but it is possible that when abuses take place, they are more likely to report the crime to the police than others in the sex work industry. As Cherry Chui from Action for REACH OUT explained, the sex workers who work on the street are afraid of the police, whereas “those in one-woman apartments are not in breach of the law, so they’re more comfortable making complaints.”<sup>201</sup> Similarly, a staff member from Zi Teng told Amnesty International: “If you’re working in a lawful setting, if a client beats you, you can call 999 and the police will investigate. If you’re a massage worker, the police will arrest you.”<sup>202</sup>

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<sup>194</sup> Crimes Ordinance §139.

<sup>195</sup> Interview with Kendy Yim, 17 December 2014.

<sup>196</sup> Interview with Sherry Hui, 23 January 2015.

<sup>197</sup> Nga Yan Cheung, *Accounting for and Managing Risk in Sex Work*, p. 224.

<sup>198</sup> Interview with Sherry Hui, 17 December 2014.

<sup>199</sup> Nga Yan Cheung, *Accounting for and Managing Risk in Sex Work*, p. 229.

<sup>200</sup> Interview with Lam Po Yee, 18 December 2014.

<sup>201</sup> Interview with Cherry Chui, 20 January 2015. Cherry was referring to Hong Kong residents who are sex workers. Migrant sex workers and sex workers from mainland China would be in breach of their conditions of stay and therefore in breach of other laws.

<sup>202</sup> Interview with Zi Teng staff, 22 January 2015.

## 6.1 MURDER

**“There is probably no section of society which is more open to robbery and violent assault than ‘prostitutes’ who work on their own. They do so to avoid working in illegal brothels.”<sup>203</sup>**

In 2008, four sex workers were killed over the course of three days in Hong Kong. Their bodies were found in residential apartments, and some of them had also been robbed.<sup>204</sup> As the Court of Appeal underlined in the case of *HKSAR v Lam Pui Fung*, in which it upheld a guilty verdict for the 2008 murder of sex worker Tam Siu-fong:

**“There is probably no section of society which is more open to robbery and violent assault than prostitutes who work on their own. They do so to avoid working in illegal brothels. Sadly, as this court knows all too well, some of the assaults on such women who work alone end in death. It is because such women are so vulnerable that the law has to pay particular regard to their protection. Unless the sanctions are very severe, others like the defendant will be tempted to use violence on unprotected victims of this kind.”<sup>205</sup>**

The penalty imposed was life imprisonment.

Karen Jo Laidler from the Sociology Department at the University of Hong Kong has pointed out that although the murders of four sex workers in 2008 changed the way these transactions occurred, and reduced the number of street-based sex workers, in some ways the increase in the number of individual apartments has made women more vulnerable: “The number of one-woman brothels has increased, and these murders had all taken place in one-woman brothels.”<sup>206</sup>

Murder continues to be a real risk for people who engage in sex work in Hong Kong. In late 2014, two Indonesian women were killed: Seneng Mujiasih and Sumarti Ningsih. Officially, they were residing in Hong Kong as domestic workers, but were believed to also have been working as sex workers.

## 6.2 RAPE AND SEXUAL ASSAULT

**“Last year [2015], a client came to my place at 9:00pm. He pushed me to the back of the room. He was drinking. After he had a shower, I asked him to pay. He said he has no money and had sex with me and abused me. He didn’t pay – he just left. I didn’t report this case to the police. I think it is useless. I just spoke to the sex worker networks. ... It is certainly rape – I couldn’t resist him at all.”**

Leah, a sex worker working in a single-person apartment, 13 April 2015

<sup>203</sup> Trial judgment, cited with approval in *HKSAR v Lam Pui Fung*, CACC 293/2012, para. 13.

<sup>204</sup> David Batty, ‘Hong Kong police suspect link in prostitute murders’ in *The Guardian*, 17 March 2008, available at [www.theguardian.com/world/2008/mar/17/internationalcrime](http://www.theguardian.com/world/2008/mar/17/internationalcrime)

<sup>205</sup> Trial judgment, cited with approval in *HKSAR v Lam Pui Fung*, CACC 293/2012, para. 13.

<sup>206</sup> Interview with Karen Joe Laidler, 22 January 2015.

Studies by academics and sex-worker advocacy groups have found that sex workers are sometimes forced to engage in non-consensual sexual acts and unprotected sex, including when clients remove condoms during sex. In some cases this would amount to rape. Cherry Chui from Action for REACH OUT told Amnesty International: “Sexual violence is a problem; the clients think that because they’re paying, they have control over the conditions, and women are forced to perform acts that they haven’t consented to.”<sup>207</sup> Indeed, a City University of Hong Kong study in 2014 found that “[m]ore than half of interviewees said they had experienced clients forcing them to take off condoms during sex acts, and 23 per cent had experienced some [other] form of sexual violence”.<sup>208</sup>

Regarding sexual assault, the sex workers with whom Amnesty International spoke in Hong Kong had had varied experiences. Asked if clients ever forced him to take part in sexual acts he did not agree to, Jimmy replied, “seldom”. However, he said that a client had done so at least once in the past year.<sup>209</sup> Similarly, Brad, a sex worker from mainland China, told Amnesty International that it is “quite rare” for him to be forced to do something he had not agreed to, but he acknowledged that he had had such experiences.<sup>210</sup> Jane, a sex worker from Thailand, told Amnesty International that she had never had a negative experience with a client.<sup>211</sup>

In contrast, Da Chun, a woman sex worker from mainland China, recounted a serious incident that took place in 2007: “The client claimed he lived in a luxury hotel; he brought me to the staircase, and raped me in the staircase.” After the client discovered she did not have change for a 1,000 Hong Kong dollar banknote (the agreed price was 500 Hong Kong dollars, about US\$66), he ran away without paying anything. Da Chun did not report the rape to the police, saying: “I felt ashamed – I didn’t want to have to explain all the details to the police – and the police can’t do anything anyway.”<sup>212</sup>

Certain sex workers appear more vulnerable to sexual assault than others. For instance, younger and less experienced sex workers may be less safe. One researcher has suggested, for example:

**“[S]ex workers are more likely to be bullied by clients if they appear new to prostitution, weak, or unable to control the sexual encounter.”<sup>213</sup>**

Furthermore, some sex workers interviewed for that study also suggested that sex workers from mainland China were more likely than Hong Kong residents to be forced to engage in unwanted sexual acts or to receive less money than agreed.<sup>214</sup>

## 6.3 THEFT AND ROBBERY

Theft and robbery appear to be the most commonly perpetrated crimes against sex workers. Of the 30 sex workers interviewed for a 2011 study, 18 reported that they had been robbed at some point by one or more clients: “Women had usually been threatened with weapons (in most cases, they had been robbed at knifepoint) or other forms of physical violence. Two respondents reported that they suffered physical injury, having been punched, slapped, beaten or tied up.”<sup>215</sup> Cherry Chui, of Action for REACH OUT, said that robbery happens every day, adding that sometimes these incidents are violent, with clients using knives or scissors, or strangling their victims.<sup>216</sup> Hong Kong courts have recognized that sex workers are particularly vulnerable to robbery.<sup>217</sup>

<sup>207</sup> Interview with Cherry Chui, 20 January 2015.

<sup>208</sup> Wing Man Yip, ‘Don’t Be So Quick to Condemn ‘Immoral’ Young Sex Workers’ in *South China Morning Post*, 12 December 2014, available at [www.scmp.com/comment/insight-opinion/article/1661371/dont-be-so-quick-condemn-immoral-young-sex-workers](http://www.scmp.com/comment/insight-opinion/article/1661371/dont-be-so-quick-condemn-immoral-young-sex-workers)

<sup>209</sup> Interview with Jimmy, 22 January 2015.

<sup>210</sup> Interview with Brad, 27 January 2015.

<sup>211</sup> Interview with Jane, 23 January 2015.

<sup>212</sup> Interview with Da Chun, 26 January 2015.

<sup>213</sup> Nga Yan Cheung, *Accounting for and Managing Risk in Sex Work*, p. 228.

<sup>214</sup> Nga Yan Cheung, *Accounting for and Managing Risk in Sex Work*, p. 229.

<sup>215</sup> Nga Yan Cheung, *Accounting for and Managing Risk in Sex Work*, pp. 123, 225-26.

<sup>216</sup> Interview with Cherry Chui, 20 January 2015.

<sup>217</sup> See, for example, *HKSAR v Tam Kwok Keung*, [2011] 1 HKLRD 141, para. 11.

In Jessica Li's study of 75 police case files in which sex workers had reported crimes against them, 64% had involved robbery.<sup>218</sup> She quotes the following incident from a case file:

**“The suspect visited the victim at her place for services. Victim invited him in. She left him in the room alone while she was in the shower. After the services, the suspect left. The victim then found that her handbag from her drawer was gone, including her cash and proof of identity (Case 20090302).”<sup>219</sup>**

Amnesty International met with a male sex worker from mainland China who recounted a similar incident in which he was robbed of his 1,000 Hong Kong dollar (US\$130) fee while he was in the shower. He was able to get some of the money back:

**“The client said he would call the police if I kept demanding money. I said: ‘You call the police. I need the money.’ When I got 800 dollars [US\$105], I left. The client said he called the police, but I don’t believe he did. I think he said this just to get out of paying.”<sup>220</sup>**

## 6.4 OTHER FORMS OF VIOLENCE

Da Chun, a sex worker from mainland China, recounted one violent incident to Amnesty International. She was working on a street in Wan Chai. A man offered her 10 Hong Kong dollars (US\$1.30), with the apparent intention to humiliate her. After she refused and walked away, the man followed her and pushed her to the ground. Her palms were bleeding. She told Amnesty International: “I ran and he chased me – I was quite terrified, and hurt. I called the police, and grabbed the client to stop him from running away. We got into a fight; when the police arrived they separated us.” She said that the police asked her “not to make trouble,” and drop the charges, or else be charged in turn for soliciting. But because she was injured, she decided to press charges. In the end the man was fined 3,000 Hong Kong dollars (US\$385), and Da Chun was not charged.<sup>221</sup>

## 6.5 NON-PAYMENT FOR SERVICES

**“The police say, ‘If you make a big deal out of this, maybe a reporter will come to take statements; maybe we’ll have to call your family.’”<sup>222</sup>**

Non-payment for services is another commonly reported problem, and one that is apparently seldom brought to the attention of the police. “Some clients just refuse to pay,” said Jimmy, a male sex worker. Asked what he does when that happens, he replied, “I just let them go”. He does not attempt to report these clients to the police because he does not believe the police would take any action.<sup>223</sup>

Similarly, Cherry Chui from Action for REACH OUT told Amnesty International: “A lot of girls told me that if they don’t get paid, if they go to the police, they just let the customer go. The police say, ‘if you make a big deal out of this, maybe a reporter will come to take statements; maybe we’ll have to call your family’.”<sup>224</sup>

In one instance, Da Chun, a sex worker from mainland China, did choose to report a case of non-payment to the police. She told Amnesty International that after staying overnight with a client at a luxury hotel, he tried

<sup>218</sup> J.C.M. Li, ‘Violence against Chinese Female Sex Workers in Hong Kong: From Understanding to Prevention’ in *International Journal of Offender Therapy and Comparative Criminology*, vol. 57, 2013, p. 622.

<sup>219</sup> J.C.M. Li, ‘Violence against Chinese Female Sex Workers in Hong Kong: From Understanding to Prevention’ in *International Journal of Offender Therapy and Comparative Criminology*, vol. 57, 2013, p.622.

<sup>220</sup> Interview with male sex worker, 27 January 2015.

<sup>221</sup> Interview with Da Chun, 26 January 2014.

<sup>222</sup> Interview with Cherry Chui, 20 January 2015.

<sup>223</sup> Interview with Jimmy, 22 January 2015.

<sup>224</sup> Interview with Cherry Chui, 20 January 2015.

to leave the next morning without paying. She called the police after he locked her out of the hotel room. When they arrived, they did not help her obtain the money. “The client said that he had already paid me,” she said, “and the police believed him.”<sup>225</sup>

Occasionally, the police do assist sex workers in obtaining payment. Cherry Chui from Action for REACH OUT said that some women have told her that, while police officers cannot arrest a client for non-payment for sexual services,<sup>226</sup> some have “used their authority” to make the client pay.<sup>227</sup>

Action for REACH OUT has received reports of clients who claim to be police officers after they have had sex with a sex worker, and then leave without paying. It is not clear whether they are actually police officers or are simply using the threat of prosecution as a means of extortion. “Sometimes they show a warrant card,” Kendy Yim told Amnesty International. “Sometimes they are people just asking for money. The real police do not do that, but we see cases of people who claim to be police so that they can ask sex workers for money. Although she believes that most serving police officers would not engage in this form of extortion, she said that she has heard of cases of former police officers who have committed such crimes. “One girl even reported a case to the police,” said Kendy Yim. “The police officer just left without paying after receiving services. The girl was angry, and she reported the case to the police, but nothing happened.”<sup>228</sup>

## 6.6 OTHER ABUSES

Blackmail is another form of abuse that sex workers in Hong Kong have reported. Younger sex workers may be particularly vulnerable to blackmail by clients. Lam Po Yee from Teen’s Key told Amnesty International that younger women may share information about their school, family, and where they live. Clients then blackmail them by taking compromising photos or videos using hidden cameras.<sup>229</sup>

## 6.7 POLICE RESPONSES

In general, sex workers and their advocacy groups are dissatisfied with the response of police to crimes and other abuses committed against sex workers.

In the aftermath of the serial murders in 2008, the way in which sex work was policed in Hong Kong changed. The extent of the transformation is not clear, but one initiative was twice-yearly meetings between the Crime Prevention Bureau of the Hong Kong Police Force and Hong Kong’s sex worker advocacy groups.

In discussions with Amnesty International, advocacy groups expressed a range of opinions about the meetings initiative. Cherry Chui of Action for REACH OUT said it was a very good platform, and has changed how front-line police officers behave in cases involving sex workers. She told Amnesty International that “sex workers now feel that police officers are more willing to communicate with them, and are more helpful”.<sup>230</sup> On the other hand, in the opinion of Lam Po Yee, Project Coordinator for Teen’s Key, the platform is not very helpful.<sup>231</sup> Meanwhile, Zi Teng staff said: “It is not a meaningful channel to facilitate the relationship” between the police and sex worker groups.<sup>232</sup>

In the opinion of the Crime Prevention Bureau, their efforts to liaise with sex workers and advocacy groups have been successful. They told Amnesty International that “prostitutes are treated the same way as ordinary citizens” when they report a crime. The Crime Prevention Bureau added that “We recognize that two meetings a year is not enough, so we also liaise with [sex worker groups] on a daily basis”, including by providing crime alerts, offering advice to enhance sex workers’ personal safety (including the installation of

<sup>225</sup> Interview with Da Chun, 26 January 2015.

<sup>226</sup> See *HKSAR v Tam Kwok Keung*, [2011] 1 HKLRD 141 (“16. The applicant’s failure to pay for the sexual service provided to him after using it does not constitute an offence at criminal law. The victim could not lodge a civil claim for it either.”)

<sup>227</sup> Interview with Cherry Chui, 20 January 2015.

<sup>228</sup> Interview with Kendy Yim, 17 December 2014.

<sup>229</sup> Interview with Lam Po Yee, 21 January 2015.

<sup>230</sup> Interview with Cherry Chui, 20 January 2015.

<sup>231</sup> Interview with Lam Po Yee, 21 January 2015.

<sup>232</sup> Interview with Zi Teng staff, 22 January 2015.



alarms and CCTV cameras), instituting regular visits to one-person apartments by designated officers, and providing direct phone numbers to the police for use by sex workers and NGOs. One officer told Amnesty International: “At first, I felt that the concerned groups were not very friendly to us. As time went by, they’re impressed with what we’re doing for them. They think we’re doing an ok job. We tell them we’re here to help – not just to prosecute or arrest them.” As an example of a positive collaboration with sex workers, the Crime Prevention Bureau cited a successful prosecution for the murder of a sex worker from mainland China in Kowloon City a year previously. A friend of the victim, who was a key witness, had returned to mainland China. With the aid of sex workers, the police found the friend. She came to Hong Kong to identify the killer, who was subsequently convicted.<sup>233</sup>

**“They’ll insult me with dirty words. This makes us hesitate before bringing charges. We’re very unsure that we’ll get any reasonable treatment from the police.”**

**- Queen**

Notwithstanding efforts such as the Crime Prevention Bureau meetings, it seems that many sex workers continue to be afraid to report crimes to the police. “Sex workers who suffer violence will not choose to report these cases to the police,” said Sherry Hui of JJJ Association. “Police will rarely follow up on these cases. Sex workers would have to go through a lot of procedures to try to make a report, and finally get nothing out of it, so they wouldn’t report. In addition, sometimes the police will be very rude to them and humiliate them.”<sup>234</sup>

Similarly, Lam Po Yee from Teen’s Key told Amnesty International: “There is often violence, but most sex workers are not willing to bring charges. The police will blame the girl for what she’s done. They’ll take the statement, but at the same time insult them. And the girls just cry and cry.”<sup>235</sup>

Indeed, Queen, a Hong Kong resident who engages in compensated dating, told Amnesty International that she does not report crimes to the police because, as she explained, “They’ll insult me with dirty words. This makes us hesitate before bringing charges. We’re very unsure that we’ll get any reasonable treatment from the police.”<sup>236</sup>

Sherry Hui from JJJ Association was somewhat less critical: “There are 10,000 police officers in Hong Kong – some are very bad. But the police try their best.”<sup>237</sup>

Apart from a sense that the police are unable or unwilling to assist them, or will insult them or otherwise treat them poorly, some sex workers choose not to report crimes because they are afraid that they will themselves be charged with soliciting. One sex worker from Hong Kong told Amnesty International: “I have never reported any crimes such as rape because I’m afraid I’ll get charged with soliciting.”<sup>238</sup> Similarly, Jane, a sex worker from Thailand, said: “If it’s not a regular client and they refuse a condom, I return the money. I do my best not to make trouble with clients. If there is a problem I simply do not serve the client. If I go to the police I might have two more charges.”<sup>239</sup> The Hon. Kenneth Leung, a Member of Hong Kong’s Legislative Council, told Amnesty International: “There is a general feeling that sex workers are afraid of reporting any crimes to the police – they don’t want to alert the police to their whereabouts.”<sup>240</sup>

These fears of being charged are well-founded. In January 2015, Amnesty International learned from several sources about the case of a Hong Kong resident. She said that she had been raped by a client in October

<sup>233</sup> All information from this paragraph based on interview with Crime Prevention Bureau, 26 January 2015.

<sup>234</sup> Interview with Sherry Hui, 18 December 2014.

<sup>235</sup> Interview with Lam Po Yee, 21 January 2015.

<sup>236</sup> Interview with Queen, 21 January 2015.

<sup>237</sup> Interview with Sherry Hui, 23 January 2015.

<sup>238</sup> Interview with Queen, 21 January 2015.

<sup>239</sup> Interview with Jane, 23 January 2015.

<sup>240</sup> Interview with the Hon. Kenneth Leung, member, Legislative Council, Hong Kong, 23 January 2015.

2014, and had subsequently filed a charge at the police station. She had been called back to the station to provide more details. According to her testimony, the police officer told her that she had two options: bring charges against the man and face charges herself for soliciting, or drop the charges entirely. After seeking legal advice via a sex worker advocacy group, the woman withdrew the charge in order to avoid prosecution.<sup>241</sup>

**“I have never reported any crimes such as rape because I’m afraid I’ll get charged with soliciting.”**

- Queen

## 6.8 DUE DILIGENCE

Acts of murder, sexual assault, robbery, and other forms of violence are human rights abuses – infringing the rights to life, security of person and health, among other human rights – as well as crimes under domestic law. The state has an obligation to exercise due diligence to prevent these and other human rights abuses by private actors and respond to such abuses when they are committed.<sup>242</sup>

In practical terms, the obligation of due diligence requires police to make good-faith efforts to investigate reports of crimes, regardless of who the alleged victim is. That is, a sex worker who reports an act of robbery or sexual assault should be treated as the victim of a crime, and police should ensure that the report is investigated fully.

To fulfil these due diligence obligations, law enforcement officials must ensure that their policies or practices do not have the effect of deterring sex workers from reporting crimes. In particular, the Hong Kong police should not ask individuals who report crimes to disclose their immigration status and should not treat a report of a crime as an opportunity to investigate the person reporting the crime for possible violations relating to sex work.

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<sup>241</sup> Interview with Lam Po Yee, 21 January 2015, and subsequent online communication.

<sup>242</sup> As articulated by the Inter-American Court of Human Rights in the *Velásquez-Rodríguez* case, an illegal act that “violates human rights and which is initially not directly imputable to a State... can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it.” *Velásquez Rodríguez v Honduras*, Inter-American Court, para. 172. See also Human Rights Committee General Comment 31, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004), para. 8; CEDAW Committee General Recommendation 19, UN Doc. A/47/38 (1993); Article 4 of the Declaration on the Elimination of Violence against Women, U.N. Doc. A/RES/48/104 (1994) (adopting the due diligence standard as the framework for assessing states’ obligations with regard to all forms of violence against women).

# 7. HONG KONG LAWS

## 7.1 SEX WORK-RELATED OFFENCES

The sale of sex is itself not unlawful in Hong Kong. But many activities associated with the sale of sex are crimes. These include:

- Solicitation for an “immoral purpose”.<sup>243</sup>
- Loitering for the purposes of solicitation.<sup>244</sup>
- Publicly displaying signs advertising “prostitution”.<sup>245</sup>
- Running a “vice establishment” of two or more people.<sup>246</sup>
- Letting premises for use as a “vice establishment”.<sup>247</sup>
- Permitting premises to be used as a “vice establishment”<sup>248</sup> or for “habitual prostitution.”<sup>249</sup>
- Living off the earnings of the “prostitution” of others.<sup>250</sup>

The Hong Kong Crimes Ordinance also has numerous provisions that regulate other aspects of sexual conduct. For example, the Crimes Ordinance prohibits “homosexual buggery” (anal sex) when it is committed with or by a male under the age of 16 (meaning that boys under this age can, on the face of the provision, be charged with a crime if they engage in anal sex);<sup>251</sup> “buggery with a girl under the age of 21”;<sup>252</sup> and “buggery” with a mentally incapacitated person.<sup>253</sup> Acts of gross indecency with or by a male under the

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<sup>243</sup> Crimes Ordinance §147(1)(b) (Hong Kong).

<sup>244</sup> Crimes Ordinance §147(1)(b).

<sup>245</sup> Crimes Ordinance §147A.

<sup>246</sup> Crimes Ordinance §139.

<sup>247</sup> Crimes Ordinance §143.

<sup>248</sup> Crimes Ordinance §144.

<sup>249</sup> Crimes Ordinance §145.

<sup>250</sup> Crimes Ordinance §137.

<sup>251</sup> Crimes Ordinance, §118C (“A man who—

(a) commits buggery with a man under the age of 16; or

(b) being under the age of 16 commits buggery with another man,

shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.”)

<sup>252</sup> Crimes Ordinance §118D (“A man who commits buggery with a girl under the age of 21 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.”)

<sup>253</sup> Crimes Ordinance §118E.

age of 16,<sup>254</sup> with a man who is mentally incapacitated,<sup>255</sup> and by men not in private<sup>256</sup> are also prohibited. The procurement of others to commit “homosexual buggery”<sup>257</sup> and “gross indecency between men”<sup>258</sup> is similarly prohibited. In addition, a man who has “unlawful sexual intercourse” with a girl under the age of 16 may be sentenced for imprisonment of up to five years, and with a girl under the age of 13, to life imprisonment.<sup>259</sup>

## 7.2 ANTI-TRAFFICKING LAWS

Hong Kong’s anti-trafficking laws are limited to trafficking “for the purpose of prostitution”<sup>260</sup> and only in cases that involve transnational movement. Amnesty International and local human rights groups have called for broader anti-trafficking protections that comply with the definition set forth in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the UN Anti-trafficking Protocol).<sup>261</sup>

Under the Palermo Protocol, trafficking in persons is defined as the acquisition of people – their recruitment, transportation, transfer, harbouring, or receipt – through fraud, deception or coercion,<sup>262</sup> with the aim of exploiting them.<sup>263</sup> Exploitation includes at a minimum the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs. In cases involving children, the means is irrelevant – any recruitment, transportation, transfer, harbouring, or receipt of a child for the purposes of exploitation is trafficking.<sup>264</sup>

## 7.3 LESBIAN, GAY, BISEXUAL AND TRANSGENDER LAWS

Hong Kong’s antidiscrimination ordinances do not currently cover sexual orientation,<sup>265</sup> and periodic calls for public consultation on expanding the reach of the ordinances have been controversial.<sup>266</sup> A 2012 Equal

<sup>254</sup> Crimes Ordinance § 118H. (“A man who (a) commits an act of gross indecency with a man under the age of 16; or (b) being under the age of 16 commits an act of gross indecency with another man, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years.”)

<sup>255</sup> Crimes Ordinance §118I.

<sup>256</sup> Crimes Ordinance §118J.

<sup>257</sup> Crimes Ordinance §118G (“A person who procures a man to commit an act of buggery with a third person, who is another man, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years.”).

<sup>258</sup> Crimes Ordinance §118K.

<sup>259</sup> Crimes Ordinance §§124, 123.

<sup>260</sup> Crimes Ordinance §129.

<sup>261</sup> See for example, Amnesty International, *Exploited for profit, failed by governments: Indonesian migrant domestic workers trafficked to Hong Kong* (Index: ASA 17/029/2013), pp. 97-98; Justice Centre Hong Kong and Liberty Asia, *How Many More Years a Slave? Trafficking for Forced Labour in Hong Kong*, 2014, pp. 16-18.

<sup>262</sup> This includes “the threat or use of force or other forms of coercion, of abduction, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”. Article 3(a) of the UN Anti-trafficking Protocol.

<sup>263</sup> China acceded to the Protocol in 2010 with the following declaration: “Unless otherwise notified by the Government, the Protocol shall not apply to the Hong Kong Special Administrative Region of the People’s Republic of China.”

<sup>264</sup> Article 3(b) of the UN Anti-trafficking Protocol.

<sup>265</sup> Hong Kong law prohibits discrimination on the basis of sex, disability, family status, and race. See Sex Discrimination Ordinance (1995); Disability Discrimination Ordinance (1995); Family Status Discrimination Ordinance (1997); Race Discrimination Ordinance (2008).

<sup>266</sup> See *South China Morning Post*, ‘Gay Rights Needs a Consultation’, 25 January 2013, available at [www.scmp.com/comment/insight-opinion/article/1135473/gay-rights-need-consultation](http://www.scmp.com/comment/insight-opinion/article/1135473/gay-rights-need-consultation); A. Lai, ‘Gay-Bias Law Could Help Create a More Tolerant Society’ in *South China Morning Post*, 20 November 2012, available at [www.scmp.com/comment/insight-opinion/article/1086181/gay-bias-law-could-help-create-more-tolerant-society](http://www.scmp.com/comment/insight-opinion/article/1086181/gay-bias-law-could-help-create-more-tolerant-society); A. Nip and V. Chow, ‘Hong Kong Behind Mainland on Gay Rights Issues, Says Gigi Chao’ in *South China Morning Post*, 27 September 2012, available at [www.scmp.com/news/hong-kong/article/1047990/hong-kong-behind-mainland-gay-rights-issues-says-gigi-chao](http://www.scmp.com/news/hong-kong/article/1047990/hong-kong-behind-mainland-gay-rights-issues-says-gigi-chao); K. Kennedy, ‘Time to Begin the Debate on Gay Rights’ in *South China Morning Post*, 22 November 2012, available at [www.scmp.com/comment/insight-opinion/article/1087659/time-begin-debate-gay-rights](http://www.scmp.com/comment/insight-opinion/article/1087659/time-begin-debate-gay-rights); A. Cheng, ‘Lawmakers’ Opposition to Gay Rights

Opportunities Commission survey found that 43% of respondents believed that discrimination on the basis of sexual orientation in Hong Kong was a serious or very serious problem,<sup>267</sup> and the commission has called for the Hong Kong government to “conduct a public consultation on legislating against discrimination on the ground of sexual orientation, gender identity and intersex status as soon as possible”.<sup>268</sup>

In the meantime, the Equal Opportunities Commission began a consultation in 2014 on proposed changes to anti-discrimination laws that would protect unmarried couples. The move received opposition from head teachers of primary and secondary schools, among others, who claimed that such a change would lead to a breakdown of “traditional family values” and would make it difficult for schools to conduct “moral and ethical education”.<sup>269</sup> This consultation was still ongoing as at April 2016, as this report was being finalized.

Even in the absence of the explicit inclusion of sexual orientation and gender identity in the anti-discrimination ordinances, the Hong Kong courts have struck down legislation that treated gay and bisexual men, lesbian women and transgender people less favourably than heterosexuals. For example, in a 2005 ruling the Hong Kong High Court found that a higher age of consent for sexual conduct between two men, as compared with the age of consent for sexual conduct between men and women, was unconstitutional and invalid.<sup>270</sup> The Court of Appeals upheld this decision the following year.<sup>271</sup> As a result, the age of consent for same-sex sexual conduct was set at 16, the same age as for heterosexual sexual conduct.

Similarly, in 2007, the Court of Final Appeal struck down a separate provision that criminalized “homosexual buggery committed otherwise than in private,” concluding that the provision was discriminatory because it did not criminalize comparable heterosexual conduct.<sup>272</sup> In spite of these developments in case law, the criminal provisions remain and laws should be changed to make it clear that such conduct is not considered unlawful.

Most recently, following a 2013 Court of Final Appeal judgment, legislation that came into effect in July 2014 allows transgender people to marry in the gender of their choice, but only if they have undergone full sex reassignment surgery.<sup>273</sup>

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Shames Hong Kong’ in *South China Morning Post*, 16 November 2012, available at [www.scmp.com/comment/insight-opinion/article/1083187/lawmakers-opposition-gay-rights-law-shames-hong-kong](http://www.scmp.com/comment/insight-opinion/article/1083187/lawmakers-opposition-gay-rights-law-shames-hong-kong)

<sup>267</sup> Equal Opportunities Commission, *Equal Opportunities Awareness Survey 2012*, 2013, available at [www.eoc.org.hk/eoc/Upload/ResearchReport/2013191436554640807.pdf](http://www.eoc.org.hk/eoc/Upload/ResearchReport/2013191436554640807.pdf)

<sup>268</sup> CEDAW submission to the Equal Opportunities Commission, September 2014, para. 9.

<sup>269</sup> See J. Ngo and E. Cheung, ‘Equality Watchdog’s Consultation Perverts Family Values, School Heads Say’ in *South China Morning Post*, 30 October 2014, available at [www.scmp.com/news/hong-kong/article/1628573/equality-watchdogs-consultation-perverts-family-values-school-heads](http://www.scmp.com/news/hong-kong/article/1628573/equality-watchdogs-consultation-perverts-family-values-school-heads)

<sup>270</sup> *Leung TC William Roy v Secretary of Justice*, [2005] 3 HKLRD 657 (CFI). See also Lai Ying-Kit, ‘Court Rules Age of Consent for Homosexuals Is Unconstitutional’ in *South China Morning Post*, 24 August 2005, available at [www.scmp.com/article/513285/court-rules-age-consent-homosexuals-unconstitutional](http://www.scmp.com/article/513285/court-rules-age-consent-homosexuals-unconstitutional); P. Hui, ‘Government Appeals Gay Sex Ruling’ in *South China Morning Post*, 1 October 2005, available at [www.scmp.com/article/518548/government-appeals-gay-sex-ruling](http://www.scmp.com/article/518548/government-appeals-gay-sex-ruling)

<sup>271</sup> [2006] 4 HKLRD 211 (CA).

<sup>272</sup> *Secretary for Justice v Yau Yuk Lung Zigo and Lee Kam Chuen*, FACC No. 12 of 2006 (HK Ct Final App 17 July 2007), paras. 28-30.

<sup>273</sup> See J. Ngo, ‘Wedding Bells Ring for Transgender People’ in *South China Morning Post*, 17 July 2014, available at [www.scmp.com/news/hong-kong/article/1555449/wedding-bells-ring-transgender-people](http://www.scmp.com/news/hong-kong/article/1555449/wedding-bells-ring-transgender-people); S. Lau and Lai Ying-kit, ‘Finally I Can Marry My Boyfriend: Transsexual Plans Wedding After Landmark Victory’ in *South China Morning Post*, 13 May 2013, available at [www.scmp.com/news/hong-kong/article/1236633/finally-i-can-marry-my-boyfriend-transsexual-plans-wedding-after](http://www.scmp.com/news/hong-kong/article/1236633/finally-i-can-marry-my-boyfriend-transsexual-plans-wedding-after). See also K. Loper, ‘W v Registrar of Marriages and the Right to Equality in Hong Kong’ in *Hong Kong Law Journal*, vol. 41 (2011), pp. 89-107.

# 8. INTERNATIONAL LAWS AND STANDARDS

Human rights violations are committed against sex workers across the world. Sex workers have the same rights as everyone else, but are particularly vulnerable to abuses because of their marginalized or criminalized status. Rights which affect sex workers include: the right to life, liberty, autonomy and security of person; the right to equality and non-discrimination; freedom from torture or cruel, inhuman or degrading treatment or punishment; the right to privacy; the right to the highest attainable standard of health; access to information and education; freedom of opinion and expression; the right to adequate housing; just and favourable conditions of work; and the right to remedy for human rights abuses. States have an obligation to protect these rights for everyone, including sex workers.

Amnesty International calls for decriminalization of sex work in recognition of a growing body of research from UN agencies, human rights organizations, including Amnesty International's own research, and social science which indicates that criminalization in its varying forms exposes sex workers to increased risks of human rights violations.

Human Rights Watch<sup>274</sup>, Open Society Foundations,<sup>275</sup> Global Alliance Against the Trafficking in Women (GAATW),<sup>276</sup> among other groups, have also called for the decriminalization of sex work. Most significantly, a large number of sex worker organizations and networks, including the Global Network of Sex Work Projects,<sup>277</sup> support the decriminalization of sex work as a means to realize sex workers' human rights. UN bodies and experts are increasingly turning their attention to the impact of criminalizing sex work on a range of human rights. In part, this is because punitive approaches tend to put sex workers at heightened risk of violence, often with little legal recourse. For example, various UN bodies have recognized that "[c]riminalization legitimizes violence and discrimination against sex workers (particularly from law enforcement officers and healthcare providers) and makes authorities reluctant to offer protection or support to sex workers."<sup>278</sup>

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<sup>274</sup> J. Amon, *Canada's prostitution bill as step in the wrong direction*, Human Rights Watch (media release), 2014, available at: [www.hrw.org/news/2014/06/18/canadas-prostitution-bill-step-wrong-direction](http://www.hrw.org/news/2014/06/18/canadas-prostitution-bill-step-wrong-direction)

<sup>275</sup> Open Society Foundations, *Ten reasons to decriminalize sex work*, 2012.

<sup>276</sup> See Global Alliance Against the Traffic of Women (GAATW), *Statement to the Human Rights Council*, 2012, available at [www.gaatw.org/statements/GAATWStatement\\_05.2013.pdf](http://www.gaatw.org/statements/GAATWStatement_05.2013.pdf)

<sup>277</sup> See [www.nswp.org/](http://www.nswp.org/)

<sup>278</sup> UNFPA, APNSW, UNDP, Policy brief: Sex work, violence and HIV in Asia – From evidence to safety, 2015, p. 7. The World Health Organization calls on all countries to “work toward decriminalization of sex work and elimination of the unjust application of non-criminal laws and regulations against sex workers. WHO, UNFPA, UNAIDS, NSWP, *Prevention and treatment of HIV and other sexually transmitted infections for sex workers in low- and middle-income countries: Recommendations for a public health approach*, 2012, p. 8, available at: [apps.who.int/iris/bitstream/10665/77745/1/9789241504744\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf). The UN Special Rapporteur on the right to health has also highlighted the impact of criminalizing sex work on health and human rights and explicitly called for decriminalization of sex work. See

Whilst the link between the direct criminalization of sex workers (for example, through laws that make selling sex a crime) and human rights violations is linear and relatively clear, it is important to recognize that the increased risk of human rights violations that sex workers experience is not only linked to the criminalization of the selling of sex. Antagonistic relationships between sex workers and the police occur wherever sex workers, clients or those providing services to sex workers are criminalized. Such relations compromise the safety of sex workers and limit their ability to effectively manage risks or secure redress for abuse or exploitation.<sup>279</sup> Criminalization in all its forms also actively stigmatizes sex work which can, in turn, bolster public prejudice, denial of agency and active marginalization of sex workers by the state, including discrimination within the social protection system.

Prejudice, discrimination, abuse and violence against sex workers are not unique to criminalized systems and can also occur in all contexts. Similarly, related problems such as homophobia, transphobia, gender-based violence and endemic police corruption undoubtedly require responses that go beyond changes in sex work laws. States must take action beyond decriminalization of sex work in order to address the full range of human rights abuses that sex workers face. The key international human rights laws and standards as they relate to sex work are outlined below.

## 8.1 HUMAN RIGHTS OBLIGATIONS OF HONG KONG

Hong Kong is bound by customary international law and such international treaties as ratified by China and notified to the UN (or the United Kingdom prior to 1 July 1997, when China resumed sovereignty over Hong Kong).

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) was extended to Hong Kong by the United Kingdom on 14 October 1996. CEDAW has continued to apply to Hong Kong with seven reservations and declarations. China notified the UN Secretary-General on 10 June 1997 that the Convention on the Rights of the Child (CRC) would apply to Hong Kong, subject to numerous reservations. China ratified the Convention on the Rights of Persons with Disabilities (CPRD) on 1 August 2008 and declared that the convention would apply to Hong Kong, with the exception that the convention's provisions on liberty of movement and nationality "shall not change the validity of relevant laws on immigration control and nationality."

In the *Hong Kong Basic Law*, the constitutional document of Hong Kong SAR, human rights are safeguarded under Chapter III: Fundamental Rights and Duties of the Residents in the law. Article 39 expressly states that the provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and international labour conventions as applied to Hong Kong shall remain in force.

## 8.2 RIGHT TO SECURITY OF THE PERSON AND FREEDOM FROM VIOLENCE

Sex workers face extortion and violence at the hands of police, clients and others, when they are forced to work in a precarious, clandestine manner because of stigma and presumptions of criminality. When they cannot seek police protection from violence, their right to security of the person is at stake. Under the ICCPR this right entails a requirement that the state protect individuals from intentional physical or mental injury.<sup>280</sup>

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Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover (UN Doc. A/HRC/14/20), 2010, para. 76(b).

<sup>279</sup> See K. Blankenship and S. Koester, 'Criminal law, policing policy, and HIV risk in female street sex workers and injection drug users', *Journal of Law, Medicine and Ethics*, 2002. Raids, cautions, arrests, and the use of antisocial behaviour orders (ASBOs) against sex workers in the United Kingdom have been found to shift sex workers toward unsafe areas and to diminish sex workers' ability to choose clients and negotiate condom use.

<sup>280</sup> Human Rights Committee, General comment 35 (Article 9 (liberty and security of person)), (UN Doc. CCPR/C/GC/35), 2014, para. 9.

To respect and protect this right, state parties must respond appropriately to patterns of violence against people, including sex workers.

States have an obligation to protect sex workers from violence, harassment and other abuse by adopting and enforcing laws that prohibit such violence and abuse.<sup>281</sup> Notably, the CEDAW Committee, in its General Comment 19 (violence against women), specifically recognizes the vulnerability of sex workers to human rights violations and violence, resulting from their marginalization and unlawful legal status.<sup>282</sup> The CEDAW Committee notes that:

**“Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.”<sup>283</sup>**

Along those lines, the Committee has called on states to take measures to ensure “the rights of all sex workers, whether men, women or transgender people, to access sexual health services; that they are free from violence or discrimination, whether by state agents or private persons; and that they have access to equal protection of the law.”<sup>284</sup> Notably, the Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment 22 on the Right to sexual and reproductive health (Article 12), explicitly calls on states parties to “take measures to fully protect persons working in the sex industry against all forms of violence, coercion and discrimination.”<sup>285</sup> States also have an obligation to tackle gender stereotypes that essentially justify violence against certain groups of people, such as transgender people.<sup>286</sup>

Violence should never be considered an inherent aspect of sex work, and states have an obligation to protect sex workers from violence regardless of whether or not sex work is criminalized. In 2013, the Canadian Supreme Court struck down criminal laws which restricted the ways in which sex workers could work on the basis that it violated the right to security of the person in the Canadian Constitution, stating:

**“The prohibitions all heighten the risks the applicants face in prostitution — itself a legal activity. They do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks. That causal connection is not negated by the actions of third-party johns and pimps, or prostitutes’ so-called choice to engage in prostitution. While some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Moreover, it makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.”<sup>287</sup>**

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<sup>281</sup> See Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover (UN Doc. A/HRC/14/20), 2010; CESCR, General Comment 22 (right to sexual and reproductive health (Article 12)), (UN Doc. E/C.12/GC/22), 2016, para. 32. Along similar lines, the CEDAW Committee has recently expressed concern to one state party about “widespread violence and discrimination against women in prostitution, in particular by the police.” CEDAW, Concluding observations: Kyrgyzstan, (UN Doc. CEDAW/C/KGZ/CO/4), 2015, para. 21(c).

<sup>282</sup> For a more in-depth discussion of the CEDAW Committee’s analysis around the human rights of sex work or “women in prostitution”, including the impact of criminalization of aspects of commercial sex, see Amnesty International’s ‘Explanatory Note’ (which both contextualizes and provides an overview of Amnesty International’s research base for its policy on states’ obligations to respect, protect and fulfill sex workers’ human rights).

<sup>283</sup> CEDAW, General Recommendation 19 (violence against women), (UN Doc. A/47/38), 1992, para. 15.

<sup>284</sup> CEDAW, General Recommendation 24 (Article 12: Women and health), (UN Doc. A/54/38/Rev.1), Chapter I, 1999. See also Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover (UN Doc. A/HRC/14/20), 2010; and CEDAW, General Recommendation 19 (Violence against women), (UN Doc. A/47/38), 1992.

<sup>285</sup> See CESCR, General Comment 22 (The right to sexual and reproductive health (Article 12)), (UN Doc. E/C.12/GC/22), 2016, para. 32.

<sup>286</sup> See CEDAW, Article 5; CEDAW, General Recommendation 28 (core obligations of States Parties under Article 2 of CEDAW), (UN Doc. CEDAW/C/2010/47/GC.2), 2010, paras 18, 26; and the Convention of Belém do Pará, Articles 6, 8. See also Office of the High Commission for Human Rights, Gender stereotyping as a human rights violation, 2013, pp. 23-24.

<sup>287</sup> *Canada (Attorney General) v. Bedford* [2013] 3 SCR 1101, 2013 SCC 72



This obligation to protect a person from violence is closely related to and overlaps the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment (see below). In line with the human rights principle of “due diligence”, the state must adopt the legislative, administrative, social, economic and other measures necessary to prevent, investigate, prosecute and punish acts of violence, whether perpetrated by the state or by private individuals.<sup>288</sup> The Hong Kong authorities must also provide mechanisms for redress and ensure reparations to victims and survivors.<sup>289</sup>

The CEDAW Committee has expressed concern about the criminalization of sex work and its negative impact on the security of sex workers.<sup>290</sup> The Committee has consistently made clear that under the Convention criminal sanctions should be reserved for those who profit from the “exploitation of prostitution.”<sup>291</sup> It has noted that imposing criminal penalties on sex workers only “entrenches sexual exploitation of women.”<sup>292</sup> Along those lines, the Committee has specifically condemned policies that seem to exacerbate the situation of sex workers instead of improving it. For example, in its concluding observations to China, Hong Kong and Macau, the Committee expressed concern that “the continued criminalization of prostitution disproportionately impacts on prostitutes rather than on the prosecution and punishment of pimps and traffickers.”<sup>293</sup>

## 8.3 RIGHT TO LIBERTY

Criminal sanctions and imprisonment for sex work related offences threatens the right to liberty, where sex workers are arbitrarily detained under international law.<sup>294</sup> The Human Rights Committee has determined that legally authorized detention must be reasonable, necessary and proportionate taking into account the

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<sup>288</sup> See Committee against Torture, General Comment 2 (Implementation of article 2 by States Parties), (UN Doc. CAT/C/GC/2), 2008; and UN General Assembly, Declaration on the Elimination of Violence against Women, (UN Doc. A/RES/48/104), 1993.

<sup>289</sup> See Human Rights Committee, General Comment 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), (UN Doc. CCPR/C/21/Rev.1/Add.13), 2004; and Inter-American Court of Human Rights, *Ana, Beatriz and Celia González v Mexico*, 2001; and *Velasquez-Rodriguez v Honduras*, 1988.

<sup>290</sup> See CEDAW, Concluding observations: Fiji, (UN Doc. A/57/38), 2002, paras 64-65; Hungary, (UN Doc. A/57/38), 2002, paras 323-324; Kenya, (UN Doc. CEDAW/C/KEN/CO/6), 2007, paras 29-30; Republic of Korea, (UN Doc. CEDAW/C/KOR/CO/6), 2007, paras 19-20; France, (UN Doc. CEDAW/FRA/CO/6), 2008, paras 30-31; Germany, (UN Doc. CEDAW/DEU/CO/6), 2009, paras 49-50; Japan, (UN Doc. CEDAW/C/JPN/CO/6), 2009, para. 39; and China, (UN Doc. CEDAW/C/CHN/CO/6), 2006, para. 4. Article 6 of CEDAW requires states to protect women and girls against “exploitation of prostitution”.

<sup>291</sup> See CEDAW, Concluding observations: Fiji, (UN Doc. A/57/38), 2002, paras 64-65; Hungary, (UN Doc. A/57/38), 2002, paras 323-324; Kenya, 27 (UN Doc. CEDAW/C/KEN/CO/6), 2007, paras 29-30; Republic of Korea, (UN Doc. CEDAW/C/KOR/CO/6), 2007, paras 19-20; France, (UN Doc. CEDAW/FRA/CO/6), 2007, paras 30-31; Germany, (UN Doc. CEDAW/DEU/CO/6), 2009, paras 49-50; Japan, (UN Doc. CEDAW/C/JPN/CO/6), 2009, para. 39; and Albania, (UN Doc. CEDAW/C/ALB/CO/3), 2010, para. 29. While Article 6 of CEDAW requires that states take “all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”, the CEDAW Committee does not define the terms “exploitation” or “prostitution.” The inclusion of the term “exploitation” suggests that not all forms of commercial sex are exploitative and that states are not obligated to suppress “prostitution”, but rather only that which involves exploitation. Indeed, when the text of CEDAW was being drafted, a proposal to amend Article 6 to call for the abolition of prostitution in all its forms was rejected. Furthermore, the delineation between “traffic in women” and “exploitation of prostitution” recognizes the two issues as distinct, but in some cases related, phenomena. See C. Mgbako and L.A. Smith, ‘Sex work and human rights in Africa’, *Fordham International Law Journal*, 2011, p. 1200-01; General Recommendation 19 (violence against women), (UN Doc. A/47/38), 1992, para. 16; CEDAW, Concluding observations: Indonesia, (UN Doc. CEDAW/C/IDN/CO/5), 2007, paras. 28-29.

<sup>292</sup> CEDAW, Concluding observations: Lithuania, (UN Doc. A/55/38), 2000, para. 152. See also CEDAW Concluding observations: Armenia, (UN Doc. CEDAW/C/ARM/CO/4/Rev.1), 2009, para. 27 (addressing administrative penalties imposed on sex workers); and Egypt, (UN Doc. CEDAW/C/EGY/CO/7), 2010, para. 25 (expressing concern that women in prostitution are punished, as opposed to clients).

<sup>293</sup> See CEDAW, Concluding observations: China (including mainland China, Hong Kong and Macau), (UN Doc. CEDAW/C/CHN/CO/6), 2006, para. 19.

<sup>294</sup> See Article 9(1) of the ICCPR, Human Rights Committee, General comment No. 35, Article 9: Liberty and security of person, UN Doc. CCPR/C/GC/R.35/Rev.3, 10 April 2014, paras. 10-23; Methods of work of the Working Group on Arbitrary Detention, UN Doc. A/HRC/30/69, 4 August 2015, para. 8.

specific circumstances of a case.<sup>295</sup> Detention can amount to arbitrary detention, even if it is authorized by law, if it includes “elements of inappropriateness, injustice, lack of predictability and due process of law”.<sup>296</sup> Related to this, the UNAIDS Advisory Group on HIV and Sex Work has recommended that:

**“States should move away from criminalizing sex work or activities associated with it. Decriminalization of sex work should include removing criminal penalties for purchase and sale of sex, management of sex workers and brothels, and other activities related to sex work. To the degree that states retain non-criminal administrative law or regulations concerning sex work, these should be applied in ways that do not violate sex workers’ rights or dignity and that ensure their enjoyment of due process of law.”<sup>297</sup>**

Imprisoning sex workers does nothing to address the violence and other abuses that sex workers face and is likely to further marginalize them. In addition, having a criminal record may make it more difficult for sex workers to find alternative employment should they wish to do so.

## 8.4 TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Criminalizing sex work can also lead to violations of the right to be free from torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment). The prohibitions against torture and other ill-treatment is absolute and cannot be derogated from at any time.<sup>298</sup> States are obliged as a matter of international law to take measures to prevent torture and other ill-treatment, to investigate and prosecute perpetrators,<sup>299</sup> and to provide adequate reparations for victims.<sup>300</sup> States have an enhanced obligation to diligently prevent acts of torture and other ill-treatment, including during law enforcement operations.<sup>301</sup>

This is particularly relevant in relation to the treatment of transgender sex workers, who often report ill treatment at the hands of police. For example, placing transgender persons in solitary cells can amount to torture or ill treatment if used as a form of punishment, in pre-trial detention, for prolonged periods or indefinitely.<sup>302</sup>

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<sup>295</sup> See Human Rights Committee, *Van Alphen v The Netherlands* (UN Doc. CCPR/C/39/D/305/1988), 1990, para. 5.8; Human Rights Committee, *Comm. No. 560/1993, A v Australia* (UN Doc. CCPR/C/59/D/560/1993), 1997, para. 9.2.

<sup>296</sup> Human Rights Committee, *A. W. Mukong v Cameroon* (UN Doc. GAOR, A/49/40 (vol. II)), 1991, para. 9.8.

<sup>297</sup> UNAIDS, *UNAIDS guidance note on HIV and sex work, Annex 1*, 2011, p. 6. The report makes clear that its recommendation relates to buying as well as selling sex.

<sup>298</sup> See ICCPR, Article 4.2; American Convention on Human Rights, Article 27. The UN Committee Against Torture has said that the obligations contained in Articles 2 and 15 of the Convention against Torture may not be derogated from under any circumstances. See also Human Rights Committee, *General Comment 29 (States of Emergency (article 4))*, (UN Doc. CCPR/C/21/Rev.1/Add.11), 2001.

<sup>299</sup> See *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UN Doc. A/RES/57/199), 2002, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 4*; Human Rights Committee, *General Comment 20 (replaces General Comment 7 concerning prohibition of torture and cruel treatment or punishment (article 7))*, (UN Doc. HRI/GEN/1/Rev.1), 1992, paras 8 and 11. See also Human Rights Committee, *Rodriguez v Uruguay* (UN Doc CCPR/C/51/D/322/1988), 1994; Human Rights Committee, *Blanco v Nicaragua* (UN Doc CCPR/C/51/328/1988), 1994; and Human Rights Committee, *Kurbanov v Tajikistan*, *Comm. No. 1096/2002* (UN Doc CCPR/C/79/D/1096/2002), 2003.

<sup>300</sup> See Human Rights Committee, *General Comment 20*, 1992, paras. 14 and 15; UN General Assembly, *Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment* (UN Doc. A/55/290), 2000, para. 28.

<sup>301</sup> See *Cabrera Garcia and Montiel Flores v Mexico*, *Inter-American Court of Human Rights*, 2010, para. 135.

<sup>302</sup> UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 January 2016, A/HRC/31/57, paras 22 and 35.

Rape by state officials, including police officers, has been unequivocally defined as torture by international criminal tribunals,<sup>303</sup> as well as by UN and regional human rights bodies.<sup>304</sup> These bodies have recognized that rape by a state agent is an exertion and abuse of power that gives rise to pain and suffering, physical or mental, justifying characterization as an act of torture. Rape and other forms of sexual assault on women and girls have also been defined as acts of gender-based violence which constitute discrimination as prohibited by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which applies to Hong Kong.<sup>305</sup>

## 8.5 RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH

Criminalization of sex work also impacts on the right to the highest attainable standard of health on various grounds.<sup>306</sup> The right to health contains both freedoms and entitlements, including the “right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference,” as well as “equality of opportunity for people to enjoy the highest attainable level of health.”<sup>307</sup>

Like other rights, the right to health is subject to non-discrimination guarantees, including the right to non-discrimination on the basis of sex, property or other status. The CEDAW Committee has recommended that special attention be given to the health rights of women belonging to at-risk groups, including “women in prostitution”.<sup>308</sup>

Health services should be made available, accessible and acceptable to people engaged in sex work based on the principles of equality and non-discrimination and the right to the highest attainable standard of health.<sup>309</sup> Human rights bodies have called on states to ensure timely and affordable access to good quality health services that ensures informed consent, respects dignity, guarantees confidentiality and is sensitive to people’s particular needs and perspectives.<sup>310</sup>

Laws which preclude individuals’ access to needed health services, including those for all dimensions of sexual health, violate human rights and are commonly associated with preventable ill health.<sup>311</sup> The CESCR has confirmed that criminalizing consensual adult sexual activities violates states’ obligation to respect the right to sexual and reproductive health as it amounts to a legal barrier that impedes access to sexual and reproductive health services.<sup>312</sup> Therefore, 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

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<sup>303</sup> See for instance Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment of 2 September 1998, para. 687; Prosecutor v. Zejnir Delalic, Case No. IT-96-21, ICTY Trial Chamber II, Judgment of 16 November 1998, paras. 475-496, 943, 965; Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, ICTY Trial Chamber, Judgment of 10 December 1998, paras. 264-9.

<sup>304</sup> See for instance Interim Report of the Special Rapporteur on torture to the General Assembly, UN Doc A/55/290 (2000), para. 5; Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/7/3, 13 January 2008, paras. 34-6; Aydin v. Turkey, European Court of Human Rights, Reports 1997-VI (57/1996/676/866), Judgment of 25 September 1997, para. 86; Fernando and Raquel Mejia v. Peru, Inter-American Commission on Human Rights, Report No. 5/96, Case No. 10.970, 1 March 1996; para. B(3)(a); Almonacid Arellano et al. v. Chile, Preliminary objections, merits, reparations and costs, Inter-American Court of Human Rights, Judgment of 26 September 2006, Series C No. 154, para. 82.4.

<sup>305</sup> See for instance UN Committee on the Elimination of Discrimination Against Women, General Recommendation 19, Violence against women, UN Doc. HR/GEN/1/Rev.1 (1992), para. 23.

<sup>306</sup> CESCR, Article 12; Protocol of San Salvador, Article 10.

<sup>307</sup> CESCR, General Comment 14 (The right to the highest attainable standard of health (Article 12 of the Covenant)), (UN Doc. E/C.12/2000/4), 2000, para. 8.

<sup>308</sup> CEDAW, General Recommendation 24 (Article 12: Women and health), (UN Doc. A/54/38/Rev.1), 1999, para. 6.

<sup>309</sup> CESCR, Article 12.

<sup>310</sup> CEDAW, General Recommendation 24 (UN Doc. A/54/38/Rev.1), 1999; CRC, General Comment 4 (Adolescent health and development in the context of the Convention on the Rights of the Child), (UN Doc. CRC/GC/2003/4), 2003.

<sup>311</sup> See General Recommendation 24 (UN Doc. A/54/38/Rev.1), 1999; CESCR, General Comment 14 (UN Doc. E/C.12/2000/4), 2000; CRC, General Comment 15 (The rights of the child to the highest attainable standard of health), (UN Doc. CRC/GC/15), 2013.

<sup>312</sup> See CESCR, General Comment 22 (right to sexual and reproductive health (Article 12)), (UN Doc. E/C.12/GC/22), 2016, para. 57.

sexual and reproductive health facilities, services, goods and information”.<sup>313</sup> The CESCR has further called on state parties to ensure that people in the sex industry have access to the full range of sexual and reproductive health care services.<sup>314</sup>

The public health impact of criminalizing sex work is well documented. Public health research has found, for example, that criminal laws undermine sex workers’ ability to collaborate to identify potentially violent clients and their capacity to demand condom use with clients as a means to prevent unintended pregnancy, HIV and sexually transmitted infections.<sup>315</sup> The need for furtive, rushed transactions is repeatedly identified in the public health literature as a principal factor in sex workers’ reduced ability to negotiate safer sex.<sup>316</sup> Criminalization also diminishes sex workers’ ability to access health services.<sup>317</sup>

## IMPACT OF CRIMINALIZATION OF SEX WORK ON HIV PREVENTION

Criminalization of sex work has particularly dire consequences for HIV prevention because it prevents sex workers – and sometimes their clients – from taking the necessary precautions to lower the risk of transmission. It also deters sex workers from testing or seeking treatment for fear of arrest.<sup>318</sup> An examination of HIV among female sex workers published in July 2014 in *the Lancet* concluded that of all potential interventions identified, “[d]ecriminalization of sex work would have the greatest effect on the course of HIV epidemics across all settings, averting 33–46% of HIV infections in the next decade.”<sup>319</sup>

The importance of recognizing and promoting sex workers’ human rights is a basic building block of sound HIV prevention, reflected in the policy positions of the Global Fund to Fight AIDS, Tuberculosis and Malaria and the Joint United Nations Programme on HIV/AIDS (UNAIDS). The UNAIDS strategy for 2011–2015, “Getting to Zero”, commits UNAIDS and its co-sponsors to empowering sex workers, pushing for the repeal of punitive laws, policies, practices and countering stigma and discrimination that block effective HIV responses.<sup>320</sup>

The Independent Commission on AIDS in Asia has also called for the removal of legislative, policing and other barriers that prevent sex workers from organizing collectives and asked donors to remove conditionalities that prevent partners from working with sex worker organizations.<sup>321</sup> Similarly, the Independent Commission on AIDS in the Pacific has called on countries to “undertake progressive legislative reform to repeal legislation that criminalizes high-risk behaviour [identified in the report to include sex work].”<sup>322</sup> The Commission noted that “[c]hanging the laws need not imply approval of the

<sup>313</sup> CESCR, General Comment 22 (UN Doc. E/C.12/GC/22), 2016, para. 49(a).

<sup>314</sup> See CESCR, General Comment 22 (UN Doc. E/C.12/GC/22), 2016, para. 32.

<sup>315</sup> See UNAIDS, *UNAIDS guidance note on HIV and sex work*, Annex 2, 2011, p. 8; see also D. Kulick, “Sex in the new Europe: The criminalization of clients and Swedish fear of penetration”, *Anthropological Theory*, 2003, pp. 199–218; NSWP, *Research for sex work*, No. 12, 2010; K. Blankenship and S. Koester, “Criminal law, policing policy, and HIV risk in female street sex workers and injection drug users”, *Journal of Law, Medicine and Ethics*, 2002, p. 550 (finding that raids, cautions, arrests, and the use of anti-social behaviour orders (ASBOs) against sex workers in the United Kingdom shift sex workers toward unsafe areas and diminish sex workers’ ability to choose clients and negotiate condom use).

<sup>316</sup> See K. Shannon, et al, “Global epidemiology of HIV among female sex workers: Influence of structural determinants”, *The Lancet*, 2010, p. 10, available at: [dx.doi.org/10.1016/S0140-6736\(14\)60931-4](https://doi.org/10.1016/S0140-6736(14)60931-4). “Kenyan sex workers describe similar experiences to Vancouver—of how criminalisation compromises HIV prevention by rushed transactions due to fear of arrest, bribes, extortion, sexual coercion, and the forgoing of condoms, and the deterrence of sex workers from reporting violence to authorities.”

<sup>317</sup> See C.M. Lowndes, et al, “Injection drug use, commercial sex work, and the HIV/STI epidemic in the Russian Federation”, *Sexually Transmitted Diseases*, 2003, p. 47. See also UNDP, Global Commission, *HIV and the Law: Risks, Rights & Health*, 2012, available at: [www.hivlawcommission.org/index.php/report](http://www.hivlawcommission.org/index.php/report).

<sup>318</sup> See UNDP, Global Commission, *HIV and the Law: Risks, Rights & Health*, 2012, p. 38.

<sup>319</sup> K. Shannon, et al, “Global epidemiology of HIV among female sex workers: influence of structural determinants”, *The Lancet*, 2010, p. 1.

<sup>320</sup> See UNAIDS Strategy 2011–2015, “Getting to Zero”, 2010, p. 7. UNAIDS issued an updated Guidance Note on HIV and Sex Work in 2009 and some additional Annexes to the Guidance Note in 2012.

<sup>321</sup> See the Commission on AIDS in Asia, *Redefining AIDS in Asia: Crafting an effective response*, 2008, para. 5.3.

<sup>322</sup> See the Commission on AIDS in the Pacific, *Turning the tide: An open strategy for a response to AIDS in the Pacific*, 2008, p. 6.

behaviour but would signal a greater concern for people.<sup>323</sup> In 2012, the Global Commission on HIV and the Law<sup>324</sup> recommended the decriminalization of sex work and called for laws and policies to ensure safe working conditions for sex workers.<sup>325</sup>

International human rights standards make it clear that the grounds set out on which discrimination is prohibited are non-exhaustive and that equal treatment is essential for specific population groups (regardless of race, colour, sex, national or social origin, or other status) as part of their right to access sexual and reproductive health services without discrimination.<sup>326</sup>

International human rights bodies and experts such as the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health have called on states to ensure (at a minimum) the rights of all sex workers to access sexual health services; that they are free from violence or discrimination, whether by state agents or private persons; and that they enjoy equal protection of the law.<sup>327</sup>

Human rights standards also call for quality health care information to be available, accessible and acceptable, including for transgender and gender non-confirming people. They also require that all those seeking services should be treated with respect and dignity and without discrimination.<sup>328</sup> Some regional standards specifically call for the consideration of the specific needs of transgender people in the development of national health plans, including suicide prevention measures, health surveys, medical curriculums, training courses and materials, and when monitoring and evaluating the quality of health services.<sup>329</sup>

Particular policing practices, such as the use of condoms as evidence of sex work related offences actively discourages the use of condoms and access to health care, hampering HIV reduction and awareness efforts.

## 8.6 RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK

States have an obligation to ensure that everyone is able to access just and favourable conditions of work and is protected against exploitation, including people who are self-employed or who make their living in

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<sup>323</sup> See the Commission on AIDS in the Pacific, *Turning the tide: An open strategy for a response to AIDS in the Pacific*, 2008, p. 6.

<sup>324</sup> The Global Commission on HIV and the Law was an independent expert body created under UN auspices to develop actionable, evidence-informed and human rights-based recommendations for effective HIV responses that promote and protect the human rights of people living with and most vulnerable to HIV.

<sup>325</sup> See UNDP, Global Commission, *HIV and the Law: Risks, Rights & Health*, 2012, p. 99.

<sup>326</sup> See CRC, General Comment 15 (the rights of the child to the highest attainable standard of health), (UN Doc. CRC/C/GC/15), 2013; CESCR, General Comment 20 (Non-discrimination in economic, social and cultural rights (Article 2, para. 2)), (UN Doc. E/C.12/GC/20), 2009, para. 108; Human Rights Committee, *Toonen v Australia* (UN Doc. CCPR/C/50/D/488/1992), 1994.

<sup>327</sup> Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover (UN Doc. A/HRC/14/20), 2010; CEDAW, General Recommendation 24 (Article 12: Women and health), (UN Doc. A/54/38/Rev.1), Chapter I, 1999; and CEDAW, General Recommendation 19 (Violence against women), (UN Doc. A/47/38), 1992.

<sup>328</sup> See CESCR, General Comment 14 (the right to the highest attainable standard of health (Article 12 of the Covenant)), (UN Doc. E/C.12/2000/4), 2000; CRC, General Comment 15 (the rights of the child to the highest attainable standard of health), (UN Doc. CRC/C/GC/15), 2013; CESCR, General Comment 20 (Non-discrimination in economic, social and cultural rights (Article 2, para. 2, of the ICESCR)), (UN Doc. E/C.12/GC/20), 2009; CEDAW, General Recommendation 28 (Core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women), (UN Doc. CEDAW/C/20107477GC.2), 2010.

<sup>329</sup> See Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe* (2nd edition), 2011.

informal settings.<sup>330</sup> There have been some moves at all levels – international<sup>331</sup>, regional<sup>332</sup> and national<sup>333</sup> – to recognize that sex workers must be protected with relevant labour and employment guarantees even in the absence of explicit recognition by the state that they are undertaking work (even in some cases where sex work remains criminalized). Notably, the ILO decided in 2010, that its recommendation on HIV and the World of Work (Recommendation 200) should apply to all workers, both formal and informal and that this should include sex workers.<sup>334</sup>

## 8.7 RIGHT TO PRIVACY

Laws that criminalize consensual adult sex in private violate the right to privacy.<sup>335</sup> Everyone is entitled to respect for their privacy and to enjoy this right without fear or discrimination. The right to privacy means that individuals may not be subject to arbitrary or unlawful interference with their privacy and should enjoy protection of the law in this respect.

The rights to privacy and bodily integrity have been applied to sexuality and individuals' autonomous decisions with regard to their bodies.<sup>336</sup> For example, in *Toonen v Australia*, the Human Rights Committee confirmed that laws that interfered with adult consensual sex in private breached the ICCPR, in particular Article 17 (right to privacy). While the Committee considered a criminal "sodomy" law in this communication, it did not limit its reasoning to this specific type of criminal provision. The Committee's analysis and reasoning can be applicable to all laws prohibiting consensual adult sex. To justify such laws which infringe on individuals' human rights, governments must demonstrate that the law has a legitimate purpose, is appropriate to meet that purpose, provided by law, necessary for and proportionate to the legitimate aim sought and not discriminatory.<sup>337</sup> Penalizing sex workers for consensual sexual activity directly violates the rights to privacy and to personal autonomy.

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<sup>330</sup> ICESCR, Article 7; see also Protocol of San Salvador, Articles 6 and 7 (Article 7, in particular, highlights the need for fair, equitable and satisfactory conditions in one's exercise of work); Inter-American Charter of Social Guarantees, IX International Conference of American, 1948 (sets forth the minimum rights workers must enjoy in the American states, including fair working conditions, without prejudice to the fact that the laws of each state may extend such rights or recognize others that are more favourable).

<sup>331</sup> See ILO, Report of the Committee on HIV/AIDS, HIV and AIDS and the world of work (Provisional Record 13 (Rev.), 2010, paras. 192-210.

<sup>332</sup> In 2001, the European Court of Justice ruled that a group of Polish and Czech women had the right to engage in sex work in the Netherlands under treaties between the European Union and its applicant countries. The judges said that 'prostitutes' could work in any European Union country where selling sex was tolerated as long as they were genuinely self-employed, had the means to set up their business and had a reasonable chance of success. See *Jany and others v Staatssecretaris van Justitie*, Case C-268/99, European Court of Justice, 2001.

<sup>333</sup> See *Kylie v Commission for Conciliation, Mediation and Arbitration & Ors*, C52/07, C52/07, ZALC 86, 2008 (in which the South African Labour Appeals Court ruled that a sex worker was entitled to protection against unfair dismissal even though sex work remained criminalized). See also the minority judgment of Sachs and O'Regan JJ in *S v Jordan and others*, 2002 (6) SA 642 (CC), para 74.

<sup>334</sup> See ILO, Report of the Committee on HIV/AIDS, 'HIV/AIDS and the world of work' (Provisional Record 13 (Rev.), 2010, paras. 192-210.

<sup>335</sup> See UDHR, Article 12, ICCPR, Article 17; Human Rights Committee, *Toonen v Australia* (UN Doc. CCPR/C/50/D/488/1992), 1994; American Convention, Article 11; see also American Declaration of Human Rights, Article V.

<sup>336</sup> ICCPR, Article 17(1)(2); CRC, Article 16(1)(2); Convention on the Rights of Persons with Disabilities, Article 22(1); Human Rights Committee, *K.L. v Peru*, (UN Doc. CCPR/C/85/D/1153/2003), 2005, paras. 6.4 and 6.5; CEDAW, General Recommendation 24 (Article 12: Women and health), (UN Doc. A/54/38/Rev.1), 1999.

<sup>337</sup> See ICCPR, Articles 18, 19, 21 and 22; ICESCR, Article 4; Protocol of San Salvador, Article 5. The content of these requirements has been developed extensively by independent experts. See, for example, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (UN Doc. E/CN.4/1985/4), annex, 1985; Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (UN Doc. E/CN.4/1987/17), annex, 1987. See also UN Human Rights Council, Report of the Special Rapporteur on extreme poverty and human rights, (UN Doc. A/66/265), 2011, para. 11.

## 8.8 RIGHT TO FREEDOM OF EXPRESSION

The right to freedom of expression includes the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print”.<sup>338</sup> This may also include commercial advertising.<sup>339</sup> The Human Rights Committee has stated that: “the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression from the scope of protected freedoms.”<sup>340</sup>

Sex workers have the same rights to freedom of expression as others. This includes the right to communicate, dress or otherwise present themselves in a particular way without repercussions, such as being profiled or targeted by the authorities in brothel raids or crackdowns on street-based sex work.

Laws against communication related to sex work, including prohibitions on solicitation that do not consider the impact on the health and safety and other rights of sex workers, may violate the right to freedom of expression, as well as the right to health and the right to liberty and security of the person. International human rights law allows only for limited restrictions on the right to freedom of expression. These restrictions must be set out in law, may only be imposed for one of the purposes permitted under international law,<sup>341</sup> and must conform to strict tests of necessity and proportionality with regard to the intended purpose.<sup>342</sup> To that end, the legitimate aim of such laws must be weighed against the impact on the most marginalized sex workers (especially street-based sex workers) and the risks they face, and not require them to work in ways which compromise their health and safety.

In addressing permissible restrictions on the right to freedom of expression, the UN Human Rights Committee has confirmed that such restrictions cannot be overbroad. Specifically, “they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; [and] they must be proportionate to the interest to be protected”.<sup>343</sup> Along those lines, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has affirmed that any limitation must not be more restrictive than required to achieve their purpose, must be periodically reviewed for its continued relevance and “must be consistent with other rights recognized in the [ICCPR] and in other international human rights instruments, as well as with the fundamental principles of universality, interdependence, equality and non-discrimination as to race, colour, sex, language, religion, political or other belief, national or social origin, property, birth or any other status.”<sup>344</sup>

## 8.9 RIGHT TO EQUALITY AND THE PRINCIPLE OF NON-DISCRIMINATION

While laws can inform social attitudes that lead to discrimination against sex workers, discrimination and inequality can occur in many different contexts, regardless of whether or not sex work is criminalized. States

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<sup>338</sup> ICCPR, Article 19; American Convention, Article 13.

<sup>339</sup> Human Rights Committee, General Comment 34 (Article 19: Freedoms of opinion and expression), (UN Doc. CCPR/C/GC/34), 2011, para. 11.

<sup>340</sup> Human Rights Committee, Ballantyne, Davidson and McIntyre v Canada (UN Docs. CCPR/C/47/D/359/1989 and 385/1989/Rev.1), 1990, para. 11.3.

<sup>341</sup> The right to freedom of expression can only be restricted if this is demonstrably necessary and proportionate for any of the following reasons: to protect the rights or reputations of others, national security or public order, or public health or morals.

<sup>342</sup> See Human Rights Committee, General Comment 34 (Article 19: freedoms of opinion and expression), UN Doc. CCPR/C/GC/34, 2011, paras. 21-36.

<sup>343</sup> See Human Rights Committee, General Comment 34 (Article 19: freedoms of opinion and expression), UN Doc. CCPR/C/GC/34, 2011, para. 34 (citing Human Rights Committee, General Comment 27 (freedom of movement (Article 12)), UN Doc. CCPR/C/21/Rev.1/Add.9, 1999, para. 14).

<sup>344</sup> Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (UN Doc. A/HRC/14/23), 2010, para. 79.

must take steps to address the discrimination faced by sex workers, including where this is based on structural gender inequality and other grounds.

The principle of non-discrimination is fundamental to the realization of all human rights. All of the core international human rights treaties reiterate this general principle, including the Universal Declaration of Human Rights.<sup>345</sup> Under international law, states have an obligation to refrain from having laws and to prohibit policies and practices that are deliberately discriminatory, as well as those whose impact could be discriminatory with regard to certain groups or categories of individuals, even when it is not possible to prove a discriminatory intention.

Sex workers are often comprised of the most marginalized people in society and may experience inequality and discrimination on the basis of one or more grounds including because of their race, sex, disability, migrant or other status. This discrimination can have a serious and detrimental impact, leading people into affecting them during and after they leave sex work. It acts as a significant barrier to the full realisation of other human rights for sex workers. States must actively address this inequality and discrimination.

## 8.10 EQUAL PROTECTION UNDER THE LAW

States have an obligation to ensure that people are treated equally under the law. Article 7 of the UDHR, for example, states: “All persons are equal before the law and are entitled without discrimination to the equal protection of the law.”<sup>346</sup>

At present, the criminal framework in Hong Kong has a disproportionate impact on those who are migrants or from mainland China. In fact, immigration laws and policies may be the primary means by which sex workers are criminalized. Police require people reporting crimes to produce identification, meaning that they can prosecute for breach of immigration offences, rather than investigating the crime reported. As a result, sex workers who are migrants and from mainland China are less able to seek equal protection under the law, particularly when crimes are committed against them.

In addition, Hong Kong’s legal framework which permits sex workers to work from apartments in isolation but prohibits brothels and street based sex work criminalizes the most marginalized sex workers, including those who may face discrimination on multiple grounds or be unable to work within the narrow legal framework for sex workers.

The right of migrants to equal protection under the law is also violated when migrant sex workers are targeted by laws and practices. The Migrant Workers’ Convention sets out a wide range of human rights to which all migrant workers, regardless of their immigration status, are entitled.<sup>347</sup> The Convention calls upon state parties to protect the fundamental rights of all migrant workers and to ensure that they and their families are accorded the same treatment as nationals in relation to their conditions of employment.<sup>348</sup> Similarly, ILO Convention No. 97 (migration and employment convention, revised) requires states to put migrants who are lawfully residing within their territory on the same footing as their own nationals in applying labour-related laws and regulations, without discrimination on the grounds of nationality, race, religion or sex.<sup>349</sup>

## 8.11 THE RIGHTS OF CHILDREN

International law prohibits the involvement of children—that is, all those who are under 18—in commercial sex acts. This prohibition is spelled out through the Convention on the Rights of the Child, its Optional Protocol on the sale of children, child prostitution, and child pornography, and in the ILO Worst Forms of Child Labor Convention. Under these treaties, states are obliged to protect children from economic

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<sup>345</sup> Article 2 of the Universal Declaration of Human Rights provides a non-exhaustive list of prohibited grounds for discrimination, including race or colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>346</sup> ICCPR, Article 26.

<sup>347</sup> See Migrant Workers’ Convention, Articles 8-24.

<sup>348</sup> See Migrant Workers’ Convention, Articles 25, 26, 27, 28, 30.

<sup>349</sup> See ILO Convention 97 (Migration for Employment Convention (Revised)), 1949, Article 6.



exploitation, sexual exploitation, and any work that is likely to be hazardous or harmful to a child's health or physical, mental, or social development.<sup>350</sup> The "use, procuring, or offering" of a child for prostitution or pornography is considered a "worst form of child labor," for which states shall design and implement action programs to eliminate as a priority.<sup>351</sup> States are also required to criminalize "offering, obtaining, procuring or providing a child" for use "in sexual activities for remuneration or any other form of consideration."<sup>352</sup> Importantly, states must "*take all feasible measures*" to ensure that all children who have been involved in sexual activities for remuneration or any other form of consideration receive "all appropriate assistance including their full social reintegration and their full physical and psychological recovery."<sup>353</sup> Such assistance should include the "necessary and appropriate direct assistance for the removal of children" from such work and ensuring "access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour."<sup>354</sup>

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<sup>350</sup> Convention on the Rights of the Child, arts. 32(1), 34.

<sup>351</sup> ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention), adopted 17 June 1999, 2133 UNTS 161 (entered into force 19 November 2000), arts. 3(b), 6(1). China ratified the Worst Forms of Child Labour Convention on 8 August 2002

<sup>352</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002), arts. 2(b), 3(1)(b). China ratified the optional protocol on 3 December 2002 but notified the UN Secretary-General that "the application of the Protocol to the Hong Kong Special Administrative Region of the People's Republic of China requires prior enactment of domestic legislation by the Hong Kong Special Administrative Region, and the Protocol shall not apply to the Hong Kong Special Administrative Region of the People's Republic of China until the Government of China notifies otherwise."

<sup>353</sup> *Ibid.*, art. 9(3).

<sup>354</sup> Worst Forms of Child Labour Convention, arts. 7(2)(b) and (c).

# 9. CONCLUSION AND RECOMMENDATIONS

Police practices such as coercion, entrapment, and the failure to properly inform sex workers of their rights undermine public confidence in the police force and discourage sex workers from reporting crimes. While there have been some initiatives to shift policing focus and improving police relationships with sex workers and sex worker organizations, this is unlikely to improve significantly until the laws prohibiting aspects of sex work are repealed. Laws related to sex work should target the exploitation and abuse that sex workers face rather than criminalizing aspects of sex work.

Sex workers who are migrants or from mainland China are particularly vulnerable to abuses as they would always be in breach of their conditions of stay, and are indirectly targeted through immigration laws. The authorities must address the institutional discrimination which makes migrant sex workers particularly vulnerable to human rights abuses.

Authorities should work with transgender individuals and organizations to develop and implement policies to protect the rights and respect the human dignity of transgender persons, including those who are involved in sex work.

Sex workers who choose to leave sex work should receive assistance by the authorities to do so. As it currently stands, the legal framework in Hong Kong fails to protect the rights of sex workers and leads to sex workers taking unnecessary risks, such as working covertly or on their own, in order to work within the narrow confines of the law.

Amnesty International calls on the government of Hong Kong to take the following steps:

## **DECriminalIZATION OF SEX WORK AND OTHER LEGAL REFORM**

- The Legislative Council should repeal criminal laws which are used to prosecute and punish sex workers, or criminalize related aspects of sex work, in particular those sections of the Crime Ordinance which prohibit:
  - Loitering for the purposes of solicitation (section 147(1)(d) of the Crimes Ordinance).
  - Publicly displaying signs advertising prostitution (section 147(A)).
  - Running a “vice establishment” of two or more people (section 139).
  - Letting premises for use as a “vice establishment” (section 143).
  - Permitting premises to be used as a vice establishment or for “habitual prostitution” (sections 144 and 145)
  - Living off the earnings of the “prostitution” of others (section 137).
- The authorities should authorize the immediate and unconditional release of, and Hong Kong Correctional Services should release, immediately and unconditionally, all who have been detained or

convicted solely for consensual sex work or same-sex activity, as opposed to those convicted of offences involving exploitation or abuse, and clear their criminal record for any such charges.

- The Legislative Council should repeal all laws that criminalize consensual same-sex sexual activity between adults, whether or not still applied in practice. In addition, because criminalization is an inappropriate response to consensual sexual activity between children, the Legislative Council should repeal legislation that criminalizes such sexual activity between children.
- The Legislative Council should adopt relevant laws to prohibit discrimination on the basis of sexual orientation and gender identity.
- The Hong Kong Immigration Department should ensure that immigration enforcement does not amount to the de facto criminalization of sex work.
- The Legislative Council should amend relevant laws and other appropriate authorities should develop policies to ensure that police distinguish between sex workers and trafficking victims.
- The Legislative Council and other appropriate authorities should ensure that sex workers enjoy equal protection under the law and are not excluded from the application of labour, health and safety and other laws.
- The Legislative Council and other appropriate authorities should ensure that everyone has equal access to health, housing, education, social security, child or spousal maintenance and any other government programmes, including sex workers, irrespective of whether they have engaged in sex work (past or present) or because of their sexual orientation or gender identity.

#### **OTHER LEGAL AND POLICY REFORM**

- The Hong Kong Police Force should ensure that coercive police conduct, rape, sexual abuse, extortion, as well as receiving sexual favours or any other inappropriate benefit from sex workers, including as a part of undercover operations, be expressly prohibited in all circumstances and be independently investigated by the authorities. Officers involved in unlawful conduct should face criminal charges, where appropriate, in addition to disciplinary action.
- The Hong Kong Police Force should take steps to ensure that officers do not engage in entrapment, and Hong Kong's courts should exclude evidence obtained on the basis of state-created entrapment, consistent with the principles of the right to a fair trial.
- The Hong Kong Police Force should ensure that condoms are not used as evidence of an offence related to sex work.
- The Hong Kong Police Force, Hong Kong Immigration Department, and Hong Kong Correctional Services should develop and implement gender and human rights training for law enforcement officials to ensure that people are not discriminated against or ill-treated in custody because of their sexual orientation or gender identity – including procedures to ensure that transgender have prompt access to hormone therapy as required, that they are detained in a facility consistent with their gender identity and are not searched by male officers if they request a search by a female officer.
- The Hong Kong Police Force should ensure that all allegations and reports of human rights violations against sex workers, or as a result of a person's sexual orientation, gender identity or migrant status, are promptly and impartially investigated by competent authorities, and that perpetrators are held accountable and brought to justice.
- The Hong Kong Police Force should introduce ongoing training, developed in consultation with nongovernmental organizations that work with sex workers, for all levels of police, prosecutors, magistrates, judges and court officials on human rights obligations related to sex work, sexual orientation and gender identity, and on effective, impartial investigation and prosecution of violent attacks without discrimination.

## **SUPPORT FOR SEX WORKERS**

- The Hong Kong government should develop and implement support programmes, in consultation with sex workers and respective organizations, including through social welfare, education and training to support sex workers and meet their specific needs.
- Support local human rights organizations, sex worker organizations and other institutions that are assisting and working with sex workers on a voluntary, participatory basis.

## **HUMAN RIGHTS TREATIES**

- The Hong Kong government should pursue with the Central Government in Beijing the extension of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol, ratified by the People's Republic of China in 2010) to the Hong Kong Special Administrative Region, and subsequently the Hong Kong authorities should incorporate its provisions into Hong Kong law and implement it in policy and practice.
- The Hong Kong government should pursue with the Central Government in Beijing the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Upon ratification, Hong Kong authorities should incorporate these treaties into Hong Kong law and implement them in policy and practice.

## **INTERNATIONAL COOPERATION**

- States that offer international training opportunities to or otherwise collaborate with Hong Kong police, immigration, correctional or other law enforcement officials should ensure that international or bilateral training programmes for the law and justice sector include human rights training on the appropriate use of force, arbitrary arrest and detention, torture and other ill-treatment (including the physical and sexual abuse of persons in custody), and non-discrimination on the basis of migrant status, gender identity and sexual orientation, in line with international law and standards.

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# HARMFULLY ISOLATED

## CRIMINALIZING SEX WORK IN HONG KONG

Police in Hong Kong engage in questionable tactics to arrest sex workers, including the receipt of sexual services as an investigatory technique; entrapment; and obtaining confessions through coercion or deception. Sex workers in Hong Kong say that police, or persons claiming to be police, extort them by demanding free sexual services. These policing tactics create antagonistic relationships between law enforcement officials and sex workers, making it more difficult for sex workers to report crimes committed against them.

Transgender sex workers report degrading and humiliating treatment in custody. Some report being segregated from the general prison population or sent to a psychiatric detention facility.

Laws in Hong Kong force sex workers to work in isolation, prohibiting them from working with others for their own safety. In addition, immigration laws prohibit migrants and people from mainland China engaging in sex work, making them vulnerable to arrest and deportation.

In this report, Amnesty International brings together testimony from sex workers and public officials, and provides recommendations to end violence and discrimination against sex workers and transgender people.

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