## **For the attention of: Committee on Migrant Workers**

## **Submission: Draft General comment No. 5 (2020) on migrants’ rights to liberty and freedom from arbitrary detention**

**Date: 29th October 2020**

NSWP welcomes the opportunity to make a submission to the Committee on Migrant Workers that aims to provide guidance to States on fulfilling their obligations under the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in relation to the right to liberty and protection against arbitrary detention of migrant workers and members of their families. We are committed to supporting efforts to ensure full compliance with states’ obligations to respect, protect and fulfil the human rights of all migrants, including sex workers, in the context of global migration.

NSWP is a global network of sex worker-led organisations, with 309 members in 95 countries, with the overwhelming majority of members being in the Global South. NSWP exists to uphold the voice of sex workers globally and connect regional networks advocating for the rights of female, male and transgender sex workers. It advocates for rights-based health and social services, freedom from abuse and discrimination, and for the self-organisation and self-determination of sex workers.

**Introduction**

A rapid growth in global migration, gender inequality, economic insecurity, neoliberalism, the impact of climate change, increased conflict and the resultant displacement of millions of people globally, all contribute to the multiple forms of discrimination and violence against migrants. Despite the global trend of increasing mobility, migrant sex workers are painted as victims or criminals in discourses that conflate sex work with human trafficking. Their human rights are often overlooked in favour of driving broader political agendas to restrict migration and criminalise sex work. A lack of safe migration routes, as well as a lack of robust employment legislation that protects migrant workers, allows discrimination, abuses and violations at all stages of migration.

As a result, migrant sex workers are rarely viewed as part of global labour migration flows. However, under the Migrant Workers Convention[[1]](#footnote-1), sex workers who move across borders are indeed labour migrants, often driven to migrate in order to escape punitive laws and economic inequalities. At the same time, the limited civil, political, economic, social, and cultural rights that migrants have, guarantees the marginalisation of migrant sex workers, as their labour is unrecognised, if not directly criminalised, in host countries. This not only harms migrant sex workers by violating their human rights and placing them at greater risk of exploitation, but also undermines their potential to participate in and enrich local and global economies. Migrants are often detained as a routine procedure and without adequate due process safeguards.[[2]](#footnote-2) As a result, migrant sex workers often rely on third parties to cross the border and navigate discriminatory laws that explicitly prohibit the participation of migrants in the sex industry. This renders them extremely vulnerable to threat of arbitrary detention and deportation.

This submission outlines the human rights barriers that migrant sex workers encounter as a result of criminalisation of their labour and discriminatory immigration laws. It highlights their lack of access to justice, as well as the increased vulnerability and exclusion they face due to legal restrictions on cross-border movement, employment in the sex industry and on sex work itself. This submission also places migrant sex work in the context of international labour migration, as opposed to the paradigm of human trafficking. Further, this submission urges the Committee on Migrant Workers to recognise that any deprivation of migrant sex workers’ liberty resulting from discriminatory laws, regulation and policies or their discriminatory application is by definition arbitrary and breaches the right of equal protection before the law.

**Migrant Sex Workers in the Context of International Human Rights Law**

Under Article 2 of the Migrant Workers Convention[[3]](#footnote-3), a migrant worker is defined as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.” This definition includes sex workers, even while sex work is not explicitly mentioned. Article 1 of the Migrant Workers Convention specifically references the principle of non-discrimination with respect to the human rights of migrant workers and their families, including the right to liberty and security of person, and the right to be free from arbitrary interference. Crucially, Article 9 reaffirms that migrant workers have the right to life and the protection of the law.

The universal applicability of human rights, without discrimination, is enshrined in every major human rights instrument, including the ICCPR[[4]](#footnote-4) and ICESCR[[5]](#footnote-5), regardless of nationality. The UN Human Rights Committee, commenting on the ICCPR, states “each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”[[6]](#footnote-6) Furthermore, the Universal Declaration of Human Rights states that “[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”[[7]](#footnote-7) These provisions are expanded and made legally binding in the ICESCR, which most countries have ratified. The ICESCR requires states to “recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right.” It further obliges countries to ensure “safe and healthy working conditions” and a fair wage.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[[8]](#footnote-8) also reaffirms the right to work “as an inalienable right,” and commits its signatories to working towards the realisation of equal workers’ rights for men and women, including choice of employment and access to work-related benefits, occupational health and safety provisions, and the support required to fulfil family obligations, work responsibilities and to participate in public life. In a number of their general recommendations and papers, CEDAW also requires states to combat gender-based discrimination by addressing laws, policies, and institutions that discriminate against women. To this end, the CEDAW Committee has recognised women migrants and women sex workers as groups of women who are disproportionately affected by gender-based violence, discrimination, and marginalisation, and has reiterated States’ obligations to protect the human rights of these groups. Notably, the Committee has drawn attention to discrimination in access to health services, condemned the unintended consequences of efforts to suppress trafficking, condemned violence by state and non-state actors, and reinforced the importance of access to justice for women sex workers. Of vital importance to migrant sex workers, the Committee has also called on states to repeal direct and indirect discrimination against women in visa schemes, ensure occupations dominated by migrant women workers are granted labour protections, and ensure that women migrant workers have the ability to access remedies when their rights are violated. As such, migrant sex workers are recognised as rights bearers under international human rights law and are entitled to the fulfilment of their rights without discrimination.

**Migrant Sex Workers and Immigration Laws**

Migrant sex workers often rely on third parties to cross the border and navigate discriminatory immigration laws that explicitly prohibit the participation of migrant workers in the sex industry. Several countries explicitly prohibit the participation of migrants in their domestic sex industry, that otherwise might be open to citizens. For example, in New Zealand, the only country in the world where sex work has been decriminalised, any person coming to the country or residing there on a temporary visa may have their visa cancelled and face deportation if they engage in sex work or operate a brothel. This affects all temporary visas, including visitor, work, and student visas. In the Netherlands, non-EU nationals are not permitted to work in the sex industry, and in Finland, non-EU nationals can be removed from, and denied re-entry into the country if they are suspected of selling sexual services.[[9]](#footnote-9) In Singapore, bans against migrants include people living with HIV, sex workers and persons benefitting from their earnings, and persons attempting to bring sex workers into the country. An unofficial licensing scheme allows female sex workers from China, Vietnam, Thailand, and Malaysia to work in brothels for a limited time, after which they are banned from re-entry for a period between three years and a lifetime. Additionally, men and transgender women who are not legally recognised as female are prohibited from engaging in sex work and are deported if discovered. This is also the case for sex workers who test positive for an STI twice. In the case of HIV, deportation comes with a lifelong ban on re-entry. This is enforced using mandatory sexual health checks. Such laws ensure that migrant sex workers are still effectively criminalised, even in countries where sex work is not.[[10]](#footnote-10)

Sex workers around the world are trapped in informal economies due to the lack of recognition of sex work as work, and for migrants this means that their very right to move, work, and reside in a country is at stake. For example, in Latin America, where migration can be facilitated by state agreements such as those set by Mercosur countries (Brazil, Argentina, Uruguay, Paraguay, and Venezuela), the lack of recognition of sex work as work means that migrant sex workers have no labour rights, protections, benefits, or the ability to pay taxes. Further, the non-recognition of sex work as work often prevents them from regularising their stay in a country, even when immigration law does not prohibit migrants from engaging in sex work. For example, in Nicaragua, sex workers from surrounding countries cannot stay in the country for longer than three months, and are often forced to bribe the police in order work in the country for longer periods. In Costa Rica, sex workers have to pay higher bribes due to stricter immigration laws. Not only does this situation prevent them from contributing locally, but it also deprives them of the financial and employment grounds typically needed in most visa or work permit applications around the world. Considering that inequality and discrimination are key drivers of labour migration for sex workers, it is of particular concern that this framework locks them into the margins permanently.

Current immigration laws and policies, meant to prevent exploitation and forced labour, have not been effective in protecting migrant sex workers’ rights and often exacerbated their vulnerability to abuse and harassment. These policies are discriminatory towards migrant sex workers and take away their ability to negotiate for better working conditions and create a safe and enabling environment for their community. They compromise migrant sex workers’ safety and infringe upon their human rights and dignity and further marginalise them by preventing them from reporting experiences of violence or harassment due to fear of repercussions from law enforcement, including detention or deportation.

## **Migrant Sex Workers and rights to liberty and freedom from arbitrary detention**

Whether a country criminalises sex work, bans migrants from entering the sex industry, or does not recognise sex work as work, the ultimate result is that migrant sex workers are criminalised for their mobility and labour. This has disastrous consequences for their human rights. When a host country does not recognise migrant sex workers as rights-bearers, they do not have the protection of the law. Migrant sex workers remain vulnerable to harassment, abuse, and violence at the hands of police, third parties, and people posing as clients precisely because they are not recognised as rights-bearers, and do not have legal recourse. Migrant sex workers often experience human rights violations while under the care of investigators, including arbitrary arrests and detainment, inhuman and degrading treatment, false allegations, and false evidence being used to keep them detained. Legal representation and support is sometimes withheld from migrant sex workers, and they can be detained for long periods of time (up to three months in some cases), which keeps them isolated from their friends and families, who are generally perceived as involved in trafficking.

Globally, NSWP members have reported that migrant sex workers face higher levels of vulnerability to exploitation and violence as a result of this, especially from the authorities.[[11]](#footnote-11) They are often beaten, raped, and robbed by the police, and in some cases can only receive ‘protection’ in exchange for sexual services. The police also frequently refuse to file their complaints simply because they are sex workers. For example, in Togo, migrant sex workers even pay local gangs for protection, because they cannot rely on the authorities. In Suriname, migrant sex workers reported that transgender women were forced to strip naked and were subjected to humiliation and torture at the hands of the police. Several African countries reported that male migrant sex workers were mocked and beaten by police. Migrant sex workers in Nicaragua stated that police violence was their greatest concern, and in Canada, migrant sex workers reported needing protection *from* law enforcement. In Singapore, migrant sex workers – especially undocumented sex workers, transgender sex workers, and male sex workers – rarely report violence, non-payment, or theft because of fear of arrest and deportation. Similarly, the illegality of migrant sex work in New Zealand results in under-reporting or refusal to report crimes.

Further, the conflation of human trafficking with sex work compounds these issues, as it results in the disproportionate policing, raids and detention of migrant sex workers. Anti-trafficking policies developed from the conflation of sex work and trafficking are informed by racism, xenophobia and transphobia. The legal ambiguity around sex work often provides fertile ground for law enforcement officials to misuse and abuse their power by sexually exploiting and extorting money from migrant sex workers. In Canada, Butterfly – Asian and Migrant Sex Workers Network documented a case where police identified themselves to a migrant sex worker as a team that helps victims. The sex worker did not realise the individuals were police officers and provided a statement that was later used to charge her for working illegally.[[12]](#footnote-12) Many sex workers decide to pay fines or bribes rather than risk being detained and taken to court, even in cases of arbitrary arrest. Further, anti-trafficking laws and practices that seek to ‘rescue’ or rehabilitate sex workers can also be a barrier to justice, especially for migrant sex workers. In Latin America and Canada, sex workers are arrested under trafficking laws when they assist their peers in finding housing or work. Globally, third party laws are used to evict sex workers and prevent them from working together, thereby disrupting sex worker-organising, which is often the only support migrant sex workers have.

For migrant sex workers, accessing healthcare services can also pose a threat to their safety. The criminalisation of HIV transmission poses severe risks for migrant sex workers as it discourages them from getting tested and seeking health services. Additionally, police often use condoms as evidence, which severely hinders the safety and autonomy of migrant sex workers. For example, in Canada, the human trafficking narrative has become so pervasive in certain healthcare circles that migrant sex workers are often assumed to be trafficked and are referred instead to the police or border services. In Norway, while migrants are entitled to emergency care, a sex worker reporting rape may be immediately deported after receiving treatment. As a result, systems claiming to protect victims of crime ultimately serve to punish them.

**Migrant Sex Workers and the COVID-19 pandemic**

The COVID-19 pandemic has exposed existing inequalities that disproportionately affect people living in criminalised, marginalised and financially precarious situations, often outside social protection mechanisms.[[13]](#footnote-13) Sex workers have been severely impacted by the economic fallout following the onset of the pandemic as well as their governments’ emergency responses that, in many countries, have been harsh and punitive. Migrant sex workers, including those who are undocumented, are unable to apply for national social protections schemes and emergency funds, as they might become vulnerable to arrest or harassment. With sex work criminalised in almost every country, sex workers are also more vulnerable to punitive measures linked to the enforcement of COVID-19 regulations. Increased policing has exposed sex workers to more harassment and violence including home raids, evictions, compulsory COVID-19 testing, arbitrary arrest, prolonged detention and threat of deportation of migrant sex workers.

**Conclusion**

Migrant sex workers experience disproportionate barriers to accessing justice including the risk of arbitrary arrest, prolonged detention and deportation, as well as gender and racial profiling by the police. The convergence of restrictive migration legislation and laws criminalising sex work ensures that migrant sex workers are marginalised and targeted by the state, while the structural factors creating their vulnerability remain hidden. Migrant sex workers face heightened levels of risk across all of the vulnerabilities that sex workers typically encounter, while simultaneously having no access to justice because the authorities that should protect them are those that threaten to arrest, detain and deport them.

Regardless of the national context, migrant sex workers around the world share the same legal concerns: support in regularising their immigration status and protecting themselves against law enforcement. Whether they are documented or undocumented migrants, sex workers are entitled to legal assistance in dealing with police harassment, surveillance, investigation, arrest, detention, and deportation. Anti-trafficking efforts do nothing to improve this situation, as they expose migrant sex workers to increased harassment from the authorities who raid their workplaces and evict them from their homes. Anti-trafficking laws also often target those who help migrant sex workers, effectively ensuring their complete isolation, even from community-based support structures. These frameworks serve to undermine the autonomy of migrant sex workers, rather than empowering them. Legal and policy reform is urgently needed to change this. In order to promote sex workers’ safety, health and well-being, governments must acknowledge and address these violations.

**Recommendations**

* Recognise sex work as work and ensure all sex workers are afforded labour rights in line with the four components of decent work as defined by ILO: employment, social protection, workers’ rights and social dialogue.
* Recognise that migrant sex workers are migrant workers and ensure safe and legal migration routes
* Decriminalise all aspects of sex work. Governments, policymakers and advocates must actively pursue the full decriminalisation of sex work, including sex workers, clients and third parties
* Remove laws that explicitly prohibit the participation of migrants in the sex industry, as these effectively guarantee their reliance on third parties and render them extremely vulnerable due to the threat of deportation
* Ensure that any laws regulating the employment of migrants also do not directly or indirectly discriminate on the basis of gender, gender identity, sexual orientation, race, ethnicity, or national origin
* Ensure that the responses to trafficking are not used to impose border control and regulate the migration of sex workers
* Ensure that law enforcement officials are sensitised to stop the surveillance, harassment, arrest, and abuse of migrant sex workers
* Ensure firewalled access to social and healthcare services, as well as to the authorities to report abuses, especially for undocumented migrants. It is crucial that all migrant sex workers have access to services and to justice without fear of deportation or reprisal
* Ensure that migrant sex workers have access to multilingual information on health, housing, and legal support
* Remove barriers to accessing public health care systems for migrant sex workers, as well as individuals who cannot provide formal proof of income or employment
1. UN General Assembly, 1990, “[International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx)” [↑](#footnote-ref-1)
2. OHCHR, “[Combating Discrimination against Migrants](https://www.ohchr.org/EN/AboutUs/Pages/DiscriminationAgainstMigrants.aspx)” [↑](#footnote-ref-2)
3. UN General Assembly, 1990, “[International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx)” [↑](#footnote-ref-3)
4. UN General Assembly, 1966, “[International Covenant on Civil and Political Rights](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx)” [↑](#footnote-ref-4)
5. UN General Assembly, 1966, “[International Covenant on Economic, Social and Cultural Rights](https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx)” [↑](#footnote-ref-5)
6. UN HRC, 1986, “[CCPR General Comment No. 15: The Position of Aliens Under the Covenant](https://www.refworld.org/docid/45139acfc.html)” [↑](#footnote-ref-6)
7. United Nations, “[Universal Declaration of Human Rights](https://www.un.org/en/universal-declaration-human-)” [↑](#footnote-ref-7)
8. UN OHCHR, 1979, “[Convention on the Elimination of all Forms of Discrimination against Women](https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx)” [↑](#footnote-ref-8)
9. INDOORS, 2014, “[Outreach in Indoor Settings: a report based on the mapping of the indoor sex work sector in nine European cities, contextualised by national overviews](https://apdes.pt/wp-content/uploads/2015/12/Outreach-in-Indoor-Sex-Work-Settings-Report.pdf)” [↑](#footnote-ref-9)
10. NSWP, 2018, “[Briefing Paper on Migrant Sex Workers](https://www.nswp.org/sites/nswp.org/files/briefing_paper_migrant_sex_workers_nswp_-_2017.pdf)” [↑](#footnote-ref-10)
11. NSWP, 2018, “[Briefing Paper on Migrant Sex Workers](https://www.nswp.org/sites/nswp.org/files/briefing_paper_migrant_sex_workers_nswp_-_2017.pdf)” [↑](#footnote-ref-11)
12. Butterfly, 2018, “[Behind the Rescue: How Anti-Trafficking Investigations and Policies Harm Migrant Sex Workers](https://www.nswp.org/resource/behind-the-rescue-how-anti-trafficking-investigations-and-policies-harm-migrant-sex-workers)” [↑](#footnote-ref-12)
13. UNAIDS, 2020, “[Sex workers must not be left behind in the response to COVID-19](https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2020/april/20200408_sex-workers-covid-19)” [↑](#footnote-ref-13)