

Upholding and promoting human rights, justice and access for migrant sex workers:

Part 2 - Laws affecting migrant sex workers

# Immigration Law and Migrant Sex Workers' Rights



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\*Not all people who sell or trade sexual or erotic services identify as sex workers. We use the terms sex work and sex workers to signify the consensual exchange of sexual or erotic services for money, goods or services, and to emphasize the human and labour rights of migrant sex workers.

This document provides general legal information, and does not provide legal advice.

Talk to a lawyer if you want legal advice specific to your situation.



*This document provides information and insight for legal, social, health, community, and other service providers to help develop their capacity to provide adequate, accessible and appropriate services to migrant sex workers.*

**The legal and non-legal information within this document will assist service providers to:**

- deepen their understanding of the complexity and diversity of migrant sex workers' realities;
- be informed of migrant sex workers' numerous and intersecting conflicts with the law and law enforcement;
- more fully understand, analyze and support migrant sex workers in various situations;
- develop their capacity to provide accessible and applied (legal or non-legal) information to migrant sex workers, or to refer them to these resources; and
- be more equipped to support, protect and defend migrant sex workers' labour and human rights.

***All of these documents were written and produced with the direct and meaningful participation of migrant sex workers, and reflect the autonomy, knowledge, skill, brilliance and expertise that migrant sex worker communities embody. We hope this document helps you to provide relevant and adequate support to migrant sex workers, and also motivates you to listen to and learn from migrant sex workers themselves. This document is part of a series that addresses migrant sex workers' rights, and the laws that prevent the protection and the realization of their rights:***

Upholding and promoting human rights, justice and access for migrant sex workers:

**Part 1 - Guide for service providers**

**Part 2 - Laws affecting migrant sex workers**

*Criminal Law and Migrant Sex Workers' Rights  
Immigration Law and Migrant Sex Workers' Rights  
Municipal Law and Migrant Sex Workers' Rights  
Migrant Sex Workers' Labour and Employment Rights*

**Part 3 – Legal information for migrant sex workers**

**Part 4 – Q&A for service providers**

**To access the full series of documents :**

<https://www.butterflysw.org/legal-information-for-services-prov>

Published October 2017 -----



Funded By -----



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*Sections of this document are inspired by and, in some cases, borrowed from legal information documents written and produced by Tara Santini in 2015 for Stella, l'amie de Maimie.*

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Chinese Canadian National Council Toronto Chapter (CCNCTO) [www.ccnctoronto.ca](http://www.ccnctoronto.ca)

Butterfly (Asian and Migrant Sex Workers Support Network) [www.butterflysw.org](http://www.butterflysw.org)

The Chinese and Southeast Asian Legal Clinic (CSALC) [www.csalc.ca](http://www.csalc.ca)

St. Stephen's Community House (SSCH) [www.sscho.ca](http://www.sscho.ca)

Funded by:

The Law Foundation of Ontario

## section 1

# Migrant sex workers and immigration status

## *Different types of immigration status and capacity to work legally in Canada*

**Migrant sex workers' immigration status affects whether they are legally allowed to work in Canada, what kind of work they can do, and for which employer they can work.**

**Migrant sex workers can have the following types of immigration status. They may:**

- Have **permanent residence**: They can work almost anywhere and for any employer in Canada (some exceptions for high level-security jobs, e.g. working for Canadian Security Intelligence Service).
- Have a valid **tourist/visitor visa\***: They generally cannot legally work anywhere in Canada (not for an employer or independently).
- Have a valid **work visa\***: They can work legally in Canada in some cases. There are two types of work visas: Open work visas allow the person to work for most employers, and closed work visas specify the employer for whom the person can work. However, even with an open work visa, migrant workers are specifically prohibited from working in the sex industry (see page 5).
- Have a valid **student visa\***: They may or may not have legal permission to work. Even with legal permission to work, immigration law prohibits them from working in the sex industry (see page 5).
- Be waiting for their **sponsorship** to be accepted: They may or may not have legal permission to work. Even if they do have legal permission to work, immigration law prohibits them from working in the sex industry (see page 5).
- Be a **refugee claimant**: They may or may not have legal permission to work. Even if they do have legal permission to work, immigration law prohibits them from working in the sex industry (see page 5).
- Be **non-status (undocumented)**: They do not have any legal immigration status and cannot legally work anywhere in Canada (not for an employer or independently).

**Immigration status is often precarious and can change quickly.**

Some migrant sex workers may not have legal status or attempted to initiate any immigration procedures. Other migrant sex workers may have status one day and lose that status the next day as a result of time or a decision from Immigration Canada. For example, if:

- Their refugee claim is refused, and a removal order is issued against them.
- They become "inadmissible" and have their status taken away.
- They do not or cannot renew their visa, and it expires. (However, if a visitor, student or worker applies to renew their visa before the expiry date, they are considered to have "implied status", i.e. they are considered to have status until they receive the renewal or the rejection).

*\*Visa and permit mean the same thing in this context (i.e. work permit = work visa).*



***The exclusion and discrimination that racialized, migrant, Indigenous, Black and trans sex workers face severely limit their economic, social and political participation and status, as well as their immigration status and the protection and realization of their rights. Racist notions imbedded in immigration policy and practices further prohibit racialized people – particularly women, trans and poor migrants – from working legally in Canada. Criminalization and stigmatization negatively affect all sex workers, yet disproportionately target racialized and Indigenous sex workers.***

- Racist law enforcement practices and policy result in over-policing, over-surveillance, investigation detention and arrest of individuals from these communities.
- Racialized communities are stigmatized by law enforcement and policy makers and are misrepresented in media as "organized crime rings."
- Racialized sex workers are misrepresented, stigmatized and labelled as "victims." This label is accepted and further imposed by the public based on the racist and sexist view that racialized women (e.g. Asian women) are ignorant, passive, helpless and lack all agency and self-determination.
- These racist and oppressive views underpin current anti-trafficking initiatives and policies, and function as racial profiling tools used to detain and exclude migrant and racialized individuals and communities.

**For more on how migrant and Indigenous sex workers experience racial discrimination,** see the Canadian Alliance for Sex Work Law Reform submission to the United Nations Committee on the Elimination of Racial Discrimination, 93rd Session, List of Issues Prior to Reporting: Canada's Compliance with the *Convention on Elimination of All Forms of Racial Discrimination*: [www.sexworklawreform.com/cerd-93/](http://www.sexworklawreform.com/cerd-93/)

## **Public mechanisms that help address racial profiling for individuals:**

- Human Rights Legal Support Centre: [www.hrlsc.on.ca](http://www.hrlsc.on.ca)
- Ontario Human Rights Commission: [www.ohrc.on.ca](http://www.ohrc.on.ca)

## **Policy responses to racial profiling:**

- Ontario Anti Racism Directorate: [www.ontario.ca/page/anti-racism-directorate](http://www.ontario.ca/page/anti-racism-directorate)

## **Legal and ethnolinguistic clinics that may offer support related to racial profiling:**

- The Chinese & Southeast Asian Legal Clinic : [www.csalc.ca](http://www.csalc.ca)
- The African Canadian Legal Clinic: [www.aclc.net](http://www.aclc.net)

Fanny was working in a hotel. One day, police officers came to her room and spoke to her in English, which she doesn't quite understand. The police officers spoke to the client who was in the room with her and showed Fanny a picture of an Asian woman who was advertising sexual services on a website. The police asked her if she is the person in the picture, if she worked for other people, and if she is being controlled. Fanny used simple English and told them NO. After the officers realized she was not a victim, they shifted their focus onto her immigration status in Canada. She was informed that she was in trouble and she would need to go to the police station with them. Her passport was taken from her, and she was handcuffed and brought to a police station. Immigration officials were contacted.

Fanny told us that three other Asian women were investigated and arrested during the same raid. Yet none of the white/local sex workers who worked at the same hotel were questioned or detained.

After immigration officers were called, Fanny was deported by the CBSA (Canada Border Services Agency).<sup>1</sup>

1. This story was collected by *Butterfly* as part of the project "Behind the Scenes of anti-trafficking investigation," which interviewed migrant sex workers who were arrested and deported between 2015 and 2017. [www.butterflysw.org](http://www.butterflysw.org)

## Losing Status, Inadmissibility, Detention, Deportation

Becoming **inadmissible** means that a person loses their immigration status and is ordered to leave Canada. Whether or not they are allowed to return to Canada without special permission depends on what type of **removal order** they face.

**Migrant sex workers may become "inadmissible" for several reasons, including if:**

- They have breached an immigration condition or regulation (e.g., they work in the sex industry or misrepresent this fact to immigration authorities).
- They have been convicted of a crime that leads to "criminal inadmissibility" (e.g., they are convicted of procuring or receiving a material benefit), inside or outside of Canada.
- They otherwise lose their status (e.g., their visa expires or their refugee application is rejected).

**There are three types of "removal orders."**

- **Deportation orders:** Special permission is required to return to Canada anytime in the future.
- **Departure orders:** Special permission is required in order to return to Canada within 1 to 5 years.
- **Conditional departure orders:** If the person leaves within the time ordered, they will not need special permission to return to Canada in the future.



**Migrant sex workers incur numerous risks that may lead to loss of immigration status and deportation, due to the multiple and contradictory laws that discriminate against sex workers.** These laws include specific immigration regulations, criminal offences, and municipal regulations that directly target sex workers and sex work. Criminal and municipal investigations that arise from these laws may lead to immigration consequences for migrant sex workers, even when they are not charged with a criminal or municipal offence.



## Immigration regulations discriminate against migrant sex workers and may lead to loss of status and deportation

The Immigration and Refugee Protection Act and its Regulations (IRPR) contain many provisions to prohibit migrant sex workers' involvement in the sex industry, even for individuals who are otherwise legally authorized to work in Canada and who autonomously decide to do sex work. **Everyone who does not have Canadian citizenship or permanent residence (e.g., "temporary resident" or "foreign national") is prohibited from doing sex work** because:

- The IRPR prohibits all temporary residents from legally working for employers offering striptease, erotic dance, escort services or erotic massages.<sup>2</sup>
- All work permits contain the following condition: "Not valid for employment in businesses related to the sex trade such as strip clubs, massage parlours or escort services." At the same time, the Ministerial Instructions provide, "This condition informs the work permit holder that employment, self-employment, or contract services in this sector are not permissible."<sup>3</sup>



2. Ss. 183 (1) (b.1) and 196.1(a) of the Immigration and Refugee Protection Regulations (SOR/2002-227)

3. Temporary Foreign Worker Program and International Mobility Program: Protecting workers from abuse and exploitation, Government of Canada, available at: <http://www.cic.gc.ca/english/resources/tools/temp/work/vulnerable.asp>

**As a result, migrant sex workers who do not have permanent residence or Canadian citizenship and who exercise their right to work and support themselves by doing sex work are automatically in breach of multiple immigration regulations:**

- They are in breach of immigration regulations that prohibit them from doing sex work or working for a business that may provide sexual or erotic services; and
- They may be in breach of immigration regulations related to misrepresentation. It is nearly impossible for a migrant worker to complete all immigration related forms and communications without referring to their work. As sex workers cannot communicate information related to their work without reprisal, they are set up to be automatically in breach of immigration regulations related to misrepresenting or withholding facts relevant to their immigration file.<sup>4</sup>

## CASE STUDY

Mui Ying was a refugee claimant and worked in a massage parlour with a valid work permit. A ticket of offering illegal body rub services was issued to her by a policeman who was enforcing municipal laws. The police asked Mui Ying to stay – while he called the CBSA (Canada Border Services Agency). She was arrested and detained by immigration. An inadmissibility hearing was held: both the investigation report from the police, and the ticket issued to Mui Ying, were used as evidence to prove that she violated the conditions of her work permit as she was not allowed to work in the sex industry.<sup>5</sup>

## "Criminal inadmissibility": Immigration status and criminal offences

Sex workers may find themselves in conflict with criminal law due to criminal offences related to sex work. **The immigration consequences of pleading guilty and/or being convicted of a criminal offence depend on a person's immigration status.** Whether conviction can lead to "criminal inadmissibility" and deportation depends on the specific criminal offence, the specific sentence that the person receives, as well as the person's immigration status.

Migrant sex workers must be informed of all possible consequences of a conviction on their immigration status before making decisions related to a criminal charge. **It is imperative that criminal lawyers advise clients of all possible consequences and ensure they receive independent immigration law advice before deciding how to proceed with their file.** If you are not convinced that the worker's criminal lawyer is consulting with an immigration lawyer, they should contact one directly, or you could do so with their informed consent.

4. See, for example, sections 40(1)(a) and 41(a) of the Immigration and Refugee Protection Act (S.C. 2001, c. 27)

5. This story was collected by Butterfly as a part of the project "Behind the Scenes of anti-trafficking investigation," which interviewed migrant sex workers who were arrested and deported between 2015 and 2017. [www.butterflysw.org](http://www.butterflysw.org)



## "Criminal inadmissibility": Immigration status and criminal offences

If a sex worker **does not have permanent resident status**, they may become criminally inadmissible if they are convicted (i.e. if they enter a guilty plea or are found guilty) of <sup>6</sup>:

- a criminal offence that is 'indictable' or a 'hybrid' offence (may be prosecuted either 'summarily' or 'by way of indictment'). These are the vast majority of criminal offences in Canada, and include criminal prohibitions related to "receiving a material benefit," "procuring," and obtaining a sexual service; or
- **two criminal offences** (of any kind), and the two offences result from **different events**.

If a sex worker **has permanent resident status**, they may become criminally inadmissible if they are convicted (i.e. if they enter a guilty plea or are found guilty) of <sup>7</sup>:

- an offence in which the **sentence that is imposed is more than 6 months** in prison <sup>8</sup>; or
- an offence in which **the maximum possible sentence for the offence is 10 years or more** in prison, as is the case for the prohibitions related to "receiving a material benefit" and "procuring."

If someone is convicted of a crime and **receives a "discharge" as a sentence** (whether the discharge is unconditional or conditional), or **if the charges are "diverted,"** this will not result in a conviction for immigration law purposes, and **they will not lose their immigration status or be deported** as a consequence of that criminal conviction. In other words, in immigration law, "discharges" and "diverted charges" do not lead to "criminal inadmissibility" and deportation.

6. See Section 36(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27

7. See Section 36(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27

8. Currently, for the purposes of Section 36(1), even a *conditional sentence of imprisonment* is considered part of the calculation of a prison sentence, see *R v Tran*, 2015 FCA 237, leave to Supreme Court granted.

## *Criminal offences related to sex work*

*Criminalizing sex work not only perpetuates stigma and discrimination against sex workers, but also prevents sex workers from taking critical steps to protect their human rights and ensure their personal safety.*



These critical steps include, among others: communicating with clients, working in association with other people including third parties, and working in organized indoor locations where workers can implement safety measures and have greater control over their environment. These steps are especially important for migrant sex workers, whose vulnerability to violence, stigma and discrimination is accentuated by their newcomer status, and whose ability to work autonomously is rendered even more difficult due to language barriers, precarious immigration status, and unfamiliarity with related laws and regulations.

Sex workers across the country have reported that, in addition to frequent police presence, social and racial profiling, harassment, surveillance, arrest and detention that result from the criminalization of sex work, sex workers do not currently have adequate access to state protection from violence when they experience violence or other crimes against them.

### **For more on the criminal offences related to sex work and their impacts on migrant sex workers,** see the following documents available at:

<http://butterflysw.org/legal-information-for-services-prov>

- *Part 2 - Criminal Law and Migrant Sex Workers' Rights*
- *Safety, Dignity, Equality: Recommendations for Sex Work Law Reform in Canada*, Canadian Alliance for Sex Work Law Reform, 2017.
- *Im/migrant Sex Workers, Myths and Misconceptions: Realities of the Anti-Trafficked*, SWAN Vancouver Society, 2015.
- Stella's legal information on sex work and criminal law, Stella l'amie de Maimie, 2015.

**For more on immigration consequences related to criminal convictions** (e.g. loss of eligibility to make a refugee claim, sponsor a family member, or apply for citizenship), see *Immigration consequences of criminal dispositions and sentencing*: <https://www.legalaid.on.ca/en/info/downloads/2016-04-Immigration-consequences-of-criminal-dispositions-and-sentencing.pdf?t=1497139200038>



# Migrant sex workers and immigration detention

## *Immigration detention and the CBSA (Canada Border Services Agency)*

- **The CBSA enforces immigration laws** (*Immigration and Refugee Protection Act* and its Regulations). They are responsible for dealing with infractions offences, immigration detention and deportation.
- **CBSA officers are federal immigration enforcement officers**, not municipal, provincial or federal police officers. Immigration detention and detention related to criminal offences involve different procedures, tribunals/courts and detention centres.
- **CBSA officers have very broad powers and discretion.**

**When officers approach someone or arrive at their workplace, the officers must identify themselves (i.e. whether they work for the city, province, immigration).** Different officers have different authority and powers, and this impacts what questions a person is legally required to answer, and if/when the officer is allowed to detain them.

### CBSA officers are allowed to ask an individual to provide identification (ID) if:

- They suspect the person committed an immigration offence (e.g., breaking an immigration law or condition); or
- They suspect the person does not have legal immigration status.

**In practice, any ID that provides information about a person's immigration status may lead to the officer finding grounds to detain them.**

For more information on CBSA officers asking for ID, see:

- *Migrants Know Your Rights!*: <http://toronto.nooneisillegal.org/knowyourrights>

### CBSA officers can DETAIN someone if they have reason to believe one of the following:

- The CBSA officer cannot confirm the person's identity;
- The person does not have legal immigration status;
- The person committed an immigration offence (e.g., breaking an immigration law or condition); or
- There is a warrant issued in their name, related to a deportation order.

## If a migrant sex worker is arrested by the CBSA:

- They may be **released** after arrest, on terms and conditions; or
- They may be **detained** in custody until their "detention review hearing" before the Immigration Division (a tribunal/informal court), **if the CBSA decides that:**

- The person is a danger to the public (e.g., they have a criminal record); or
- The person is a flight risk (e.g., they will not show up for their immigration hearing or for removal); or
- The CBSA officer can't confirm the person's identity.

## If a migrant sex worker is detained in custody by the CBSA ("detention review"):

- If the officer does not release them, their detention will be reviewed within 48 hours or soon after by a tribunal called the Immigration Division (ID). This may be by phone or in person depending on where they are.
- If they are not released at this hearing, there will be another one in 7 days, and then every 30 days after that. These hearings are called Detention Reviews (DRs).

At their "detention review hearing," **they may be released with conditions that provide a "reasonable alternative to detention," such as being able to provide a bondsperson, or being taken on by the Toronto Bail Program in the Greater Toronto Area** (this includes if the worker is held at Vanier).

## *A bondsperson (BP)*

A bondsperson (BP) is someone who can provide immigration bail (called a "bond"), and is usually a key factor in determining whether they will be released. The BP will need to come to their detention review and testify.

Generally, only a CBSA officer can arrest someone for committing an immigration offence. But if an arrest warrant is issued in their name, a police officer can detain them and transfer them to CBSA custody. **When someone is detained/arrested by CBSA, they have the right to contact a lawyer and seek their advice before answering questions.** Otherwise, unlike criminal law, people do not have the right to silence when they are in immigration detention. If a person does not answer questions, this will be raised as a factor at the detention review (immigration bail hearings) to argue that the person should continue to be held.



## Factors that may determine if the Immigration Division (ID) accepts the bondsperson/bail at the detention review:

- The BP must be a Canadian citizen or permanent resident, present and residing in Canada.
- The BP cannot be in default of another guarantee (default means that they were a BP for someone in the past who did not follow their conditions, and the BP never paid the money/bond).
- ID will ask if the BP is employed. Employment information is a section in the BP form. There is no official requirement that the BP be employed, but they will need to explain their ability to pay, and ensure that the money is not from criminal/illegal activities (e.g. a retired person with savings may be accepted as a BP).
- The BP should not have a criminal record. If the BP has a criminal record, this will be a serious barrier to being accepted as a BP.
- The BP needs to know the person well. The BP will be questioned at the review hearing. To convince the tribunal that they will ensure that the person will follow their conditions, they need to demonstrate that they have close and meaningful contact with the person.
- It is also significant if the person who is released will live with the BP, for the same reason.
- It is helpful to have a release and supervision plan, including the residential address of where the person will live if released.

## There are two types of bonds that the BP can provide:

### **(1) Cash bond (or deposit):** The BP deposits money upfront to the CBSA.

- This money is returned to the BP when the person leaves Canada or becomes a permanent resident.
- The BP loses the money if the person does not follow CBSA conditions, or if they are ordered to leave Canada and they do not.

### **(2) Performance bonds (or guarantees):** The BP does not deposit money upfront.

- The BP can promise up to 1/7 of their annual income.
- The CBSA comes after the BP for this money if the person does not follow CBSA conditions, or if they are ordered to leave Canada and they do not.

## Aspects of the detention review that migrant sex workers and their BPs should watch out for:

### ➤ **If they have children or family in Canada:**

- The Immigration Division (ID) will use this as an argument against them, claiming that they are less likely to leave Canada in order to keep their children here.
- If the children are detained with them, this can be a factor favouring their release.
- If they have children in Canada they could discuss the possibility of Humanitarian and Compassionate claim (H&C) with counsel.
- In order to be released, they may need to argue that their kids will leave with them if they are released, and that the children need their parent.

- Immigration will ask the BP **if they knew about the detained person's immigration status prior to their arrest/detention**. No matter what answer the BP provides, there will be resistance. Discuss this question and answer with counsel in advance.

- Immigration will ask the BP **if they have employment**. Once again, discuss this with counsel in advance.

If a migrant sex worker may be at risk of detention, discuss the following things that they may want to prepare in advance:



- Do they have **community support** (outreach workers, friends, family, organizations) that can help with a release plan if they are detained?
- Do they want **references** to organizations that may help them develop a release plan?
- Do they have a potential **bondsperson** (see page 10 - 11) ?
- Have they memorized the **phone numbers** of the people they need to contact if they are detained? Their cell phone and contact list will be taken from them if they are detained.
- Does someone they trust have a **spare key** to their apartment to get their money, important papers, medications, etc.?
- Do they have someone to take care of their **children**?
- Do they have **prescriptions** that they need on their person?
- Do they have **identification documents (ID)**? If so, do they carry those documents on them at all times, or does someone they trust and can contact easily hold onto them? Being released is easier if the person has ID, but be aware that ID from other countries will likely lead a CBSA officer to further investigate their immigration status.
- Have they made contact with a reputable **immigration lawyer or consultant** who can represent them? Are they aware of the **legal aid** system and **legal clinics** in their area?
- If leaving Canada is something they may want to do, do they have a valid and up to date **passport**? If not, this could delay their ability to leave and result in longer time spent in detention.



*Community support is an important factor that the Immigration Division (ID) considers when deciding whether to release someone at their detention review.*

- It demonstrates that they are part of a local community, and people from the community may assure the ID that they will, for example:
  - help the person leave Canada;
  - help them with housing, health care, or other supports;
  - provide, or make sure they have access to, supports for physical, mental health, or drug/alcohol needs;
  - remind them of, and encourage them to follow, their conditions for release;
  - help with childcare (children will be detained with the person or turned over to a Children's Aid Society if the tribunal is not assured that someone else will take care of them).

**For people considered by CBSA to be a danger to the public or a flight risk, having the support of supervisory organizations like the Toronto Bail Program may be helpful.**

## Community support is also important for someone who is detained, for things such as:

- accessing prescriptions for medication or hormones, clothes, money, important papers, etc.;
- contacting people for them (keep in mind that they have limited access to phone calls and, other than speaking with counsel, their calls are monitored);
- helping with their pets or dependents.

**For more information on release plans and things to prepare in advance, see:**

- *Immigration Status and Sex Work*, Stella and Butterfly
- *Working in Canada without Canadian Citizenship*, Stella and Butterfly
- *Migrants Know Your Rights*, No one is illegal

**Although migrant sex workers have limited rights when faced with CBSA or immigration detention, they need access to legal information that explains their rights in relation to law enforcement.** See the following documents available at:  
<http://www.butterflysw.org/legal-information-for-services-prov>

- *Comic: Who is Who?*, Butterfly
- *Immigration Status and Sex Work*, Stella and Butterfly
- *Working in Canada without Canadian Citizenship*, Stella and Butterfly
- *Police Powers: In-call and Outcalls*, Stella
- *Arrest and Detention*, Stella
- *Migrants Know Your Rights*, No One Is Illegal
- *Community Legal Education Ontario*

Michelle worked from a hotel room, providing escort services. The hotel manager informed the CBSA that some Asian women were providing sexual services in his hotel. A CBSA officer came to her hotel room and arrested her. She was detained in an immigration holding centre. Her bail was rejected at her first detention review, because the Immigration Division (ID) suspected that Michelle's bondsperson was a client who received her sexual services. She also could not provide ID with an address where she would stay, which is a condition necessary for her release. Butterfly (Asian and Migrant Sex Workers Support Network) helped her to locate a shelter for her to stay upon release, and found a legal representative to represent her at the detention review. Finally, she was released on bail.<sup>9</sup>

CASE STUDY

9. This story was collected by *Butterfly* as a part of the project "Behind the Scenes of anti-trafficking investigation," which interviewed migrant sex workers who were arrested and deported between 2015 and 2017. [www.butterflysw.org](http://www.butterflysw.org)

### Finding counsel

**When someone is detained by the CBSA, they have the right to contact counsel and seek their advice before answering questions. Otherwise, unlike in criminal law, people do not have the right to silence when they are in immigration detention.**

- If someone is detained, Legal Aid can usually help find a lawyer, no matter what their status.
- It is important to have the Legal Aid Ontario hotline number on hand: 1-800-668-8258.
- If they are detained in the Toronto Immigration Holding Centre, there is a clinic there called the Toronto Refugee Advisory Council. They can ask to see them free of charge.
- If they are detained in or around Toronto, in a jail such as the Vanier Centre for Women, they can ask to call the Refugee Law Office at 416-977-8111. They are free and take collect calls.
- If they are detained in an Immigration Holding Centre (IHC) and have mental health issues, discuss whether it is worth it to disclose those issues to IHC staff or the CBSA. In certain cases, detainees have been transferred from Immigration Holding Centres to maximum security jails because the jails ostensibly have greater psychiatric support capacity.

### Navigating immigration hearings and non-judgmental representation:

- If they have mental health or other issues that make it very difficult for them to understand what is going on at the hearing, they can request for someone to assist them (called a Designated Representative – usually a mental health worker or a community worker they trust is best).
- Butterfly and other community groups may be able to help find a lawyer and/or a designated representative who is adequately informed and respectful of migrant sex workers' rights, needs and realities.
- Be aware that many lawyers may not be sex worker positive and they may need to be educated. Butterfly and other sex worker organizations may be helpful in intervening with the lawyer to make sure they protect the person's interests!

### Language and Interpreters:

- The Immigration Division (ID) has the duty to provide an interpreter for the detainee and any relevant witnesses. The detainee and/or counsel should notify the ID ahead of time in writing to request an interpreter if one has not already been assigned.
- The ID may also allow a professional or non-professional to interpret for the detainee at the hearing, but this interpreter may be questioned and may be rejected if the ID decides that they are not impartial. It is generally not considered a good idea for the detainee to ask their relatives or friends to interpret for them for this reason.
- If the interpreter does not translate accurately, this may be raised at the hearing, and the hearing may be postponed to a later date to obtain another interpreter.



## Things counsel can do to prepare for the Detention Review (DR) and provide adequate services to migrant sex workers:

### **Be informed of, and create links with, migrant community and sex worker positive organizations:**

- Which organizations can you call on for support?
- Which organizations might assist with a release plan and/or an alternative to detention?
- Which organizations may be able to help communicate with important contacts (e.g. a potential bondsperson, person to follow-up with friends and family)?

### **Know the relevant case law:**

- In particular s. 248 of the *Immigration and Refugee Protection Regulations*, which lists the factors the ID considers when deciding whether to detain or release the person (e.g. reason for detention, length of time in detention).

### **Try to talk to the Removals Officer at CBSA before the hearing:**

- They may be able to assist with removal efforts if the client wants to leave Canada, or to find out an update and timeline as to removal if the client does not (both are factors under section 248).

### **Try to talk to Minister's Counsel (opposing counsel) before the first DR:**

- Ask for disclosure of all documents, and see if they are willing to negotiate a joint submission.
- If the Minister's Counsel is unable to come up with a timeline for deportation, that is a factor that may support the argument for release.
- See if you can identify what concerns the Minister's Counsel has with releasing the client and if there is an opportunity to help address those concerns (e.g., if they are having difficulty confirming the identity of the client).

### **If you work with the client before they are arrested/detained:**

- Get their CBSA and Immigration Refugee Citizenship Canada files. The forms and procedures are available at: [cic.gc.ca](http://cic.gc.ca).
- Make sure they have 24 hour contact information for you.
- Tell them to call you immediately after being arrested/detained, and then try to advocate with the police officer or CBSA officer to release the client.

## Sanctuary cities and 'Access Without Fear' policies

Some cities are officially designated 'sanctuary cities' (e.g. Toronto, Hamilton, Vancouver).<sup>10</sup> This means that the municipal government has adopted an 'Access Without Fear' policy, which is meant to apply to all city officials to ensure that all residents can access all city and city-administered services (e.g. shelters) without fear, regardless of their immigration or documentation status.

### These policies direct city officials to not:

- inquire about an individual's immigration status;
- deny non-status residents access to services; or
- share personal or identifying information with immigration authorities (such as the CBSA) unless they are required to do so by law.

**In practice, police forces in certain instances have not consistently applied these policies** (e.g. Toronto police force),<sup>11</sup> and therefore even in 'sanctuary cities' these forms of inquiry and information sharing between departments may in fact still take place. The policy "remains somewhat of a pilot project, with a rather small contingent of city staff championing the ideals of the policy in the face of steep challenges and powerful counter-influences. Interview participants highlighted first and foremost that non-status migrants have not been able to consistently access municipal services, and continue to hold well-founded fear of local authorities, including police."<sup>12</sup> **While policy is not applied consistently in Toronto, migrant sex workers may want someone who has legal status and who they can trust to inquire about specific municipal services before they attempt to access a service.**

10. Toronto City Council's January 31, 2017 statement reaffirming Sanctuary City, available at: <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017-MM24.23>

11. See *Often Asking, Always Telling: The Toronto Police Service and the Sanctuary City Policy*, No One Is Illegal-Toronto, November 2015, available at: [http://rabble.ca/sites/rabble/files/often\\_asking\\_always\\_telling\\_-\\_kredits\\_dec\\_1.pdf](http://rabble.ca/sites/rabble/files/often_asking_always_telling_-_kredits_dec_1.pdf) See *Cops 'duty bound' to report illegal immigrants: Report*, Toronto Sun, Artuso, A., March 16, 2017 available at: <http://www.torontosun.com/2017/03/16/cops-duty-bound-to-report-illegal-immigrants-report>

12. See *(No) Access T.O.: A Pilot Study on Sanctuary City Policy in Toronto, Canada*, G. Hudson et al., RCIS Working Paper No. 2017/1, February 2017, page 25, available at: [http://www.ryerson.ca/content/dam/rcis/documents/RCIS%20Working%20Paper%202017\\_1GHudsonFinal%20.pdf](http://www.ryerson.ca/content/dam/rcis/documents/RCIS%20Working%20Paper%202017_1GHudsonFinal%20.pdf)

# Migrant sex workers and human trafficking

## Distinguish sex work from human trafficking

Remunerated, consensual sexual services (i.e., sex work) must not be confused with human trafficking. Human trafficking involves a form of physical or psychological force or coercion in addition to exploitation.<sup>13</sup> Exploitative working conditions are a reality that migrant workers may face in the context of precarious immigration status, poverty, racial discrimination, inaccessible channels of regularized migration, and inability to legally access decent paying jobs. Migrants in many different industries may experience poor working conditions, particularly migrants involved in precarious work and/or informal and poorly regulated industries (e.g. agriculture, restaurant, textile, sex work, grocery stores, construction). Yet people who do not recognize sex work as a legitimate form of labour mistakenly define sex work as inherently exploitative and/or related to human trafficking and therefore not deserving of the same labour protections as other industries.


- When sex work – the sale or exchange of consensual sexual services – is seen as exploitation, actual cases of exploitation in the workplace are not recognized, and workers are prevented from improving their conditions and accessing labour protections. See *Part - 2 Migrant Sex Workers' Labour and Employment Rights*.
- When sex work – the sale or exchange of consensual sexual services – is seen as an act of force and/or violence (e.g. human trafficking, sexual assault, sexual abuse, sexual exploitation and violence against women and girls), this trivializes actual incidences of violence against sex workers, denies sex workers their right to autonomy and invalidates sex workers' consent. See *Part 2 - Criminal Law and Migrant Sex Workers' Rights*.
- When the CBSA or police target what they term trafficking and sexual exploitation, the people most frequently harmed are sex workers. CBSA and police routinely target sex workers in order to "protect them," which often translates into arrest, removal and/or detention.<sup>14</sup>

Human trafficking is of great concern to many service providers, yet conflating human trafficking with sex work, or focusing solely on human trafficking and imposing this framework onto migrant sex workers, can have extremely harmful effects for migrant sex workers. **An approach that assumes that sex work is inherently exploitative limits service providers' understanding of the diversity of migrant sex workers' lives and realities, and the complexities of their needs and concerns.** It also obstructs migrant sex workers' access to protection from other kinds of violence. As a result, it may isolate them from supports and services, impede services providers' capacity to provide support, information and services that meet their needs, and does not foster a holistic approach to the protection of migrant sex workers' human rights.

13. The human trafficking provision in the *Criminal Code* requires that the victim "fears for their safety" (i.e., by believing "that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service" (s. 279.04 (1)). Experts argue that the "fear for safety" test - and more generally, that a criminal framework - does not recognize the complexities experienced by victims of human and labour trafficking, and is too limited to adequately protect human and labour trafficking victims. See Kaye, J. & Hastie, B, *The Canadian Criminal Code offence of trafficking in persons: Challenges from the field and within the law*, 2015, available at [www.kingsu.ca/public/download/documents/33771](http://www.kingsu.ca/public/download/documents/33771), and *The Palermo Protocol & Canada: The Evolution and Human Rights Impacts of Anti-Trafficking Laws in Canada (2002-2015)*, available at: <http://iclrtemporary.law.ubc.ca/wp-content/uploads/2017/06/Palermo-Project-Key-Findings-Report-15-October-2015-with-copyright-2.pdf>

14. See *Stop the Harm from Anti-Trafficking Policies & Campaigns: Support Sex Workers' Rights, Justice, and Dignity*, by Elene Lam (Butterfly, Asian and Migration Sex Workers Support Network), in collaboration with Migrant Sex Workers Project, Maggie's, Canadian HIV/AIDS Legal Network, STRUT and No One Is Illegal, available at: <https://www.butterflysw.org/harm-of-anti-trafficking-campaign->

## Human trafficking initiatives and harmful impacts on migrant sex workers



Anti-trafficking initiatives, campaigns and policies that conflate exploitation and human trafficking with sex work place migrant sex workers in contact with law enforcement more frequently, often with highly negative consequences for sex workers who avoid law enforcement due to criminal and precarious migrant status.

Anti-trafficking provisions are currently being employed as a general law enforcement strategy to target sex work and capture third parties working with sex workers. These third parties may be mistakenly identified as "traffickers" rather than co-workers, employers or employees, particularly when working with migrant sex workers who often rely on the support of third parties to help organize their work, communicate with clients, offer additional security precautions and/or advertise their services. Sex workers themselves frequently act as third parties for other workers. Anti-trafficking initiatives isolate sex workers from essential third parties because sex workers fear and avoid detection and detention by law enforcement. As a result, sex workers' security and general working conditions are compromised.

15. <https://www.theglobeandmail.com/news/british-columbia/sex-worker-advocates-call-for-end-to-bc-police-sting-operations/article35584381/>  
<https://www.straight.com/news/933756/open-letter-decries-police-posing-sex-worker-clients-repressive-operation-northern>  
[https://www.vice.com/en\\_us/article/a3d3xz/canadian-sex-workers-are-sick-of-being-impersonated-by-cops](https://www.vice.com/en_us/article/a3d3xz/canadian-sex-workers-are-sick-of-being-impersonated-by-cops)

In recent years, aggressive anti-trafficking initiatives have resulted in increased operations and raids of sex workers' workplaces.<sup>15</sup> **While law enforcement may claim that these initiatives are intended to target clients and third parties, they usually result in the detention, arrest and deportation of migrant sex workers.** Migrant sex workers, for example, may be charged with a trafficking offence, even in the absence of exploitation, if they work with, receive material benefits from, or assist other sex workers to enter or work in Canada. Even when no criminal charges are laid, raids result in the arrest, detention, and deportation of migrant sex workers with precarious immigration status.

These actions create a huge disincentive for sex workers to report exploitative working conditions or violence for fear of repercussions for themselves or for their colleagues, friends or family. Migrant sex workers — including workers who may experience mistreatment — are further marginalized and isolated as a result. Thus, the very people most in need of protection are denied access to the criminal law system.

### For more on criminal offences related to trafficking in persons and the impacts on sex workers,

see the following documents available at:  
<http://www.butterflysw.org/legal-information-for-services-prov>

- *Part 2 - Criminal Law and Migrant Sex Workers' Rights*
- *Harms of trafficking*, Butterfly
- *Immigration Status and Sex Work*, Stella and Butterfly, 2015
- *Safety, Dignity, Equality: Recommendations for Sex Work Law Reform in Canada*, Canadian Alliance for Sex Work Law Reform, 2017
- *Im/migrant Sex Workers, Myths and Misconceptions: Realities of the Anti-Trafficked*, SWAN Vancouver Society, 2015

## *Victims of human trafficking and a person centered-approach to service delivery*

**Migrant sex workers are not victims. Sex work is not human trafficking. However, migrant sex workers can be victims of human trafficking.**

Human trafficking involves a form of physical or psychological force or coercion in addition to exploitation. Coercion and force may include taking someone's passport, confining someone in a house where they are not able to leave, forcing someone to work against their will, or inflicting acts of violence, such as forcing someone to perform sexual acts against their express consent.

If a migrant sex worker tells you that they are experiencing coercion or violence, **our experience tells us that it is essential that service providers do not contact anyone, or disclose any information concerning an individual, without the explicit and informed consent of the person affected.<sup>16</sup> This applies to any person that you think may be a victim of violence and/or human trafficking.** Informed consent requires that you discuss — in advance — all possible negative consequences with the individual concerned.<sup>17</sup>

**Disclosing information without the person's informed and explicit consent may destroy the possibility of trust and push migrant sex workers away from the support or service, further isolating them and deterring them from contacting service providers in the future.**

Service providers may have obligations (e.g., legal, ethical and professional obligations, internal organizational policies) that may seem at first glance to be in potential conflict with the recommendation to not disclose information without the person's informed and explicit consent. **If you cannot provide an anonymous and confidential service, and if you cannot guarantee that you will not disclose any information without their consent, ensure that you clearly explain these limits of the service you are providing.** Explain what personal information is needed, for what purpose, who can access their file, and in what cases you will/may share information, **before a migrant sex worker discloses any information.**

**This does not mean that you cannot support and intervene in a crisis situation.** It does mean that as a service provider you have an ethical obligation to focus on your client's self-determined interests, to respect their autonomy and decisions, and to obtain their consent in order to take the best possible action.

16. Butterfly's Presentation on 2017 Provincial OAITH - Leaving no one behind – Expanding our reach on gender-based violence approaches, available at: [www.oaith.ca/train/2017-provincial-training-day.html](http://www.oaith.ca/train/2017-provincial-training-day.html)

17. This recommendation not to contact or disclose information without the informed consent of the person affected does not constitute legal advice. It is the pragmatic and political position that we take based on experience working with marginalized and/or policed communities that are often at greater risk of conflict with discriminatory laws, as well as risk of human rights abuses when faced with law enforcement.

If someone tells you that they are experiencing coercion or violence, you may recommend that they contact counsel and/or community organizations, as coming forward to police may have negative consequences that should be fully explored and understood. We encourage you to refer clients to supports within the community that provide services to sex workers and to migrant communities, such as *Butterfly*. Having access to these supports will help a person make an informed decision about their situation.



**For more on establishing trust between service providers and migrant sex workers, including supporting someone who is a victim of human trafficking or violence, or whose personal safety is threatened, see *Upholding and promoting human rights, justice and access for migrant sex workers*:**

- *Part 1 – Guide for service providers*
- *Part 4 – Q&A for service providers*
- *Part 2 – Criminal Law and Migrant Sex Workers' Rights*



**Many migrant sex workers will not meet a service provider unless they can do so anonymously and confidentially.** Try to provide information, support and services without requiring individuals to disclose their sex work or immigration status, and when possible, without having to identify themselves.





## *Victims of human trafficking and Temporary Resident Permits*

If someone used violence or coercion to help someone come to Canada, to force someone to come to Canada, or to force someone to provide services or labour, the person who was coerced/forced may be able to obtain temporary or even permanent status. **If someone identifies as "a victim of human trafficking," they may apply for a special Temporary Resident Permit (TRP) from Immigration, Refugees and Citizenship Canada (IRCC).**

- This often involves criminal investigation or charges against the individual(s) identified by the victim. According to government policy, you **do not have to testify** against the individuals accused of trafficking.<sup>18</sup>
- An immigration officer will interview the person and decide if they can get a TRP.<sup>19</sup>
- **The TRP is temporary (not permanent). It is valid for 6 months,** but there is a possibility of renewal.
- Victims of human trafficking may also be eligible to apply for an application for permanent residency based on **Humanitarian and Compassionate considerations (H&C)**. They need to discuss the particular facts of their case with a lawyer.
- Legal aid may pay for counsel for these matters depending where they are. This is a free service that will pay counsel for people without a lot of money, regardless of their immigration status. Lawyers may not be aware that legal aid is a possibility. Check with legal aid before consulting a lawyer.
- Legal aid cannot (by law) share information about someone with immigration.

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18. Protection and assistance for victims of human trafficking, Government of Canada, available at: [www.cic.gc.ca/english/information/applications/trp.asp](http://www.cic.gc.ca/english/information/applications/trp.asp)

19. Protection and assistance for victims of human trafficking, Government of Canada, available at: [www.cic.gc.ca/english/information/applications/trp.asp](http://www.cic.gc.ca/english/information/applications/trp.asp)

## Deciding to stay or leave



**When migrant sex workers are detained by immigration, they may want to stay in Canada and try to fight the possibility of deportation, or they may want to leave Canada, and they may want to leave as quickly as possible.** This often depends on whether the person is detained throughout their immigration procedures. For example, whether they are released or detained while awaiting their inadmissibility hearing may be a significant factor in deciding whether to contest deportation. **If a sex worker is detained, it is important they that are informed of all possible options, as well as the length of time that each procedure requires.**

### Factors to consider when deciding whether to LEAVE Canada, may include:

- Whether they want to buy their own ticket. If they do, it shows cooperation and means they are more likely to be released until their deportation date, and if they come back to Canada they won't have to refund the government for the cost of the flight.
- Whether they have arrangements in place to help them with leaving (e.g., a way to send their stuff back home, a way to get out of their lease or tenancy agreement).
- Whether their counsel has argued, or can successfully argue, for a short period of release so that they have time to make arrangements to leave (this may be more likely if the person buys a plane ticket).
- Whether the person would possibly be authorized to return to Canada (ARC) in the future, which may depend on the following factors:
  - If the person came on a visitor visa and are found inadmissible for working without a permit, for sex working, or for both, they cannot return to Canada for a year without special permission (the permission is called an Authorization to Return to Canada [ARC]).
  - If the person lied to an immigration official and is issued an exclusion order, they won't be able to return to Canada for 5 years without an ARC.
  - If the person has a criminal conviction or they are subject to a deportation order, they won't ever be able to return to Canada without an ARC.
  - If they don't buy their own plane ticket, they will have to reimburse Immigration, Refugees and Citizenship Canada (IRCC) before it is possible for them to apply for an ARC.

## Factors to consider when deciding whether to STAY in Canada, may include:

- Generally if they already have a permanent residency application in place (PR), it will be easier to stay or stop removal. If the person currently has PR status, IRCC needs to take legal steps to revoke their PR through an inadmissibility hearing before they can deport them.
- Migrant sex workers must be informed that lying to IRCC or the CBSA may lead to an immigration offence (misrepresentation), and that this can also be grounds to revoke their PR status.
- They will usually need a lawyer to stop the removal. It is an intensive court process. If they want to stay, tell counsel as soon as possible as preparing submissions is time consuming. Legal aid may provide funds to hire a lawyer to do this, and there may be free legal clinics that can also do this.
- If they are arrested by immigration authorities for doing sex work, any valid temporary status they may have (visitor, student, worker) will be revoked.
- If they are convicted of a crime, it will be very difficult to stay. While the charges are outstanding, they cannot be removed, unless the Crown Attorney (prosecutor) agrees to stay the charges, which often happens. This means the prosecutor puts the charges on hold so the person can be deported, and if they leave Canada, after 6 months the charges may be dropped.
- In general, even if the person does not need an ARC to return to Canada, it will be difficult for them to return as a visitor, student or worker once they leave.

## If a migrant sex worker wants to stay in Canada, it is important that they discuss all available options with counsel. Options may include:

If someone is arrested/detained and wants to stay, their counsel may need to make a deferral of removal request to the CBSA. Relevant factors to argue for a deferral request and stay motion include:

- medical and/or mental health issues for which there is treatment and support in Canada but not in their home country;
- effect of separation on children and family in Canada;
- effect on business and employment interests in Canada, disruption of studies; and
- personal harm/risk to life.

If this request is rejected, they can apply for leave for judicial review (JR) to the Federal Court along with a motion to stay the removal pending a final decision on the JR. Legal aid may provide funds to hire a lawyer to do this, and there may be free legal clinics that can also do this.

**Legal aid may provide funds to hire a lawyer for the following procedures. Free legal clinics may also provide assistance. Not everyone may be eligible to make these applications. They need to discuss the particular facts of their case with a lawyer:**

- They may want to apply for **permanent residence on Humanitarian and Compassionate grounds (H&C)** and an application for a stay of removal.
- If the person's **security or life would be at risk or if they are at risk of persecution or serious harm** in the country to which they would be deported, they may also want to apply for a **refugee claim** or a **pre-removal risk assessment (PRRA)**.



Stigma towards sex work and discrimination against sex workers are common, including among police, the CBSA, and other decision-makers. Racist, sexist and victimizing assumptions about migrant sex workers impact the way they are treated by immigration officials, as well as how their files and removal proceedings are dealt with.

**Migrant sex workers incur numerous risks that may lead to loss of immigration status and deportation, due to the multiple and contradictory laws that discriminate against sex workers.** These laws include specific immigration regulations, criminal offences, and municipal regulations that directly target sex workers and sex work. Criminal and municipal investigations that arise from these laws may lead to immigration consequences for migrant sex workers, even when they are not charged with a criminal or municipal offence.

**These prohibitions have the harmful impact of placing migrant sex workers in conflict with the law and with law enforcement, while they do not provide support or redress for migrant workers facing exploitative working conditions.**

- These laws contribute to the violence, stigma and discrimination that sex workers face, and prevent them from taking critical steps to protect their human rights and ensure their personal safety.
- The threat of detention and deportation drives sex workers into precarious working conditions, increases their vulnerability to exploitation and violence, and deters them from seeking supports and services, including state protection and vital health and social supports, if they do experience exploitation or violence.
- Migrant sex workers who do seek support may be investigated as potential criminals in violation of offences related to sex work and/or trafficking, even when there is no evidence of exploitation or coercion.



**Our experience working with migrant sex workers tells us that it is essential that service providers do not contact anyone, or disclose any information concerning an individual, without the explicit and informed consent of the person affected.** This applies to any person that you think may be a victim of violence and/or human trafficking. Informed consent requires that you discuss — in advance — all possible negative consequences with the individual concerned.

**Disclosing information without the person's informed and explicit consent may lead to harmful consequences, such as:**

- involuntary/unwanted involvement with law enforcement and legal systems;
- criminal and immigration investigations, detention, arrest and deportation;
- destroying the possibility of trust with service providers, pushing migrant sex workers away from supports and services, further isolating them and deterring them from contacting service providers in the future.

**If you cannot provide an anonymous and confidential service, and if you cannot guarantee the person that you will not disclose any information without their consent, ensure that you clearly explain these limits of the service you are providing.** Explain what personal information is needed, for what purpose, who can access their file, and in what cases you will/may share information, **before a migrant sex worker discloses any information.**

**Whatever your personal views about sex work, you have a professional and ethical responsibility to protect migrant sex workers' personal safety and to uphold their human rights.** Empowering yourself with knowledge of migrant sex workers' human rights — and sharing this knowledge with your clients who are migrant sex workers — are critical steps in fulfilling your professional and ethical responsibility to your clients, advocating for migrant sex workers' rights and access to justice, and promoting migrant sex workers' right to dignity, health, autonomy, safety and security.