

A REVIEW OF THE ANTI-SEX TRAFFICKING APPROACH IN MALAYSIA

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Abstract

The term ‘sex trafficking’ is commonly used to describe activities which involve trafficking for the purpose of sexual exploitation. However, the term ‘sex trafficking’ has become a highly contested term because of the diverse views held by state officials, anti-trafficking scholars and non-governmental organisations on sex work. Hypothetical viewpoints range from abolitionism and neo-abolitionism to those that see trafficking on a continuum of movement, as a human rights issue, inside a pro-sex work/labour system, and an expansion of religious/faith-based convictions. Despite these differing hypothetical viewpoints, the definition of sex trafficking tends to be dominated by state officials and other powerful groups who commonly position trafficking as a product of neo-abolitionism, crime control, and sex work deterrence. This has resulted in punitive measures which further victimises trafficked women. Therefore, this article aims to review the key debates surrounding the term ‘sex trafficking’ and the policing practices carried out by enforcement officers in ‘protecting’ migrant women who have been sexually trafficked. The article will also examine the ongoing victim-protection policies during the pandemic and provide recommendations to improve the current anti-trafficking framework.

Keywords: Sex trafficking, sex work, sex work debates, shelter, policing.

I INTRODUCTION

In Malaysia, the criminalisation of sex work has failed to deter sex trafficking activities. Instead, the sex trade is operated discreetly by various quarters and is reported to generate multibillion-dollar profits. Given the lucrative profits reaped from the human trade, Malaysia has been categorised as a hub and destination for sex trafficking activities in Southeast Asia.¹ In response to such ranking, the state carries out various types of interventions such as raid and rescue of potential trafficked victims. While such practices may be successful in removing women from a trafficking situation, the process

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¹ United States Department of State, *Trafficking in Persons Report 2018 – Malaysia* (2018) <<https://my.usembassy.gov/our-relationship/official-reports/report-trafficking-in-persons-062918/>>; United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* in United Nations (ed) (United Nations Publications, 2020).

is carried out through punitive ways which are harmful to women. Women who have been rescued will be placed in government-run shelters, compelled to act as witnesses for the prosecution, and forcefully repatriated after the trial or deposition pursuant to section 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIP). Such practices have received wide criticisms from human rights advocates and non-governmental organisations across the globe. Therefore, this article intends to expose such practices with the aim of devising better strategies to protect women from the continuum of harm. In doing so, this article will explore how Malaysia carries out its anti-trafficking activities and victim protection policies.

This article will also delve into the key debates surrounding the term ‘sex trafficking’, the demand for sex work, and the policing practices carried out by enforcement officers in ‘protecting’ migrant women who have been trafficked for sexual exploitation. The final discussion in this article will revolve around the impact of the Covid-19 pandemic on trafficking activities and the rules and regulations carried out in shelters. Within this discussion, this article will demonstrate the punitive methods used to rescue and protect women and argue that the existing states practices are incongruous with the human rights approach recommended by the international community. This article will conclude by providing practical recommendations to improve the current anti-trafficking framework and minimise harms on trafficked women.

II DEBATES ON SEX TRAFFICKING

Sex trafficking is a complex type of crime that occurs within and across national borders.² Sex trafficking includes recruiting, transporting, harbouring and/or controlling a person with the aim of exploiting the person for the purpose of sex.³ In most cases, the flow of movement is from rural areas to cities; from poor nations to relatively more affluent ones; and from less developed countries to developed countries.⁴ In this context, human beings are treated as marketable commodities and exploited in the sex industry.⁵

Although the United Nations ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children’ (the Palermo Protocol)⁶ prohibits acts of trafficking and lays out certain guidelines on protection of victims, the identification of trafficked victims remains complicated and blurry. Hypothetical viewpoints run from abolitionism and neo-abolitionism to those that see trafficking on a continuum of movement, as a human rights issue, inside a pro-sex work/labour system, and an expansion

² Marie Segrave, Sanja Milivojevic, and Sharon Pickering, *Sex Trafficking: International Context And Response* (Routledge, 2009).

³ Ibid.

⁴ Vidyamali Samarasinghe, *Female Sex Trafficking in Asia, The Resiliency of Patriarchy in a Changing World* (Routledge, 2008).

⁵ Gretchen Clark Hammond and Mandy McGlone, ‘Entry, Progression, Exit, and Service Provision for Survivors of Sex Trafficking: Implications for Effective Interventions’ (2014) 1(4) *Global Social Welfare*, 151.

⁶ United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (entered into force on 25 Dec 2003).

of religious/faith-based convictions.⁷ Human trafficking is also viewed as a subset of illegal migration or smuggling as it often involves the breaching of immigration controls.⁸ Due to such diverse understanding, human trafficking is sometimes conflated with illegal migration and smuggling which obscures and obstructs a clear definition of trafficking.⁹ This has resulted in multiple, sometimes oppositional, and shifting understandings of sex trafficking.¹⁰ There also seems to be a lack of consensus in determining the number of individuals trafficked each year, which makes the statistics unreliable.¹¹ Thus, Dunne argues that the different understandings of sex trafficking create confusion as attention is drawn away from the ‘real victims of trafficking’ towards voluntary sex workers.¹² It also allows trafficking activities to flourish because of the multiple understanding of sex trafficking.

In general, the term ‘sex trafficking’ is used to describe activities which involves trafficking for the purpose of sexual exploitation. Based on such description, sex trafficking in the Malaysian context would refer to all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing, or receiving a person for the purpose of sexual exploitation (see section 2 of the ATIP). Therefore, any person who traffics an individual for the purpose of exploitation can be punished with imprisonment for a term not exceeding 15 years (see section 12 of the ATIP) and shall also be liable to fine. For child victims of trafficking, section 14 of the ATIP provides a term of imprisonment or 20 years and fine if convicted. Further offences relating to trafficking is stipulated under Part III of the ATIP. Exploitation is defined in section 2 of the ATIP as all forms of sexual exploitation, forced labour or services, slavery, servitude, any illegal activity, or the removal of human organs. Although the term ‘exploitation’ is not specifically defined in the Palermo Protocol or the ATIP, the learned High Court Judge in the case of *Ng Yu Wah v Public Prosecutor*¹³ decreed that a trafficking case under section 14 of the ATIP requires the *mens rea* or mental element of the accused to be established. Therefore, it is vital for the prosecution to state the mode of exploitation in the charge sheet to meet the requirements of a trafficking charge.

While women who are trafficked for non-sexual purposes are commonly referred to as trafficked victims, those who are exploited for their sexual labour are often referred to as ‘sex trafficked victims.’ Scholars argue that this form of labelling specifically singles

⁷ G Soderlund, ‘Running From The Rescuers: New U.S Crusades Against Sex Trafficking And The Rhetoric Of Abolition’ (2005) 17 (3) *Fem Form*, 70.

⁸ Frank Laczko and Marco A. Gramegna, ‘Developing Better Indicators of Human Trafficking’ (2002) 10 (1) *The Brown Journal of World Affairs*, 182.

⁹ Liz Kelly, ‘You Can Find Anything You Want: A Critical Reflection On Research On Trafficking In Persons Within And Into Europe’ (2005) 43 (1-2) *International Migration*, 258.

¹⁰ Maggy Lee, ‘Contested Definitions of Human Trafficking’ in Maggy Lee (ed), *Trafficking and Global Crime Control* (Sage Publications Ltd, 2011).

¹¹ Kelly (n 10) 235.

¹² Joseph L. Dunne, ‘Hijacked: How Efforts to Redefine the International Definition of Human Trafficking Threaten Its Purpose’ (2012) 48 *Willamette Law Review*, 410.

¹³ [2012] 9 MLJ 326.

out sexual labour from other forms of exploitative labour.¹⁴ According to them, ‘sex trafficking’ should be considered a form of labour trafficking because women are exploited for their sexual labour. However, in order to attract attention and support from the public, the term ‘sex trafficking’ has been used by governments, media, and non-governmental organisations to increase ratings (particularly for media), encourage funding, and promote political support.¹⁵ Debates on sex trafficking are further complicated by debates regarding migration and sex work.¹⁶ While there is no single definition, a migrant sex worker is generally referred to a person who moves from one location to another; a person who crosses state borders or stays within them; a person who may have various legal statuses; and a person who engages in any kind of sexual or erotic service in exchange for money, food, shelter, and resources.¹⁷ Conversely, a trafficked sex worker would include anyone who has been forced, coerced, deceived, and exploited in the commercial sex trade.¹⁸

Further, sex trafficking definitions have converged around differing viewpoints on sex labour, individual organisation, and consent.¹⁹ Sex worker organisations in Spain, Thailand, and India, for example, have argued that human trafficking is a problem brought in (or imposed) from outside the sector, motivated by a moralistic agenda.²⁰ In this instance, anti-sex work advocates hope to raise public awareness about the issue of human trafficking and persuade government leaders to impose tougher measures on traffickers or criminalise commercial sex.²¹ In response to such lobbying and advocacy, many countries have taken measures to criminalise human trafficking and illegal border crossings. This includes systematic monitoring of the sex industry as well as regular raids on premises that offers sexual services.²²

However, such interventions have resulted in the conflation of human trafficking and the voluntary cross-border movement of women for sex work. In this respect, migrant women who work in the sex industry are often branded as ‘victims of trafficking’, despite the fact that they made conscious and reasonable decisions to migrate and work in the sex industry.²³ Therefore, the Global Network of Sex Work Projects (NSWP) contends that the conflation of sex work and trafficking is a systematic effort to eliminate sex work and discourage women from migrating for the purpose of sex work, rather

¹⁴ Sex work is not trafficking, NSWP (2011).

<<https://www.nswp.org/sites/nswp.org/files/SW%20is%20Not%20Trafficking.pdf>>.

¹⁵ Ronald Weitzer, The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade (2007) *Politics and Society* 35 (3) 450.

¹⁶ Haezreena Begum Abdul Hamid, Sex Trafficking in Malaysia: Repositioning the Trafficked Victim and Victim Protection Mechanism (2019) 4 (1) *Southeast Asian Social Science Review*, 138.

¹⁷ Elene Lam, *Behind The Rescue: How Anti-Trafficking Investigations and Policies Harm Migrant Sex Workers* (2018, Butterfly Print) 26.

¹⁸ Wendy Chapkis, ‘Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants’ (2003) 17 (6) *Gender & Society*, 930.

¹⁹ Lee (n 11) 16.

²⁰ Annalee Lepp and Borislav Gerasimov, ‘Editorial: Gains And Challenges In The Global Movement For Sex Workers’ Rights (2019) 12 (1) *Anti Trafficking Review*, 1.

²¹ Weitzer (n 11).

²² The Impact of Criminalisation on Sex Workers’ Vulnerability to HIV and Violence’ (December 2017) https://www.nswp.org/sites/nswp.org/files/impact_of_criminalisation_pb_prf01.pdf,

²³ Ibid. See also L. M. Agustin, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry* (2007, Zed Books) 56.

than a misunderstanding of terms. This is evident through the anti-trafficking laws, policies, and interventions which specifically target sex workers. For example, raids that are conducted by the police are specifically aimed at ‘rescuing’ sex workers from establishments that provide sexual services. Similarly, in Malaysia, the government continues to target commercial sex establishments and conduct large-scale police raids instead of investigating other forms of forced labour such as domestic servitude, factory, and construction sites, which is said to be an even more serious problem in the region.²⁴

Thus, sex workers’ organisations criticise such form of ‘rescue’ and argue that raids on workplaces and establishments that offer sexual services are not carried out in the name of trafficking, but to eliminate sex work altogether.²⁵ It is argued that such forms of ‘rescue’ create fear among migrant sex workers and isolate them from the mainstream society and generates distrust towards authorities.²⁶ This compromises women’s access to support and services. Thus, the sex worker rights movement (particularly in the global south) has consistently demanded for sexual labour to be recognised as any other form of labour. They also strive to challenge any form of stigma, sexism, threat, and abuse, aimed at sex workers including those perpetrated by law enforcement. Apart from providing peer-based support and services, the group also advocates for the decriminalisation of sex work, human rights and labour rights for sex workers and aims to improve sex workers working conditions.²⁷ According to them, any legislation aimed at combating sex trafficking must go beyond criminalising traffickers to strengthening immigrants’ and workers’ rights.²⁸

Therefore, sex worker groups argue that it is important to demarcate sex work and sex trafficking clearly.²⁹ This is because equating sex work to sex trafficking infantilizes women and depicts them as helpless and powerless individuals who are incapable of exercising their agency.³⁰ It also hinders effective responses and accurate identification of trafficked victims.³¹ In this instance, scholars argue that there is an absence of a systematic mechanism on victim identification and referral.³² This shows that the policy and ideological contexts within which trafficking is considered are complex and

²⁴ United States Department of State, *Trafficking in Persons Report 2020 - Malaysia* (Report, 2020) <<https://my.usembassy.gov/our-relationship/official-reports/2020-trafficking-in-persons-malaysia/>>.

²⁵ Sex work is not trafficking (n 15).

²⁶ Ibid.

²⁷ Lepp & Gerasimov (n 21).

²⁸ Barbara Ehrenreich and Arlie Russell Hochschild, *Global Woman: Nannies, Maids and Sex Workers in the New Economy* (2002, Granta Books).

²⁹ Catherine Healy, Calum Bennachie, and Raewyn Marshall, ‘Harm Reduction And Sex Workers: A New Zealand Response: Taking The Harm Out Of The Law’ in Richard Pates and Diane Riley (eds), *Harm Reduction in Substance Use and High-Risk Behaviour* (Blackwell Publishing Ltd, 2012).

³⁰ Neil Howard and Mumtaz Lalani, ‘The Politics Of Human Trafficking’ (2008) 4 (1) *St Antony’s International Review*, 8.

³¹ Empower Foundation, *Hit & Run: The Impact Of Anti-Trafficking Policy And Practice On Sex Worker’s Human Rights In Thailand* (November 2019) <http://www.empowerfoundation.org/sexy_file/Hit%20and%20Run%20%20RATSW%20Eng%20online.pdf>.

³² Lee (n 11).

ambiguous.³³ As a result, state officials are given a wide discretion to assess and identify victims of trafficking. Within this, many voluntary sex workers are misidentified as being ‘trafficked’ and some women who are ‘trafficked’ have been misidentified as ‘voluntary sex workers’ because they do not display the image of a stereotypical victim.

According to Andrijasevic & Mai, the stereotypical imagery of a trafficked victim is of a young, naive foreign woman who was coerced into prostitution abroad.³⁴ While there have been instances of horrific violence,³⁵ many women are conscious of their decision to migrate and engage in sex work.³⁶ As Zimmerman and Watts note that ‘not all women who have been trafficked are traumatised, consider themselves victims, detest their captors, or wish to escape or go home.’³⁷ On the contrary, women may view their ‘traffickers’ or ‘recruiters’ as employers or friends who have given them the opportunity to work abroad and earn an income. Therefore, this article argues that the ‘rescue’ practices can sometimes be problematic particularly for women who have willingly agreed to migrate and engage in sex work.

III MATERIAL AND METHODS

Given the nature of the study which focuses on sex trafficking and governmental policies, the use of secondary data analysis is thought to be a viable method for utilisation in the process of inquiry.³⁸ Secondary analysis is a structured approach with procedural and evaluative steps that explains how a researcher gathers, analyses, and interprets data in a report.³⁹ Hakim defines secondary analysis as ‘any further analysis of an existing dataset which presents interpretations, conclusions or knowledge additional to, or different from, those presented in the first report on the inquiry as a whole and its main results.’⁴⁰ Most secondary method research starts with what is already known and investigated in the stated area of interest before moving on to what is still unknown about the subject. Therefore, secondary data processing is an analytical exercise that includes methodological and evaluative measures, much like gathering and analysing primary

³³ Thorburn Natalie, ‘Practitioner Knowledge And Responsiveness To Victims of Sex Trafficking in Aotearoa/ New Zealand’ (2017) 31 (2) *Women Studies Journal*, 81.

³⁴ Rutvica Andrijasevic, ‘Beautiful Dead Bodies: Gender, Migration and Representation in Anti-Trafficking Campaigns’ (2007) 86 (1) *Feminist Review*, 35.

³⁵ Liz Kelly, ‘The Wrong Debate: Reflections On Why Force is Not the Only Issue with Respect to Trafficking in Women for Sexual Exploitation in the UK’ (2003) 73 (1) *Feminist Review*, 141.

³⁶ Julie Cwikel and Elizabeth Hoban, ‘Contentious Issues In Research On Trafficked Women Working In The Sex Industry: Study Design, Ethics, And Methodology’ (2005) 42 (4) *The Journal of Sex Research*, 308.

³⁷ Cathy Zimmerman and Charlotte Watts, ‘WHO Ethical And Safety Recommendations for Interviewing Trafficked Women’ in *World Health Organization*, (ed), World Health Organization (World Health Organization, 2003) 3.

³⁸ Melissa P. Johnston, ‘Secondary Data Analysis: A Method of which the Time Has Come’ (2014) 3 (1) *Qualitative and Quantitative Methods in Libraries*, 623.

³⁹ J. W. Creswell, *Research Design, ‘Qualitative, Quantitative, and Mixed Methods Approaches* (Sage Publications, 3rd rev ed, 2009).

⁴⁰ C. Hakim, *Secondary Analysis In Social Research: A Guide To Data Sources And Method Examples* (George Allen & Uwin, 1982) 1.

data.⁴¹ Even though criticisms have been directed towards the data obtained which is said to be out of date, inaccurate or lacking sufficient details, secondary data analysis offers methodological benefits and can contribute to the field of human trafficking through an alternate perspective. Furthermore, vast quantities of data are readily available through technological developments which allows data to be collected, compiled, and archived for the purpose of research.⁴² Thus, utilizing existing data for research using secondary data analysis has become a viable method of research and it also allows data to be analysed through multiple readings and interpretations.

Given the viability of using secondary data analysis to examine data, interpretations, discourses and reports, this study uses a secondary method to conduct the study. The secondary data analysis is derived from primary and secondary sources. This includes books, journal articles, legislations, published reports, newspaper and magazine articles, websites of non-governmental organizations (NGOs) websites, and of governments, including the United States Department of State, covering the period from 1993 to 2021. Statistics are also taken from the United States Department of State website which provides a comprehensive report on countries annually and the data obtained is based on information given by the United States (US) embassy in Malaysia, state agencies and officials, NGOs and international organizations, fieldwork conducted in Malaysia, research, published reports, news and online articles, academic studies, and information submitted to their official email addresses. The most common keywords used for this analysis are terms and phrases which include: 'sex trafficking', 'sex work debates', 'migrant sex workers in Malaysia', 'prostitution', and 'shelter for trafficked victims', 'undocumented migrants', and 'demand for sex work'.

IV RESULTS AND DISCUSSION

Following a study of the literature, three main themes emerged. They are: the demand for sexual services in Malaysia, the protection of victims, and prosecution of traffickers.

A Demand

Although Malaysia criminalises sex work, the demand and supply of migrant women in the sex trade continue to escalate as the government did not make efforts to reduce the demand for commercial sex.⁴³ According to Cauduro, Nicola, Lombardi, & Ruspini⁴⁴ and Marmo & Forgia,⁴⁵ the sex industry depends on the volume of demand and the supply of women. The significance of demand as a 'pull factor' is contained in Article 9 of the

⁴¹ D. M. Doolan and E. S. Froelicher, 'Using An Existing Data Set To Answer New Research Questions: A Methodological Review' (2009) 23 (3) *Research and Theory for Nursing Practice*, 207.

⁴² Johnston (n 40).

⁴³ United States Department of State (n 26).

⁴⁴ Andrea Cauduro, 'Review Of The Research Studies On The Demand For Prostitution In The European Union And Beyond' in Andrea Cauduro et al. (ed), *Prostitution And Human Trafficking: Focus On Clients* (Springer, 2009).

⁴⁵ Marinella Marmo and Rebecca La Forgia, 'Inclusive National Governance And Trafficked Women In Australia: Otherness And Local Demand' (2008) 3 (1) *Asian Criminology*, 184.

Palermo Protocol which calls upon nation states to reduce demand for trafficked labour.⁴⁶ The demand for women mainly comes from male clients as they come into direct contact with women.⁴⁷ This is echoed by Raymond who argues that demand is gendered and specifically fuelled by men. However, their identities remain concealed and kept with utmost secrecy.⁴⁸ Nevertheless, research shows that customers who purchase sexual services from females (for sexual gratification, entertainment, and violence) are men of all ages, ethnicities, nationalities, and socio-economic backgrounds.⁴⁹

In this context, the demand for sex workers comes from men from wealthier countries while the supply comes from women from the poorer countries.⁵⁰ This situation reflects the current setting in Malaysia where the majority of sex workers (trafficked and voluntary) originate from countries such as Vietnam, Thailand, Indonesia, China, and the Philippines.⁵¹ Many of them are faced with pressing issues such as poverty, unemployment, gender inequality, low-wages and are unable to access social welfare programmes. To them, sex work could generate far more income than other wage labour available to them back home. According to a newspaper report, sex workers could earn between RM450 (for 45 minutes) to RM7,000 (per night) per customer.⁵² The worker would be entitled to 60 percent of the amount while the remaining 40 percent would be paid to the employer.⁵³ This amount is considered to be lucrative for women as it fulfils their expectations of themselves and as breadwinners for their families.

According to Aronowitz and Koning, there is a general consumer demand for sex workers which is sometimes met by trafficked women.⁵⁴ However, this does not mean that clients prefer to purchase the labour of trafficked women, but because trafficked women sometimes possess certain specific characteristics that are demanded by men.⁵⁵ The demand may be for women from certain countries, ethnic groups, or ages (particularly young children) or having a certain attribute (being a virgin).⁵⁶ In this regard, it is unclear if states are expected to criminalise the use of a trafficked victim's services. While this remains blurry, the European Trafficking Directive allows Member States to recognise

⁴⁶ Erin O'Brien, Belinda Carpenter, and Sharon Hayes, 'Sex Trafficking and Moral Harm: Politicised Understandings and Depictions of the Trafficked Experience' (2013) 21 (4) *The Official Journal of the ASC Division on Critical Criminology and the ACJS Section on Critical Criminology*, 408.

⁴⁷ B. Anderson and O'Connell Davidson, 'Is Trafficking In Human Beings Demand Driven? A Multi-Country Pilot Study' (2003, International Organisation for Migration).

⁴⁸ Donna Hughes, 'The Demand For Victims Of Sex Trafficking' (2005) 26 (1) *Women's Studies Program*, 37; Janice G. Raymond, 'Legalizing the Buyers as Sexual Consumers' (2004) 10 (1) *Violence Against Women*, 1168.

⁴⁹ R. B. Flowers, 'The Prostitution Of Women And Girls' (McFarland & Company, Inc, 1998); Teela Sanders, *Paying for Pleasure: Men Who Buy Sex* (Routledge, 2008).

⁵⁰ Siddharth Kara, 'Sex Trafficking: An Overview' in Siddharth Kara (ed), *Sex Trafficking: Inside The Business Of Modern Slavery* (Columbia University Press, 2009).

⁵¹ Noraini Hassan Basri, 'Perangkap Seks Wanita Asing' *Kosmo* (online, 31 March 2018) <<https://www.kosmo.com.my/jurnal/perangkap-seks-wanita-asing-1.638432>>.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Alexis A. Aronowitz and Anneke Koning, 'Understanding Human Trafficking As A Market System: Addressing The Demand Side Of Trafficking For Sexual Exploitation' (2014) 85 (3/4) *Cairn.Info*, 672.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

the possibility of enforcing sanctions on users of any service extracted from a victim, if they are aware that the person is trafficked.⁵⁷ The Directive's preamble states that further criminalization could include the behaviour of employers of lawfully staying third-country citizens, as well as those who purchase sexual services from a trafficked person regardless of their nationality.⁵⁸ In this regard, Sweden has introduced a sex purchase law or locally known as 'sexköpslagen' or the Swedish/Demand/Nordic Model since 1999⁵⁹ where paying for sex is defined as a form of 'sexual abuse'.⁶⁰

The Nordic model seeks to eliminate sex labour by focusing on demand and decriminalising those who sell sex in order to protect sex workers.⁶¹ The Nordic Model criminalises the purchase of commercial sex and provides an exit strategy for women and children from sex work.⁶² The Nordic Model has also been passed in Norway in 2009, Iceland in 2009, Canada in 2014, Northern Ireland in 2015 and France in 2016.⁶³ However, the Nordic Model has been widely critiqued by scholars who argue that the Nordic model is merely a transfer of 'rhetoric and ideology'.⁶⁴ Based on a research conducted in Sweden, Levy & Jakobsson argue that since there is no credible evidence showing any overall reduction in people selling sex, the Nordic model law has failed to reduce levels of sex work.⁶⁵ Instead, the law has increased the risk of certain types of sex work (particularly street-based sex workers) by giving women less time to negotiate their transactions with clients before getting into a vehicle or leaving the street with the client to avoid police detection.⁶⁶ As a result, sex workers have less time to determine a client's potential risk, negotiate which services will be given, and negotiate payment.⁶⁷

While Sweden, Norway, Iceland, Canada, and North Ireland continue to impose its sex purchase law, other countries such as Malaysia continue to criminalise sex workers, including those who have been trafficked. As a result of such actions, the United States has regularly criticised the Malaysian government for failing to uphold victim protection policies, and upholding victim's human rights and has placed Malaysia at Tier Three

⁵⁷ Anne T Gallagher and Nicole Karlebach, *Prosecution Of Trafficking In Persons Cases: Integrating A Human Rights-Based Approach In The Administration Of Criminal Justice* (Bepress, 2011).

⁵⁸ *Ibid.*

⁵⁹ Jay Levy and Pye Jakobsson, 'Sweden's Abolitionist Discourse And Law: Effects On The Dynamics Of Swedish Sex Work And On The Lives Of Sweden's Sex Workers' (2014) 14 (5) *Criminology & Criminal Justice*. 599.

⁶⁰ Carol Harrington, 'The Politics Of Rescue: Peacekeeping And Anti-Trafficking Programmes in Bosnia-Herzegovina and Kosovo' (2005) 17 (2) *International Feminist Journal of Politics*, 180.

⁶¹ *Ibid.*

⁶² Ivana Bacik, '#MeToo, Consent And Prostitution – The Irish Law Reform Experience' (2021) 86 (1) *Women's Studies International Forum*, 102457.

⁶³ Laura McMenzie, Ian R Cook, and Mary Laing, 'Criminological Policy Mobilities And Sex Work: Understanding The Movement Of The 'Swedish Model' to Northern Ireland' (2019) 59 (5) *The British Journal of Criminology*, 1210.

⁶⁴ Sarah Kingston and Terry Thomas, 'No Model In Practice: A "Nordic Model" To Respond To Prostitution?' (2018) 71(1) *Crime, Law and Social Change*, 423.

⁶⁵ Levy and Jakobsson (n 63).

⁶⁶ *Ibid.*

⁶⁷ The Global Network of Sex Work Projects, *The Real Impact of the Swedish Model on Sex Workers: Impacts of The Sex Purchase Law: Street-Based Sex Work And Levels Of Sex Work* (November 2015) <<https://www.nswp.org/sites/nswp.org/files/2.%20Impacts%20of%20the%20Sex%20Purchase%20Law%20-%20Street-Based%20Sex%20Work%20and%20Levels%20of%20Sex%20work%2C%20Swedish%20Model%20Advocacy%20Toolkit%2C%20NSWP%20-%20December%202014.pdf>>.

in its 2021 Trafficking in Persons Report. This is despite the fact that the United States (except for some cities in state of Nevada) criminalises sex work and do not recognise the legal status of sex work. Criticisms have also been made on the number of prosecutions carried out by the Malaysian government and their failure to coordinate with foreign law enforcement to investigate or prosecute trafficking cases. As a result, the number of conviction remains low compared to the number of investigations and number victims 'rescued' by enforcement officers.

B 'Protection'

Migrant sex workers who are 'rescued' are compelled to live in 'shelters' while those who 'chose' to work in brothels or establishments that offers sexual services will be categorised as offenders and charged in court for two counts – as illegal immigrants and engaging with prostitution activities.⁶⁸ In this situation, many of them are faced with xenophobic slurs and sentiments due to the precarity of their immigration status. Other problems they face include the lack of access to health care, counselling, translation and legal services, vulnerability to abuse and violence, and the threat of detention and deportation.⁶⁹ Women who have been 'rescued' from their traffickers are detained in shelters, forced to undergo judicial processing, and are expected to adhere to all rules and regulations before they are repatriated. The act of 'rescue' and detaining women in shelters is thought to be the 'ideal' mode of protecting them. For example, a newspaper report considered 'shelter homes a temporary haven for sex-trafficking victims' (Malay Mail Online dated 18/04/2016).⁷⁰ In reality, these 'shelters' resemble a carceral institution which restricts women's mobility and communication and imposes punitive rules and regulations.⁷¹

The Ministry of Women, Family, and Community Development (Ministry) operates all the eight shelters for trafficked victims in Malaysia. These shelters are armed with high levels of security, including barbed wire fences and security guards, which are intended to prevent women from escaping rather than to protect them from harm.⁷² According to the ATIP, trafficked women are given an initial 21-day interim protection order (for suspected trafficking victims) and/or a subsequent 90-day protection order (for certified trafficking victims) from the court. The period of detention may also be extended by the Court to facilitate the prosecution's case against the traffickers, since the prosecutors

⁶⁸ Sani S. Ibrahim, Adlina Ab. Halim, and Zatul Himmah Adnan, 'A Review of Human Trafficking Issues in Malaysia and Nigeria' (2019) 27 (1) *Pertanika Journal Social Science and Humanities*, 15.

⁶⁹ Lepp and Gerasimov (n 21).

⁷⁰ Jonathan Edward, 'Shelter Homes A Temporary Haven For Sex-Trafficking Victims' *Malaymail* (Online, 18 April 2016) <<http://www.themalaymailonline.com/malaysia/article/shelter-homes-a-temporary-haven-for-sex-trafficking-victims#32uFbAVU4Eu011yQ.97>>.

⁷¹ Anne Gallagher and Elaine Pearson, 'The High Cost Of Freedom: A Legal And Policy Analysis Of Shelter Detention For Victims Of Trafficking' (2010) 32(1) *Human Rights Quarterly*, 14.

⁷² United Nations Human Rights Council, *Report of the Special Rapporteur On Trafficking In Persons, Especially Women And Children* (June, 2015) <https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww.ohchr.org%2FEN%2FHRBodies%2FHRC%2FRegularSessions%2FSession29%2FDocuments%2FA_HRC_29_38_Add.1_AUV.doc>; United States Department of State, *Trafficking in Persons Report 2012 – Malaysia* (2012) <<https://www.state.gov/documents/organization/192596.pdf>>.

mainly rely on the cooperation and testimonies of the women.⁷³ Gallagher⁷⁴ and Lee⁷⁵ describe these shelters as resembling immigration detention centres and not complying with the guidelines contained in the 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (2002) (the Guidelines).

Guideline 1(6) states that all anti-trafficking measures should protect the trafficked victim's freedom of movement and should not infringe upon the victim's rights. Guideline 6 guarantees that victims' access to refuge is not conditional on their ability to testify in criminal proceedings, and that victims are not held in immigrant detention centres, other detention facilities, or vagrant houses. However, the Malaysian government does not seem to abide by this guideline because trafficked women are forced to live in shelters. The Malaysian government however claims that victims of human trafficking have agreed to limit their own freedom of movement and therefore, their stay in the shelter should not be regarded as detention.⁷⁶ Such assertion however is not supported by any written document or law which gives an option for victims to reject shelter and shelter conditions. In this regard, state authorities often claim that the detention of victims is necessary to secure their presence and cooperation in the criminal prosecution of their traffickers.⁷⁷ This shows how shelters are being forced upon trafficked women and being made contingent upon women testifying in court, which contravenes Guideline 6 (see above).

Sheltered women are forced to wear uniforms, required to undergo multiple interviews or interrogation with government officials, held under strict surveillance, prohibited from communicating with anyone outside the shelter, and are deprived of medical, legal, translation and psychological services.⁷⁸ As a result, women feel victimised and stressed having to live in these shelters. In response to the repressive treatments accorded to trafficked women, non-governmental organisations such as The Human Rights Commission of Malaysia⁷⁹ (SUHAKAM) and Tenaganita⁸⁰ have taken on the difficult role of tracking human rights abuses and violence against migrants that occur in shelters or of similar settings.

Over the years, NGOs have raised concerns about overcrowding, poor living conditions, restriction of movement, and physical and verbal abuse towards migrants detained in the shelters.⁸¹ They have continuously imposed pressure on the Malaysian government to adopt non-punitive practices and to improve treatments and conditions. The Human Rights Commission of Malaysia (SUHAKAM) also urged the government to discuss the limited rights of human trafficking victims in order to protect victims and

⁷³ United States Department of State, *Trafficking in Persons Report 2016 – Malaysia* (2016) <<https://www.state.gov/documents/organization/258880.pdf>>.

⁷⁴ Gallagher and Pearson (n 75).

⁷⁵ Lee (n 11).

⁷⁶ Gallagher and Pearson (n 75).

⁷⁷ Ibid.

⁷⁸ United States Department of State, *Trafficking in Persons Report 2014 – Malaysia* (2014) <<http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226770.htm>>.

⁷⁹ 'Human Trafficking', *Suhakam*, (2013) <<http://www.suhakam.org.my/human-trafficking/>>.

⁸⁰ 'Tenaganita: The Truth About Migrants in Malaysia', *Women's Aid Organisation* (May 2012) <http://www.wao.org.my/news_details.php?nid=243&ntitle=TENAGANITA:+The+Truth+About+Migrants+in+Malaysia>.

⁸¹ Ibid.

prevent trafficking with the help of civil society organisations, diplomatic missions, and other related stakeholders.⁸² In response, the Malaysian government has appointed a few local NGOs known as Suka Society,⁸³ Good Shepherd, Persatuan Salimah, and Tenaganita to conduct various sports activities, counselling, and religious programmes in the shelters.⁸⁴ These NGOs are given a funding allocation by the government to organise activities for trafficked women, but they cannot offer any legal advice nor advise the shelter on improving its human rights standards.⁸⁵

To improve victim protection policies, the Malaysian government introduced new laws in 2015, allowing trafficked persons to work (section 51A (1) (b) of the ATIP) or move freely (section 51A (1) (a) of the ATIP) after they have been rescued.⁸⁶ The right to work allows trafficked persons to work and reside outside of the shelter. However, they are required to undergo a stringent risk assessment process, which involves security and medical examinations, and approval by the ‘Council of Anti-Trafficking in Persons and Migrant Smuggling’ (MAPO) (section 51A (2) of the ATIP).⁸⁷ Even though such laws have provided some flexibility to the existing rules, only a small percentage of trafficked women have been given the right to work. This is due to the bureaucratic delays (including a shortage of counsellors willing to complete necessary mental health evaluations), risk-averse and paternalistic attitudes toward victims, and a lack of victim participation in available job opportunities due to low wages.⁸⁸ In 2017, only two people were issued with work visas out of 721 identified victims, because the majority of the victims declined to participate in the programme and preferred to return home.⁸⁹ Special immigration passes which allows freedom of movement were only issued to 91 individuals in 2017,⁹⁰ 68 passes in 2019 for 97 confirmed victims and 45 passes for 82 confirmed victims.⁹¹

In practice, officials have restricted travel outside the shelter to two to three times a month with a chaperone (United States Department of State, 2017).⁹² The government is also reluctant to issue special passes to female victims of trafficking (United States Department of State, 2020).⁹³ This shows how the state authorities control women’s mobility, even though they are entitled to their freedom of movement under Article 13 of the Universal Declaration of Human Rights (UDHR). It also demonstrates the enhanced

⁸² Akil Yunus, ‘Suhakam: Significant Improvement Needed After Malaysia Sinks To Lowest Ever Ranking In Human Trafficking Report’ *The Star* (online, 22 June 2014) <<https://www.thestar.com.my/news/nation/2014/06/22/suhakam-anti-trafficking-report/>>.

⁸³ Suka Society, *Protecting Trafficked Survivors* (2015) <<http://www.sukasociety.org/protecting-trafficked-survivors/>>.

⁸⁴ United States Department of State, *Trafficking in Persons Report 2017 – Malaysia* (2017) <<https://www.state.gov/j/tip/rls/tiprpt/countries/2017/271235.htm>>.

⁸⁵ Ibid.

⁸⁶ United States Department of State, *Trafficking in Persons Report 2016 – Malaysia* (2016) <<https://www.state.gov/documents/organization/258880.pdf>>.

⁸⁷ United States Department of State (n 89).

⁸⁸ Ibid.

⁸⁹ United States Department of State (n1).

⁹⁰ Ibid.

⁹¹ United States Department of State (n 26).

⁹² United States Department of State (n 89).

⁹³ United States Department of State (n 26).

security imposed on female sex trafficked victims. The complexities associated with obtaining freedom of movement suggest that legislation and policing are not protecting women,⁹⁴ but are being used to control women. This is because the police focus on prosecuting traffickers, and women's testimony is vital to prove the prosecution's case and convict the traffickers.⁹⁵ This raises the question of whether trafficked women are really seen as 'true victims' and viewed as such, or whether they are simply used as a tool to assist the government in their fight against sex trafficking.

Although supporters of shelter detention commonly justify detention with the need to protect victims of trafficking, detention of trafficking victims is not a universal practice.⁹⁶ The right of victims of human trafficking to freedom of movement is upheld in many countries, and assistance and protection are given based on genuinely informed consent.⁹⁷ However, this is not the case in Malaysia as the provision of living in a shelter is compulsory for women who have been classified as trafficked (section 51 (3) of the ATIP). Therefore, shelter detention has become one of the most problematic practices that is justified by the anti-trafficking imperative. Such situation has worsened since the emergence of Covid-19 where women have been forced to stay in shelters for a long period of time due to the closure of countries' borders, cancelled flights, minimum hours of operation in courts and government agencies.

C Prosecution

Malaysia adopts the 3P approach (prosecute, protect, and prevent). However, the focus is on prosecution of traffickers while victim protection and prevention of trafficking remains secondary.⁹⁸ While prosecuting traffickers is a significant move towards eliminating sex trafficking, it does not always help to mitigate or relieve the pain and suffering of those who have been trafficked. In some cases, women do not wish to go through the court process, or to witness their traffickers being tried in court.⁹⁹ This often happens when women are detained in a shelter for a long period of time awaiting trial, as they tend to become emotionally unstable and stressed in those conditions.¹⁰⁰ In this instance, their credibility is easily challenged by the defence counsel and their testimonies are not always useful in court.¹⁰¹ In some cases, women fear the consequences that may occur following the prosecution of their traffickers. Such risks include the danger of being beaten, kidnapped, raped, or killed by other members of the syndicate.¹⁰² They may fear for the safety of their families and worry about being re-trafficked. Given that the

⁹⁴ Deborah Brock et al., 'Migrant Sex Work: A Roundtable Analysis' (2000) 2(1) *Canadian Women Studies*, 44.

⁹⁵ Zuraini Ab Hamid, Norjihan Ab Aziz, and Noorshuhadawati Mohamad Amin, 'Challenges Encountered By Malaysian Prosecutors In Human Trafficking' (2018) 1 (1) *International Journal of Asian Social Science*, 21.

⁹⁶ Gallagher and Pearson (n 75).

⁹⁷ *Ibid.*

⁹⁸ Mohamed Y. Mattar, 'Human Security Of State Security - The Overriding Threat In Trafficking In Persons' (2006) 1 *Intercultural Human Rights Law Review*, 249.

⁹⁹ Segrave, Milivojevic and Pickering (n 3).

¹⁰⁰ Hamid, Aziz, and Amin (n 100).

¹⁰¹ *Ibid.*

¹⁰² Segrave, Milivojevic and Pickering (n 3).

victim's evidence is vital in a trafficking trial, women's reluctance to testify against their traffickers could jeopardise the prosecution's case.

In addition, technical defects on trafficking charges, poor quality of investigation, the lack of will, and the failure to prove exploitation are among the reasons for acquittal in trafficking offences. For example, in the High Court appeal case of *Public Prosecutor v Hwong Yu Hee & Ors*,¹⁰³ the respondents complained that the deputy public prosecutor ('DPP') was not only absent from court, but seemed uninterested in prosecuting the appeal as the submissions were filed at the last minute. The prosecution's notice of appeal also failed to state the grounds the prosecution was appealing against. Therefore, the learned Judge was of the view that the prosecution failed to establish a link or a nexus between the traffickers (accused) and the victims based on the prevailing evidence. In this case, three accused were jointly charged¹⁰⁴ for trafficking five women from Indonesia for sexual exploitation pursuant to section 12 of the ATIP but were acquitted based on the lack of evidence. The prosecution's appeal was struck out and the acquittals were affirmed because of the lack of evidence, lackadaisical attitude of the DPP, and the failure to prove common intention among the accused.

Because of these obstacles, the number of prosecutions for sex trafficking offences has been low in comparison to the number of victims reported by the enforcement agencies.¹⁰⁵ This is particularly noticeable in 2020 and 2021 where the number of cases has reduced considerably due to the outbreak of Covid-19. For example, from April 2020 to March 2021, the government only conducted 118 human trafficking investigations, initiated 79 prosecutions, and secured 25 convictions.¹⁰⁶ The number of investigations was also relatively low from the second half of 2019 to February 2020. During this period, the government only conducted 277 investigations, initiated 20 prosecutions, and convicted 20 individuals, compared to 281 investigations, 50 prosecutions, and 50 convictions in 2019.¹⁰⁷ The decrease in the number of cases is attributed to the restricted court operations and reduced investigations of potential trafficking crimes. It is also attributed to the failure on the part of the authorities to identify trafficking victims during the series of raids conducted on undocumented migrants in order to control the spread of the pandemic. As a result, many trafficked victims may have been misidentified as immigration violators and charged in court for immigration offences. This impedes anti-trafficking law enforcement and victim identification efforts.

¹⁰³ [2015] 11 MLJ 138.

¹⁰⁴ See s. 34 of the Penal Code on common intention.

¹⁰⁵ Human Rights Commission of Malaysia, *Annual Report* (2016) <<https://drive.google.com/file/d/0B6FQ7SONa3PRLVfYOHoyODc0eDg/view?resourcekey=0-al4Umw6V-5Lr6SdsGJfjw>>; United Nations Human Rights Office of the High Commissioner, *Human rights and human trafficking: Fact Sheet No. 36* (2014) <http://www.ohchr.org/Documents/Publications/FS36_en.pdf>.

¹⁰⁶ United States Department of State, *Trafficking in Persons Report 2021 – Malaysia* (2021) <https://www.state.gov/wp-content/uploads/2021/07/TIP_Report_Final_20210701.pdf>.

¹⁰⁷ United States Department of State (n 26).

V THE COVID-19 PANDEMIC

The number of trafficked people identified and rescued in 2020 had dropped considerably given the rise of Covid-19. From April 2020 to March 2021, the government identified and confirmed 119 trafficking victims among 487 potential victims. Of the confirmed victims, 72 were adult women and 47 were men or children. According to The Royal Malaysian Police, only 6,142 migrant sex workers and 988 local sex workers were arrested in 2020 compared to 12,023 migrant sex workers and 1,106 local sex workers in 2019.¹⁰⁸ From 2019 to February 2020, the Malaysian government identified 2,229 potential victims and confirmed 82 victims of trafficking, an increase compared to 1,305 potential victims and confirmed 97 victims in 2019.¹⁰⁹ Of the 82 confirmed victims, 55 were adult women.¹¹⁰

The multiple restrictions imposed by the government during the pandemic has pushed trafficking activities further underground.¹¹¹ Despite the fact that imposed quarantine, curfews and lockdowns, travel bans, and restrictions on economic activity and public life can seem to deter crime, the United Nations reports that online sexual harassment by online content and pornography has increased, making it harder to track and detect.¹¹² In Malaysia, sexual services are now being offered by syndicates using chat platforms such as Telegram and We Chat.¹¹³ Given the present economic turmoil as a result of the prolonged lockdown and the need to recuperate from financial losses, many traffickers offer attractive sex packages to clients. For example, a complete package of sexual services which includes sexual arousal, intercourse, and oral sex are available between the price range of RM180 to RM225 which is much cheaper than what was normally offered.¹¹⁴ There are also syndicates that offers packages known as ‘6 for 1’.¹¹⁵ For this package, customers are required to make a one-time payment of RM235, and are given a ‘loyalty’ card. Those cards will be stamped during each visit and the customer will be entitled to a free service on the seventh visit.

These practices indicate lack of caution and concern on the spread of the pandemic and puts trafficked victims at risk of contracting the virus. To worsen the situation, trafficked women are less equipped to protect themselves, and have less access to

¹⁰⁸ Nurfarahin Hussin, ‘Pelacur Musim PKP Tak Laku’ *Utusan* (online, 24 January 2021) <<https://www.utusan.com.my/berita/2021/01/pelacur-musim-pkp-tak-laku/>>.

¹⁰⁹ United States Department of State (n 26).

¹¹⁰ *Ibid.*

¹¹¹ Gerald Flynn and Andreas Schloenhardt, ‘COVID-19 Pandemic Creating Conditions Ripe For Human Trafficking, Experts Fear’ *Globe* (online, 5 June 2020) <<https://southeastasiaglobe.com/human-trafficking-southeast-asia-covid/>>; United Nations Office of Drugs and Crime (n 2).

¹¹² Adriana Zehbrauskas, ‘Social Media-Based Trafficking On The Rise During Coronavirus Pandemic’ *UN News* (online, 11 November 2020) <<https://news.un.org/en/story/2020/11/1077402>>.

¹¹³ Thasha Jayamanogaran, ‘In Fighting Covid-19, Malaysia Goes All Out Against Human Traffickers’ *Malay Mail* (online, 29 June 2020) <<https://www.malaymail.com/news/malaysia/2020/06/29/in-fighting-covid-19-malaysia-goes-all-out-against-human-traffickers/1879670>>.

¹¹⁴ Muhammad Aminnuraliff, ‘Pusat Urut Tawar Khidmat Seks Ketika PKP Diserbu’ *Sinar Harian* (online, 11 February 2011) <<https://www.sinarharian.com.my/article/123530/BERITA/Semasa/Pusat-urut-tawar-khidmat-seks-ketika-pkp-diserbu>>.

¹¹⁵ Nor Azizah Mokhtar, ‘Sindiket Pelacuran ‘6 Kali Bayar, 1 Kali Percuma’ Diserbu’ *BH Online* (online, 31 December 2020) <<https://www.bharian.com.my/berita/kes/2020/12/770579/sindiket-pelacuran-6-kali-bayar-1-kali-percuma-diserbu>>.

healthcare.¹¹⁶ Thus, there have been concerns that the regulations imposed during the pandemic could obstruct victims of trafficking from being identified and reaching out for assistance.¹¹⁷ Although Malaysia's Communications and Multimedia Act 1988 (CAMA), and the Personal Data Protection Act 2010 (PDPA)¹¹⁸ are used to monitor and prevent criminal and commercial sexual activities over the internet, the sex industry continues to thrive, and traffickers advertise and exploit women with impunity using these platforms.¹¹⁸ In this context, the United Nations Office on Drugs and Crime (UNODC) suggests that human traffickers are adapting their business models to the pandemic's 'new normal', especially through the use of modern communication technologies.¹¹⁹

In response to such abuse, the government launched a series of immigration raids on undocumented migrants and refugees in various cities. An example can be seen on the eve of May 1, 2020, where hundreds of undocumented migrant workers and refugees were detained in a major raid near Jalan Masjid India in Kuala Lumpur.¹²⁰ The raid was launched despite the government's assurances that undocumented migrant workers and refugees would have little to fear if they came forward to be screened for COVID-19.¹²¹ It is also worth noting that the government did not properly test asylum seekers and refugees for signs of human trafficking, and they were not provided with interpreters to ensure prompt and effective contact with possible victims.¹²² Thousands of undocumented workers and refugees, including women and children, were rounded up and detained in immigration detention centres in several areas in the Klang Valley, including the Kuala Lumpur Wholesale Market, Selayang, and Gombak.¹²³

Such form of practices has only pushed trafficked persons into hiding and trafficking activities further underground. Thus, migrant activists and non-governmental organisations (NGOs) such as Tenaganita and Refuge for Refugees have criticised the government for arresting and detaining undocumented workers and refugees, arguing that the government had broken its promise that there would be no repercussions if marginalised undocumented migrants and refugees came forward to be checked.¹²⁴ Furthermore, migrants, especially those with an irregular legal status, are often excluded from social security initiatives implemented by governments to assist those impacted by job losses and economic

¹¹⁶ United Nations Office Of Drugs and Crime, *Impact Of The Covid-19 Pandemic On Trafficking In Persons: Preliminary Findings And Messaging Based On Rapid Stocktaking* (2020) <<https://www.un.org/ruleoflaw/wp-content/uploads/2020/05/Thematic-Brief-on-COVID-19-EN-ver.21.pdf>>.

¹¹⁷ Ibid.

¹¹⁸ Athira Nortajuddin, 'Social Media-Based Traffickers On The Rise' *The Asean Post* (online, 7 February 2020) <<https://theaseanpost.com/article/social-media-based-traffickers-rise>>.

¹¹⁹ Flynn and Schloenhardt (n 116).

¹²⁰ 'Malaysia Rounds Up Migrants To Contain Coronavirus, U.N. Warns Of Detention Risks' *Reuters* (online, 2 May 2020) <<https://www.reuters.com/article/us-health-coronavirus-malaysia-migrants/malaysia-rounding-up-migrants-to-contain-coronavirus-spread-police-say-idUSKBN22E04A?il=0>>.

¹²¹ Andika Wahab, 'The Outbreak Of Covid-19 In Malaysia: Pushing Migrant Workers At The Margin' (2020) 2(1) *Social Science & Humanities*, 1.

¹²² United States Department of State (n 26).

¹²³ 'Immigration Dept Nabs 1,368 Undocumented Migrants In Selayang Market, Including 98 Kids' *Malay Mail* (online, 12 May 2020) <<https://www.malaymail.com/news/malaysia/2020/05/12/immigration-dept-nabs-1368-undocumented-migrants-in-selayang-market-includi/1865505>>.

¹²⁴ Wahab (127).

downturn.¹²⁵ Therefore, migrant activists and NGOs have imposed pressure on the government to improve its treatment towards trafficked women by addressing issues of discrimination and unequal treatment and adhering to the guidelines contained in the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking. Yet, unless there is an ideological shift in Malaysian politics and media, the pressure from NGOs may remain unsuccessful.

VI RECOMMENDATIONS

It is imperative to acknowledge the fact that trafficked women are not offenders and should not be treated as criminals or processed as offenders. Although the Malaysian government has incorporated the Palermo Protocol into the ATIP, it has not adhered to most of the guidelines stated in the Recommended Principles and Guidelines on Human Rights and Human Trafficking. Incorporating and enforcing these guidelines could provide better support and assistance to women. This includes providing interpretation and translation services, counselling, medical care, legal advice, and the option for women to choose if they want to live in a shelter or otherwise. Efforts should also be made to raise awareness among women about their rights while in state custody. Therefore, state authorities need to develop a comprehensive human rights approach when dealing with women. Courses on human trafficking and handling victims should be provided to first responders and officials who are in contact with migrant women. These courses should include the participation of NGOs, as their involvement could assist the state officials in understanding women's needs.

Second, the definition of trafficking needs to be amended to clarify any ambiguities and uncertainty of the meaning of trafficking. This has given the police and immigration wide discretionary powers to identify trafficked victims. Given this, state officials often conflate voluntary sex work and trafficked sex work. Such conflation not only victimises the women but may also affect the prosecution's case in court because misidentification of victims may harm victims and they may be reluctant to testify in court. Furthermore, identifying all migrant sex workers as victims of trafficking inhibits sex workers from taking a constructive role in fighting human trafficking in the sex industry.¹²⁶ In this instance, all sex workers will be at risk of being 'detained' or 'rescued'.

Third, to consider granting women temporary visas and the right to work and reside outside a shelter without any bureaucratic delay or supervision. This would not only reduce the overcrowding in the shelter but also give the opportunity for women to work and support their families. The granting of T-visas, for example, has been implemented in New Zealand, Australia, and the United States. This type of visa provides relief to immigrant victims of human trafficking by allowing them to reside and work in the country.¹²⁷

¹²⁵ Flynn and Schloenhardt (116).

¹²⁶ Empower Foundation (n 33).

¹²⁷ Parliament of Australia, *People Trafficking: An Update on Australia's Response* (2008) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0809/09rp05>.

Fourth, to decriminalise sex work. This would, however, be difficult to achieve given the sentiment and religious beliefs towards sex work in Malaysia. However, the decriminalisation of sex work allows sex workers to work more safely, thereby reducing marginalisation and vulnerability.¹²⁸ By framing sex work as an issue of crime, with migrant sex workers being both the perpetrators of crime and the potential victims of exploitative crime, the state is able to legitimise its actions against migrant sex workers, while ignoring the harm done to migrant sex workers by the state.¹²⁹ Therefore, decriminalisation of sex work is important in ensuring that women are given the rights to work in safer conditions. Although the suggestion to decriminalise sex work is bound to be resisted by politicians and the larger public, efforts can be made to study how decriminalisation of sex work has worked in other countries so that steps can be taken to remove laws that criminalise sex work in Malaysia.

VII CONCLUSION

The UN Human Rights Council stressed that it is the obligation of States to protect the human rights of migrants, regardless of their status.¹³⁰ Despite such recommendations, trafficked women continue to be policed and victimised through state practices. This is because the Malaysian government appears to be more focused on imposing stringent punishment on migrant sex workers and has retained immigration laws which criminalise foreign sex workers. As a result, women fear the authorities, and many feel victimised during state custody. Women who are deemed to be trafficked often occupy dual identities: of victims and offenders. On the one hand, state officials often associate women's involvement in sex work with their victimisation, their lack of agency and helplessness. As a result, attempts will be made by state officials to rescue women in the name of 'protection'. On the other hand, state authorities also regard trafficked women as 'immoral' individuals who pose a risk to the state and society, and who require secure containment, punishment, and expulsion.

¹²⁸ Erin Albright and Kate D'Adamo, 'Decreasing Human Trafficking Through Sex Work Decriminalization' (2017) 19 (1) *AMA Journal of Ethics*, 122.

¹²⁹ Laura Graham, 'Governing Sex Work Through Crime: Creating The Context For Violence And Exploitation' (2017) 81 (3) *The Journal of Criminal Law*, 201.

¹³⁰ Global Migration Group, *Exploitation and Abuse of International Migrants, Particularly those in an Irregular Situation: A Human Rights Approach* (Webpage, 2013) https://www.unodc.org/documents/human-trafficking/2013/2013_GMG_Thematic_Paper.pdf.