

# An Insight

into the

# Legalisation of Prostitution

An GñSL Policy Paper





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## **Definitions**

*Abolitionist*: supporting the abolition of something

*Lenocinium*: living off the profits of the prostitution of an underage person

*Neo-prohibtionalist*: the belief that prostitution for example, should be reduced through legislation and policies which further restrict it

*Prohibitionist*: an approach tending to prohibit an issue

*Regulationist*: tending to favour regulation to control an issue

## 1. The Current Legal Situation in Malta

Prostitution, as it currently stands today, is not particularly defined in The Criminal Code of Malta. This in itself raises a problem, as it opens up the parameters for interpretation. The only articles in the Criminal Code which refer to prostitution are those prohibiting person A from forcing, deceiving or manipulating person B into prostitution.

According to Article 54C, enforced prostitution falls under the category of crimes against humanity. Acts committed as a widespread or systematic attack on a civilian population, with the knowledge of the said attack.

Needless to say, child prostitution is considered as an unlawful sexual activity (Article 204D). However there are numerous articles in The Criminal Code which tackle particular scenarios regarding prostitution of minors. Article 197(1) relates to the prostitution of an underage descendant by an ascendant. Article 197(2) relates to a husband, wife or tutor who induces prostitution of their underage spouse, or any other minor under their tutorship. The above crimes are punishable by 3-6 years imprisonment with or without solitary confinement.

Article 204, regards the subjecting of a minor to prostitution, or defilement, or in aiding in the prostitution or defilement of a child, in order to satisfy the lust of a third party. This crime is punishable by 2-5 years imprisonment with or without solitary confinement. On a similar note, Article 204A relates to the instigation of underage people to prostitution, and Article 204B to the inducement of underage persons to prostitution or to participation in pornographic performances. The former is punishable by 3-12 years, and the latter by 2-9 years imprisonment with or without solitary confinement.

In addition to the above, the Criminal Code also includes articles regarding the prostitution of persons of age. Article 197(3) refers to 197(2) and holds that in this particular scenario, if the person induced to prostitution by their wife, husband, or tutor is a person of age, the punishment is that of 1-4 years imprisonment with or without solitary confinement. Article 205 indirectly supports this law by holding that the inducement of persons of age to prostitution which do not fall under the category of Article 197(3), are punishable by less than 5 years of imprisonment.

There are two articles within The Civil Code of Malta with regard to prostitution. Article 1618 regards the automatic termination of rent, if it is determined that the rental place is being used for prostitution purposes, and Article 623 holds that one can disinherit a descendant if he/she is a prostitute.

Two other aspects which arise from prostitution, is Loitering and *Lenocinium*. Presently, loitering for prostitution purposes in Malta, is illegal. Maltese Law holds that those who are caught loitering, can be charged with disturbing public peace. In addition, Article 251AA of The Criminal Code holds that loitering in a private or a public place can be taken to be as a form of stalking. This act is punishable by law with 6-12 months imprisonment, or a multa not exceeding 10,000 Euros, or in some cases both.

Article 204B of The Criminal Code of Malta, holds that living off the profits of the prostitution of an underage person, is illegal. This crime is punishable by 2-9 years (in certain cases 3-12 years) of imprisonment with or without solitary confinement. Therefore, one cannot but ask whether living off the profits of prostitution of a person of age is allowed by law. Or whether this was simply a mistake made while drafting the law, in which case such mistake should not be left unamended.

One can conclude that the current legal situation in Malta is that voluntary prostitution is not considered to be illegal. The manipulating, compelling, and deceiving nature of people who subject, or induce others,

whether they are minors or of age, to prostitution is considered to be illegal. In addition, both loitering and the lenocinium of minors are considered to be illegal.

## 2. A Comparative view of the Laws on Prostitution

As we have identified the situation in Malta, what is perhaps significant in our analytical approach is a comparative view on how prostitution is perceived and dealt with across the rest of Europe. There are indeed a multitude of methods on how one could go about the situation of prostitution in one's country, varying from one extreme to the other, with also tendencies of mediacy. On one hand, Malta would undoubtedly be listed under the prohibitionist approach, as although there isn't a specific statute which states that prostitution is to be prohibited, there are several other laws which prohibit it in an indirect manner, as aforementioned in respect to loitering. On the other hand, a country like the Netherlands would be categorised as being a neo-regulationist country<sup>1</sup>, where prostitution is legalised and decriminalized and there are even certain social benefits attached to it. However, which is the position we are likely to take? Are we to consider moral issues when it comes to deciding which approach we are to take, or should we rely on being solely objective?

### 2.1 Different models of a prostitution policy

Throughout history, humanity realized that one of the improvements with regard to the dealing with prostitution is the change of roles in respect to criminalization - that is public attention has deviated from the prostitute towards the client in respect to crime. This is particularly evident in neo-prohibitionist countries such as Sweden, which we shall be dealing with further on in this paper, where clients are penalized for paying for such services.

#### 2.1.1 Classical models of policies and legislations

Three of the earliest approaches to prostitution include the following:

- i. The Prohibitionist Approach
- ii. The Abolitionist Approach
- iii. The Regulationist Approach

The Prohibitionist approach could be said to have been tackled in one of its earliest forms, legislatively, through the French *Code de Napoleon*, in which prostitution was only legal in brothels, and its workers did not have any civil rights and were subject to a somewhat ridiculing and dehumanizing medical examination. This gave rise to one of the earliest of feminist movements, Josephine Butler's, a Victorian feminist, Abolitionist movement — an attempt to combat discrimination against prostitutes<sup>2</sup>. It was felt that under Napoleon's code, women were being objectified, and oftentimes seemed like they were being reduced to slavery. Butler's movement obtained its first victories when it managed to close down and prohibit brothels in 1885<sup>3</sup>. Prostitution was allowed to be practiced privately.

Abolitionism, as a movement, was there to defend prostitutes and remind us that these women are human beings who deserve civil rights. Their act should be merely viewed as an exchange of services for money, without the legal guarantees (and this is only because there were still some issues related to morality). However, there are two facets related to abolitionism, the other aspect deviating from that of Butler, is that of policy, where it legally abolished prostitution and encouraged women in this profession to

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<sup>1</sup> Lianne Bonello, *Legalising Prostitution as a Job Description: Comparing Malta with the Netherlands*, Institute of Criminology at the University of Malta (Dissertation), 2014

<sup>2</sup> Daniela Danna, *Report on Prostitution Laws in the European Union*, University delgi Studi di Milani, Dipartimento di scienza sociale e politiche, 2013, pg. 13

<sup>3</sup> Ibid, pg. 14



leave such a trade and seek another. Laws were created against the economic exploitation of prostitution, such as the renting of rooms of the purposes of the exchange for sexual services, but prostitution was not directly prohibited.

On another note, the Regulationist method was adopted by countries such as Greece, Hungary and Latvia, where it is legalised through registration and regulating brothels. These countries would have perhaps realized that through making these services illegal more often than not, such services would still go on, and at the same time making workers prone to abuse or even the transmission of diseases.

### 2.1.2 Newer models of policies and legislation

The modern situation in Europe is a whole variety of the classical and neoclassical models, that is to say that in certain cases the classical models have been modified to meet more modern demands. Earlier we had the prohibitionist, abolitionist and the regulationist approach, now we find the following recreations:

- i. The Neo-prohibitionist approach
- ii. The Neo-regulationist approach
- iii. Abolitionism with legal indoor prostitution<sup>4</sup>

Sweden was one of the first countries to introduce the neo-prohibitionist approach to their legal system back in 1999, where rather than criminalising the prostitute, the law seeks to criminalize the client. This includes six-month prison terms and a fine in accordance to the client's income<sup>5</sup>. Norway and Iceland followed after its footsteps in 2009, where such prison terms could be even extended to a year<sup>6</sup>. Although new movements and approaches on how to tackle prostitution have been propounded, even nowadays the oldest of methods seem to be more commonly used until now. The prohibitionist and abolitionist method are indeed the most popular, racking in more than half of the countries of Europe. The following table will give a clear idea of how each respective country more or less deals with the situation of prostitution<sup>7</sup>.

<b>Prohibitionism</b>	<b>Abolitionism</b>	<b>Regulationism</b>
Lithuania, <b>Malta</b> , Romania	Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Ireland, Italy, Luxembourg, Poland, Portugal, Slovakia, Slovenia United Kingdom	Greece, Hungary, Latvia
<b>Neoprohibitionism</b>	<b>Abolitionism with legal indoor prostitution</b>	<b>Neo-regulationism</b>

<sup>4</sup> Ibid. pg. 17

<sup>5</sup> The Local.Fr, *Prostitution around Europe: Which country has it right?*, <<http://www.thelocal.fr/20131129/prostitution-around-europe-which-country-has-it-right>>, November 2013

<sup>6</sup> Ibid

<sup>7</sup> The table has been extracted from Daniela Danni's report on prostitution laws in the European Union

Sweden	Belgium	Austria, Germany, The Netherlands
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Prostitution is often linked to the idea of human trafficking. Sexual exploitation of persons could happen regardless of the fact of whether prostitution is legal or not, and in countries where it is actually legalised, it has been apparent that the problem of human trafficking is perhaps more persistent, or rather, didn't change. A 2008 report of the Netherlands nation police stated that about 50% to 90% of prostitutes worked involuntarily and yet possessed a license. What is alarming is not only the fact that these women work involuntarily, but the fact that they possess a license and work in brothels which pay taxes.

Germany's Prostitution Act of 2002 has categorised Germany into being one of the most modern neo-regulationist countries in Europe and was even called "Europe's biggest brothel"<sup>8</sup>. The Prostitution Act was to provide normal labour conditions for sex workers and eliminate immoral connotations. It sought to improve not only the social status of prostitutes, but also the legal and the structural. The truth is, however, that there is a great difference between practice and theory, and in the long run the Prostitution Act proved to not have lived up to its aims.

The problems arose, for instance, in matters regarding police intervention, as through the legislation, the police were prohibited from detaining sex workers, which they could do before. When they did detain sex workers, this would often bring out whether they were being held involuntarily under forced prostitution or human trafficking. This would have given an opportunity for victims to announce their situation.

Another problem which arose through the neo-regulationist piece of legislation, was that brothels were oftentimes exploiting their workers through the use of flat rates. Through prostitution and brothels being legalised, the service was much easier to access and there wasn't the need to cover anything up. Having said so, the brothels would promise their sex-workers a daily flat-rate - hence this would mean that if a worker would have provided her service for 8 hours or 24 hours, she would have been paid the same amount. This obviously resulted in exploitation and abuse. Some clients even ended up saying that the "women were not fit for use"<sup>9</sup>, which apart from being very objectifying is also breaching several of the worker's rights. In April 2014 it was decided that the Prostitution Act would need to be redeveloped to meet the standards it aimed at fulfilling in the first place. The refurbishing of the Prostitution Act would result in brothels prohibiting payment through flat-rates amongst other necessities.

## 2.2 The Council of Europe and Prostitution

On a Community level, the Council of Europe seeks to make clear that when it comes to providing sex services, it condemns forced prostitution, human trafficking, and the prostitution of minors. The only permitted means of prostitution would be from a consenting adult, who chose this way of life on his or her own accord.

The Council of Europe acknowledges that there are different views throughout Europe as to how to tackle prostitution, as indicated earlier in this paper, however one must bear in mind that being in the Council of Europe means human rights and human dignity are to be made a priority. This does not mean taking a

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<sup>8</sup> Mr José Mendes Bota, *Prostitution, trafficking and modern slavery in Europe*, A report from the Parliamentary Assembly from the Council of Europe, <<http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=20559&>>, 20th March, 2014

<sup>9</sup> Ibid

moralistic approach, but much rather respecting people's decisions and their way of life, whilst also ensuring that they are protected by law<sup>10</sup>.

It seeks to ensure that the health aspect is regulated, and due to prostitution being taken underground in most prohibitionist and neo-abolitionist countries, there is an ever increase of the risk of STDs and HIV/aids. Due to these risks, the World Health Organisation has abandoned any moralist approaches and adopted a pragmatic attitude. Through a more regulationist approach, prostitutes not only work more independently and free from the mercy of pimps or procurers, but also have access to medical care and other social benefits. That being said, it must be kept in mind that regardless of how ideal this might seem, there is a distinction between practice and theory.

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<sup>10</sup> Parliamentary assembly, Resolution 1579 (2007), *Assembly debate* on 4 October 2007 (35th Sitting)

### 3. The Professional Opinion

As part of the research process about this topic, we spoke to a number of professionals who gave us their insight regarding the topic through their perspective, given the nature of their job. The questions asked were the following:

*1. Legalisation of Prostitution has been talked about over the past few years, though even more recently it has been considered as an issue that might be brought forward at parliamentary sittings for discussion. Do you, as a professional individual, believe that it should be legalised?*

*2. Do you believe that it would be possible for prostitution to be regulated?*

*3. Following the previous question, if it the discussion would indeed commence, how can it be regulated and what are the procedures that should be followed?*

*4. Through years of practice in your profession and consultations; what impacts can this way of life have on one's mental, physical and/or emotional state?*

#### 3.1 Dr John Mifsud's perspective on legalising prostitution – Head, Postgraduate Psychiatrist, Couple and Sex Therapist:

According to Dr Mifsud, the fact that prostitution exists is a fact known to all, even though it may not be legal. He recalls how he has met a patient who was offered sexual favours just because this particular female could not pay for a service offered to him and offered sex instead. Thus, it is something which happens regularly in society even though it may not occur to everyone and he believes that a person of legal age having control of his/her body should be allowed to do whatever he/she wants to with their body. Following from this point, Dr Mifsud insisted that prostitution can and should be legalised in order to safeguard the health of the individuals concerned. Some procedures which can be followed can be that sex workers can have licenses as well as operate from licensed premises so that the authorities can monitor their work and ensure that certain health and safety requirements are also met as well as ensure that no one is being forced into doing such work.

Furthermore, this system can also reduce the burden on social assistance since they would be claiming their income like any other work. Finally, Dr Mifsud spoke about the impacts of such a reform from a professional point of view. First of all, the sex workers can practice their work without fear of legal proceedings against them. Furthermore, there is a decreased chance of getting sexually transmitted diseases or being abused. On the other hand, such a reform can also be beneficial for the clients as they can seek services without fear of prosecution or illnesses. This system can also benefit those clients who do not want a relationship but still need a sexual outlet from time to time, which at the end of the day can reduce abuses as well as crimes such as rape.

#### 3.2 As part of our research, we also spoke to Ms. Lorraine Spiteri who is the Chairperson for the Malta Confederation of Women's Organisations (MCWO) to give us her view regarding the subject.

Ms. Spiteri told us that as a Confederation, the MCWO is strongly against the legalisation of Prostitution in Malta. This is because, even though the motive for legalising prostitution regarding health issues can be understood, prostitution as a sex industry can never be safe since it often leads to the prostitutes experiencing threats as well as physical and sexual violence. Rather than legalising prostitution, the way forward should be to put forward a legislation which aims to support prostituted persons and consider prostitution as an obstacle to gender equality and a violation of human rights and dignity. Persons in prostitution should not be criminalized anymore but should be offered alternatives to exit this system of prostitution. What should be

criminalized is the purchase of sex and the fight against all trafficking should be strengthened. Furthermore, prevention and education actions should be implemented to raise awareness of the reality of prostitution as well as the violence linked to it. According to Ms. Spiteri, legalizing prostitution would mean that government and society are ready to commercialize violence at the expense of women.

The MCWO is also strongly against Gentlemen's Clubs and has already called for a ban on them since there is a link between prostitution, crime and human trafficking in such clubs. These types of businesses glamorize the exploitation and objectification of women for money and it is for these reasons that they should not be regulated but banned instead. Ms. Spiteri also insisted that studies show that female workers working within this industry tend to suffer from sexual harassment and are often humiliated by the club owners who are making a constant profit from their exploitation. Unfortunately, the females working here are often pressured to offer their sexual services and this is why countries like Iceland have banned such clubs.

Finally, Ms. Spiteri spoke about the European Women's Lobby Bill which has been signed by the MCWO called 'Together for a Europe free from Prostitution'. The European Women's Lobby believes that prostitution of women and girls is a fundamental violation of women's human rights as well as a form of male violence against women, which leads to one of the obstacles of realizing equality between men and women in society. Furthermore, this lobby believes that in order to realize a world free from prostitution, we need to raise awareness, open spaces for debates and questions as well as allow people to discuss and learn more about what prostitution really is. Women survivors of prostitution need to be supported and make their voices heard. Finally, men should also be involved in such discussions and should be ready to encourage positive attitudes towards equality and respect for women's rights. For more information about this Lobby's work please visit <http://www.womenlobby.org/news/ewl-news/article/18-myths-on-prostitution-read-and>.

3.3 Dr Anne Vella is a Medical Doctor, specialised in public health with a postgraduate diploma in Women's health. She has worked at the substance misuse clinic for the past 20 years, and her area of expertise is female substance misuse. Women on drugs she explains usually end up getting the money they need from prostitution, and therefore she has worked closely with these women. She has also been actively involved in a project managed by the St. Jeanne Antide foundation aiming at empowering women so as not to feel vulnerable when on the streets.

The following were her answers.

1. I do not think that through legalisation of prostitution we will be helping in any way anyone who works in the sex industry. Legislation that legalizes prostitution is legislation that legalizes abuse of the most vulnerable. It is very important to underline the fact that both males and females use prostitution as a means to fund their drug or usury problems. Nobody hits the streets indifferently. All tell us of the shame and fear that the work brings along. Yet most of them are not ashamed to admit their drug problem. Therefore it is not the criminality that is the issue but the loss of dignity that shames them. Legalisation will not give them their dignity back. We have worked with NGO's abroad who do not hail from Christian or religious backgrounds and all speak about the same problem....the broken inner self that needs to be healed before they manage to get out of the streets.
2. I do not believe that regularization will be of any benefit to anyone. I must say that as the law stands now, nobody is really gaining or benefitting anything. The law speaks against loitering, thus punishing the most vulnerable! People resorting to prostitution should be helped into getting better employment and not punished for loitering. Regularization of prostitution would only benefit the consumers and not the workers. Women can still be coerced into prostitution, despite the safeguards introduced. Pimps targeting very vulnerable women will move underground; thus a certain category of women will fare much worse than before. Pimping should be criminalised and anyone gaining from abusing the vulnerable. A solution has to be found on how to gather evidence against pimps without relying on the woman to report and give evidence (which they hardly ever do).

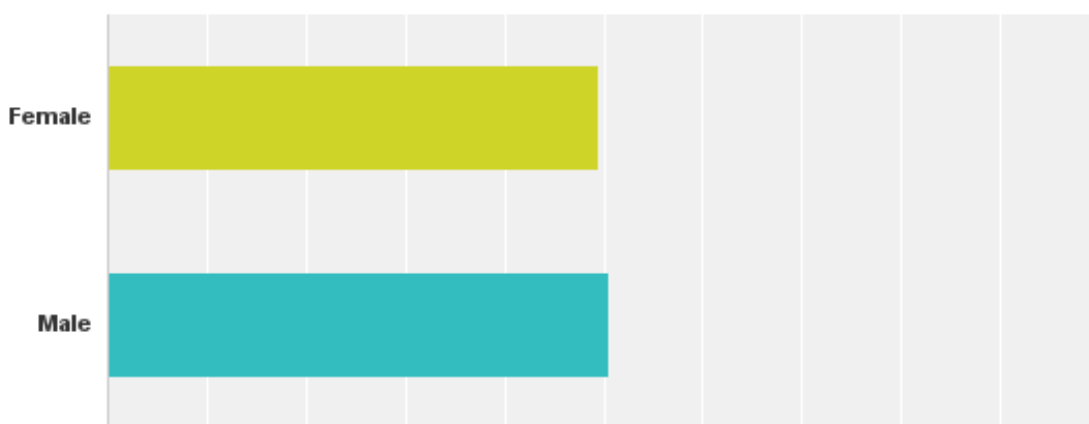
3. Refer to previous answer.
4. Many of our clients have serious mental, emotional and psychiatric problems. Nobody prostitutes him/her self without having previous abuse, usually sexual abuse. This has long been researched and found to be so. Prostitution enhances and increases problems which are already there.

#### 4. The Students Opinion

As GhSL we took the liberty to ask the students to give their take on whether they agree or not with prostitution and whether they think it can be regulated. We also asked students to give their view on whether the Maltese people would be ready to see such regularisation through. We had a good mix of students giving a reply with an equal number of males and females answering the survey. While the majority were of the ages from 18-23, there were a few who answered between the ages of 24-29 and a few above the age of 29. While 41.04% of the respondents said that they agreed with the legalisation of prostitution, 37.26% said they didn't and 21.7% said they were not sure. Only 13.7% said that the Maltese people would be ready for this legalisation, 56.43% said they wouldn't be ready and 30.41% replied saying they were not sure.

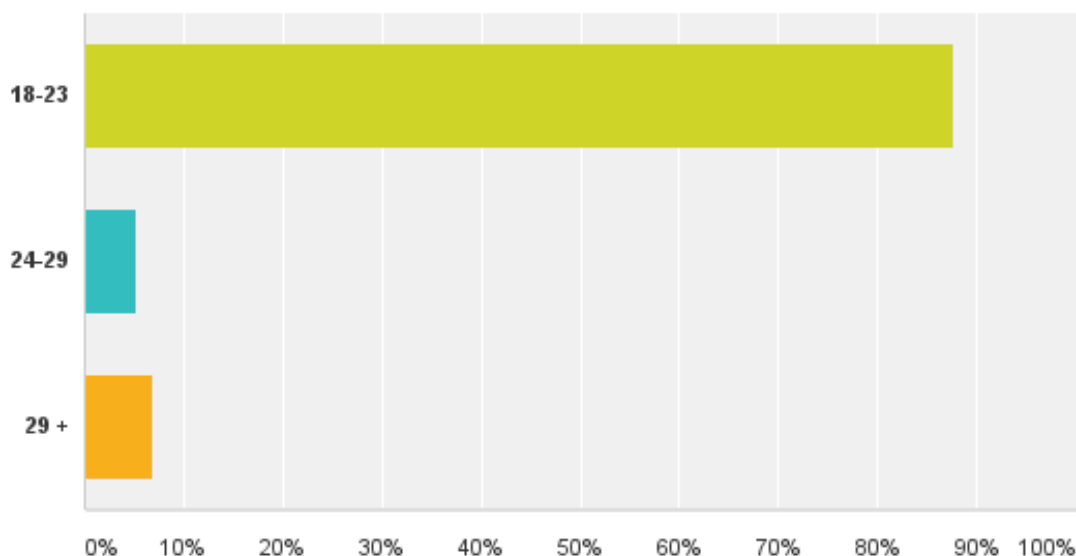
### Q1 What is your gender?

Answered: 439 Skipped: 3



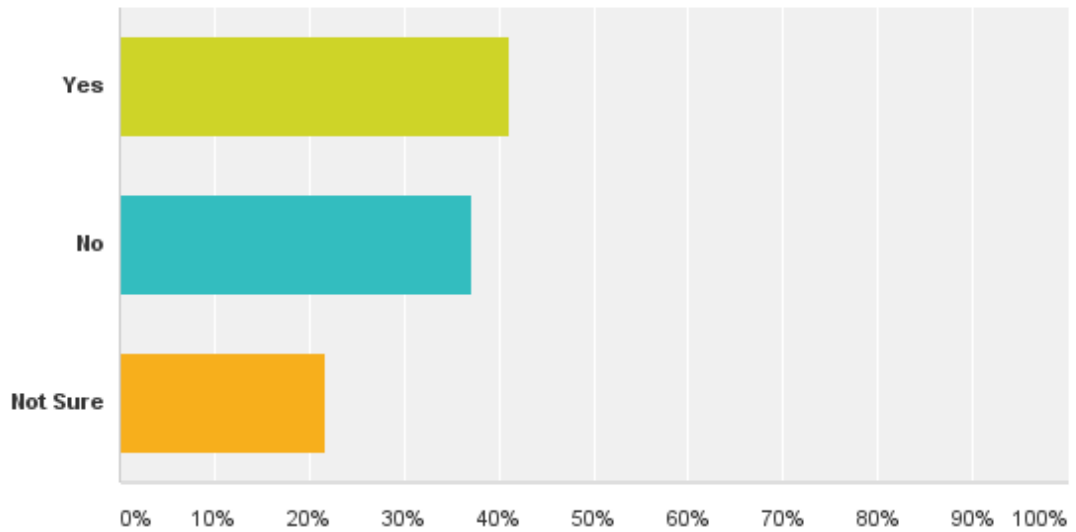
### Q2 How old are you?

Answered: 433 Skipped: 9



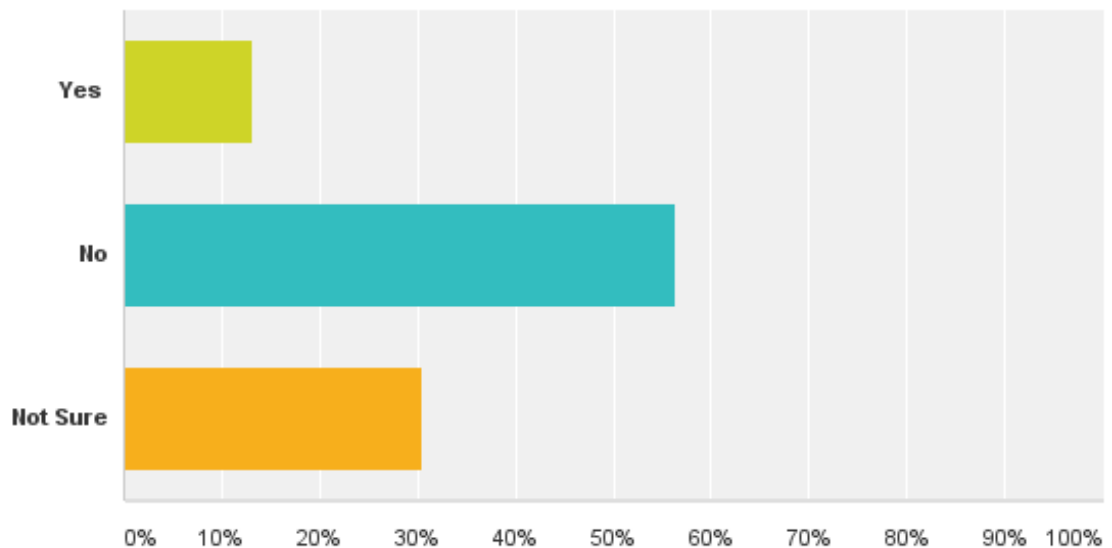
### Q3 Do you agree with the legalisation of prostitution?

Answered: 424 Skipped: 18



### Q6 Do you think the majority of Maltese would be ready for such legislation?

Answered: 319 Skipped: 123





## 5. GhSL's opinion

Our suggestion is that the issue of prostitution in Malta should leave no room for interpretation, since it has always been relatively unregulated. Therefore specific legislation regulating it should be enacted to ensure certainty within this field.

- From our standpoint we propose that certain criminal offences already regulated by the Criminal Code, such as that of enforcing prostitution<sup>11</sup> should be continued to be regulated, as well as the instigation of underage people to prostitution<sup>12</sup>. Prostitution should be an **independent** choice made by a person of age, not enforced in any way.
- An essential part of legalising prostitution would be by making it subject to employment laws, regulations, as well as taxation laws. In this scenario, government would receive revenue from taxation, while prostitutes would receive social benefits. This system can also reduce the burden on social assistance by the State since prostitutes would be claiming their income like any other work.
- However GhSL is of the opinion that the main intention behind legalisation of prostitution ought to be that of making it as safe as possible, especially in health-related matters regarding sexually transmitted diseases. As reported by the Times of Malta in an article by Kim Dalli<sup>13</sup>, Malta does not have a national prevention programme for HIV and sexually transmitted infections. If prostitution were to be regulated there would be less reluctance on the part of sex workers to access healthcare and support services since this would be part of the job.
- A suggestion would be that prostitutes operate with a license, so they can be monitored by authorities and can go for regular check-ups at health clinics. Furthermore provision and use of contraceptives should be made mandatory. This will also contribute in preventing accidental pregnancies.
- On a community level, the Council of Europe makes it clear that it condemns forced prostitution, human trafficking, and prostitution of minors. The only permitted means of prostitution would be from a consenting adult, who chose this way of life on his or her own accord.<sup>14</sup>
- With the ever increasing relevance of human rights in the aspect of law, one must also keep this in mind when drafting legislation on such a contentious subject. This does not mean including a moralistic approach, but rather, a more pragmatic approach by emphasizing on respect for people's decisions and protection by the law.
- Sex workers would be able to practice their work without fearing prosecution or being forced or threatened into such work by pimps. Although there must be some form of intermediary between client and prostitute, through 'pimps', this should be well-regulated to prevent exploitation of individuals.

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<sup>11</sup> Article 54C of the Criminal Code

<sup>12</sup> Article 204B

<sup>13</sup> December 15, 2003, Legalise Prostitution, says sex health expert

<sup>14</sup> Mr José Mendes Bota, Prostitution, trafficking and modern slavery in Europe, A report from the 8 Parliamentary Assembly from the Council of Europe, <<http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=20559&>>, 20th March, 2014

- From the survey which GhSL made regarding this subject (taking a sample of 10% from amongst 442 entries), a number of people commented that brothels should be regulated by having specific times and places where they can be opened for business, as well as potentially having police enforcement.
- It was also mentioned that such profession might also be a much needed sexual outlet for individuals, which at the end of the day can reduce criminal offences such as rape or violent indecent assault. Through a more regulatory approach, a profession which has been with us for a long time and which will surely not go anywhere, will at least be regulated and given some form of monitoring.
- However, when it comes to the question of whether the Maltese would be ready for such legalisation, the majority of the opinions were that Malta is still a very traditional country, with sex being a very taboo subject, and a large influence by the Church. Thus it was deemed by many people taking the survey that there would be a lot of criticism against such regulation.