

**Drafting sex workers' human rights: using decriminalisation to combat  
gender-based violence faced by sex workers**

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## ABSTRACT

Rates of gender-based violence (“GBV”) are rapidly growing in South Africa, which has come to be known as the “rape capital” of the world.<sup>1</sup> This violence is indiscriminately perpetrated against women across the country, including sex workers who are often victim of heinous acts of GBV due to their limited protection under the law and stigmatised role in society. The legal responses to sex work, namely legalisation, criminalisation, or decriminalisation, have become an increasingly discussed topic across the world due to a heightened understanding of the complex challenges sex workers face. While it is currently illegal to buy or sell sex in South Africa, if the Criminal Law (Sexual Offences and Related Matters) Amendment Bill 2022 (“the Bill”) is passed, South Africa will become only the third country in the world to fully decriminalise sex work. The draft Bill proposes the removal of the criminalisation of buying and selling of sex and the clearing of criminal records of those who have been prosecuted for buying or selling sex.

This dissertation is therefore, aimed at critically analysing how decriminalising sex work in South Africa by way of enacting the draft Bill can aid in reducing sex workers’ vulnerability to experiencing GBV, specifically by affording greater protection to sex workers and eradicating the dangerous stigma around sex work. This dissertation therefore undertakes to investigate how the criminalisation of sex work disproportionately affects sex workers by exposing them to rampant levels of abuse, sexual violence and police brutality, under the umbrella of GBV. Therefore, it further aims to establish how the criminalisation of sex work correlates directly with the violation of numerous sex workers’ human rights. In considering how effective South Africa’s current legal response to sex work is, it is pertinent to analyse our international and domestic obligations to protect women against violence and violations of their human rights, specifically identifying the position of sex workers amongst these protective forces. In bolstering attempts to protect the rights of sex workers and give effect to the intentions of the Bill of Rights and South Africa’s international obligations, the findings of this dissertation ultimately reveal why it is of the utmost importance that government decriminalise sex work and enact the Bill without undue delay. Further recommendations will be provided to work in conjunction with the draft Bill to assist the safety of sex workers in South Africa.

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<sup>1</sup> Khauhelo Mile ‘Gender Based Violence: A South African Plague’ 2020 *Rebecca Oppenheimer Internship 2*.

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# CHAPTER 1

## INTRODUCTION

### 1.1 Introduction

Violence against women by men is the most prevalent form of GBV in South Africa,<sup>2</sup> and has long been a systemic issue plaguing South African society. According to the Human Rights Council Working Group on discrimination and girls, the diminishment of women's and girl's human rights, has intensified to hazardous levels in certain countries.<sup>3</sup> GBV is defined by Meghan Ott of Women International organisation as “violence that is directed at an individual based on his or her biological sex or gender identity” and includes “physical, sexual, verbal, emotional, and psychological abuse, threats, coercion, and economic or educational deprivation, whether occurring in public or private life.”<sup>4</sup> As noted by Mile, despite President Cyril Ramaphosa's condemnation of GBV and declaration of it as national pandemic, South African women are still the targets of brutalisation at the hands of men.<sup>5</sup> However, this dissertation will focus solely on the GBV perpetrated against adult, female sex workers, in light of the dangerous circumstances around their occupancy and the crippling relationship they have with the law that should otherwise protect their human rights. In exposing the violence faced by sex workers, this dissertation will shed significant light upon this epidemic and the findings will underlie South Africa's response and position generally.

According to the National Institutes of Health in the United States of America, sex work is understood as a “formalised and commercial negotiation of sex in return for payment” and occurs “outside of the bounds of relationships.”<sup>6</sup> Globally the legal response to sex work is either criminalisation, legalisation, or decriminalisation, all three of which peak significant controversy due to the unique nature of sex work. South Africa's approach to sex work is one of full criminalisation, whereby it is illegal to both buy and sell sex under s20(1)(Aa) of the

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<sup>2</sup> Mile op cit note 1 at 3.

<sup>3</sup> Human Rights Council ‘Escalating backlash against gender equality and urgency of reaffirming substantive equality and the human rights of women and girls’ (2024) report of the Working Group on discrimination against women and girls 2-21.

<sup>4</sup> Meghan Ott ‘Series: What Does That Mean? Gender-based Violence’ *Women for Women International* 4 June 2021, available at <https://www.womenforwomen.org/blogs/series-what-does-mean-gender-based-violence>, accessed on 26 July 2023.

<sup>5</sup> Mile op cit note 1 at 2.

<sup>6</sup> Tamaryn L Crankshaw & Jane Freedman ‘Sex work or transactional sex? Shifting the dialogue from risk to rights’ (2023) 31 *Sexual and Reproductive Health Matters*.

Sexual Offences Act 23 of 1957 (“Sexual Offences Act”).<sup>7</sup> This dissertation aims to critically analyse the volcanic consequences of the criminalisation of sex work in South Africa, revealing a dire need for legislative reform geared at protecting sex workers against GBV. The criminalisation of sex work has been proven to be ineffective and costly, a perpetuator of the harmful stigma against sex workers, and most significantly, results in increasing sex worker’s vulnerability to experiencing GBV.<sup>8</sup> As a result of their illegal status, sex workers are at constant risk of persecution and are forced to operate in unsafe working conditions with limited ability to negotiate safe sex or to report and seek legal recourse against violence at the hands of their clients, ‘pimps’, and the police.<sup>9</sup> Secondary accounts from sex workers within this dissertation will reveal harrowing tales of incidents of rape, harassment, extortion and abuse.<sup>10</sup> Research indicates that sex workers’ exposure to violence is so severe, that the “murder rate among female sex workers” is six times higher than the rate of the general female population.<sup>11</sup> Having limited recourse to legal protections and labour rights, sex workers are left vulnerable and unable to escape the GBV that is flagrantly perpetrated against them.

As a result of increased vulnerability to experiencing GBV sex workers experience multiple violations of their human rights, notwithstanding the fact that these rights are guaranteed by the Constitution of South Africa (“the Constitution”). These include *inter alia*, violations of their right to bodily and psychological integrity; the right to freedom and security of the person; the right against deprivation of liberty; and the right to dignity.<sup>12</sup> Evidently, the soaring levels of violence perpetrated against sex workers and the resulting human rights violations they experience, conflict with both South Africa’s international and domestic obligations to protect women from violence and to guarantee equal protection under the law.<sup>13</sup>

It is thus pertinent for government and civil society to strategically re-evaluate the best model of legal reform for sex work in South Africa. By decriminalising the sale and purchase of adult sexual services and clearing of criminal records of those who have been prosecuted for buying or selling sex, the draft Bill will significantly reduce sex workers’ vulnerability to

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<sup>7</sup> S20(1)(Aa) of the Sexual Offences Act 23 of 1957.

<sup>8</sup> Chi Adanna Mgbako et al ‘The case for decriminalization of sex work in South Africa’ (2012) 44 *Georgetown Journal of International Law* at 1447.

<sup>9</sup> Mgbako et al op cit note 7 at 1424.

<sup>10</sup> Donna Evans & Dr Rebecca Walker ‘The Policing Of Sex Work In South Africa: A Research Report On The Human Rights Challenges Across Two South African Provinces’ (2017) *Sonke Gender Justice and SWEAT* 1-64.

<sup>11</sup> Mgbako et al op cit note 7 at 1451

<sup>12</sup> Mgbako et al op cit note 7 at 1424.

<sup>13</sup> Ibid at 1452.

experiencing GBV.<sup>14</sup> By legitimating sex work as an industry and removing associated criminal penalties, sex workers will have greater access to legal recourse, improved relationships with the police, as well as safer working conditions.<sup>15</sup>

## 1.2 Problem statement study

GBV is a harrowing epidemic plaguing women globally and is especially rife in South Africa. However it is only of recent that this crisis has gained media traction and been marked an area of great concern. The brutal killing of Uyinene Mrwetyana, a student of the University of Cape Town, marked a catalyst moment in South African history and cases that followed have since left a gruesome taste in the mouths of South African women who face the threat of physical, sexual or psychological harm daily.<sup>16</sup> Despite government's declared commitment to addressing GBV, South African women continue to be targets of violence at the hands of men.<sup>17</sup> Sex workers in South Africa are a specifically vulnerable group that continue to experience extraordinary levels of violence, violations of their human rights, abuse perpetrated by the police, and limited access to the justice system.<sup>18</sup>

This dissertation aims to investigate and illustrate the violence faced by sex workers as a consequence of the criminalisation of sex work, and to provide evidence to support the enactment of legislation to fully decriminalise sex work in South Africa. The issue at hand is effectively the lack of legal protections for sex workers and the industry in which they work. Due to their current illegal status as a result of the criminalisation of sex work in South Africa, there exists no legal safeguards to regulate their employment, their interactions with clients and their ability to access legal recourse and report abuse out of fear of persecution. Their vulnerability is worsened by the cruel targeting of sex workers by the police. Therefore sex workers are left voiceless and are increasingly vulnerable to experiencing systematic incidents of GBV. This threatens their livelihood and ability to exist in society, undermining their fundamental human rights that should be afforded to them as equally as it is to the rest of us.

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<sup>14</sup> South African Government 'Minister Ronald Lamola on Criminal Law Amendment Bill of 2022 – decriminalisation of sex work' 9 December 2022, available at <https://www.gov.za/news/mediastatements/minister-ronald-lamola-criminal-law-amendment-bill-2022-decriminalisationsex#:~:text=On%2030%20November%202022%20Cabinet,23%20of%201957>, accessed on 7 October 2023.

<sup>15</sup> Mgbako et al op cit note 7 at 1438.

<sup>16</sup> Shirley Ramabulana *To be or not to be?: The decriminalisation of sex work in South Africa* (unpublished MPhil thesis, University of Cape Town, 2021); Pickup et al. (2001: 12).

<sup>17</sup> Mile op cit note 1 at 32.

<sup>18</sup> Mgbako et al op cit note 7 at 1423.

Given the numerous legal commitments and constitutional guarantees South Africa has made to protect minorities including women's rights, it is deeply problematic that sex workers continue to be ostracised and excluded from legal protections, affecting the enjoyment of their rights. Therefore it must be interrogated why sex workers do not receive equal protection under the law and why South Africa is able to avert its international legal obligations in respect of sex workers. In investigating the human rights protections afforded to sex workers (or lack thereof), it must be concluded that the criminalisation of sex work conflicts with these obligations and the rights vested in the Bill of Rights.

The decriminalisation of sex work has gained international traction and the accompanying legislative reform has long since been in the works by various organisations, activists and the government. However, the movement has not seen any legitimate mobility up until the publishing of the draft Bill in 2022. It is therefore necessary to further consider the underlying political and social reasons hindering the decriminalisation of sex work in South Africa. Furthermore it is pertinent to strategically scrutinise the draft Bill and consider the exact parameters and contents of the Bill. Despite the progressive nature of the draft Bill, the delays in enacting it are unsurprising to anyone. Therefore, this dissertation further aims to weigh out the potential challenges of the draft Bill against the likely positive outcomes. There exists many misconceptions and false narratives that are hindering the legal reform of sex work in South Africa, including that decriminalisation will increase demand and trafficking, and will break down the moral fabric of society. In the same breadth, many opponents of decriminalisation argue that criminalisation, or legalisation are safer and more effective legal responses to sex work. All of which must be addressed.

Ultimately by acknowledging that sex work, is work, the industry will be legitimated and sex workers will be granted access to legal protection, safe working conditions and better relationships with the police, which will result in reducing their vulnerability to experiencing GBV.<sup>19</sup> While decriminalisation cannot single handedly eradicate all forms of GBV, it is hypothesised that it will significantly reduce GBV faced by sex workers and dismantle the stigma around sex work.

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<sup>19</sup> Mgbako et al op cit note 7 at 1435.

### 1.3 Significance of the research

This dissertation aims to stand in solidarity with and fully support the realisation of sex workers' human rights, which are often ignored or deemed outside of the protective forces of the law due to their choice of occupation. While there are a range of existing studies that provide insights into women's experiences of GBV and access to justice barriers, there is little consideration of how these issues are understood by sex workers.<sup>20</sup> Sex work is an extremely unreported profession, given its illegal status. Through in-depth research, the publication of this dissertation aims to shed light on the realities and statistics of sex workers that are only common knowledge to activist organisations, thereby encouraging future academics to investigate this precarious field. By enlightening others on the realities of sex workers in South Africa it will aid in dismantling the inherent shame and stigma surrounding sex work.<sup>21</sup> This will further empower sex workers to demand access to their fundamental human rights and work to restore their dignity.<sup>22</sup> Furthermore it will catalyse a larger conversation, paving the way to better protection of the rights of all South African women.

This dissertation will further advocate for the change of policy and aim to influence legal reform that leads to better treatment of sex workers. Given that the draft Bill is new, little research exists on analysing it and its potential merits. It thus aims to offer criticism of the draft Bill and lead recommendations for its improvement. Such research will be helpful to other academics and especially laypersons who would benefit from an objective and wholesome picture of the arguments for and against decriminalising sex work. Therefore, it also aims to catalyse fair public discourse regarding sex work and to build on existing research.

### 1.4 Research question

In response to the identified issue, the main research question this paper aims to investigate is how the decriminalisation of sex work in South Africa, through the proposed draft Bill, will

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<sup>20</sup> Christina Beninger *Gender and the Rule of Law in Theory and Practice: Challenges and Prospects for Strengthening Women's Access to Justice in Gender-Based Violence Cases* (unpublished LLM thesis, University of Cape Town, 2022) 15.

<sup>21</sup> Mongiwa Pamela Ncube *Protection Orders in South Africa: The Effectiveness of Implementation and Enforcement for Victims of Gender-based Violence* (unpublished LLM thesis, University of Cape Town, 2021) 15.

<sup>22</sup> Ebenezer Hutchful *Sexual Violence and the Criminal Justice System in Ghana: Exploring the Issues of Victim Protection and Confidentiality in the Courts* (unpublished LLM thesis, University of Cape Town, 2019) 15.

reduce sex workers' vulnerability to experiencing GBV and lead to better fulfilment of their human rights.

To answer this question, the following sub-questions will be analysed:

- i. What are the consequences of criminalising sex work for the human rights of sex workers and how exactly does it increase their vulnerability to experiencing GBV?
- ii. How does criminalisation hinder the government from fulfilling its constitutional and international legal obligations in respect of protecting women against violence?
- iii. How would decriminalisation through the draft Bill be the most effective legal response to sex work in South Africa?

## **1.5 Research aims and objectives**

This dissertation is situated in the overarching context of South Africa's constitutional and legislative mandate to provide sex workers with equitable access to fundamental human rights. Therefore this paper aims to investigate the status quo of sex workers in South Africa and how the criminalisation of sex work leads to their increased exposure to GBV and diminishment of their human rights. This dissertation aims to ultimately illustrate the need to reform South Africa's legal response to sex work. In offering an objective analysis of the draft Bill it will be illustrated why decriminalisation is a necessary and effective policy which will aid in eradicating the high levels of GBV faced by sex workers.

Its objectives are:

- i. To provide an analysis of South Africa's legal framework in respect of sex workers and the shortcomings thereof.
- ii. To critically analyse the proposed draft Bill and recommend its enactment.
- iii. To illustrate how decriminalisation will protect sex workers from GBV without resulting in catastrophic consequences.
- iv. To provide further recommendations for how bureaucratic institutions and civil society can aid in ensuring the safety of sex workers.

## 1.6 Methodology

This dissertation utilised a literature review to investigate to what extent the decriminalisation of sex work can help reduce incidents of GBV against sex workers. The research relied on was therefore predominantly qualitative data, which was restricted to purely desktop research. Qualitative research is suitable for this dissertation as it allowed for the gathering of detailed information generated from other credible sources regarding the cruel realities faced by sex workers and provided detailed accounts of their experiences.<sup>23</sup> This consisted of searching for a vast collection of various sources for this study, and thereafter the relevant materials were vetted and sorted according to their credibility and relevance for each chapter and the various research questions. A qualitative approach allowed for contextual and tangible research to be discovered regarding the perceptions and stigma surrounding sex workers and its causal relationship with their lack of legal protection and exposure to violence.<sup>24</sup> This was done by consulting various primary sources under desk and literature review to substantiate the argument and hypothesis, particularly by analysing the Constitution, legislation and international human rights instruments relating to sex workers and their corresponding human rights. Furthermore, critical commentary on the proposed draft Bill was provided to weigh out the credibility of the Bill and consider to what extent its enactment would protect sex workers against GBV. Consideration of the Bill is aimed at filling a research gap in this field of study and allowed for a critical consideration of a relatively new piece of legislation.

Secondary sources namely specific books, journal articles, thesis work and reports was consulted to investigate the research question. Whilst secondary sources may lack the same credibility as primary sources, they were useful to this dissertation given the lack of primary data on sex workers and aided in curating a tangible picture of the lived realities of sex workers in South Africa under a system of criminalisation. Furthermore, data was collected primarily from statistics gathered from various reports and the authority of non-governmental organisations (“NGO’s”), to contribute to the credibility of this study.<sup>25</sup> Statistics and case studies as utilised under the condition that they represent the lived experiences of sex workers in South Africa. Reports and statistics were only accepted from credible sources and organisations who were able to provide legitimate authority for their findings. Thereafter, thematic and discourse analysis was conducted, identifying themes and meaning from research

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<sup>23</sup> Karin Klenke *Qualitative Research in the Study of Leadership* (2016).

<sup>24</sup> Beninger op cit note 19 at 9.

<sup>25</sup> Ibid at 11.

and social context.<sup>26</sup> This methodological approach to the research conducted, ultimately enabled the research question to be thoroughly investigated.

## 1.7 Limitations and ethical considerations

Due to the high incidents of GBV perpetrated against women and girls, female, adult sex workers in SA will be exclusively considered in this dissertation. It was of the utmost importance that the research conducted and presented in this thesis does not cause further harm or the re-traumatisation of sex workers or encourage any further discrimination upon them. Therefore attention was paid to the language used and sensitivity embedded in all information provided. For example, the phrase “sex worker” is utilised over derogatory terms such as prostitute.<sup>27</sup> This dissertation is limited by its use of purely desktop research and given that there exists limited reporting and statistics on sex workers’ experiences of GBV. Therefore accounts and experiences of sex workers may not be reflective of all sex workers in South Africa and does not aim to speak for sex workers, but rather to advocate for and empower their own voices. This dissertation unfortunately did not consist of first-hand collecting of data from sex workers and all accounts of sex workers and their experiences with GBV are emitted from reported works.

Furthermore, in presenting an objective analysis of the draft Bill, caution was paid to ensure that no foundation is provided to further fuel critics against the Bill or sex workers. Flexibility was maintained in the conducting of research to ensure that the most valuable and reliable research was provided following a conducive framework. Considering my positionality as a researcher, specifically my background, gender and race and its relation to this study is a further important step.<sup>28</sup> Qualitative and desktop research necessitates a limited and subjective scope to offer a gendered perspective of this particular phenomenon.<sup>29</sup> Furthermore the research is limited as it is specifically undertaken within the South African context, however, given that GBV is a global barrier to women’s rights, the findings and recommendations made within this thesis may very well be relevant to other jurisdictions.<sup>30</sup> However to avoid bias, strict criteria will be utilised so to ensure data and information are chosen that will illustrate a fair and objective picture, outside of my personal subjectivities. Therefore despite not having high

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<sup>26</sup> Shona McCombes & Tegan George ‘What Is a Research Methodology? Steps & Tips’ *Scribbr* 22 June 2023, available at <https://www.scribbr.com/dissertation/methodology/>, accessed 26 July 2023.

<sup>27</sup> Beninger op cit note 19 at 14.

<sup>28</sup> Ibid at 15.

<sup>29</sup> Ibid at 16.

<sup>30</sup> Ibid at 16.

ethical concerns, I did ensure I maintained a suitable ethical standard for that of a student and legal professional.

## **1.8 Chapter Framework**

This thesis is structured in five chapters, beginning with this introduction.

### ***Chapter 1 – Introduction***

For a nuanced and in-depth understanding of the phenomenon under study, the present chapter of this dissertation provided the research question, problem statement and background to the study. The problem statement indicates that the criminalisation of sex work has substantial detrimental consequences for sex workers and their human rights and hints at the urgent need for legal reform.<sup>31</sup>

### ***Chapter 2 – Consequences of criminalisation***

This chapter provides a brief understanding of why sex work exists and examines the different legal responses to sex work. Thereafter the chapter is aimed at providing a review of literature on the effects of the criminalisation of sex work and puts forward the hypothesis that the criminalisation of sex work results in the violation of sex workers' human rights. In casting a light on the dark realities of sex workers' lives under criminalisation, it is suggested that legal reform, namely decriminalisation, must be considered.

### ***Chapter 3 – Legal and policy framework informing sex workers' rights***

This chapter considers the international human rights legal and normative frameworks to determine the protection that is intended to be afforded to sex workers.<sup>32</sup> This chapter concludes that the criminalisation of sex work is in conflict with South Africa's legal obligations to protect sex workers and that decriminalisation may be better suited to comply with international standards of human rights.

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<sup>31</sup> Lumba Ndhlovu *Criminalisation of Sex Work As a Human Rights Violation Against Women in South Africa* (unpublished LLM thesis, University of the Western Cape, 2019) 9. Ndhlovu op cit note 30 at

<sup>32</sup> Ibid at 10.

#### ***Chapter 4 – Decriminalisation and the draft Bill***

This chapter provides a critical analysis and commentary on the draft Bill and ultimately calls for the decriminalisation of sex work in South Africa as the only legal response that can effectively protect sex workers from experiencing GBV and therefore uphold their human rights.<sup>33</sup> The contents and parameters of the Bill will be interrogated, along with the potential challenges that may accompany the Bill and the enactment thereof.<sup>34</sup>

#### ***Chapter 5 – Conclusion and recommendations***

This chapter concludes the dissertation by summarising the key findings of the thesis in light of the research questions identified, as well as comprehensive recommendations for policymakers, relevant stakeholders and future academic research, aimed at greater protection for sex workers.<sup>35</sup> Ultimately it re-emphasises the urgent need to implement the decriminalisation of sex work in South Africa, under the parameters of the draft Bill.

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<sup>33</sup> Mgbako et al op cit note 7 at 1424.

<sup>34</sup> Mgbako et al op cit note 7 at 1424.

<sup>35</sup> Ndhlovu op cit note 30 at chap 2 at 10.

## CHAPTER 2

### THE CONSEQUENCES OF CRIMINALISING SEX WORK

#### 2.1 Introduction

Women in South Africa experience significant levels of GBV, however research indicates that female sex workers are even more disproportionately exposed to violence than other women.<sup>36</sup> A recent study conducted indicates that 70 per cent of female sex workers have experienced violence in the past year and more than half have been raped by the police, clients, and other men.<sup>37</sup> Therefore this chapter aims to investigate the GBV perpetrated against sex workers in light of the dangerous circumstances around their occupation, the crippling relationship they have with the law and legal mechanisms that should protect their rights.

One of the purposes of this dissertation is to illustrate the complexities that are embedded within the sex industry, including why sex work exists and how it is influenced by societal and moral views. According to Ndhlovu, how a society treats sex workers is revealed through its legal response to sex work.<sup>38</sup> In response to sex work, a country may either choose to respond with the criminalisation, decriminalisation, or legalisation of sex work.<sup>39</sup> Legalisation allows for the selling and purchasing of sex to be regulated by the government, while decriminalisation removes all laws prohibiting the buying and selling of sex work.<sup>40</sup> South Africa utilises an abolitionist approach to sex work under which sex work is criminalised so to call for the total abolition of sex work.<sup>41</sup>

The criminalisation of sex work in South Africa disproportionately exposes sex workers to dangerous and unsafe working conditions, wherein they are unable to access legal recourse, police protection and remedies due to the criminalised nature of their occupation. Gordon

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<sup>36</sup> Marlise Richter & Monique Huysamen 'Sex work in South Africa: why both buying and selling should be legal' 2 March 2023, available at <https://theconversation.com/sex-work-in-south-africa-why-both-buying-and-selling-should-be-legal/198742#:~:text=It%20is%20illegal%20to%20buy,and%20what%20still%20needs%20work>, accessed on 12 March 2023.

<sup>37</sup> Ibid.

<sup>38</sup> Ndhlovu op cit note 30 at chap 2 at 1.

<sup>39</sup> Amanda Spies 'The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform' (2021) 65(3) *Journal of African Law* 327-249.

<sup>40</sup> Ibid at 328.

<sup>41</sup> Jane Scoular & Anna Carline 'A critical account of a 'creeping neo-abolitionism': Regulating prostitution in England and Wales' (2014) 14 *Criminology & Criminal Justice* 610.

postulates that repressive governance has caused sex workers to work and exist in isolation, which can be significantly more harmful than the work itself.<sup>42</sup> As a result, sex workers face increased vulnerability to experiencing incidents of GBV such as rape and sexual violence, abuse, police brutality, and heightened discrimination.<sup>43</sup> Shockingly sex workers in South Africa experience GBV perpetrated against them not only by ‘pimps’, clients and third parties, but significantly by the police, which worsens their ability to seek protection against violence. The Commission of Gender Equality has accordingly established that the criminalisation of sex work has a significant impact on the human rights of sex workers.<sup>44</sup> As a result of dangerous working conditions and their inability to access legal recourse; sex workers experience disproportionate violations of their human rights, including *inter alia*, the right to bodily and psychological integrity; freedom and security of the person; dignity; equality; and the right against deprivation of liberty.<sup>45</sup> Ultimately, this chapter will hypothesise that criminalisation of sex work results in increased exposure of sex workers to GBV and the violation of their human rights, and therefore decriminalisation must be considered as a potential policy response to these incidents of violence.

## 2.2 Defining and understanding sex work

Before one can consider which legal and policy-based avenues can be considered to improve sex workers’ access to human rights and reduce their exposure to GBV in South Africa, it is imperative to understand what sex work is and what the underlying motives for entering the industry are.<sup>46</sup> Many of us are quick to stigmatise sex work based on an obscure and stereotyped understanding constructed by our knowledge which is founded on social mores, popular culture and media.<sup>47</sup> However, understanding the influences and driving forces behind sex work will aid in the public identifying sex work as akin to any other form of labour, requiring necessary forms of protection. Sex work is defined differently by different authors, notably, most of whom refer to sex work as “prostitution.”<sup>48</sup> Section 1 of the Sexual Offences Act defines sex

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<sup>42</sup> Brooks-Gordon, Belinda et al ‘Harm Reduction and Decriminalisation of Sex Work: Introduction to the Special Section’ (2021) 18 Springer Nature.

<sup>43</sup> Ramabulana op cit note 15 at 58

<sup>44</sup> Ibid at 58.

<sup>45</sup> Mgbako et al op cit note 7 at 1424.

<sup>46</sup> Ramabulana op cit note 15 at 13.

<sup>47</sup> Ibid at 13.

<sup>48</sup> Ibid at 13.

work as “unlawful carnal intercourse.”<sup>49</sup> This outdated definition is intrinsically harmful to sex workers and South Africa’s ability to protect to sex workers.

The Commission of Gender Equality cautions against such language and the interchangeability of ‘sex worker’ and ‘prostitute’ because “prostitution is viewed as coerced sex work whereby women have no choice in the matter”<sup>50</sup> and is linked to ideas of “criminality and immorality.”<sup>51</sup> According to Gemme, the demand for satisfying sexual needs through a “commercial exchange,” will always exist,<sup>52</sup> and therefore utilising the term “sex worker” leads to the recognition that sex work is a legitimate form of work.<sup>53</sup> In the context of a human rights paper and to uphold the dignity of sex workers, this dissertation will accordingly refer exclusively to “sex workers.” Furthermore, it will employ the definition utilised by the South African Law Reform Commissions Report on Adult Prostitution (“SALRC”), namely that sex work is “the exchange of any financial reward, favour or compensation for the purposes of engaging in a sexual act.”<sup>54</sup> Importantly, the SALRC’s definition is concerned with an adult person who “voluntarily offers or provides sexual services for financial or other reward, irrespective of whether the sexual act occurred or not.”<sup>55</sup> Similarly the United Nations (“UN”) defines sex work as the selling of consensual sex and therefore, only recognises voluntary sex work.<sup>56</sup> Potatt-Warren maintains that ‘forced prostitution’ in itself is actually exploitation or trafficking and must therefore be subjected to different laws, outside the ambit of this dissertation.<sup>57</sup> Whereas according to liberal feminists, sex workers are for all intents and purposes “independent contractors” having a choice in the transactions they engage in.<sup>58</sup> Therefore in advocating for the decriminalisation of sex work one must draw a clear distinction between forced and voluntary sex work.

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<sup>49</sup> Supra note 6 at sec 1.

<sup>50</sup> Ramabulana op cit note 15 at 13.

<sup>51</sup> The Open Society Foundation ‘Understanding Sex Work in an Open Society’ April 2019, available at <https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society>, accessed on 4 April 2023.

<sup>52</sup> Martin A Monto ‘Female Prostitution, Customers, and Violence’ (2004) 10 *Violence Against Women* 165.

<sup>53</sup> Ramabulana op cit note 15 at 14.

<sup>54</sup> SALRC 2009 op cit note 52 at 10.

<sup>55</sup> Ibid at 61.

<sup>56</sup> Ndhlovu op cit note 30 at chap 2 at 3.

<sup>57</sup> Jade Potot-Warren ‘Confusing, Dated and Ineffective? Current Sex Work Laws in England and Wales and Proposals for Reform’ (2021) 3(1) *Student Journal of Professional Practice and Academic Research* 9.

<sup>58</sup> Ndhlovu op cit note 30 at chap 2 at 3.

Due to the various understandings and types of sex work, the exact number of people engaging in sex work in South Africa remains unknown.<sup>59</sup> However, a 2013 study approximated that there are between 132 000 and 182 000 sex workers in South Africa.<sup>60</sup> Furthermore according to Harcourt and Donovan, “sex work has no specific gender.”<sup>61</sup> Defining sex work depends on various factors for example, whether street, online, or occasional work is being considered.<sup>62</sup> Furthermore Masvawure et al note that sex workers may sell sex “formally or informally, regularly or occasionally.”<sup>63</sup> As indicated by the SALRC discussion paper there exists two categories of sex work, namely indoor and outdoor sex work.<sup>64</sup> Indoor sex work entails sex work that occurs in the private sphere, such as ‘brothels’ or escort agencies.<sup>65</sup> Outdoor sex work entails sex work operating in public spheres, such as on street corners.<sup>66</sup> Furthermore there are various factors and circumstances that may influence a women’s choice to enter the sex industry and may inform a country’s given policy choice. As the sex work industry continues to grow globally,<sup>67</sup> research indicates that socio-economic reasons, namely the need for “financial stability” is the dominant motivator for women entering into this industry.<sup>68</sup> According to the Working Group, women and girls living in poverty, experience soaring levels of stigma and intersectional discrimination.<sup>69</sup> Black women in South Africa face the most burdensome socio-economic consequences,<sup>70</sup> and there exists a clear link between financial deprivation and the entering of some women into the sex industry.<sup>71</sup> Furthermore, many sex workers are victims of sexual abuse, which offers an alternative explanation to the circumstances under which they enter into the industry.<sup>72</sup> Given the soaring rates of sexual violence perpetrated against women and children in South Africa, it is not

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<sup>59</sup> Gary Rhoda *The Decriminalisation of Prostitution in South Africa: Towards a Legal Framework* (unpublished LLM thesis, University of Western Cape, 2010) 26.

<sup>60</sup> Evans & Walker op cit note 9 at 8.

<sup>61</sup> Ramabulana op cit note 15 at 13.

<sup>62</sup> Potot-Warren op cit note 55 at 4.

<sup>63</sup> Ramabulana op cit note 15 at 14.

<sup>64</sup> SALRC 2009 op cit note 52 at 95.

<sup>65</sup> Ibid at 95.

<sup>66</sup> SALRC 2009 op cit note 52 at 9.

<sup>67</sup> Shahid Qayyum et al ‘Causes and decision of women’s involvement into Prostitution and its Consequences in Punjab, Pakistan’ (2013) 4(5) *Academic Research International* 223.

<sup>68</sup> Rhoda op cit note 57 at 74.

<sup>69</sup> Human Rights Council op cit note 3 at 12.

<sup>70</sup> Mfanozelwe Shoji ‘Challenges that Remain a Hindrance in Attaining Gender Equality in South Africa’ *Commission for Gender Equality* available at <http://www.cge.org.za/challenges-that-remain-a-hindrance-inattaining-gender-equality-in-south-africa/>, accessed 30 March 2023.

<sup>71</sup> Qayyum op cit note 65 at 403.

<sup>72</sup> Ramabulana op cit note 15 at 21.

surprising that prior experiences of sexual violence could have prompted some sex workers entering into the industry.<sup>73</sup> Regardless of whether a sex worker has experienced sexual abuse or not, many sex workers who suffer from substance abuse may also turn to sex work to fund their use of drugs and alcohol.<sup>74</sup> Therefore, understanding the nuances of sex work will contextualise much of the argument made in this dissertation and is necessary to inform the optimal legal response to the industry.<sup>75</sup>

### **2.3 The status quo of sex work in South Africa**

According to Saady B, how a society treats sex workers is illuminated by its' chosen legal response to sex work.<sup>76</sup> In investigating the current legal response to sex work in South Africa, it is necessary to illustrate how the current laws in South Africa are both ineffective and increase sex workers vulnerability to GBV. A given government can respond to sex work either through criminalisation, decriminalisation, or legalisation.<sup>77</sup> However before the end of the twentieth century, the abolitionist and regulatory responses were the dominant legal responses.<sup>78</sup> The abolitionist approach continues to be the most popular approach as it utilises criminalisation to effect the "total abolition" of sex work.<sup>79</sup> Decriminalisation and legalisation exist as alternatives to this abolitionist approach.<sup>80</sup> The legalisation of sex work is a recent basis upon which sex work is regulated,<sup>81</sup> while decriminalisation eliminates the criminal sanctions associated with sex work.<sup>82</sup> Therefore, whether a country adopts the criminalisation, legalisation, or decriminalisation of sex work will have significant effects on the industry and is often motivated by historical context.

Criminalisation, as stated above, entails imposing of criminal sanctions against the sex worker, the purchaser and/or the facilitator involved.<sup>83</sup> The criminalisation approach has two variations within itself,<sup>84</sup> namely total criminalisation (prohibitionist approach) or partial

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<sup>73</sup> Romi Sigsworth 'Anyone Can Be a Rapist' (2009) *Centre for the Study of Violence and Reconciliation* 8.

<sup>74</sup> Ndhlovu op cit note 30 at chap 2 at 10.

<sup>75</sup> Qayyum op cit note 65 at 399.

<sup>76</sup> Brian Saady *Decriminalized Prostitution: The Common Sense Solution* 1 ed (2017) 3.

<sup>77</sup> Mathieson et al 'Prostitution Policy: Legalization, Decriminalization and the Nordic Model' (2015) 14 *Seattle Journal for Social Justice* 368.

<sup>78</sup> Ibid at 368.

<sup>79</sup> Saady op cit note 73 at 3.

<sup>80</sup> Ibid at at 3.

<sup>81</sup> Mathieson op cit note 74 at 368.

<sup>82</sup> Ibid at 379.

<sup>83</sup> Ibid at 379

<sup>84</sup> SALRC 2009 op cit note 52 at 13.

criminalisation (the abolitionist approach).<sup>85</sup> According to the New Zealand Ministry of Justice, criminalisation aims to eliminate the sex industry as a whole.<sup>86</sup> The total criminalisation of sex work is accordingly found amongst countries wherein sex work is rendered completely unacceptable.<sup>87</sup> This therefore effectively sees the criminalisation of all persons involved in sex work.<sup>88</sup> On the other hand, partial criminalisation of sex work may be modified to allow for the selling of sex, but prohibits any related activity including *inter alia*, the soliciting of sex and owning of a ‘brothel.’<sup>89</sup> Due to the view of the sex worker as a victim of exploitation, this approach believes that it will reduce the consequences faced by sex workers.<sup>90</sup><sup>87</sup> The criminalisation of sex work in South Africa and its accompanying legislative forces will be critically analysed below.

### 2.3.1 Criminalisation of sex work in South Africa

While the legal approach to sex work has long since been controversial in South Africa,<sup>91</sup> South Africa’s approach is that of full or total criminalisation, whereby it is illegal to both buy or sell sex.<sup>92</sup> The Immorality Act of 1927 (“Immorality Act”), which was passed to outlaw relations between white women and black men, first initiated a legal system that ruled on the private sexual choices of individuals.<sup>93</sup> Before 1988, the Immorality Act did not explicitly criminalise sex work, but instead criminalised related activities such as the running of brothels.<sup>94</sup> However, the Immorality Act also catered for the fining of those who participated in sex work.<sup>95</sup> Sex work was first criminalised under the 1988 amendment to the Immorality Act.<sup>96</sup> The amendment to this act further renamed the Immorality Act of 1950 to the Sexual Offences Act, which banned all sex work, brothels and “anyone who makes a living off the exchange of any sexual favours.”<sup>97</sup> The buying of sex, however, was only later criminalised after the

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<sup>85</sup> Ibid at 13.

<sup>86</sup> Elaine Mossman ‘International Approaches to Decriminalising or Legalising Prostitution Ministry of Justice New Zealand, Mossman E ‘International Approaches to Decriminalising or Legalising Prostitution’ *University of Wellington* (2007).

<sup>87</sup> Ibid.

<sup>88</sup> SALRC 2009 op cit note 52 at 13.

<sup>89</sup> Mossman op cit note 83.

<sup>90</sup> Ibid.

<sup>91</sup> Ndhlovu op cit note 30 at chap 4 at 1.

<sup>92</sup> Supra note 6 at s20(1)(aA).

<sup>93</sup> Immorality Act 5 of 1927; Ramabulana op cit note 15 at 17.

<sup>94</sup> Ibid at 17.

<sup>95</sup> Ibid at 17.

<sup>96</sup> Immorality Amendment Act 2 of 1988.

<sup>97</sup> Supra note 6; Ramabulana op cit note 15 at 17.

Constitutional Court judgement of *S v Jordan and Others* 2002,<sup>98</sup> and the amendment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.<sup>99</sup> The latter Act also banned the buying of sex from people under 18 years of age.<sup>100</sup> This judgement was then followed by the infamous section 20(1)(aA) of the Sexual Offences, which criminalised sexual intercourse for reward.<sup>101</sup> Section 20(1)(aA) of the Sexual Offences Act provides that:

Any person 18 years or older who- (a) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward,<sup>102</sup> shall be guilty of an offence.<sup>103</sup>

Under this contentious section, it is illegal to engage in sex work or be associated with the industry, and therefore, sex workers and all participants of the industry are subject to arrest and conviction.<sup>104</sup> Certain municipal by-laws are also in force to complement the above legislation and thereby impact sex work.<sup>105</sup><sup>102</sup> Therefore, criminal sanctions are imposed on both the seller and buyer of sex.<sup>106</sup> According to Chi Mgbako, the modern legal approach to sex work in South Africa is a clear remnant of apartheid's "failed attempt to control consensual adult sexual behaviour."<sup>107</sup>

Therefore the criminalisation of sex work in South Africa has a complex history in our legal system and is much debated.<sup>108</sup> Many attempts have been made to regulate the industry in South Africa, all of which infamously excluded the interests of the sex worker.<sup>109</sup> From the above historical context, it is clear that South Africa's views on morality were embedded in its legislation.<sup>110</sup> Proponents of criminalisation view sex work as immoral and exploitative of vulnerable women.<sup>111</sup> However as held by Ndhlovu morality is not stagnant, but rather it develops alongside a given society.<sup>112</sup> Therefore, to use morality to justify the stigmatisation

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<sup>98</sup> 2006 (6) South Africa 642 (CC).

<sup>99</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>100</sup> Ramabulana op cit note 15 at 17.

<sup>101</sup> Supra note 6 at s20(1)(aA); Ndhlovu op cit note 30 at chap 2 at 1.

<sup>102</sup> Supra note 6 at s20(1)(aA)(a).

<sup>103</sup> Ibid at s20(1)(aA)(b).

<sup>104</sup> Mgbako et al op cit note 7 at 1425.

<sup>105</sup> Ibid at 1425.

<sup>106</sup> Rebecca Hayes-Smith & Zahra Shekarkhar 'Why is prostitution criminalized? An alternative viewpoint on the construction of sex work' (2010) 13.1 *Contemporary Justice Review* 43.

<sup>107</sup> Mgbako et al op cit note 7 at 1425.

<sup>108</sup> Ibid.

<sup>109</sup> Ramabulana op cit note 15 at 18.

<sup>110</sup> Ndhlovu op cit note 30 at chap 2 at 21.

<sup>111</sup> Gail M Deady 'The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification within the Prostitution Industry' (2011) 17 *WASH. & LEE J.C.R. & SOC. JUST* 536.

<sup>112</sup> Ndhlovu op cit note 30 at chap 2 at 21

and criminalisation of sex work, does not hold weight.<sup>113</sup> A further fundamental justification for criminalisation is its supposed deterrent value.<sup>114</sup> Deterrence is based on the assumption that criminalisation will reduce the demand for sex work and the purchasing of sex, as well as sex trafficking.<sup>115</sup> However as mentioned above, sex work and exploitative trafficking are mutually exclusive,<sup>116</sup> and must be understood individually.<sup>117</sup> However, criminalisation is not a “magic fix” and these assumptions fail to recognise the complex reality of sex work.<sup>118</sup> Ultimately, despite the criminalisation of sex work in South Africa pursued by a moral high ground and outdated thinking, the current legislative framework is not succeeding in eliminating sex work, but is rather exposing sex workers to disproportionate levels of GBV.

## 2.4 The consequences of criminalisation

According to Asijiki Coalition (“Asijiki”) and Sonke Gender Justice (“Sonke”) sex workers are evidently one of the most marginalised and violated women in our society.<sup>119</sup> It is only through investigating the experiences of sex workers in South Africa that harrowing tales of frequent abuse, sexual violence and police brutality are revealed.<sup>120</sup> Sex workers engage in unsafe working environments and their experiences are worsened due to their isolation from the state’s protection.<sup>121</sup> According to Potatt Warren, South Africa’s legislation “precludes sex workers from being acknowledged as potential victims, professionals in their own right or anything other than criminals.”<sup>122</sup> As a result, sex workers are callously placed on the periphery of society without any recourse or protection against the harm or exploitation they face.<sup>123</sup> By viewing sex workers as criminals they are ostracised from the legal system and the protections afforded by it, despite needing protection more desperately than most of society.<sup>124</sup> The criminal nature of sex work therefore worsens their vulnerability to experiencing GBV and

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<sup>113</sup> Ibid at chap 2 at 21.

<sup>114</sup> Mathieson op cit note 74 at 401.

<sup>115</sup> Ibid at 401.

<sup>116</sup> Nomonde Nyembe et al ‘Sex Workers and Sex Work in South Africa: A Guide for Journalists and Writers’ Sonke Gender Justice, Sex Workers Education and Advocacy Taskforce, Sisonke Sex Workers Movement & Women’s Legal Centre (2014) 12.

<sup>117</sup> Hayes-Smith & Shekarkhar op cit note 103 at 44.

<sup>118</sup> Nyembe op cit note 113 at 12.

<sup>119</sup> Ramabulana op cit note 15 at 54.

<sup>120</sup> Mgbako et al op cit note 7 at 1425.

<sup>121</sup> Teela Sanders & Rosie Cambell ‘Criminalization, protection and rights: Global tensions in the governance of commercial sex’ (2014) 14 *Criminology & Criminal Justice* 539.

<sup>122</sup> Potot-Warren op cit note 55 at 7.

<sup>123</sup> Ibid at 7.

<sup>124</sup> Nyembe op cit note 113 at 1.

limits their abilities to report incidents as they are unable or unwilling to admit to their participation in the industry. According to Ramabulana, sex workers experience soaring levels of physical and sexual violence perpetrated by clients, the police and others involved in the industry.<sup>125</sup> Linking sex work and GBV voids the traditional moral arguments against decriminalisation and ensures that the explicit nature of abuse that sex workers experience does not fall on deaf ears.<sup>126</sup>

#### **2.4.1 GBV and femicide**

According to Sonke and Asijiki sex workers experience the highest rate of GBV due to their vulnerability and lack of protections as a result of their illegal status.<sup>127</sup> Perpetrators of GBV are able to capitalise on the lack of legal and police protection of sex workers in South Africa and catalyse disturbing levels of physical and sexual violence against them.<sup>128</sup> This dissertation aims to focus on the physical abuse and sexual brutality that sex workers experience in South Africa, whilst still paying homage to the incredulous psychological impact that follows. According to Manoek, a significantly large percentage of reported GBV cases involve sex workers and it is reported that between 2014 and 2017, 118 female sex workers had reportedly died, 55 per cent of which were murdered.<sup>129</sup> Importantly however, the statistics regarding experiences of GBV faced by sex workers are not necessarily accurate as many cases go unreported and unrecorded.<sup>130</sup> The 2021 Sonke factsheet stated that murder is one of the most severe consequences brought about by the neglect of sex workers.<sup>131</sup> This factsheet strikingly holds that “sex worker women are 18 times more likely to be vulnerable to being murdered than any other women in South Africa.”<sup>132</sup> Therefore, while GBV is a grotesque epidemic in South Africa, sex workers are significantly more vulnerable to experiencing incidents of violence and losing their lives.

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<sup>125</sup> Ramabulana op cit note 15 at 54.

<sup>126</sup> Ibid at 27.

<sup>127</sup> Ibid at 55.

<sup>128</sup> Ibid at 55.

<sup>129</sup> Jerusha Rangasami et al ‘Police Abuse of Sex Workers: Data from cases reported to the Women’s Legal Centre between 2011 and 2015’ (2016) *Women’s Legal Centre*.

<sup>130</sup> Ibid at 6.

<sup>131</sup> Karabo van Heerden ‘Sonke Annual Report 2021’ *Sonke Gender Justice* available at <https://genderjustice.org.za/publication/sonke-annual-report-2021/>; Ramabulana op cit note 15 at 18.

<sup>132</sup> Ibid; Ramabulana op cit note 15 at 18.

## 2.4.2 Abuse and sexual violence

According to Ramabulana the lack of dignity and human rights accorded to sex workers makes it intrinsically easier for people to take advantage of them knowing that they do not have any means of recourse.<sup>133</sup> It is reported that the most prevalent form of abuse faced by sex workers in South Africa is physical and sexual abuse.<sup>134</sup> According to a study conducted, about a third to half of all South African sex workers have experienced physical or sexual violence in their lifetime.<sup>135</sup> It is asserted that men purchase sexual intercourse because they view sex workers as objects they can temporarily possess,<sup>136</sup> and can “dictate the circumstances” under which the sexual intercourse occurs.<sup>137</sup> These misogynistic beliefs have limited sex workers’ abilities to insist on safe working environments.<sup>138</sup> Therefore, criminalisation increases sex workers’ vulnerability to abuse, be it from their clients, employers or authorities.<sup>139</sup>

Both pimps and clients often use force and their position of power to coerce sex workers into fulfilling dangerous demands.<sup>140</sup> For example, some pimps will force sex workers to give them the earnings made by the sex worker, or force sex workers into compromising positions.<sup>141</sup> Due to these power relations and the fact that sex workers are often financially desperate, many sex workers are unable to negotiate the terms under which sex occurs or refuse the demands of their employers or clients.<sup>142</sup> Furthermore due to their dangerous working environments, sex workers are unable to demand safe sexual circumstances, such as the use of protection.<sup>143</sup> The decision to use condoms falls mostly within the client’s power and sex workers are unable to fight back against clients who force them to have unprotected sex, due to their fear of being physically or sexually abused.<sup>144</sup> As a result sex workers often face abuse

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<sup>133</sup> Ibid at 33.

<sup>134</sup> Nyembe op cit note 113 at 11

<sup>135</sup> Ibid at 11.

<sup>136</sup> Ruchira Gupta & Ruchi Sinha ‘Confronting the Demand for Sex-trafficking: A Handbook for Lawenforcement’ (2007) *Apne Aap Worldwide* 89.

<sup>137</sup> Donna Hughes ‘Prostitution: Causes and Solutions’ (2004) 1 *Presentation at Female Prostitution: Prostitution and Interventions held in Santiago de Compostela, Galicia, Spain* 4.

<sup>138</sup> Gupta & Sinha op cit note 133 at 89.

<sup>139</sup> Ramabulana op cit note 15 at 33.

<sup>140</sup> Nancy Erbe ‘Prostituteds: Victims of Men's Exploitation and Abuse’ (1984) 2 *Law & Inequality: A Journal of Theory and Practice* 3.

<sup>141</sup> Mark Grough & Toby Goldbach ‘Relationship between Pimps and Prostitutes’ available at [https://courses2.cit.cornell.edu/sociallaw/student\\_projects/PimpsandProstitutes.htm](https://courses2.cit.cornell.edu/sociallaw/student_projects/PimpsandProstitutes.htm), accessed 15 April 2023.

<sup>142</sup> Erbe op cit note 137 at 4.

<sup>143</sup> John M. Luiz & Leon Roets ‘On Prostitution, STDs and the Law in South Africa: The State as Pimp’ (2000) 18(1) *Journal of Contemporary African Studies* 28.

<sup>144</sup> Quarraisha Abdool Karim et al ‘Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers’ (1995) 85(11) *American Journal of Public Health* 1523.

and exploitation by their clients,<sup>145</sup> with one study indicating that 70 per cent of female sex workers were raped by their clients.<sup>146</sup> Furthermore because of the criminal nature of sex work, abuse and violence faced by sex workers often goes unreported and when it is reported, it is inadequately dealt with.<sup>147</sup> This further empowers clients to abuse sex workers, and to do so with immunity and the knowledge that sex workers are unlikely to receive assistance from the police.<sup>148</sup> According to Mgbako et al, sex workers are powerless to fight back against abuse and sexual assault as they receive no protection from the legal or justice system.<sup>149</sup> Other than being unable to speak up against abuse experienced by clients and pimps, they are also unable to report the abuse due to the possibility of being criminally pursued and charged with sex work.<sup>150</sup> This is further evidenced by the fact that much of the abuse faced by sex workers goes unreported, and without sex work organisations the realities of sex workers would largely be excluded from criminal statistics.<sup>151</sup>

Vidima et al found that between 40 and 70 per cent of sex workers had experienced physical violence within one year of entering into the industry, perpetrated by *inter alia*, clients, intimate partners, third parties and the public.<sup>152</sup> Research indicates that men who purchase sex demonstrate violent or harmful behaviour to their sexual partners.<sup>153</sup> This results in a cycle whereby an increase in the demand for sex work, leads to “increased violent behaviour, leading to an increased demand for violent sex.”<sup>154</sup> In a research report conducted by Sonke and Sex Workers Education and Advocacy Taskforce (“SWEAT”) (“Sonke Report”), interviews with sex workers revealed that sexual violence and rape by clients and the police are two of the most common forms of abuse experienced by sex workers daily in South Africa.<sup>155</sup> Perpetrators of rape are further reported to not utilise condoms when raping sex workers.<sup>156</sup> A further report

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<sup>145</sup> Erbe op cit note 137 at 12.

<sup>146</sup> Ibid at 12.

<sup>147</sup> S Pudifin & S Bosch ‘Demographic and Social Factors Influencing Public Opinion on Prostitution: an Exploratory Study in KwaZulu-Natal Province, South Africa’ (2012) 15.4 *PER/PELJ*.

<sup>148</sup> Ramabulana op cit note 15 at 33.

<sup>149</sup> Mgbako et al op cit note 7 at 1431.

<sup>150</sup> Deady op cit note 108 at 536.

<sup>151</sup> Ramabulana op cit note 15 at 33.

<sup>152</sup> Ibid at 33.

<sup>153</sup> Jan Macleod et al ‘Challenging Men’s Demand for Prostitution in Scotland’ (2008) *Women’s Support Project* 15.

<sup>154</sup> Ibid at 15.

<sup>155</sup> Evans & Walker op cit note 9 at 29.

<sup>156</sup> Human Rights Watch & SWEAT ‘Why Sex Work Should be Decriminalised in South Africa’ (2019) available at [https://www.hrw.org/sites/default/files/report\\_pdf/southafrica0819\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/southafrica0819_web_0.pdf) 44.

and series of interviews conducted by SWEAT and Human Rights Watch (“SWEAT Report”) revealed that the rapes often include various forms of violence and are sometimes “sadistic in nature.”<sup>157</sup> Sex worker Lucy Kege reported being held down and raped for six hours by a man who said to Kege that he “would do what he liked with [her] and for as long as he liked.”<sup>158</sup> Thirty-one-year-old Yolanda Nkgapele had scars on her head, back and shoulders during the interviews from when she was stepped on, threatened and raped by a client.<sup>159</sup> Approximately one-third of sex workers interviewed reported being raped, while others reported experiencing severe physical violence, ranging in severity from being slapped to being cut, hit by weapons or severely beaten.<sup>160</sup> Clients who are drunk or may want rough sex may also increase sex workers’ vulnerability to being attacked.<sup>161</sup> Furthermore sex workers reported being robbed by clients or having clients demand their money back after sex, with some even using knives and guns.<sup>162</sup> These experiences leave sex workers across South Africa fearful of engaging in sex work and encountering such “sadists” and rapists.<sup>163</sup>

Criminalisation further results in sex workers being forced into performing sex work in dark streets, bushes and isolated shacks which increases their exposure to violence and abuse.<sup>164</sup> Sex workers therefore describe themselves as “easy targets” who are isolated from the protection of the law and quickly become known to perpetrators.<sup>165</sup> However this grim reality is worsened by the fact that sex workers are unable and unwilling to report the above incidents of abuse, specifically out of fear of arrest.<sup>166</sup> According to the SWEAT Report, the criminalisation of sex work has only contributed to violence against sex workers, instead of addressing it.<sup>167</sup> Ultimately, the criminalisation of sex work has inherently linked sex workers with crime and criminal activities, when in reality sex workers are victims in need of protection.<sup>168</sup>

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<sup>157</sup> Ibid at 43.

<sup>158</sup> Ibid at 44.

<sup>159</sup> SWEAT op cit note 153 at 40.

<sup>160</sup> Ibid at 40.

<sup>161</sup> Ibid at 46.

<sup>162</sup> Ibid at 46.

<sup>163</sup> Ibid at 40.

<sup>164</sup> Ibid at 41.

<sup>165</sup> Ibid at 41.

<sup>166</sup> Ibid at 41.

<sup>167</sup> Ibid at 40.

<sup>168</sup> Ibid at 40.

### 2.4.3 Police brutality and a lack of justice

The police are legally responsible for defending and serving their community, however because of the criminal nature of sex work, police are frequently known to abuse and exploit sex workers.<sup>169</sup> Research conducted over the last fifteen years indicates that police abuse against sex workers under the system of criminalisation has been “cruel and rampant.”<sup>170</sup> Through the arresting of sex workers, police find opportunities to inflict abuse and coerce sex workers for money or sex.<sup>171</sup> When sex workers are non-compliant or unwilling to cooperate with the police or perform sexual activities for them, they are further brutalised.<sup>172</sup> Serious offences perpetrated by the police against sex workers include violence, torture, rape, intimidation, harassment, corruption and unlawful arrests and detention.<sup>173</sup> Therefore, it is not uncommon for perpetrators of abuse against sex workers to be authorities and those in law enforcement, as they are easily able to take advantage of their positions of power,<sup>174</sup> and act with immunity.<sup>175</sup> The police furthermore use their ‘moral’ positions against sex workers who are ostracised in society, to get away with their acts of abuse.<sup>176</sup> The criminalisation of sex work therefore perpetuates the GBV that sex workers face and given that the police are rarely held accountable, these dangers are heightened.<sup>177</sup>

This expedition of abuse and police brutality, according to Mgbako is due to the “power imbalance” that exists between sex workers and the police.<sup>178</sup> According to the Sonke report, 37.2 per cent of sex workers indicated that they do not trust the police.<sup>179</sup> The Sonke report specifically interviewed 57 sex workers so to ascertain their relationship and interactions with the police.<sup>180</sup> The Sonke report indicated that 33 per cent of respondents in the survey had been sexually assaulted or raped by a police officer, while 25 per cent had been pepper-sprayed.<sup>181</sup>

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<sup>169</sup> SALRC 2009 op cit note 52 at 21.

<sup>170</sup> SWEAT op cit note 153 at 30.

<sup>171</sup> Rangasami op cit note 126 at 12.

<sup>172</sup> SALRC 2009 op cit note 52 at 21.

<sup>173</sup> Evans & Walker op cit note 9 at 22.

<sup>174</sup> Rangasami op cit note 126 at 12.

<sup>175</sup> Marlise Richter et al ‘Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail’ *Globalization and Health*, 11 February 2010 available at <http://www.globalizationandhealth.com/content/6/1/1>, accessed on 1 June 2023.

<sup>176</sup> Ramabulana op cit note 15 at 32.

<sup>177</sup> Ibid at 32.

<sup>178</sup> Mgbako et al op cit note 7 at 1429.

<sup>179</sup> Evans & Walker op cit note 9 at 22.

<sup>180</sup> Ibid at 22.

<sup>181</sup> Ibid at 22.

Certain respondents have described experiencing “prolonged attacks and very serious human rights violations against them.”<sup>182</sup> Physical abuse perpetrated by the police against sex workers includes beatings done by hands, guns, knives, sjamboks; and the use of electric shocks, pepper sprays and attacks by police dogs.<sup>183</sup> South African sex worker Nosipho Vidima states that she has “lost count of how many times I have been raped by the police” and that “if you say no to a police officer asking for sexual favours he threatens you.”<sup>184</sup> Sex workers are so accustomed to being raped by police officers, often without protection that Joanna who has been a sex worker for 17 years, holds “we just let them as long as our lives are safe.”<sup>185</sup> Sex workers are frequently forced to pay bribes in order to avoid arrest or to be released from detention,<sup>186</sup> which indicates that corruption is entrenched in the abuse that sex workers face in South Africa.<sup>187</sup> According to Joanna the result of this extortion is that sex workers often forfeit an entire night’s profit, jeopardising their ability to provide for their families.<sup>188</sup> Sex workers who do not comply with these demands are then unlawfully arrested and detained.<sup>189</sup>

These acts are nothing short of a callous manifestation of the police’s impunity and lack of accountability awarded to them under a framework of criminalisation. Beyond experiencing cruel acts of violence, sex workers report further methods utilised by the police intended only to shame, humiliate and harass sex workers.<sup>190</sup> Sex worker Mbali maintains that this treatment further traumatises sex workers and increases their mistrust of the police<sup>191</sup> Mbali recalls a jarring incident whereby a female police officer forced her and another sex workers to strip and enter a cold water bath.<sup>192</sup> Notably the women targeted were simply sitting outside of a brothel and not participating in sex work.<sup>193</sup> Unfortunately stories of police targeting sex workers who are engaging in activities unrelated to sex work are all too common. The Sonke report reveals interviewees’ experiences of being harassed by police officers, which includes chasing,

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<sup>182</sup> Ibid at 27.

<sup>183</sup> Ibid at 22

<sup>184</sup> Ramabulana op cit note 15 at 32.

<sup>185</sup> Tariro Washinyira ‘Sex workers welcome government’s decriminalisation plans’ 6 December 2022, available at <https://www.groundup.org.za/article/sex-workers-react-to-governments-decriminalisation-plans/>, accessed on 17 September 2023.

<sup>186</sup> Ibid.

<sup>187</sup> Evans & Walker op cit note 9 at 36.

<sup>188</sup> Washinyira op cit note 182.

<sup>189</sup> Ibid.

<sup>190</sup> Evans & Walker op cit note 9 at 29.

<sup>191</sup> Ibid at 29.

<sup>192</sup> Evans & Walker op cit note 9 at 29.

<sup>193</sup> Ibid at 29.

shouting, raiding homes without warrants and threatening sex workers; all of which occurred when these women were not ‘working.’<sup>194</sup> A further popular form of harassment is referred to as “pick and drop” whereby police officers take sex workers far distances away and drop them on the side of the road, leaving them to find their way home without any resources or assistance.<sup>195</sup>

Entrenched in and complimentary to the jarring abuse, sexual violence and harassment, is repeated experiences of unlawful arrests and arbitrary detentions.<sup>196</sup> Research shows that sex workers are often detained for lengthy periods in cells that are overcrowded and fail to meet basic humanitarian standards, such as having toilets or blankets.<sup>197</sup> As mentioned, the police target sex workers who are not engaging in any sex work-related activities and arrest and detain them for arbitrary and trite reasons.<sup>198</sup> Sex worker Paballo describes how the police would routinely arrive at the same brothel every weekend and even if the workers were just having a drink, they would collect them in the back of the police van and keep them at the station over the weekend unless a ‘fine’ was paid.<sup>199</sup> Sex workers who are unwilling or unable to pay these ‘fines’ are detained over the weekend and would be released without a charge.<sup>200</sup> The Sonke report therefore reveals that the perpetrating of human rights violations against sex workers is a systematic issue in South Africa.<sup>201</sup> Furthermore, sex workers are arrested and detained under trite municipal laws such as loitering or public drunkenness and the police frequently write unclear charges on arrest paperwork such as “prostitution” or “sexual offences bill.”<sup>202</sup> For example, sex worker Tracy reports being arrested for not carrying her identity document.<sup>203</sup> These arrests occur not only often occur outside the ambits of the law, but also without substantial evidence proving a sex work-related charger under the Sexual Offences Act.<sup>204</sup> Sex workers in South Africa are targeted as a result of strategic police profiling of ‘hot spots’ as opposed to evidence of observed illegal activities or sex work.<sup>205</sup> Despite how humiliating 1

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<sup>194</sup> Ibid at 33.

<sup>195</sup> Ibid at 34.

<sup>196</sup> SWEAT op cit note 153 at 30.

<sup>197</sup> Evans & Walker op cit note 9 at 38.

<sup>198</sup> SWEAT op cit note 153 at 30.

<sup>199</sup> Evans & Walker op cit note 9 at 38.

<sup>200</sup> Ibid at 38.

<sup>201</sup> Ibid at 40.

<sup>202</sup> SWEAT op cit note 153 at 32.

<sup>203</sup> Ibid at 32.

<sup>204</sup> Ibid at 32.

<sup>205</sup> Ibid at 34.

these arrests and detention periods are, research reveals that they rarely result in sex workers being formally charged, prosecuted or convicted.<sup>206</sup> Despite these jarring incidents, the SWEAT report indicates that police behaviour has not succeeded in deterring sex workers from performing sex work.<sup>207</sup>

These power imbalances and abuses perpetuated by the police under a system of criminalisation result in sex workers frequently being denied justice and access to legal recourse, especially since their cases are hardly ever taken seriously.<sup>208</sup> According to Mgbako sex workers are therefore unable to access justice when they are victims of violent crimes as detailed above.<sup>209</sup> Sex workers are often intimidated from reporting crimes or opening cases out of fear that they will be subjected to further harassment.<sup>210</sup> This deepens the power that authorities and clients have over them and only works to impede the administration of justice.<sup>211</sup> Out of fear, sex workers thus rarely report crimes even when serious offences are committed against them.<sup>212</sup> When sex workers do find the courage to report crimes, police often don't take them seriously or see them as deserving of the crimes they have endured.<sup>213</sup> For example, because sex workers choose to have sexual intercourse it leads to the perception that they are "unrape-able."<sup>214</sup> One sex worker reported that the police refused to assist her in opening a case because she was wearing a 'miniskirt.'<sup>215</sup> The actions of the police can therefore lead to secondary-revictimisation of sex workers and further repel them against reporting abuse.<sup>216</sup> Furthermore due to the criminalisation of sex work, if sex workers were to report being raped, the police are legally bound to arrest and charge the sex worker.<sup>217</sup> This looming threat of arrest is used as leverage by the police to further force sex workers into having sex with police officers.<sup>218</sup> Ultimately the result of this is that sex workers rarely ever receive the justice that any other ordinary civilian would receive and their human rights are eroded because of the

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<sup>206</sup> Evans & Walker op cit note 9 at 39.

<sup>207</sup> SWEAT op cit note 153 at 32.

<sup>208</sup> Ramabulana op cit note 15 at 32.

<sup>209</sup> Ibid at 32; Mgbako et.al (2013: 1429).

<sup>210</sup> Ramabulana op cit note 15 at 33.

<sup>211</sup> Richter op cit note 172.

<sup>212</sup> Nicole Fick 'Sex Workers Speak Out - Policing the Sex Industry' (2006) 15 *SA Crime Quarterly* 16.

<sup>213</sup> Ibid at 16.

<sup>214</sup> Ibid.

<sup>215</sup> Evans & Walker op cit note 9 at 28.

<sup>216</sup> Guest Lecture by Dr Karin Chinnian at the University of Cape Town, International Protection of Womens' Rights course, 19 September 2023.

<sup>217</sup> Ndhlovu op cit note 30 at chap 2 at 4.

<sup>218</sup> Fick op cit note 209.

stigma that sex work carries.<sup>219</sup> There therefore exists a deep-seated failure of the police to recognise the inalienable human rights of sex workers.<sup>220</sup> These human rights violations and harrowing experiences of GBV are evidently made possible under a system of total criminalisation, which forces sex workers to operate under dangerous working conditions, without any legal recourse or protection from the police.<sup>221</sup>

## 2.5 Sex work as a human rights issue

As a result of experiencing unimaginable levels of physical abuse, sexual violence and police brutality, sex workers experience significant violations of their human rights. As there exists a clear nexus between sex work and human rights,<sup>222</sup> it is pivotal to consider a human rights perspective to respond to sex work.<sup>223</sup> If the above section was not jarring enough, analysing how sex workers' human rights are violated daily can further highlight the need to decriminalise sex work.

Human rights, as interpreted by the South African courts, are inherent rights that all human beings are entitled to and possess by virtue of being human.<sup>224</sup> Human rights are accorded to all individuals, are universal and inalienable and apply to all individuals without discrimination.<sup>225</sup> Furthermore, human rights are “indivisible, interrelated, and interdependent,” meaning that all rights are equal and affect each other and cannot exist in isolation.<sup>226</sup> Therefore the violation of a specific right of a sex worker will have an impact upon their enjoyment of other rights.<sup>227</sup> Human rights are encoded in various treaties, customary international law and other bodies of universal principles that importantly work to guide South Africa and the actions it takes.<sup>228</sup> These fundamental rights are further found in the Bill of Rights within the South African Constitution (“the Constitution”),<sup>229</sup> and any conduct or law

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<sup>219</sup> Ramabulana op cit note 15 at 33.

<sup>220</sup> Evans & Walker op cit note 9 at 10.

<sup>221</sup> Ramabulana op cit note 15 at 35.

<sup>222</sup> Rhoda op cit note 57 at 30.

<sup>223</sup> Ibid at 30.

<sup>224</sup> *S v Makwanyane and Another* 1995 (6) BCLR 665 Para 308.

<sup>225</sup> Office of the High Commissioner for Human Rights, Human Rights: ‘Human Rights: A Basic Handbook for UN Staff’ *United Nations*.

<sup>226</sup> Whelan, Daniel J. ‘Indivisible Human Rights’ (2010) 69 *Global Issues Series*.

<sup>227</sup> Parliamentary Monitoring Group ‘Gender-Based Violence Bills: public hearings day 1’ 20 October 2020 available at <https://pmg.org.za/committee-meeting/31247/>, accessed on 18 September 2023.

<sup>228</sup> High Commissioner op cit note 222.

<sup>229</sup> The Constitution of the Republic of South Africa of 1996.

that infringes upon constitutional rights is deemed invalid.<sup>230</sup> The Bill of Rights encodes the rights that all South Africans are entitled to, as well as proclaims democratic values such as human dignity and equality.<sup>231</sup> The Commission for Gender Equality explicitly acknowledges human dignity, freedom and security of the person and freedom of trade, as applicable to sex workers.<sup>232</sup> The Bill of Rights therefore further obliges all organs of state to respect, promote and protect the rights encoded within the Constitution.”<sup>233</sup> South Africa is therefore obligated by the Constitution and the numerous international human rights instruments to which it is a signatory to, to uphold and protect the human rights of all of its citizens.<sup>234</sup>

However under a system of criminalisation sex workers in South Africa have been historically excluded from the enjoyment of the human rights that others are free to exercise.<sup>235</sup> These rights include sex workers’ rights to dignity, equality, bodily and psychological integrity, and the right to be free from deprivation against liberty.<sup>236</sup> The criminalisation of sex work therefore curates various barriers to the enjoyment of basic human rights by sex workers, which only further exacerbates their vulnerability to experiencing GBV.<sup>237</sup>

### **2.5.1 The affected human rights**

Section 10 of the Constitution holds that every person has “inherent dignity and the right to have their dignity respected and protected,”<sup>238</sup> which implies that each person is worthy of respect and having their “intrinsic human worth” protected.<sup>239</sup> Therefore human dignity is a fundamental right that empowers all other rights, regardless of one’s age, race or occupation.<sup>240</sup> However when sex workers face excessive sexual violence and abuse due to

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<sup>230</sup> Ian Currie & Johan de Waal *The Bill of Rights Handbook* (2005) Juta 23.

<sup>231</sup> Ibid at 23.

<sup>232</sup> Commission for Gender Equality ‘Decriminalising Sex Work in South Africa’ (2013) *Official Position of the Commission for Gender Equality* 1-9.

<sup>233</sup> Currie & de Waal op cit note 227 at 13.

<sup>234</sup> Ndhlovu op cit note 30 at chap 3 at 1.

<sup>235</sup> South African Law Report Commission (Project 107) adult prostitution (2018).

<sup>236</sup> Ramabulana op cit note 15 at 25.

<sup>237</sup> Ibid at 25.

<sup>238</sup> Supra note 226 s10.

<sup>239</sup> Ndhlovu op cit note 30 at chap 3 at 18.

<sup>240</sup> Ibid at 18.

their occupation, it fundamentally threatens their dignity and undermines their inherent humanness.<sup>241</sup> Section 9 of the Constitution further guarantees the right to equality including the “right to equal protection and benefit of the law” and the right not to be unfairly discriminated against,<sup>242</sup> which is also embedded in international human rights instruments.<sup>243</sup> The Human Rights Committee maintains that ‘discrimination’ should be understood to imply “any distinction, exclusion, restriction or preference” which is based on any ground including *inter alia*, race, colour, sex, language or religion, and which limits one’s enjoyment of other rights.<sup>244</sup> To the extent that sex workers do not have equal access to legal remedies, police protection and assistance from the law, the criminalisation of sex work violates sex workers’ right to equality and results in rampant discrimination.

Furthermore, section 12 of the Constitution holds that every person has the right to freedom and security of the person, which includes the right to be free from all forms of violence, from either public or private sources.<sup>245</sup> including the right to “not be deprived of freedom arbitrarily or without just cause.”<sup>246</sup> This is echoed in the Universal Declaration of Human Rights,<sup>247</sup> and accordingly, South Africa’s obligation to protect the right to liberty of persons is both domestic and internationally rooted.<sup>248</sup> Arrests and detentions are considered to be arbitrary or unlawful if they are not justified according to criminal sanction or in accordance with the procedure established by law.<sup>249</sup> The concept of ‘arbitrariness’ refers to the “elements of inappropriateness, lack of due process and injustice being present in the arrest or detention.”<sup>250</sup> Sex workers are vulnerable to violence perpetrated by clients, pimps and the police,<sup>251</sup> the latter of whom often abuse their power and rarely follow correct procedures, often unlawfully arresting and detaining sex workers.<sup>252</sup> Similarly, s12(2) holds that everyone has the right to bodily and psychological integrity, which includes the right to “security in and control over their body” and security from violence.<sup>253</sup> The criminalisation

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<sup>241</sup> Ibid at 18.

<sup>242</sup> Supra note 226 s9.

<sup>243</sup> Ndhlovu op cit note 30 at chap 3 at 19.

<sup>244</sup> Ibid at 19.

<sup>245</sup> Supra note 226 s12(1)(c).

<sup>246</sup> Ibid s12(1)(a).

<sup>247</sup> Universal Declaration of Human Rights 1948, General Assembly Resolution 217 A(III) (1948).

<sup>248</sup> Ndhlovu op cit note 30 at chap 3 at 20.

<sup>249</sup> Universal Declaration op cit note 243 at art 9.

<sup>250</sup> Ibid at art 9.

<sup>251</sup> Ndhlovu op cit note 30 at chap 3 at 17.

<sup>252</sup> Ibid at 17.

<sup>253</sup> Supra note 226 s12(2)(b).

of sex workers however, undermines sex workers' agency over their bodies.<sup>254</sup> Furthermore, criminalisation exposes sex workers to perturbing levels of violence and abuse, which further threatens this constitutional right.

Lastly, Section 35 of the Constitution provides for the rights of arrested, detained or accused persons, including "the right to conditions of detention that are consistent with human dignity and the right to a fair trial."<sup>255</sup> Due to the criminal nature of sex work however, sex workers do not have much recourse if they are arrested or detained, and the police are therefore given impunity to continue to extort, harass and arbitrarily arrest sex workers.<sup>256</sup> This is a clear violation of their right to liberty. Therefore, under a system of criminalisation sex workers face daily threats to their constitutional and human rights, which should otherwise be guaranteed to them.

## 2.6 Conclusion and critical commentary

Sex work is a heavily contentious issue that has penetrated most societies far back in history. Initially sex work was considered a "necessary evil" and its history in South Africa reveals that men were happy to have sex with sex workers to fulfil their desires, however, were not willing to recognise their humanity.<sup>257</sup> It is clear that the issue is not about the sale of sex but rather about obstructing women's agency in respect of their bodies and choices. Therefore, understanding the contextual and socio-economic issues underlying sex work is imperative in informing the legal response adopted and respecting the inherent humanness of sex workers.

This chapter explicitly illustrated the challenges associated with South Africa's system of total criminalisation, specifically that it results in isolating sex workers from legal recourse, police protection and the ability to report human rights abuses. Sex workers' illegal status renders them increasingly vulnerable to experiencing GBV perpetrated by clients, pimps, the police and third parties, the harrowing details of which are revealed through primary accounts from sex workers themselves.<sup>258</sup> Therefore crimes perpetrated against sex workers are

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<sup>254</sup> Mervi Patosalmi 'Bodily Integrity and Conceptions of Subjectivity' (2009) 24.2 *Hypatia* 136.

<sup>255</sup> *Supra* note 226 s35.

<sup>256</sup> Ndhlovu *op cit* note 30 at chap 3 at 21.

<sup>257</sup> Ramabulana *op cit* note 15 at 20.

<sup>258</sup> Evans & Walker *op cit* note 9 at 10.

normalised and perpetrators are treated with impunity, which makes it difficult for sex workers to exercise or protect their human rights.<sup>259</sup>

Undoubtedly the defiance towards recognising sex work as a form of labour has informed South Africa's legal response to sex work and has perpetuated the vulnerabilities of sex workers towards violence and exploitation by all members of society.<sup>260</sup> However, sex workers must be protected by the same rights and legal protections guaranteed to all other persons and their human rights should not be up for debate. The criminalisation of sex work therefore not only fails to protect women and deter sex work, but it is also not aligned with our constitutional values, or the various obligations embedded in the international human rights instruments to which we are signatories to.<sup>261</sup> Despite one's personal views, sex workers are indeed human beings who are worthy of inherent human rights.<sup>262</sup> The most imperative consideration in responding to sex work should therefore be the protection of the vulnerable women who engage in this industry.<sup>263</sup> The following chapter will analyse the prevailing international and domestic legal framework to determine South Africa's obligations to protect sex workers.

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<sup>259</sup> Ibid at 10.

<sup>260</sup> Jo Bindman 'Redefining Prostitution as Sex Work on the International Agenda,' *Anti-Slavery International WALNET* 13 October 1997, <http://www.WALNET.org/csis/papers/redefining.html#1>, accessed on 12 March 2023.

<sup>261</sup> "Securing Women's Rights through the Constitution," *Realizing Rights*, available at [http://www.realizingrights.org/pdf/Securing\\_Womens\\_Rights\\_in\\_the\\_Constitution-Zimbabwe.pdf](http://www.realizingrights.org/pdf/Securing_Womens_Rights_in_the_Constitution-Zimbabwe.pdf) (accessed on Oct. 29, 2010).

<sup>262</sup> Ndhlovu op cit note 30 at chap 3 at 22.

<sup>263</sup> Rhoda op cit note 57 at 43.

## CHAPTER 3

### LEGAL AND POLICY FRAMEWORK INFORMING SEX WORKERS' RIGHTS

#### 3.1 Introduction

The criminalisation of sex work has been argued to be incompatible with several international human rights instruments and according to Human Rights Watch, it obstructs sex workers from exercising their basic human rights, including being protected from violence and accessing justice and essential services.<sup>264</sup> This chapter will offer a comprehensive analysis of the legal and policy framework that is intended to protect sex worker's and women's rights and therefore inform South Africa's legal response to the buying and selling of sex work. International law has a specific value to South African law and South African courts are required to take into account international law,<sup>265</sup> and to interpret domestic legislation in such a manner that is consistent with international law and its obligations conferred on South Africa.<sup>266</sup> Under international human rights law therefore, states have an obligation to realise human rights guarantees for all those within its jurisdiction.<sup>267</sup>

While these international instruments do not explicitly address sex work or provide a framework for regulating sex work, the interpretation of said instruments does reveal an obligation to protect all women from violence and to respect and fulfil the rights of sex workers.<sup>268</sup> These international laws therefore cultivate an international standard for the protection and enjoyment of women and sex workers' rights, and certain instruments may require South Africa to enact legislation to give effect to these obligations.<sup>269</sup> Importantly the interpretation of these international human rights instruments is argued to indicate an aim to eliminate the exploitation of sex work, rather than the elimination of sex work itself.<sup>270</sup> The distinction between voluntary and forced sex work is therefore imperative in protecting sex workers from GBV and exploitation, and in determining the protection that is intended to be

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<sup>264</sup> SWEAT op cit note 153 at 62.

<sup>265</sup> Supra note 226 s39(1)(b).

<sup>266</sup> Ibid s233.

<sup>267</sup> SWEAT op cit note 153 at 62.

<sup>268</sup> SALRC 2009 op cit note 52 at 87.

<sup>269</sup> Rhoda op cit note 57 at 46.

<sup>270</sup> Ndhlovu op cit note 30 at chap 3 at 22.

afforded to sex workers.<sup>271</sup> Therefore it can be concluded that as a signatory to said instruments, South Africa has a legal obligation to protect female sex workers against GBV and the lack of enforcement of these instruments ultimately results in the exclusion of legal protection for sex workers.<sup>272</sup> Ultimately, the consequences of criminalising sex work are harrowing and therefore it is a necessary exercise to consider to what extent criminalisation conflicts with these international instruments and to what extent would decriminalisation result in better fulfilment of the objectives encoded in said instruments.

## **3.2 International instruments**

### **3.2.1 The Convention for the Suppression of Traffic in Persons and of the Exploitation of The Prostitution of Others of 1949**

The UN adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (“the Trafficking Convention”),<sup>273</sup> in 1949 and South Africa signed and ratified it in 1950 and 1951 respectively. As held by the SALRC, the preamble to the Trafficking Convention declares that the “enslavement of women and children subjected to prostitution is incompatible with the dignity and fundamental rights of the human person and endangers the welfare of the individual, the family and the community.”<sup>274</sup> The Trafficking Conventions however, fails to define sex work or exploitation and distinctly addresses trafficking or exploitation of persons for purposes of “prostitution.”<sup>275</sup> Given that this Convention entered into force in 1951, it is no surprise that it still refers to sex work as “prostitution” and thus the language of this Convention does not represent the sentiment of this dissertation. Articles 1 and 2 of the Trafficking Convention accordingly require State Parties to punish any person who “procures, entices or leads away another person for purposes of prostitution;” who “exploits the prostitution of another person;” and who “commits certain acts relating to brothel-keeping.”<sup>276</sup>

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<sup>271</sup> SWEAT op cit note 153 at 62

<sup>272</sup> Ndhlovu op cit note 30 at chap 3 at 10.

<sup>273</sup> The Convention for the Suppression of Traffic in Persons and of the Exploitation of The Prostitution of Others of 1949, United Nations General Assembly A/RES/317 (1949), signed and 1950 and ratified by South Africa in 1951.

<sup>274</sup> Ibid preamble.

<sup>275</sup> Ibid preamble.

<sup>276</sup> Trafficking Convention supra note 269 art 1 & 2.

Furthermore Article 6 of the Trafficking Convention requires States Parties to take measures to “repeal or abolish any existing laws or policies” in terms of which prostitutes or suspected prostitutes are “subject either to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification.”<sup>277</sup> Article 17 requires State Parties to take measures to prevent prostitution and rehabilitate “victims” of prostitution, done through various educational, social, economic and other services.<sup>278</sup> Furthermore it requires State Parties to “undertake, adopt or maintain such measures as required in terms of their obligations under the present Convention, to monitor the traffic in persons of either sex for the purpose of prostitution.”<sup>279</sup> While Article 20 of the Trafficking Convention requires States Parties to take measures to supervise employment agencies in attempts to prevent persons looking for employment, specifically women and children, “from being exposed to the danger of prostitution.”<sup>280</sup>

From the above terminology and approach to sex work, it is evident that the Trafficking Convention considers sex workers as “victims” which fails to take into account the differences between forced and voluntary sex work.<sup>281</sup> As indicated in the previous chapter there is a discernible difference between forced and voluntary sex work and laws must account for women who voluntarily enter the sex industry. Therefore this Convention is premised on the desire to end all sex work and supports the view that adult sex workers should be saved from themselves.<sup>282</sup> Furthermore, it seemingly supports the criminalisation of all activities related to sex work, including brothel-keeping, procuring sex work and living off the money made from sex work.<sup>283</sup> However it exempts the criminalisation of the actual sex worker as they are considered victims of exploitation.<sup>284</sup> The SALRC therefore views the Trafficking Convention as supporting the partial criminalisation of sex work.<sup>285</sup> The Trafficking Convention is therefore a clear manifestation of an unwillingness to discern the parameters of voluntary sex work and its applicability in present day is therefore questionable.

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<sup>277</sup> Ibid art 6; SALRC 2009 op cit note 52 at 91

<sup>278</sup> Trafficking Convention supra note 269 art 17.

<sup>279</sup> Ibid art 17.

<sup>280</sup> Ibid art 20 of the Trafficking Convention.

<sup>281</sup> SALRC 2009 op cit note 52 at 91.

<sup>282</sup> Ibid at 91.

<sup>283</sup> Trafficking Convention supra note 269 art 2 to 7; SALRC 2009 op cit note 52 at 91.

<sup>284</sup> Ibid at 91.

<sup>285</sup> Ibid at 91

### 3.2.2 International Covenant on Civil and Political Rights of 1966 (“ICCPR”)

State Parties to the ICCPR “have the obligation to respect, protect and fulfil the rights set out in this instrument for all peoples within its territory.”<sup>286</sup> South Africa ratified the ICCPR in 1998 and is therefore obligated to give effect to the rights contained within the instrument. The SALRC fundamentally points out that sex workers indeed fall under the category of “all peoples” and are therefore entitled to the various rights delineated within the ICCPR.<sup>287</sup> These rights include *inter alia*, the right to life,<sup>288</sup> the “right to liberty” and “security of the person” and not to be “arbitrarily arrested or detained,”<sup>289</sup> and the “right to not be subjected to arbitrary or unlawful interference with their privacy or to unlawful attacks on their honour and reputation,”<sup>290</sup> and the right to be protected by law against said interference or attacks.<sup>291</sup> Furthermore article 10 requires that when persons are subjected to deprivations of their liberty, that they must be treated “with humanity and with respect for the inherent dignity of the human person.”<sup>292</sup> However the criminalisation of sex work, disproportionately increases sex workers’ vulnerability to experiencing GBV, police brutality, harassment and arbitrary arrests and detentions. Therefore as indicated from the harrowing primary accounts of sex workers in chapter two, the criminalisation of sex work has various consequences for female sex workers in South Africa, which flagrantly violates aspects of both domestic and international law.

Furthermore, Article 26 provides for the right to equality before the law and equal protection of the law without any discrimination on any grounds including race, colour, or sex.<sup>293</sup> Lastly the ICCPR provides for the right to an effective remedy for violations of rights or freedoms, regardless of if the violation has been committed by persons acting in an official capacity.<sup>294</sup> However as already illustrated, under criminalisation sex workers in South Africa are not able to access the same protections and equality as other individuals. As a result of many of these violations being perpetrated by police officials, sex workers are unable to access remedies and recourse in the event of violations of their human rights and are therefore isolated from the

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<sup>286</sup> International Covenant on Civil and Political Rights 2200 (XXI) adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, ratified by South Africa in 1998 Preamble.

<sup>287</sup> SALRC 2009 op cit note 52 at 92.

<sup>288</sup> ICCPR supra note 282 art 6.

<sup>289</sup> Ibid art 9.

<sup>290</sup> Ibid art 17(1).

<sup>291</sup> Ibid art 17(2).

<sup>292</sup> Ibid art 10.

<sup>293</sup> Ibid art 26.

<sup>294</sup> Ibid art 2(3)(a).

protection of the justice system. This therefore amounts to non-compliance with the ICCPR which only worsens the vulnerability of sex workers to increased GBV.<sup>295</sup> The ICCPR however, as a “non-prostitution-specific convention” offers sex workers a wider realm of protection than the Trafficking Convention, and according to the SALRC it is possible to realise these rights under a non-criminalisation response.<sup>296</sup> Therefore the ICCPR can mould a legal response to sex work that leads to better fulfilment and protection of sex workers’ human rights.

### **3.2.3 International Convention on Economic, Social and Cultural Rights of 1966 (“ICESCR”)**

State parties to the ICESCR,<sup>297</sup> undertake to achieve the progressive realisation of the rights contained in the instrument, under a recognition that not all states have the resources to do so immediately.<sup>298</sup> South Africa signed and ratified the ICESCR in 2015, obligating South Africa to fulfil its commitment to alleviate poverty and strive for social justice for all.<sup>299</sup> Similarly to the ICCPR, sex workers are included in the category of “all peoples” and are therefore entitled to the progressive realisation of their human rights.<sup>300</sup> These rights include the right to work and to gain ones’ living by work freely chosen and accepted;<sup>301</sup> and the right to enjoy “just and favourable conditions of work” which includes inter alia, a fair wage and decent living, safe and healthy working conditions, and reasonable limitation of working hours.<sup>302</sup> Furthermore, the ICESCR provides for the right to form and join a trade union,<sup>303</sup> the right to social security and social insurance;<sup>304</sup> the right to adequate standard of living for themselves and their families;<sup>305</sup> and the right to the highest attainable standard of physical and mental health.<sup>306</sup> However, under the criminalisation of sex work in South Africa, sex workers are not free to legally enter the sex industry and due to the illegal nature of their profession, they are faced with unsafe and unregulated working environments in which they are exploited by their clients,

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<sup>295</sup> SALRC 2009 op cit note 52 at 93.

<sup>296</sup> SALRC 2009 op cit note 52 at 93.

<sup>297</sup> International Covenant on Economic, Social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27.

<sup>298</sup> Ibid art 2(1).

<sup>299</sup> SALRC 2009 op cit note 52 at 93.

<sup>300</sup> ICESCR supra note 293 art 1.

<sup>301</sup> Ibid art 6(1).

<sup>302</sup> Ibid art 7.

<sup>303</sup> Ibid art 8(1).

<sup>304</sup> Ibid art 9.

<sup>305</sup> Ibid art 11(1).

<sup>306</sup> Ibid art 12(1).

pimps and even authorities. They are unable to negotiate for better working environments, nor are they able to access certain social and employment rights. Without safe and healthy working conditions, sex workers are made more vulnerable to experiencing violence and thus face excessive abuse and other human rights violations.

According to the SALRC the ICESCR focuses on social and economic rights which supports the non-criminalisation or decriminalisation of sex work, whereby sex workers are considered as workers who are entitled to health and safe working conditions.<sup>307</sup> Decriminalisation of sex work would therefore be an appropriate response as it calls for the regulation of the industry through already existing legislation and regulations regarding employment that would ensure much safer working conditions than that under criminalisation.

### **3.2.4 Convention on the Elimination of Violence against Women of 1993 (“CEDAW”)**

CEDAW was prepared by the Commission on the Status of Women and adopted by the General Assembly in 1979.<sup>308</sup> CEDAW is commonly referred to as the leading international instrument for women’s rights as it constructs steps that State Parties are mandated to take to eliminate discrimination against women.<sup>309</sup> The SALRC maintains that many of these steps apply to the circumstances of sex workers.<sup>310</sup> South Africa signed and ratified CEDAW in 1995, without any reservations.<sup>311</sup> Article 1 of CEDAW defines discrimination against women as:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>312</sup>

In terms of CEDAW, State Parties are obligated to eliminate discrimination against women as defined above and must take various measures to do so.<sup>313</sup> Therefore states must “refrain from engaging in any act or practice of discrimination against women” and ensure that public

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<sup>307</sup> SALRC 2009 op cit note 52 at 94.

<sup>308</sup> Convention on the Elimination of All Forms of Discrimination against Women adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 287(1), signed and ratified by South Africa in 1995.

<sup>309</sup> SALRC 2009 op cit note 52 at 95.

<sup>310</sup> Ibid at 51.

<sup>311</sup> Ibid at 95.

<sup>312</sup> CEDAW supra note 304 art 1.

<sup>313</sup> Ibid art 2(b).

authorities and institutions act accordingly;<sup>314</sup> take all appropriate measures to eliminate all discrimination against women;<sup>315</sup><sup>311</sup> and must modify or abolish existing laws, regulations, customs, practices and national penal provisions which constitute discrimination against women.<sup>316</sup> Furthermore State Parties must take all appropriate measures to “modify the social and cultural patterns of conduct of men and women” in order to eliminate prejudice and practices based on stereotypes of women’s ‘inferiority’;<sup>317</sup> and to “protect health and safety in working conditions.”<sup>318</sup> Given that chapter two clearly illustrates that the criminalisation of sex work results in sex workers facing unprecedented discrimination, the continued laws that criminalise sex work are in conflict with multiple of the above Articles of CEDAW. Furthermore through criminalisation, the South African Government is failing to remove the culture of stigma around sex workers and women generally which increases their susceptibility to violence and perpetuates the discrimination and ostracization they face as a result.

Article 6 of CEDAW states that State Parties must “take all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women.”<sup>319</sup> As held by the SALRC Article 6 differs from the Trafficking Convention as it does not call for the elimination of all sex work, rather it aims to eliminate trafficking of women and exploitation for the purposes of sex work, in attempts to remove discrimination against all women.<sup>320</sup> This interpretation is accordingly more compatible with the provisions of CEDAW specifically because CEDAW’s ultimate purpose is to eliminate discrimination against all women without differentiating between women who are sex workers and who are not.<sup>321</sup> According to SECTION27 & the Treatment Action Campaign (“TAC”) this interpretation allows women to “autonomously engage in sex work while still preserving their right to be free from exploitation.”<sup>322</sup> Therefore there are various approaches that State Parties could take to fulfil their related obligations and total decriminalisation is but one.<sup>323</sup>

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<sup>314</sup> Ibid art 2(d).

<sup>315</sup> Ibid art 2(e).

<sup>316</sup> Ibid art 2(g).

<sup>317</sup> CEDAW supra note 304 art 5(a).

<sup>318</sup> Ibid art 11(1)(f).

<sup>319</sup> Ibid art 6.

<sup>320</sup> SALRC 2009 op cit note 52 at 96.

<sup>321</sup> Ibid at 96.

<sup>322</sup> Joint Submission by SECTION27 and the Treatment Action Campaign on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022 6.

<sup>323</sup> Ibid at 6.

Importantly Article 21 of CEDAW empowers the UN Committee on CEDAW to make suggestions and General Recommendations based on reports they receive from State Parties.<sup>324</sup> General Recommendation No. 19 addresses the issue of violence against women,<sup>325</sup> and General Recommendation No 24. addresses women and health.<sup>326</sup> According to the SALRC both recommendations are relevant to the issues of sex work.<sup>327</sup> The SALRC maintains that Paragraph 14 of General Recommendation No. 19 is interpreted so to not call for the “suppression of prostitution” as it is not considered as an exploitative practice.<sup>328</sup> In fact, Paragraph 15 of General Recommendation No. 19 specifically cites the economic urgency that forces many poverty-stricken women into sex work.<sup>329</sup> Furthermore Paragraph 15 indicates that sex workers are specifically vulnerable to experiencing violence because of their precarious status under criminalisation and which therefore necessitates their equal protection under laws against violence.<sup>330</sup> According to the SALRC this Recommendation emphasises the vulnerable position of sex workers and the need to protect them irrespective of their underlying motivations for engaging in sex work.<sup>331</sup> Therefore in understanding the discrimination and socio-economic marginalisation that all women face, the SALRC highlights how this vulnerability and marginalisation is exacerbated for sex workers given their illegal status.<sup>332</sup> Furthermore, the need to protect the rights of sex workers is further emphasised in paragraph 24 of General Recommendation No. 19 which requires State Parties to articulate in their reports, the “penal provisions, preventative and rehabilitation measures” they have taken to protect sex workers and women subjected to sexual exploitation.<sup>333</sup> Paragraph 18 of General Recommendation No. 24 furthermore recognises the power imbalances facing women and girls, which as a result, sex workers may not be able to refuse sex or negotiate safe sex with clients.<sup>334</sup> Article 4(i) of the Declaration on the Elimination of Violence against Women of

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<sup>324</sup> CEDAW supra note 304 art 21.

<sup>325</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: the UN Declaration on the Elimination of Violence against women*, 1992, adopted by the General Assembly in 1993.

<sup>326</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 24, Article 12 of the Convention: the UN Declaration on the Elimination of Violence against women*, 20<sup>th</sup> session, adopted by the General Assembly in 1999.

<sup>327</sup> SALRC 2009 op cit note 52 at 96.

<sup>328</sup> General Recommendation No.19 supra note 321 para 14.

<sup>329</sup> Ibid at para 15.

<sup>330</sup> Ibid at para 15.

<sup>331</sup> SALRC 2009 op cit note 52 at 97.

<sup>332</sup> Ibid at 97.

<sup>333</sup> General Recommendation No.19 supra note 321 para 24.

<sup>334</sup> General Recommendation No.24 supra note 321 para 18.

1993 similarly requires law enforcement and public officials to take measures to implement policies that prevent, investigate and punish violence against women, and must be trained to act with sensitivity for the needs of women.<sup>335</sup> Therefore there is no shortage within this instrument of a concrete recognition of the vulnerability of sex workers and clear obligations on State Parties to alleviate said vulnerability.

According to the SALRC given the need to protect women against violence and the clear distinction between forced and voluntary sex work, a model whereby sex work is non-criminalised is fitting.<sup>336</sup> Ultimately CEDAW recognises that not all sex work equates to exploitation and further, that sex workers experience exacerbated vulnerability and marginalisation due to their criminalised status in South Africa.<sup>337</sup> The SALRC importantly indicates that non-criminalisation has significant potential to assist in the realisation of the rights of sex workers which are undoubtedly protected under CEDAW.<sup>338</sup>

### **3.3 African instruments**

#### **3.3.1 The African Charter on Human and People's Rights of 1986 ("African Charter")**

The African Charter is a regional human rights instrument aimed at reflecting an African perspective towards human rights and was ratified by South Africa in 1995.<sup>339</sup> Article 1 of the African Charter requires State Parties to adopt legislative and other measures to give effect to the rights, duties and freedoms enshrined within the Charter,<sup>340</sup> which are entitled to every individual under Article 2.<sup>341</sup> These rights include the rights to equality, dignity, work under adequate conditions, and to be free from exploitation, which must therefore be equally guaranteed to sex workers.<sup>342</sup>

#### **3.3.2 The Protocol to the African Charter on Human and People's Rights on the Rights of Women of 2005 ("the Maputo Protocol")**

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<sup>335</sup> UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104 Art 4(i).

<sup>336</sup> SALRC 2009 op cit note 52 at 99.

<sup>337</sup> Ibid at 98.

<sup>338</sup> Ibid 98.

<sup>339</sup> *African Charter on Human and Peoples' Rights*, adopted by Organization of African Unity on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entry into force on 21 October 1986.

<sup>340</sup> Ibid art 1.

<sup>341</sup> Ibid art 2.

<sup>342</sup> Ibid.

The Maputo Protocol intends to embed the protection and promotion of women's rights in Africa, setting new international standards for the rights of women.<sup>343</sup> It was ratified by South Africa in 2004 and entered into force in 2005. The Protocol verbalises a need to end all forms of violence against women, including “unwanted or forced sex, whether it takes place in private or in public, and recognises that protection from sexual violence is inherent to the right to dignity.”<sup>344</sup> The Maputo Protocol imperatively recognises the rights of vulnerable groups, which includes inter alia, poor women, “women in distress” and women from marginalised population groups.<sup>345</sup>

Article 1 of the Maputo Protocol defines ‘violence against women’ as including “all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm...” and defines ‘harmful practices’ as “all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls” including their right to life, health, dignity, and physical integrity.<sup>346</sup> Under the Maputo Protocol State Parties are obligated to take measures to prevent all forms of discrimination against women,<sup>347</sup> and to protect women from all forms of violence.<sup>348</sup> Furthermore, States Parties are obligated to enact and enforce laws to prohibit all forms of violence against women, which includes unwanted or forced sex.<sup>349</sup> By criminalising sex work, sex workers undoubtedly face discrimination and egregious levels of violence, which indicates that South Africa's legal framework is not in line with the above articles and obligations. Therefore according to the SALRC because of sex worker's vulnerability to experiencing violence, the above provisions regarding violence against women are relevant and imperative to the position of sex workers in South Africa.<sup>350</sup> It must therefore accordingly be catered for in drafting an appropriate legal response to sex work.

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<sup>343</sup> Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), adopted by the 2<sup>nd</sup> Ordinary Session of the Assembly of the Union Maputo, Mozambique 11<sup>th</sup> July 2003, entry into force 25 November 2005.

<sup>344</sup> Maputo Protocol supra note 339 arts 3(1) & 4(2)(a).

<sup>345</sup> Ibid art 24.

<sup>346</sup> Ibid art 1.

<sup>347</sup> Ibid art 2(1).

<sup>348</sup> Ibid art 3

<sup>349</sup> Ibid art 4(2).

<sup>350</sup> SALRC 2009 op cit note 52 at 103.

### **3.3.3 Southern African Development Community (“SADC”) Protocol on Gender and Development of 2008**

The SADC Heads of State and Government signed the SADC Protocol on Gender and Development in 2008,<sup>351</sup> in attempt to further promote the empowerment of and elimination of discrimination against women. This is a binding agreement that obligates SADC member states, including South Africa, to take steps towards achieving gender equality.<sup>352</sup> Article 2 specifically references the empowerment of women through eliminating barriers which hinder women from participating fully in all spheres of life.<sup>353</sup> Article 7 further requires states to take legitimate legislative and other measures to ensure the full realisation of women’s equality.<sup>354</sup> Importantly Articles 17 and 19 mandate State Parties to adopt and enact laws that promote “equal access, benefit and opportunities for women and men in trade and entrepreneurship and to wage employment in all sectors of the economy.”<sup>355</sup> Therefore South Africa is obligated to re-evaluate its current legislative position to better fulfil its obligations as a member of SADC.

## **3.4 Non-binding instruments**

### **3.4.1 The Beijing Declaration and Platform for Action 1995 (“the Declaration”)**

The Beijing Declaration supports a position that expresses a distinction between forced and voluntary sex work, under its broader commitment to address the issues of women worldwide.<sup>356</sup> The Declaration provides for different categories of violence against women, which encompasses but is not limited to ‘forced prostitution’.<sup>357</sup> The Declaration specifically includes forced sex work as a form of violence against women, which serves to further solidify the distinction between forced and voluntary sex work.<sup>358</sup> Conversely the Declaration views voluntary sex work as a legitimate way to empower women to make a living.<sup>359</sup> The SALRC therefore maintains that this distinction between forced and voluntary sex work further supports

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<sup>351</sup> Southern African Development Community Protocol on Gender and Development of 2008, signed by the SADC Heads on 17 August 2008.

<sup>352</sup> Ibid.

<sup>353</sup> Ibid art 2.

<sup>354</sup> SADC Protocol supra note 347 art 7.

<sup>355</sup> Ibid art 17 & 19.

<sup>356</sup> UN, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995.*

<sup>357</sup> Ibid para 39.

<sup>358</sup> Ibid para 39.

<sup>359</sup> Ibid at para 130(b); Ndhlovu op cit note 30 at chap 3 at 4.

a model of decriminalisation or non-criminalisation and bolsters the call for better protection of sex workers by South Africa.<sup>360</sup>

### **3.4.2 UNAIDS International Guidelines on HIV/AIDS and Human Rights**

A further ode to this sentiment can be seen through the SALRC's analysis of the UNAIDS International Guidelines on HIV/AIDS and Human Rights.<sup>361</sup> Although these guidelines regulate the sexual rights of women in the context of HIV, the Guidelines specifically mention that in respect of international human rights, State Parties are required to take measures that may be controversial but prioritise the status of women, children and sex workers.<sup>362</sup> The SALRC maintains that Guideline 4 on Criminal Laws and Correctional Systems favours the decriminalisation of sex work as it states that "sex work that involves no victimisation, or criminal law should be reviewed with the aim of decriminalising" intended to protect sex workers and allow for safe sex work.<sup>363</sup> It furthermore recognises the distinction between forced and voluntary sex work, which reiterates the point that one can still decriminalise sex work while also protecting individuals against trafficking and exploitation.<sup>364</sup> Guideline 8 regulates the protection of women and other vulnerable groups, calling on states to create safe environments that address underlying prejudices and inequalities faced by women, including sex workers.<sup>365</sup> Part III of the Guidelines further recognises the vulnerability of sex workers and their inability to enjoy human rights protections due to their "illegal status."<sup>366</sup> Therefore, according to the SALRC because of sex worker's vulnerability to experiencing violence, the above provisions regarding violence against women are relevant to the protection of sex workers in South Africa.<sup>367</sup>

### **3.5 Conclusion and critical commentary**

Sex workers should be beneficiaries of guaranteed human rights, under which they are protected from abuse and shielded from social marginalisation.<sup>368</sup> As determined in chapter

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<sup>360</sup> SALRC 2009 op cit note 52 at 100.

<sup>361</sup> UNAIDS, International Guidelines on HIV/AIDS and Human Rights, 2006.

<sup>362</sup> Ibid at guideline 6(e).

<sup>363</sup> UNAIDS supra note 357; SALRC 2009 op cit note 52 at 106.

<sup>364</sup> SALRC 2009 op cit note 52 at 106.

<sup>365</sup> UNAIDS supra note 357 guideline 8.

<sup>366</sup> Ibid at part 3.

<sup>367</sup> SALRC 2009 op cit note 52 at 103.

<sup>368</sup> UNAIDS supra note 357 guideline 98.

two, sex workers are a vulnerable group whose human rights hang in the balance, however, they nonetheless deserve to enjoy equal protection. Unfortunately due to the dangerous nature of their profession, sex workers have historically been excluded from exercising their human rights. While international law does not explicitly address sex work, it does make a clear distinction between voluntary and forced sex work and recognises the vulnerability of sex workers.<sup>369</sup> To conform with the standards of international law and fulfil its objectives, it is therefore necessary for states to protect and regulate voluntary commercial sex work accordingly.<sup>370</sup> Therefore as a signatory to the above Conventions, South Africa is obligated to fulfil the objectives of the different instruments and ensure the protection of all women from exploitation and violations of their human rights.<sup>371</sup> However, evidently when states do not conform to these obligations in respect of their duty to protect sex workers against violence, it results in devastating consequences for the human rights of sex workers.

The interpretation of these instruments reveals a clear obligation to protect all women against violence and makes it possible to access protection for sex workers' human rights.<sup>372</sup> While international law may not go far in shielding the human rights of sex workers, it is state who are primarily to blame as their domestic frameworks often conflict with these international obligations.<sup>373</sup> This is illustrated under the criminalisation of sex work in South Africa whereby sex workers experience incredulous levels of GBV. South Africa's international, regional, and even domestic position on sex work, however, indicates a trend towards decriminalisation and the intent to realise the human rights of sex workers.<sup>374</sup> This must therefore inform the positioning of the legislature and Chapter five will further argue that a system of decriminalisation through the draft Bill will result in better fulfilment of these international human rights obligations.

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<sup>369</sup> SALRC 2009 op cit note 52 at 107.

<sup>370</sup> Ibid at 104.

<sup>371</sup> Ndhlovu op cit note 30 at chap 3 at 23.

<sup>372</sup> SALRC 2009 op cit note 52 at 89.

<sup>373</sup> Ibid at 87.

<sup>374</sup> Ibid at 109.

## Chapter 4

### Decriminalisation and the draft Bill

#### 4.1 Introduction

The previous chapters have dedicated themselves to providing a thorough analysis of the dark realities of sex workers in South Africa, including the stance of criminalisation taken by the South African government and the consequences thereof. It has been evidenced that the criminalisation of sex work increases sex workers' vulnerability to experiencing GBV which undermines South Africa's international obligations to protect women. According to Spies, despite the ongoing criminalisation of sex work, the South African government through different initiatives, has publicly supported the decriminalisation of sex work.<sup>375</sup> In 2016 the then Deputy President Cyril Ramaphosa in his role as South African National Aids Council Chair, promised to investigate potential legislation to ensure that sex workers are able to realise their human rights and achieve social justice.<sup>376</sup> President Ramaphosa further committed the government to work towards decriminalisation at the GBV and Femicide Declaration launch in 2019.<sup>377</sup>

This chapter investigates the solution to the above-identified crisis and aims to analyse the best legal response to sex work in South Africa. The point of departure in said analysis is the draft Bill approved by Cabinet, which ultimately calls for the decriminalisation of sex work. Building on the theoretical and legal frameworks underpinning this dissertation, the draft Bill will be thoroughly analysed so to bring understanding to its legislative intentions and its intended significance for the lives of sex workers. Although decriminalisation is asserted in this dissertation as the ultimate solution, the shortcomings and obstacles currently facing the enactment of the draft Bill will be acknowledged and problematised. Ultimately this dissertation will analyse whether the draft Bill, through its initiation of decriminalising sex work, has the potential to reduce sex workers' vulnerability to experiencing violence.

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<sup>375</sup> Spies op cit note 38 at 341.

<sup>376</sup> Sonke Gender Justice 'Asijiki Coalition for the Decriminalisation of Sex Work celebrates President Ramaphosa's commitment to decriminalise sex work' 5 June 2019 available at <https://genderjustice.org.za/newsitem/asijiki-coalition-for-the-decriminalisation-of-sex-work-celebrates-president-ramaphosas-commitment-todecriminalise-sex-work/>, accessed on 12 September 2023.

<sup>377</sup> Ibid.

## 4.2 Alternative legal responses to sex work that South Africa may consider

In order to credibly postulate that decriminalisation is the optimal legal response to sex work, it is necessary to consider why the different legal responses to sex work are not suited to addressing the GBV crisis faced by sex workers in South Africa. Criminalisation, which involves the rendering of sex work and related activities as illegal, has already been evidenced to exacerbate the vulnerability of sex workers, while simultaneously being largely unsuccessful in deterring sex work.<sup>378</sup> Legalisation on the other hand, is argued to drive sex work underground which limits its capacity to substantially protect sex workers. This will ultimately work to aid in constructing an argument in support of decriminalisation.

### 4.2.1 Legalisation

The legalisation of sex work exists as an alternative to criminalisation, and consists of the government directly regulating sex work, whereby sex work is no longer illegal.<sup>379</sup> Unlike decriminalisation, the legalisation of sex work imposes the responsibility on the government to enact legislation to regulate how the industry operates and restrict the scope of sex work that may be practiced.<sup>380</sup> The prominent feature of legalisation is therefore that there are certain requirements, conditions and controls that must be met and specified by the state such as licensing and registration requirements, for legal sex work to be performed.<sup>381</sup> The major concern raised is the extent to which states can regulate these activities, specifically in countries where accountability is low and GBV is high.<sup>382</sup> Therefore, while legalisation appears to be idyllic, the South African government does not currently have the capacity, competency or resources to regulate sex work in the same manner as some European countries who have legalised sex work.<sup>383</sup>

The Netherlands, which follows a system of legalisation, provides for local government to establish similar criteria allowing sex workers to perform sexual services for a reward.<sup>384</sup> This approach has been commended for reducing the strain on the criminal justice system, improving

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<sup>378</sup> South African Government op cit note 13.

<sup>379</sup> Ramabulana op cit note 15 at 38.

<sup>380</sup> Mossman op cit note 83

<sup>381</sup> Samuel Lee & Petra Persson 'Human Trafficking and Regulating Prostitution' (2022) 14.3 *American Economic Journal: Economic Policy* 87.

<sup>382</sup> Rhoda op cit note 57 at 43.

<sup>383</sup> Spies op cit note 38 at 334.

<sup>384</sup> Ndhlovu op cit note 30 at chap 5 at 4.

conditions for sex workers, and increasing tourism and revenue for the state.<sup>385</sup> However, some sex workers maintain that this system still ostracises and ‘criminalises’ those who do not meet these various “bureaucratic requirements.”<sup>386</sup> This is because legalisation provides a system of regulation wherein the selling of sexual services is controlled and where sex workers have limited agency in deciding the circumstances under which they work and the clients with which they engage.<sup>387</sup> The result of which is that hidden sex work increases, especially where sex workers do not want to register and comply with regular check-ups out of concern of losing their agency and experiencing discrimination.<sup>388</sup>

Furthermore proponents of legalisation rest their support on the assumption that legalisation of sex work positively assists in combatting human trafficking and reducing crimes related to sex work.<sup>389</sup> This is because legalisation supposedly provides sex workers with the freedom to report instances of trafficking and abuse.<sup>390</sup> The Netherlands specifically prevents trafficked sex workers from obtaining a working license, which is thought to then decrease the number of trafficked sex workers as traffickers do not wish to risk their ability to earn an income.<sup>391</sup> However critics of legalisation argue that on the contrary, legalisation increases the number of trafficked and child sex workers.<sup>392</sup> According to Day, the Netherlands has become a more lucrative destination for trafficking and sexual exploitation.<sup>393</sup> While legalisation is postulated to prevent the harms associated with sex work, ultimately the extent in which it does so cannot be proven.<sup>394</sup> Forced regulations drives more dangerous and exploitative sex work underground and away from any legislative regulation, or protection.<sup>395</sup> Furthermore legalisation and regulation still results in sex work that is outside of this regulation, being considered as illegal.<sup>396</sup> Therefore legalisation does not substantially address the levels of GBV faced by

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<sup>385</sup> Spies op cit note 38 at 334.

<sup>386</sup> Ibid at 334.

<sup>387</sup> Ibid at 334.

<sup>388</sup> Kristie Trifolis ‘Legalizing Prostitution: An Introduction’ (2014) *Law School Student Scholarship* 18.

<sup>389</sup> Rhoda op cit note 57 at 35; Mossman op cit note 83.

<sup>390</sup> Annelies L Daalder ‘Prostitution in the Netherlands since the lifting of the brothel ban’ (2007) 54.

<sup>391</sup> Deady op cit note 108 at 15.

<sup>392</sup> Janice G Raymond ‘Prostitution on Demand: Legalizing the Buyers as Sexual Consumers’ (2004) 10.10 *Violence Against Women* 1156.

<sup>393</sup> Shelagh Day ‘Prostitution: Violating the Human Rights of Poor Women’ (2008) *Action ontarienne contre la violence faite aux femmes* 38.

<sup>394</sup> Raymond op cit note 388 at 1157.

<sup>395</sup> Ibid at 1157.

<sup>396</sup> Mgbako et al op cit note 7 at 1434.

vulnerable sex workers in South Africa as still results in continued harm to those sex workers who operate outside of the ambits of the law.<sup>397</sup>

#### 4.2.2 Decriminalisation and the New Zealand Model

Decriminalisation according to Schwartzbach, consists of the “removal of laws and regulation” and criminal sanctions related to sex work, whereby it is regulated as any other occupation would be and no longer considered illegal.<sup>398</sup> However as seen with New Zealand, decriminalisation can be accompanied by specific boundaries or the continued criminalisation of clients of sex work.<sup>399</sup> For example, while sex work may be decriminalised, related activities such as brothel keeping can be made legal only when certain requirements are fulfilled, such as the absence of exploitation in these brothels.<sup>400</sup> Similarly to the interpretation of various international human right instruments, decriminalisation makes a clear distinction between forced and voluntary sex work, with the former remaining criminalised.<sup>401</sup> A salient feature of the decriminalisation approach is that it does not include the enactment of sex work-specific legislation,<sup>402</sup> instead sex work is regulated through the existing legal framework and with legislation governing sectors such as employment and labour.<sup>403</sup> Under a decriminalisation approach, sex work is considered a legitimate form of labour and is therefore it is necessarily governed by existing labour laws, the application of which falls under the responsibility of the state.<sup>404</sup> Decriminalisation therefore normalises sex work as a voluntary choice embarked on by sex workers, shifting the way society perceives the industry.<sup>405</sup>

New Zealand’s approach has come to best articulate a model of decriminalisation, known as having the most liberal sex work policy.<sup>406</sup> Under a model of decriminalisation, New Zealand recognises sex work as “service work” wherein sex work operates under the same employment and legal rights as any other profession and there exists no sex-work specific legislation.<sup>407</sup> Nevertheless, brothels must be certified and inspected and clients remain under the threat of

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<sup>397</sup> Ibid at 1424.

<sup>398</sup> Ramabulana op cit note 15 at 39.

<sup>399</sup> Ibid at 39.

<sup>400</sup> Ndhlovu op cit note 30 at chap 5 at 8.

<sup>401</sup> Jo Doezema ‘Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy’ in *Global Sex Workers* (2018) ed. Kamala Kempadoo and Jo Doezema. (London: Routledge) 37.

<sup>402</sup> SALRC 2009 op cit note 52 at 13.

<sup>403</sup> Mossman op cit note 83.

<sup>404</sup> SALRC 2009 op cit note 52 at 13.

<sup>405</sup> Mathieson op cit note 74 at 378; Commission for Gender Equality op cit note 232 at 2.

<sup>406</sup> Spies op cit note 38 at 334.

<sup>407</sup> Ibid at 334.

receiving a fine if they do not abide by safe sex practices.<sup>408</sup> New Zealand's approach was developed in consultation with sex workers and is therefore thought to be fully responsive and workable to the realities of sex workers.<sup>409</sup> Outcomes of this approach include newly reported abilities of sex workers to negotiate safe sex practices and to access services without fears of prosecution or harassment.<sup>410</sup> Furthermore, in response to critics, New Zealand has not reported any evidence of an increase in sex work and trafficking.<sup>411</sup> Instead decriminalisation has been argued to improve the relationship between sex workers and the police, which improves their ability to report trafficking and incidents of abuse.<sup>412</sup> Furthermore decriminalisation is argued to have a positive economic effect by increasing revenue for states through the collection of tax from sex workers.<sup>413</sup> Therefore proponents of decriminalising sex work argue that it aims to result in respecting the human rights of sex workers by improving their working conditions,<sup>414</sup> and reducing the detrimental harms associated with criminalising sex work.<sup>415</sup>

In 2015 the SALRC submission cautioned against following New Zealand's footsteps in decriminalising sex work, noting its differing context from South Africa and the possibility that it would not aid in reducing illegal activities linked to sex work such as violence faced by sex workers.<sup>416</sup> However individuals and other organisations who advocate for decriminalisation do so in line with a rights-based approach towards regulating sex work and in consideration of the harmful impact that criminalisation has on vulnerable sex workers.<sup>417</sup> Decriminalisation is considered by many as the best policy choice for protecting sex workers and their human rights for the reasons described throughout this dissertation.<sup>418</sup> Furthermore, unlike legalisation, decriminalisation allows sex workers to exercise their rights without placing extraneous burdens on state resources to maintain the legal framework.<sup>419</sup> According to Ndhlovu, South Africa has the socio-economic capacity to undertake a project of decriminalisation, however the same cannot be said for the task of legalisation.<sup>420</sup>

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<sup>408</sup> Mathieson op cit note 74 at 396.

<sup>409</sup> Spies op cit note 38 at 334.

<sup>410</sup> Ibid at 334.

<sup>411</sup> Ibid at 334; Deady op cit note 108 at 515.

<sup>412</sup> Spies op cit note 38 at 334.

<sup>413</sup> Ibid at 334.

<sup>414</sup> Mossman op cit note 83.

<sup>415</sup> Day op cit note 389 at 14.

<sup>416</sup> Spies op cit note 38 at 342.

<sup>417</sup> SALRC 2009 op cit note 52 at 182.

<sup>418</sup> Spies op cit note 38 at 335.

<sup>419</sup> Ndhlovu op cit note 30 at chap 5 at 8.

<sup>420</sup> Ndhlovu op cit note 30 at chap 5 at 8.

Ultimately is imperative that South Africa's legal response to sex work is informed by the Bill of Rights as well as international human rights instruments, in order to best protect the human rights of sex workers and reduce their exposure to GBV.<sup>421417</sup> Given that South Africa is considered one of the most progressive African states, it is not surprising that it is on the cusp of decriminalising sex work and developing a new legal response to sex work. The policy of decriminalisation and the benefits that it will bring will be investigated in the analysis of the draft Bill below.

### **4.3 The Criminal Law Sexual Offences Amendment Bill 2022**

The Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022 relating to the decriminalisation of sex work was introduced by the National Assembly and was approved for publishing for public comments on the 30<sup>th</sup> of November 2022 by the Cabinet of South Africa.<sup>422</sup> The purpose of the Bill is to repeal the Sexual Offences Act, as well as s11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, so to decriminalise the sale and purchase of adult sexual services.<sup>423</sup> In order to address the epidemic of GBV in South Africa and in response to nationwide protests against GBV, the Government adopted the National Strategic Plan on Gender-Based Violence and Femicide (“National Strategic Plan”) and released three GBV Bills for public comment, including this draft Bill. These new pieces of legislation are aimed at changing the landscape with respect to how government and law enforcement deal with violent crime, specifically against women in South Africa.<sup>424</sup> President Ramaphosa has declared that the enactment of this legislation will better protect victims of abuse and provide justice to survivors, while making it more difficult for perpetrators to “escape justice.”<sup>425</sup> Pillar three of the National Plan contains a list of various interventions and activities, including the “finalisation of legislative process to decriminalise sex work.”<sup>426</sup> This highlights the Government's commitment to the decriminalisation of sex work and corroborates the link between the criminalisation of sex work and experiencing GBV. The National Strategic Plan is ultimately aimed at “minimising human rights violations” against

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<sup>421</sup> Ibid at chap 5 at 9.

<sup>422</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022.

<sup>423</sup> PMG op cit note 224.

<sup>424</sup> BusinessTech ‘Ramaphosa signs 3 new crime laws in South Africa’ 31 January 2022 available at <https://businesstech.co.za/news/government/554188/ramaphosa-signs-3-new-crime-laws-in-south-africa/>, accessed on 11 December 2023. BusinessTech op cit note 419.

<sup>425</sup> Ibid.

<sup>426</sup> South African Government op cit note 13.

sex workers and according to the Minister of Justice and Correctional Services, Ronald Lamola, it would afford sex workers better protection and working conditions and reduce the stigma and discrimination they face.<sup>427</sup>

The Bill marks the first step South Africa has taken towards the decriminalisation of sex work and is revolutionary in re-evaluating its legal response to sex work. Masuka and Kwanje maintain that the primary purpose of the Bill is to maintain and uphold the dignity of sex workers rather than attempting to deter “morally reprehensible criminal conduct.”<sup>428</sup> According to Lamola despite the social complexities of sex work, the “high levels of sexual violence against women” and “targeted exploitation of women engaging in sex work by third parties, authorities and buyers” is a looming threat in society.<sup>429</sup> Therefore the Bill aims to eradicate human rights violations against sex workers by enabling their access to reproductive healthcare, calling for safe labour practices, and dismantling the discrimination they face, as well as ensuring that health and safety regulations are being followed.<sup>430</sup>

#### 4.3.1 Parameters of the Bill

In analysing the draft Bill it is imperative to understand exactly what it advocates for and the parameters in which decriminalisation would operate. In terms of the clauses of the Bill, Clause 1 would aim to repeal the Sexual Offences Act and section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007.<sup>431</sup> Clause 2(1) relates to the expungement of criminal records and maintains that:

Where a court has convicted a person of rendering, engaging or receiving sexual services from a persons 18 years or older, in terms of the provisions of the Sexual Offences Act and s11 of SORMA, the criminal record of the person in respect of the offence must be automatically expunged.<sup>432</sup>

According to clause 2(2), if said person’s criminal record is not expunged automatically it, on written application to the Director-General of the Department of Justice and Constitutional

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<sup>427</sup> South African Government op cit note 13..

<sup>428</sup> Wezi Masuku & Seraphine Kwanje ‘The decriminalising of sex work in South Africa: A brief trajectory overview of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022 1 June 2023 available at <https://www.derebus.org.za/the-decriminalising-of-sex-work-in-south-africa-a-brief-trajectoryoverview-of-the-criminal-law-sexual-offences-and-related-matters-amendment-bill-of-2022/>, accessed on 8 August 2023.

<sup>429</sup> South African Government op cit note 13.

<sup>430</sup> Ibid.

<sup>431</sup> Amendment Bill supra note 418 clause 1.

<sup>432</sup> Ibid clause 2(1)

Development, must be expunged in line with the provisions of the Criminal Procedure Act of 1977.<sup>433</sup> Clause 3 of the Bill relates to transitional provisions and maintains that “all criminal proceedings relating to sexual services rendered or received by persons 18 years or older,” which were instituted prior to and not concluded before the commencement of this Act must be ceased and withdrawn.<sup>434</sup> Lastly, clause 4 of the Bill deals with the short title and commencement.<sup>435</sup>

Therefore the Bill only decriminalises sex work related to the buying and selling of adult sexual services and engaging in sexual services with children or mentally disabled persons will still constitute an offence under the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007.<sup>436</sup> Therefore the Bill does not tamper with any existing laws that prohibit children from selling sex and being trafficked for sexual purposes.<sup>437</sup> In terms of regulation, municipal bylaws will operate to direct where solicitation in public spaces may or may not take place and define the parameters in terms of which sex may be sold.<sup>438</sup> These bylaws may still enact certain restrictions for purposes of regulating sex work, such as prohibiting taverns, shebeens and trading in certain locations such as neighbourhoods, or near schools.<sup>439</sup> Furthermore, according to Lamola, the Bill follows a “two-step approach to sex work” and does not attempt to decriminalise and regulate the industry at the same time.<sup>440</sup> The Bill places emphasis on decriminalisation as it is an important step towards eradicating the criminal charging of sex workers, which ultimately results in greater protection for them.<sup>441</sup> Decriminalisation under the Bill will therefore dismantle the discrimination that sex workers face and allow them to access basic services and protection, while still iterating the boundaries within which they may operate.<sup>442</sup>

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<sup>433</sup> Amendment Bill supra note 418 clause 2(2).

<sup>434</sup> Ibid clause 3.

<sup>435</sup> Ibid clause 4.

<sup>436</sup> South African Government op cit note 13.

<sup>437</sup> Ibid.

<sup>438</sup> Ibid.

<sup>439</sup> Ibid.

<sup>440</sup> Ibid.

<sup>441</sup> Ibid.

<sup>442</sup> Ibid.

### 4.3.2 Public comments and submissions

In understanding that sex work is a complex and debated topic within South African society, the public was afforded an opportunity to participate in the legislative process and provide factual input aimed at improving the Bill.<sup>443</sup> The introduction and passing of the Bill appears to be generally welcomed amongst legal professionals and various organisations. In response to the call for public comments, various trusted institutions such as the Helen Suzman Foundation and the African Policing Oversight Forum (“APCOF”) offered their full support of the Bill and government’s intention to decriminalise sex work. According to APCOF the enactment of the Bill will “strengthen existing interventions to address the underlying conditions that foster GBV, reduce social-economic marginalisation of historically vulnerable persons, and give effect to South Africa’s constitutional, regional and international human rights obligations” aimed at addressing sexual and GBV.<sup>444</sup> This dissertation has largely argued that these objectives are more likely achieved under a system of decriminalisation. APCOF further concur that the repealing of the Sexual Offences Act and expunging of related criminal records by the Bill will aid in eradicating “colonial-era legislative tools that criminalise commercial sex work,” which will then give effect to South Africa’s human rights obligations to review and repeal laws that perpetuate discrimination and socio-economic ostracisation.<sup>445</sup> As already reported, due to the criminalisation of sex work it is known that sex workers are isolated from enjoying the rights conferred within these instruments. Therefore, according to Lamola the Bill is a step towards guaranteeing that South Africa complies with its international obligations as mandated in the above international instruments.<sup>446</sup>

According to the Chief Director of HIV & AIDS at the Department of Social Development in South Africa, the Bill finally affirms that sex workers are human beings who should be afforded the same dignity and services as every other citizen.<sup>447</sup> Furthermore he corroborates that the Bill will undoubtedly combat issues of discrimination and exploitation of sex workers and enhance sex workers’ abilities to access social and legal services, such as in instances where

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<sup>443</sup> PMG op cit note 224.

<sup>444</sup> Submission on the proposed Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022, African Policing Civilian Oversight Forum, dated 31 January 2023 2.

<sup>445</sup> Ibid at 2.

<sup>446</sup> South African Government op cit note 13.

<sup>447</sup> AidsFonds ‘Interview: This Bill Says Sex Workers Are Human Beings’ 23 January 2023 available at <https://aidsfonds.org/work/love-alliance/news/interview-this-bill-says-sex-workers-are-human-beings>, accessed on 23 August 2023.

they have been raped.<sup>448</sup> It is for these reasons that he is confident that the Bill will garner sufficient public support to encourage its ultimate enactment.<sup>449</sup> Similarly, the South African Institute for Race Relations (“the IRR”) supports the enactment of the Bill as it argues that decriminalisation works to fulfil the dominant goal of government, namely to ensure that the civil liberties of its citizens are respected and advanced.<sup>450</sup> Furthermore based on results in New Zealand published in the *Georgetown Journal of International Law*, the IRR maintains that decriminalisation will increase the agency of sex workers and empower them to refuse certain clients, improve their working conditions, and access to justice when crimes are perpetrated against them.<sup>451</sup> Interestingly enough the IRR believes that the Bill represents the ‘righting of the error’ made by the Constitutional Court in *S v Jordan* wherein they upheld the constitutionality of the criminalisation of sex work.<sup>452</sup> Furthermore the IRR refers to the Bill as a “breath of fresh air” noting that government has a tendency to publish lengthy legislation that represents the “overextending themselves outside of their primary roles into ancillary areas of regulation best left to civil society to regulate itself.”<sup>453</sup> Therefore the IRR commends the brief nature of the Bill and calls for it to retain its response of decriminalisation rather than legalisation.<sup>454</sup>

The Centre for Social Justice (“CSJ”) and the Law Trust Chair at Stellenbosch University have also made a submission in which they analyse the Bill from a social justice perspective and in respect of international normative standards.<sup>455</sup> In its submission the CSJ and Law Faculty Trust maintain that law reform must be underpinned by a duty to uphold and advance human rights for all, including the right to equality, dignity and privacy.<sup>456</sup> This duty involves the reducing of power imbalances between social groups and necessitates a consideration of how the law perpetuates existing inequality due to past injustices.<sup>457</sup> The CSJ and Law Trust Chair submit that conservative morals and colonial ethics have perpetuated stigmatisation

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<sup>448</sup> AidsFonds op cit note 443.

<sup>449</sup> Ibid.

<sup>450</sup> South African Institute of Race Relations ‘Comments on the Draft Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022’ 23 January 2023 available at <https://socialjustice.sun.ac.za/downloads/posts/2023-02-comments-on-the-criminal-law-sexual-offences-and-related-matters-amendment-bill-of-2022.pdf>, accessed on 10 October 2023.

<sup>451</sup> Ibid at 2.

<sup>452</sup> Ibid at 3.

<sup>453</sup> Ibid at 3.

<sup>454</sup> Ibid at 4.

<sup>455</sup> Ibid at 2.

<sup>456</sup> Ibid at 3.

<sup>457</sup> Ibid at 7.

against sex workers and because society does not see sex workers as “fully human” they are not shielded from harm as others are.<sup>458</sup> The most positive dimension of the Bill submitted by CSJ and Law Trust Chair, is the reduction of sex workers’ vulnerability to experiencing daily human rights violations, abuse, violence and police brutality.<sup>459</sup> This is especially important because while the current legislation criminalises both the buying and selling of sex, in reality the “power imbalance” favours the buyers and therefore the sex worker is the one who is ultimately targeted, arrested and subjected to abuse.<sup>460</sup> They therefore submit that it is necessary for South Africa to “move away from a framework that seeks to control, punish and police” towards “democratic justice.”<sup>461</sup> It is therefore the view of the CSJ and Law Trust Chair that decriminalisation of sex work is the best legal response that fulfils the duty to uphold the human rights of all and reiterates the inherent human dignity of sex workers.<sup>462</sup>

A joint submission was also made by SECTION27, a public interest law centre, and the Treatment Action Campaign (“TAC”), an activist organisation which frequently monitors discrimination against sex workers, both of whom support the decriminalisation of sex work.<sup>463</sup> These two institutions specifically maintain that the Bill will eliminate harmful stereotypes around sex work, acknowledging that criminalisation perpetuates the marginalisation of sex workers and punishes conduct that falls outside what is ‘morally acceptable.’<sup>464</sup> SECTION 27 and TAC submit that many of these negative stereotypes mostly effect females sex workers who are viewed as social outcasts, while the patron is almost always male and either accepted or ignored.<sup>465</sup> The difference in narratives is rooted in gender stereotypes that attribute certain qualities to men who are deemed entitled to freely exercise their sexuality, while women are deemed to lack sexual agency.<sup>466</sup> The limitations of the individual rights and freedoms of sex workers is what leads to discrimination and threatens the equal enjoyment of their rights.<sup>467</sup> SECTION27 and TAC therefore submit that decriminalisation through the Bill would result in the balancing of the rights of sex workers, clients and third parties and would empower the sex

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<sup>458</sup> IRR op cit note 446 at 14.

<sup>459</sup> Ibid at 9.

<sup>460</sup> Ibid at 9; SALRC 2009 op cit note 52.

<sup>461</sup> IRR op cit note 446 at 15.

<sup>462</sup> Ibid at 9.

<sup>463</sup> SECTION27 op cit note 318 at 1.

<sup>464</sup> Ibid at 2 & 3.

<sup>465</sup> Ibid at 4.

<sup>466</sup> Ibid at 5.

<sup>467</sup> Ibid at 5.

worker to freely engage in their work and recognise their personhood.<sup>468</sup> Furthermore, it is submitted that decriminalisation would assist States in realising their existing legal obligations that are otherwise undermined by the criminalisation of sex work, such as the duty to eliminate harmful gender stereotypes.<sup>469</sup>

According to Sonke Gender Justice (“Sonke”) the decriminalisation of sex work proposed through the Bill will be accompanied by a rights-based approach to sex work, which will ultimately make sex workers safer and reduce the levels of GBV they experience.<sup>470</sup> Sonke, along with its key partners SWEAT and the Sisonke Sex Worker Movement, advocate for the decriminalisation of sex work in South Africa motivated by the human rights violations that sex workers face under the current regime of criminalisation.<sup>471</sup> Similarly such commitment to the decriminalisation of sex work has been championed by Asijiki Coalition for the Decriminalisation of sex work.<sup>472</sup> Sonke maintains that through decriminalisation, sex workers as a marginalised group, will be offered human rights protections under South African labour and occupational health and safety laws.<sup>473</sup> Similarly, the World Health Organisation, encourages decriminalisation as a means to improve sex worker’s access to healthcare<sup>474</sup>. In terms of sex workers themselves, GroundUp reports that the consensus amongst sex workers appears to be that the Bill and its enactment will save lives and aid in protecting sex workers, particularly from police abuse.<sup>475</sup> Constance Mathe, a sex worker and national coordinator of the Asijiki Coalition maintains that sex workers have been advocating for decriminalisation for the last twenty years and that the passing of the Bill is considered a “a life-or-death issue” for sex workers.<sup>476</sup> According to Mathe, the Bill represents the recognising of sex work by the government, which would result in sex workers ‘gaining’ constitutional rights.<sup>477</sup> Furthermore, Mathe notes that sex work is a profession that will never cease and therefore the enactment of the Bill is important for the future generation of sex workers who will similarly require

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<sup>468</sup> Ibid at 6 & 7.

<sup>469</sup> Ibid at 6; CEDAW supra note 304 art 5(a).

<sup>470</sup> Sonke Gender Justice ‘Decriminalisation of Sex Work’ available at <https://genderjustice.org.za/project/policydevelopment-advocacy/decriminalisation-sex-work/>, accessed on 23 November 2023.

<sup>471</sup> Ibid.

<sup>472</sup> Ibid.

<sup>473</sup> Ibid.

<sup>474</sup> Brooks-Gordon op cit note 42 at 813.

<sup>475</sup> Washinyira op cit note 182.

<sup>476</sup> Ibid.

<sup>477</sup> Ibid.

protection.<sup>478</sup> Joanna who has been a sex worker for seventeen years further reported to GroundUp that the Bill means a lot to sex workers as the ‘erasing’ of sex workers criminal records would allow many of them to regain their freedom and shield them from police abuse.<sup>479</sup> For sex workers like Tracy the passing of the Bill would signify the elimination of stigma and discrimination, empower sex workers to seek justice when violated or abused by clients or the police and allow sex workers to work freely.<sup>480</sup> While the dangers of sex work will still exist, the decriminalisation of sex work will allow sex workers to freely report injustices and violence and seek justice like any other citizen. According to SWEAT spokesperson Megan Lessing, there is hope that the passing of the Bill would result in a moratorium “placed on the way sex work is policed, the arbitrary arrests, fines and the subsequent violations, like extortion, physical and sexual violence.”<sup>481</sup> Therefore, as put by SWEAT, the Bill being brought into law is believed by various activist organisations to have the potential to end “legalised violence” against sex workers and empower sex workers to freely exercise and enjoy their human rights.<sup>482</sup>

#### **4.4 Potential challenges and arguments against decriminalisation and the Bill**

The novelty of the Bill and its future implementation bear great significance for sex workers. However, to truly determine if the enactment of the Bill can introduce a model of decriminalisation that will reduce sex workers’ vulnerability to experiencing GBV, it is also necessary to investigate its potential challenges.

##### **4.4.1 Regulation and enforcement**

The Bill as mentioned, only decriminalises sex work and therefore does not provide regulations specific to the sex industry. According to Minister Lamola, regulations will follow at a later stage and in the interim, the Department will rely on municipal by-laws to regulate sex work.<sup>483</sup> In the absence of legalisation and regulations, certain individuals have raised concerns that there may be challenges in regulating and enforcing the laws related to sex work.<sup>484</sup> The Bill is largely silent on addressing how the current municipal by-laws would be impacted or

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<sup>478</sup> Ibid.

<sup>479</sup> Ibid.

<sup>480</sup> Washinyira op cit note 182.

<sup>481</sup> Ibid.

<sup>482</sup> Ibid.

<sup>483</sup> South African Government op cit note 13.

<sup>484</sup> Masuku & Kwanje op cit note 424.

adapted.<sup>485</sup> Dr Karin Chinnian maintains that the brief nature of the Bill perhaps reflects government's rush to getting a Bill on the table and passed by Cabinet.<sup>486</sup> HSF therefore cautions the government that regulations addressing sex work must be implemented if sex workers are to receive protection from the law and the objectives of the Bill are to be upheld.<sup>487</sup> Furthermore it has been argued that relying on municipal by-laws as "interim regulation" is insufficient in protecting sex workers,<sup>488</sup> as it still gives the police the power to target and arrest sex workers on arbitrary charges such as 'causing a nuisance'<sup>489</sup> or public indecency.<sup>490</sup> This could ultimately result in continued exploitation and abuse by law enforcement, as well as reduce sex workers' inability to access justice and to protect their human rights.<sup>491</sup> APCOF believe that further legislative interventions are therefore required to bolster the efforts of the Bill in combatting GBV faced by sex workers.<sup>492</sup> Specifically, APCOF calls for there to at least be regulations related to "minimum standards and conditions of work that are compatible" with existing labour law legislation and that guarantee sex workers access to legal recourse.<sup>493</sup> Therefore many critics believe that the Bill faces "a major roadblock" specifically because of the "two-step approach" mentioned by Lamola.<sup>494</sup> According to the Deputy Minister of Justice and Constitutional Development, John Jeffrey, several issues have been flagged by the State Law Advisors who are concerned that the current iteration of the Bill may not pass constitutional muster and be prevented from being enacted if it fails to provide for the regulation of sex work.<sup>495</sup> Jeffrey maintains that it is necessary for the Department of Justice to start negotiating with role-players to draft regulations for sex work so to have a revised Bill ready to be enacted during the newly elected Administration.<sup>496</sup>

While these concerns are valid, this dissertation does not advocate for legalisation. However while calling for a system of pure decriminalisation, this dissertation does acknowledge the

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<sup>485</sup> Ibid.

<sup>486</sup> Chinnian op cit note 213.

<sup>487</sup> Submission on Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022, Helen Suzman Foundation, dated 31 January 2023 2.

<sup>488</sup> HSF op cit note 482 at 2.

<sup>489</sup> Ibid at 3, APCOF op cit note 440 at 2.

<sup>490</sup> Human Rights Council op cit note 3 at 13.

<sup>491</sup> Ibid at 2.

<sup>492</sup> Ibid at 3.

<sup>493</sup> Ibid at 2.

<sup>494</sup> BusinessTech op cit note 419.

<sup>495</sup> Ibid.

<sup>496</sup> Ibid.

harmful consequences of certain existing by-laws.<sup>497</sup> Therefore to create the necessary safeguards, it is proposed that the Department of Justice efficiently revise the Bill to make provision for how the change in legislation to sex work would impact existing regulations and by-laws.<sup>498</sup> Furthermore it might be necessary for the government to repeal any by-laws that perpetuate harm against sex workers and that are overly broad and create vague offences such as “loitering” or “public nuisance,” so to avoid sex workers being targeted.<sup>499</sup> However it must be noted that without a response of criminalisation, these by-laws and their enforcers will not have the same strength to target sex workers.<sup>500</sup> Any revisions to the Bill should therefore provide clearer instructions on how it intends to prevent and reduce incidents of GBV against sex workers.<sup>501</sup> Sex work activist groups themselves have raised concern that the call for more detailed regulations and revisions of the Bill will only further delay the implementation of the Act, especially given that the 2024 elections have been finalised.<sup>502</sup> It must also be noted that any regulations that accompany the Bill will be drafted without public participation and consultation and therefore, stand to weaken attempts to empower sex workers.<sup>503</sup> The current Bill however has been through substantial public consultations and the dissertation submits that it necessarily needs to move forward. The dangers of delaying decriminalisation were made clear earlier this year when over one hundred sex workers and activists marched the streets of Pretoria to demand that government urgently finalise the decriminalisation process in light of the Bill being sent back for revision.<sup>504</sup>

Furthermore, the IRR strongly maintains that decriminalisation must be undertaken in a sensitive manner and the legal framework under which sex workers would operate must ensure that sex work can be practiced with little difficulty or impossibility.<sup>505</sup> Therefore the IRR cautions against burdensome regulations, taxes and other interventions which would have the effect of “imposing a significantly higher burden of compliance on sex workers,” and driving sex workers underground into more dangerous working conditions.<sup>506</sup> The IRR further

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<sup>497</sup> HSF op cit note 482 at 2.

<sup>498</sup> Washinyira op cit note 182.

<sup>499</sup> Ibid.

<sup>500</sup> SWEAT op cit note 153 at 6.

<sup>501</sup> IRR op cit note 446 at 10.

<sup>502</sup> Human op cit note 470.

<sup>503</sup> South African Government op cit note 13.

<sup>504</sup> Human op cit note 470.

<sup>505</sup> IRR op cit note 446 at 3.

<sup>506</sup> Ibid at 3

acknowledges that sex work is an intimate and personal profession and it would therefore be inappropriate to burden the industry with a consortium of restrictions and regulations.<sup>507</sup> The Bill should therefore retain its decriminalisation character whereby the laws of general application are applied to sex work as opposed to special ad hoc laws and regulations.<sup>508</sup> Ultimately as maintained by the IRR, the government should make the transition from unlawful to lawful sex work as seamless as possible by introducing minimal legal obstacles and following a system of decriminalisation proposed under the Bill.<sup>509</sup>

#### 4.4.2 Increased demand and trafficking

Many critics of decriminalisation argue that it would result in increased demand and an uncontrollable influx of sex work, which would worsen issues of exploitation and trafficking and place further strain on law enforcement and social services.<sup>510</sup> However Richter et al refer to tangible examples of countries that have decriminalised sex work to provide evidence indicating no real increase in the demand for sexual services or number of sex workers despite popular belief.<sup>511</sup> On the contrary, evidence indicates improved working conditions and an ability for sex workers to negotiate safer sex and report abuses, indicating overall safer environments in the sex industry.<sup>512</sup> Furthermore, pro-prostitution human rights advocates argue that decriminalisation of the sex industry prevents forced sex work.<sup>513</sup> Under decriminalisation sex work manifests as the “voluntary sale of someone’s body of which that person has total control,” which is otherwise illusory under criminalisation.<sup>514</sup> The CSJ and Law Trust Chair further addresses concerns that decriminalisation will “open the floodgates” to crimes such as human and drug trafficking, child trafficking and the abuse of sex workers.<sup>515</sup> According to the CSJ and Law Trust Chair, there exists no evidence that suggests the *status quo* of criminalising sex work is successful in addressing these very concerns.<sup>516</sup> They however maintain that issues of trafficking and drugs should be dealt with through the proper enforcement of the related laws, while reiterating that evidence suggests decriminalisation will

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<sup>507</sup> Ibid at 3.

<sup>508</sup> Ibid at 3.

<sup>509</sup> Ibid at 3

<sup>510</sup> Masuku & Kwanje op cit note 424.

<sup>511</sup> Ramabulana op cit note 15 at 22.

<sup>512</sup> Ibid at 22.

<sup>513</sup> Rhoda op cit note 57 at 42.

<sup>514</sup> Ibid at 42.

<sup>515</sup> IRR op cit note 446 at 11.

<sup>516</sup> Ibid at 12.

assist in reducing the abuse and violence sex workers currently face.<sup>517</sup> Furthermore Emily Rothman who is an expert in sexual abuse and violence, maintains that while criminalisation *may* reduce the likelihood of trafficking, the arresting of sex workers is often selective and those from marginalised communities are mostly targeted.<sup>518</sup> Therefore criminalisation does not necessarily stifle trafficking, but may rather increase sex workers vulnerabilities.<sup>519</sup> Therefore according to the IRR, any harms associated with sex work are better addressed through “social pressure and light-touch regulation” rather than criminalisation and persecution, reiterating the suitability of decriminalisation.<sup>520</sup>

#### 4.4.3 Resistance from religious and conservative groups and radical feminists

The looming potential of the enactment of the Bill has triggered various religious and conservative groups who are in opposition to the “immoral” nature of criminalisation.<sup>521</sup> The African Christian Democratic Party (“ACDP”) for example, has called the decision to decriminalise sex work as “extreme” given the high rates of crime and GBV in South Africa.<sup>522</sup> The ACDP further claims that sex work is “inherently exploitative” of vulnerable persons.<sup>523</sup> These critiques have the potential to cause social unrest and pressure the government against enacting the Bill and the decriminalisation of sex work.<sup>524</sup> More importantly, this dissertation has already cautioned against the misconceived conflation between voluntary sex work and exploitation. Furthermore, this dissertation strongly debunks the false deterrent value of criminalisation because no probable evidence indicates that criminalisation deters clients from buying sexual services or eliminates the demand for sex work.<sup>525</sup>

According to Dr Karin Chinnian the Bill faced its biggest backlash from radical feminists who view sex work as the oppression of women and see the decriminalisation of sex work as opening the floodgates that further this oppression.<sup>526</sup> Chinnian therefore believes that radical

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<sup>517</sup> Ibid at 12.

<sup>518</sup> Emily F Rothman ‘Second Thoughts: Should US Physicians Support the Decriminalization of Commercial Sex?’ (2017) 19(1) *AMA Journal of Ethics* 110.

<sup>519</sup> Ibid at 13.

<sup>520</sup> IRR op cit note 446 at 2.

<sup>521</sup> Masuku & Kwanje op cit note 424.

<sup>522</sup> Human op cit note 470.

<sup>523</sup> Ibid.

<sup>524</sup> Masuku & Kwanje op cit note 424.

<sup>525</sup> Richter & Huysamen op cit note 35.

<sup>526</sup> Chinnian op cit note 213.

feminism has played a big role in delaying the finalisation of the Bill.<sup>527</sup> According to liberal feminism however, sex work should be viewed as “a job equivalent to other jobs,”<sup>528</sup> and this is the stance advocated for by this dissertation. This stance maintains that criminalisation is the real tool subjugating sex workers, whereas under a system of decriminalisation sex workers are able to freely enjoy various human rights with increased protection against exploitation and abuse.<sup>529</sup> The Working Group caution against the resurgence of conservatism in international and national legislative and policy forums.<sup>530</sup> Ultimately in advocating for a reduction in sex workers’ vulnerability to experiencing GBV, the ultimate concern is not religious or outdated convictions but rather saving lives of vulnerable sex workers.<sup>531</sup>

#### **4.4.4 Lack of political will and implementation of the Bill**

A lack of political will to enact the Bill and implement the decriminalisation of sex work is a looming threat that stands to limit the effectiveness of the Bill and any legislation relating to decriminalisation.<sup>532</sup> According to Sisonke national organiser, Katlego Rasebitse, there exists an evident lack of political will to decriminalise sex work, despite government’s declared intentions.<sup>533</sup> In a memorandum handed over to the Department of Justice and Constitutional Development, various organisations however, stated that the delay in decriminalising sex work constitutes “cruel and unnecessary punishment by the Department of Justice” which tortures sex workers and undermines their rights to dignity and equality.<sup>534</sup> Chinnian describes the Bill as ‘sitting in legal limbo’ not unsimilar to other Bills awaiting enactment by Parliament.<sup>535</sup> It is therefore evident that while Parliament may pass progressive laws, it often takes years for them to be enacted and finalised.<sup>536</sup> This undermines the work of Parliament in the eyes of the public and can weaken the impact of passing laws in the first place.<sup>537</sup> Therefore, although the Bill has been passed, its efficacy stands to be threatened by a lack of government action and

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<sup>527</sup> Ibid.

<sup>528</sup> Ann Weatherall & Anna Priestley ‘A feminist discourse analysis of sex work’ (2001) 11.3 *Feminism & Psychology* 323 16.

<sup>529</sup> Ibid at 16.

<sup>530</sup> Human Rights Council op cit note 3 at 4.

<sup>531</sup> Ramabulana op cit note 15 at 55.

<sup>532</sup> Masuku & Kwanje op cit note 424.

<sup>533</sup> Human op cit note 470.

<sup>534</sup> Ibid

<sup>535</sup> Chinnian op cit note 213.

<sup>536</sup> PMG op cit note 224.

<sup>537</sup> Ibid.

assistance. Furthermore there remains a lot of work to be done to urge government to follow through on the implementation of the Act and ensure it is done in an effective and calculated manner.<sup>538</sup> The Bill may have lost traction due to being under revision, however it is imperative that it be enacted as early as possible so to prevent further harm being perpetrated in terms of outdated and repealed laws.<sup>539</sup>

#### **4.5 Conclusion and critical analysis of the Bill**

While states may opt to either criminalise, legalise or decriminalise sex work, according to Rothman there exists no perfect model and any legal response taken must be carefully evaluated.<sup>540</sup> As submitted by the CSJ and Law Trust Chair, both criminalisation and legalisation have “ethical pitfalls” because they can disempower already vulnerable sex workers and increase their risk of harm.<sup>541</sup> As explicitly evidenced in this dissertation, the criminalisation of sex work contributes to GBV against sex workers who are unable to exercise their rights and shield themselves from abuse.<sup>542</sup> According to the SWEAT report, decriminalisation is considered the most effective legal response for reducing the harms experienced by sex workers.<sup>543</sup> The Bill purports to decriminalise the sale and purchase of adult sexual services,<sup>544</sup> and is ultimately a manifestation of years of advocacy for the protection of sex workers.<sup>545</sup> Furthermore it is symbolic of government initiative towards the addressing of GBV, an epidemic affecting society as a whole.

According to Richter and Huysamen the decriminalisation of sex work ultimately means that clients, police, and third parties have reduced power to abuse and harass sex workers.<sup>546</sup> Furthermore as evidenced by New Zealand, sex workers will be able to negotiate safe sex, be empowered to respond to GBV and access protection from the criminal justice system.<sup>547</sup> By increasing sex workers’ access to basic protection and services, sex workers are made less vulnerable to exploitation, disproving the conflation between sex work and human

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<sup>538</sup> AidsFonds op cit note 443.

<sup>539</sup> IRR op cit note 446 at 4.

<sup>540</sup> Rothman op cit note 512 at 114.

<sup>541</sup> Ibid at 112.

<sup>542</sup> South African Government op cit note 13.

<sup>543</sup> SWEAT-Policing-47.

<sup>544</sup> Richter & Huysamen op cit note 35.

<sup>545</sup> Masuku & Kwanje op cit note 424.

<sup>546</sup> Richter & Huysamen op cit note 35.

<sup>547</sup> Ibid.

trafficking.<sup>548</sup> Furthermore under the current iteration of the Bill, sex work is legally recognised as work, meaning that occupational health and safety and fair labour practices would apply to sex workers equally.<sup>549</sup> Therefore this dissertation in supporting a human rights paradigm for sex work and decriminalisation ensures that we socially and legally understand sex work as a form of labour.<sup>550</sup> Ultimately, it is therefore argued that decriminalisation is the only legal response that allows sex workers to fully enjoy their human rights in accordance with South Africa's legal obligations to protect women.<sup>551</sup>

Decriminalisation, however, will require careful planning and consideration of the potential challenges as well as shortcomings in the Bill.<sup>552</sup> The Bill has largely been celebrated as it marks a historical moment in history set to change the lives of sex workers forever. However it has also faced criticism mostly from religious and conservative groups. In its initial stage the Bill does not aim to provide regulations related to the sex industry, however, that is not to say that decriminalisation cannot be accompanied by boundaries intended to further protect sex workers. For example the Bill does not reduce legal protection against child trafficking or sexual abuse, and disproves the correlation between decriminalisation and an increased demand for sex work and exploitation.<sup>553</sup> While the Bill may be criticised for lacking regulations and its brief nature, it is an indication of government no longer overextending itself into private domains.<sup>554</sup> Furthermore, this dissertation nonetheless recognises the necessity to repeal vague by-laws and regulations that may target sex workers and reduce the efficacy of the Bill. The Bill must therefore be properly enacted and planned for, accompanied by careful application and enforcement of labour laws, which will be of great importance if sex work is decriminalised.<sup>555</sup> Decriminalisation therefore provides sex workers with the highest capacity of protection against GBV, while proving to introduce as little legal obstacles and administrative burdens as possible for already vulnerable sex workers. Any backlash the Bill receives from moral fanatics and critics of its framework, is far outweighed by its potential to

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<sup>548</sup> Evans & Walker op cit note 9 at 47; Chinnian op cit note 213.

<sup>549</sup> Richter & Huysamen op cit note 35.

<sup>550</sup> Bindman op cit note 256.

<sup>551</sup> Evans & Walker op cit note 9 at 47.

<sup>552</sup> Masuku & Kwanje op cit note 424.

<sup>553</sup> Ibid.

<sup>554</sup> Ibid.

<sup>555</sup> Ibid.

significantly reduce GBV faced by sex workers and therefore the Bill should be enacted in its current iteration and any delays and further revision should be limited as far as possible.<sup>556</sup>

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<sup>556</sup> SECTION27 op cit note 318 at 2.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Main Findings

In a constitutional democracy dedicated to gender equality and women's rights, it is concerning that sex workers continue to be isolated from the enjoyment of their constitutional and human rights.<sup>557</sup> Out of concern for sex workers who are a highly marginalised group, this dissertation aimed to critically investigate whether decriminalising sex work in South Africa would reduce sex workers' vulnerability to experiencing GBV. This was done by preliminary establishing a causal connection between the criminalisation of sex work and the exacerbated vulnerability of sex workers to experiencing incredulous levels of violence, abuse, sexual exploitation, police brutality and daily human rights violations. Therefore it unequivocally placed the issue of sex work within a human rights framework. This chapter thus collates the conclusions established in the previous chapters and makes subsequent recommendations to bolster South Africa's social and legal response to sex work.

At present South Africa criminalises both the buying and selling of sex work through s(20)(1)(aA) of the Sexual Offences Act, which maintains that any person who renders sexual services for reward is guilty of an offence.<sup>558</sup> Responding to sex work with outdated moral and religious values instead of normative legal standards undoubtedly perpetuates the stigma and marginalisation of sex workers. The continued subjection of sex workers to criminal sanctions has visceral consequences for the lives of sex workers who are discriminately isolated from legal protection and remedies, exposed to dangerous working conditions and subjected to disproportionate levels of GBV.<sup>559</sup> The evidence provided from research reports such as the SWEAT and Sonke reports further indicates the gruesome extent of human rights violations perpetuated by the police against sex workers in South Africa.<sup>560</sup> Based on the analysis of interviews and surveys conducted with sex workers, it is made clear that police brutality against sex workers is cruel and systemically entrenched.<sup>561</sup> Police violence against sex workers includes daily harassment, corruption and bribery, sexual and physical violence, and torture.<sup>562</sup>

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<sup>557</sup> Masuku & Kwanje op cit note 424.

<sup>558</sup> Supra note 6 at s20(1)(aA).

<sup>559</sup> SECTION27 op cit note 318 at 2.

<sup>560</sup> Evans & Walker op cit note 9 at 46.

<sup>561</sup> Evans & Walker op cit note 9 at 46.

<sup>562</sup> Ibid at 46.

Furthermore when sex workers attempt to report crimes and seek police protection, they face various barriers including a refusal by the police to protect complainants, denying sex workers their rights, victim shaming and revictimising and perpetrating violence against sex workers.<sup>563</sup> In instances where the police are perpetrators of violence, sex workers are obstructed from processing formal complaints out of fear of being targeted by police officials.<sup>564</sup> Criminalisation therefore directly prevents sex workers from seeking protection and recourse for instances of abuse, as their illegal status threatens to have them arrested and prosecuted even when they are victims of crimes.<sup>559</sup> According to the first-hand accounts procured by SWEAT, sex workers are desperate for legal reform aimed at better protecting them from violence and targeted abuse.<sup>565</sup>

While international law does not prescribe a specific legal framework regarding the regulation of sex work, it does mandate states to respect and fulfil the rights of sex workers and to protect all women from violence.<sup>566</sup> Therefore the various international treaties and conventions to which South Africa is a signatory to are capable of guiding South Africa's legal response to sex work in a manner that could best protect the human rights of sex workers. International human rights law has made it explicitly clear that human rights are inherent to all human beings and therefore sex workers should not be excluded from exercising and enjoying their human rights.<sup>567</sup> Women who decide to enter the sex work industry are there to make money and therefore their objective is no different from other persons doing other 'unpleasant jobs.'<sup>568</sup> This dissertation argues that decriminalisation is therefore a tool to dismantle the "asymmetrical relationship of economic exchange between men and women," resulting in sex workers becoming ordinary, empowered labourers.<sup>569</sup> Therefore it can be argued that most international instruments can be interpreted so to make a clear distinction between forced and voluntary sex work, which calls for the eradication of the consequences of exploitation of sex work, as opposed to sex work itself.<sup>570</sup> Therefore to the extent that the criminalisation of sex work results in the violation of the human rights of sex workers, including *inter alia*, their right

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<sup>563</sup> Ibid at 46.

<sup>564</sup> Evans & Walker op cit note 9 at 46.

<sup>559</sup> Ibid at 46.

<sup>565</sup> Ibid at 46.

<sup>566</sup> SWEAT op cit note 153 at 64.

<sup>567</sup> Ndhlovu op cit note 30 at chap 5 at 2.

<sup>568</sup> Ibid at 2.

<sup>569</sup> Commission for Gender Equality op cit note 232 at 3.

<sup>570</sup> SALRC 2009 op cit note 52 at 29.

to dignity, bodily and psychological integrity and equality, it is in conflict with the South Africa's international and domestic obligations to protect women.<sup>571</sup> Ultimately because sex workers are arguably protected under international law, in order for South Africa to better fulfil its legal obligations to protect all women, it is necessary for South Africa to reform its legal response to sex work.<sup>572</sup>

This dissertation has ultimately proven that the current legislative framework governing sex work in South Africa has been ineffective and has significantly exposed sex workers to significant levels of GBV.<sup>573</sup> Therefore South Africa needs to critically reconsider its legal response to sex work, a step it has initiated by the drafting and passing of the draft Bill. The Bill aims to fully decriminalise the buying and selling of sex work in South Africa and expunges the criminal record of persons who had previously committed the offence of rendering, engaging, or receiving sexual services in terms of the Sexual Offences Act.<sup>574</sup> Decriminalisation is argued to be the most effective legal response to combat the harms experienced by sex workers and the growing concern that sex workers do not enjoy access to the rights contained in international human rights instruments.<sup>575</sup> Evidence from New Zealand who has led the decriminalisation movement, reveals that decriminalisation improves the wellbeing and safety of sex workers and significantly enhances their ability to respond to violence.<sup>576</sup> The Bill is intended to enable the fostering of effective relationships between sex workers and the police, which would increase sex workers' ability to respond to and report incidents of GBV and reduce the levels of violence perpetrated by the police against them.<sup>577</sup> Sex workers would therefore have a renewed sense of agency, safer working conditions and be empowered to fully exercise and enjoy their human rights and access legal protection without fears of being detained or persecuted.<sup>572</sup> Contrary to criticism received, decriminalising sex work stands to reduce the overall vulnerability of sex workers which arguably would reduce their susceptibility to exploitation and other harms associated with the criminalisation of sex work.<sup>578</sup> Furthermore under a system of decriminalisation, the Bill enables sex work to be

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<sup>571</sup> Ndhlovu op cit note 30 at chap 3 at 22.

<sup>572</sup> Ibid at 22.

<sup>573</sup> Rhoda op cit note 57 at 128.

<sup>574</sup> Amendment Bill supra note 418 clauses 1 & 2(1).

<sup>575</sup> South African Government op cit note 13.

<sup>576</sup> Ibid.

<sup>577</sup> Evans & Walker op cit note 9 at 47.

<sup>572</sup> Masuku & Kwanje op cit note 424.

<sup>578</sup> Evans & Walker op cit note 9 at 47.

legally recognised as a form of labour that is subject to ordinary labour legislation, therefore providing sex workers with the same rights and recourse as other labourers in respect of their working conditions.<sup>579</sup> The Commission for Gender Equality therefore calls for legislation that subjects sex workers to existing labour and business laws, which can effectively prevent unsafe working conditions and business practices.<sup>580</sup> The recognising of sex work as a legitimate form of labour is pertinent in shielding sex workers from GBV and violations of their human rights.<sup>581</sup>

While it is likely untrue that the enacted Bill (the Act) will not pass constitutional muster if it is not accompanied by regulations, it is still possible that any revisions made to the Bill can both retain the nature of decriminalisation and more explicitly address the status quo of any harmful municipal by-laws. This dissertation does not advocate for legalisation, however, it does recognise that existing regulations and by-laws should be revised and repealed in attempts to offer sex workers the best possible protection under the enacted Bill. The introduction of new regulations, however, would be done without the consultation of sex workers and therefore void of adequate protections for sex workers, while only placing more burdensome bureaucratic requirements on them.<sup>582</sup> Furthermore, it has already been indicated that the South Africa government does not have the resources or sufficient dedication needed to successfully legalise sex work. Therefore it is best that South Africa invest in a system that is proven to reduce sex workers' vulnerability to experiencing violence and which is also likely to be successfully implemented by the current government, within their given capacity.

## **5.2 Other recommendations**

While the future implementation of the Bill marks a revolutionary step for the rights of sex workers, based on the conclusions drawn herein, the decriminalisation of sex work in South Africa must be accompanied by a collaborative effort across all the relevant stakeholders. The implementation of the Act stands to be accompanied by various challenges, however, certain recommendations may assist in reducing the harm experienced by sex workers and in ensuring the effective enactment of the Bill.

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<sup>579</sup> Bindman op cit note 256.

<sup>580</sup> Commission for Gender Equality op cit note 232 at 6.

<sup>581</sup> Ibid.

<sup>582</sup> IRR op cit note 446 at 3.

### 5.2.1 Accepting sex workers and reducing stigma

As already explicitly demanded in this dissertation, sex workers must be afforded the same rights, opportunities, and protections as all other citizens.<sup>583</sup> Sex work is an industry that is unlikely to disappear and therefore in order for sex workers to fully enjoy their human rights, sex workers must be accepted by society and sex work must be considered a legitimate form of employment.<sup>584</sup> By creating a normative standard that sex workers should be able to equally access basic services, join labour unions and access legal protection in instances of abuse, it will aid in introducing a seamless system of decriminalisation under the Bill.<sup>585</sup>

The social integration of sex workers in society must be accompanied by calculated efforts to prioritise harm and reduce stigma. Harm reduction within a system of decriminalisation focuses on minimising the negative consequences of sex work rather than criminalising sex work itself.<sup>586</sup> To do so would require providing sex workers with access to healthcare and education on how to safely navigate the sex industry, as well as addressing the underlying structural issues that can result in the exploitation of sex workers.<sup>587</sup> While legislation may change under the enacted Bill, discrimination and stigma may remain and therefore, it is imperative that we challenge the misconception that sex workers are underserving of human rights.<sup>588</sup> In order to foster public acceptance and reduce the stigma attached to sex work, it is necessary for public education and awareness campaigns to be prioritised.<sup>589</sup> The government must conduct these education campaigns to educate society on the nature of shifting morality and how the law must reflect these shifts and the Constitution, as opposed to reflecting personal moral beliefs.<sup>590</sup> According to Ndhlovu, public awareness campaigns will aid in the public no longer viewing sex work as threatening to their morality and assist in detaching the stigma attached to sex work.<sup>591</sup>

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<sup>583</sup> Masuku & Kwanje op cit note 424.

<sup>584</sup> Masuku & Kwanje op cit note 424.

<sup>585</sup> Ibid.

<sup>586</sup> Ibid.

<sup>587</sup> Ibid.

<sup>588</sup> 47.

<sup>589</sup> Ibid at 49.

<sup>590</sup> Ndhlovu op cit note 30 at chap 5 at 7.

<sup>591</sup> Ibid at 7.

### 5.2.2 Involving and educating sex workers

It is of the utmost importance that sex workers are given the opportunity to participate in developing and implementing of policies related to sex work.<sup>592</sup> This would require the government to fund and support organisations and initiatives led by sex workers and ensuring that sex workers are free to participate in policy discussions and all decision-making processes.<sup>593</sup> By fostering the public participation of sex workers in a bottom-up manner, it would mobilise sex worker support services and enhance sex workers' abilities to influence government policies and agendas.<sup>594</sup> The fostering of relationships between sex workers and the government, will assist the decriminalisation of sex work and advance a standard of human rights for sex workers.<sup>595</sup> Furthermore the HSF maintains that decriminalisation must be accompanied by impact evaluations of the effect of decriminalisation on sex workers, which will further influence future policy changes based on the input of sex workers.<sup>596</sup>

Furthermore sex workers must be provided with community support and peer education which would increase sex workers' trust and enhance their ability to locate support services.<sup>597</sup> Education should be provided to sex workers who have experienced police violence, violations of their legal rights and abuse to assist sex workers in accessing the necessary resources and support.<sup>598</sup> Therefore the Sonke report calls for increased awareness raising within the sex community itself as a point of departure, in order to help sex workers understand their rights, what to expect during police interactions and how to safely lodge complaints involving police officers and other incidents of violence.<sup>599</sup> However competent education and awareness raising will require sufficient funding and resources.<sup>600</sup> During the public hearings for the Bill, Wize4Afrika emphasised a need for proper training, implementation of the Act and adequate funding of agencies that are responsible for implementing the Act.<sup>601</sup> Therefore awareness raising, participation and proper enactment of the Bill are all necessary steps to safeguard sex workers, all of which require collaborative efforts and adequate funding.

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<sup>592</sup> Masuku & Kwanje op cit note 424.

<sup>593</sup> Ibid.

<sup>594</sup> Evans & Walker op cit note 9 at 48.

<sup>595</sup> Ibid at 48.

<sup>596</sup> HSF op cit note 482 at 4.

<sup>597</sup> SECTION27 op cit note 318 at 16.

<sup>598</sup> 48.

<sup>599</sup> Ibid at 48.

<sup>600</sup> Ibid at 48.

<sup>601</sup> PMG op cit note 224.

### 5.2.3 Recommendations for the police

While decriminalisation will aid in holding the police accountable, it is nonetheless imperative that SAPS be willing to address the soaring levels of abuse and violence that is perpetrated by police officers against sex workers, as highlighted in this dissertation.<sup>602</sup> To do so SAPS should firstly engage with sex workers and sex worker organisations to determine how they can support sex workers and reduce police violations of sex workers' human rights.<sup>603</sup> It is necessary for SAPS to illustrate their solidarity and therefore commit publicly to enforce national provisions that "prohibit torture, arbitrary arrests and detentions, police brutality" as well as to dismantling police discrimination and targeting of sex workers.<sup>604</sup> These efforts however must be accompanied with rigorous police training and education specifically on the international and domestic rights of sex workers and on proper protocol for interacting, arresting and detaining sex workers.<sup>605</sup> According to General Recommendation No.19 made by the CEDAW Committee, judicial and law enforcement officials must undertake gender-sensitive training in order to ensure the effective implementation of the CEDAW Convention, and similarly of the implementation of the Act.<sup>606</sup>

According to the Sonke report, the SAPS complaint procedures and facilities for vulnerable persons and victims should be re-evaluated to design a more effective and "operationally friendly process" whereby complaints can be followed up on and strict guidelines govern the timelines on reporting of progress and receiving an outcome.<sup>607</sup> The Sonke report specifically recommends the designing and implementing of a "national Policing of Sex Work framework" which would include National Instructions and Standard Operating Procedures to guide the policing of sex workers.<sup>608</sup> Complaints and allegations of abuse that are currently pending against SAPS officers must be urgently investigated by the relevant authorities, including the Civilian Secretariat of Police, the Independent Police Investigative Directorate and the SAHRC, and necessary prosecutions and sanctions against police perpetrators must follow.<sup>609</sup> Furthermore it is recommended that SAPS engage in continuous collaboration with police

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<sup>602</sup> Evans & Walker op cit note 9 at 47.

<sup>603</sup> Ibid at 47.

<sup>604</sup> SWEAT op cit note 153 at 6.

<sup>605</sup> Ibid at 6; Commission for Gender Equality op cit note 232 at 8.

<sup>606</sup> General Recommendation No.19 supra note 321 para 24.

<sup>607</sup> 47.

<sup>608</sup> Ibid at 47.

<sup>609</sup> SWEAT op cit note 153 at 7.

forces and other authorities to reinforce existing police procedures, as well as attend extensive training on how to safely interact with sex workers.<sup>610</sup> This is believed to increase the police's understanding of sex workers and their prevailing socio-economic circumstances, the levels of GBV they face from the police and other parties, and the legal frameworks that exist to protect the rights of vulnerable persons.<sup>611</sup>

Furthermore, as a result of the concerns around the proper implementation of the Act, APCOF submit that the Minister of Justice and Constitutional Development, the South African Police Service, and the National Prosecuting Authority “should be required to collect, analyse and report data on sex workers and the crimes they experience” and to publish the data in the relevant annual reports.<sup>612</sup> Furthermore, APCOF believes that the Bill fails to provide explicit positive obligations on the police to protect and give effect to the rights of sex workers and improve their access to social, legal and police services.<sup>613</sup> APCOF therefore suggest the addition of a “section 4” to be added to the Bill which would require an obligation on SAPS to assist sex workers with *inter alia*, finding suitable shelter, obtaining healthcare services and to do so in “a manner that respects and protects their rights to dignity, autonomy and equality.”<sup>614</sup> This is because SAPS is integral in ensuring the successful implementation of the Bill and has a deeply meaningful role in ensuring the protection of sex workers in South Africa, and therefore the possible addition of this new section may be rightfully considered.<sup>615</sup>

### 5.3 Concluding remarks

If this dissertation raised the question of whether decriminalisation as proposed through the Bill will reduce the GBV faced by sex workers, then the answer is unequivocally yes.<sup>616</sup> The discourse on which legal response to sex work is the most effective is ongoing, however, what has been proven is that criminalisation significantly exacerbates sex workers vulnerability to experiencing GBV and experiencing daily human rights violations.<sup>617</sup> Ultimately, sex work is an industry that will continue to exist and must therefore be responded to on the basis of legal

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<sup>610</sup> Evans & Walker op cit note 9 at 47.

<sup>611</sup> Ibid at 47.

<sup>612</sup> APCOF op cit note 440 at 4.

<sup>613</sup> Ibid at 3.

<sup>614</sup> Ibid at 3.

<sup>615</sup> Ibid at 3.

<sup>616</sup> Evans & Walker op cit note 9 at 49.

<sup>617</sup> Ndhlovu op cit note 30 at chap 5 at 9.

conviction rather than morality.<sup>618</sup> It is therefore made evident that the non-criminalisation of sex work is the optimal response to safely and securely protect the human rights of sex workers, in line with South Africa's international and domestic obligations.<sup>619</sup>

While the Bill is not without its challenges or critiques, it represents a groundbreaking moment in history for sex workers and decriminalisation will evidently provide sex workers with safer working conditions, greater police protections and an ability to demand the enjoyment of their human rights. Furthermore, by prioritising harm reduction, providing for the participation of sex workers and taking a multi-collaborative approach with all relevant stakeholders, the enacted Bill is guaranteed to improve the status quo of sex workers in South Africa.<sup>620</sup> It is therefore recommended that the South African government enact the Bill without any further delays, thereby aligning itself with a legal response proven to protect the human rights of sex workers. Evidently, the enactment of the Bill holds the potential to quite literally save the lives of sex workers in this country.

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<sup>618</sup> Ibid at 9.

<sup>619</sup> Ibid at 9.

<sup>620</sup> SWEAT op cit note 153 at 46.

## **BIBLIOGRAPHY**

### Primary Sources

#### ***Constitutions***

Constitution of the Republic of South Africa, 1996.

#### ***Statutes***

The Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Immorality Act 5 of 1927.

Immorality Amendment Act 2 of 1988.

Sexual Offences Act 23 of 1957.

#### ***International instruments***

Convention on the Elimination of All Forms of Discrimination against Women adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 287(1), signed and ratified by South Africa in 1995.

Convention for the Suppression of Traffic in Persons and of the Exploitation of The Prostitution of Others of 1949, United Nations General Assembly A/RES/317 (1949), signed and 1950 and ratified by South Africa in 1951.

International Covenant on Civil and Political Rights 2200 (XXI) adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, ratified by South Africa in 1998.

International Covenant on Economic, Social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27.

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, Mozambique 11th July 2003, entry into force 25 November 2005.

UN Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995.

UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24 on Article 12 of the Convention, Women and Health, A/54/38/Rev.1, chap. I, 1999.

UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19 on the UN Declaration on the Elimination of Violence against women, 1992, adopted by the General Assembly in 1993.

Universal Declaration of Human Rights 1948, General Assembly Resolution 217 A(III) (1948).

UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104.

UNAIDS, International Guidelines on HIV/AIDS and Human Rights, 2006.

### *African Instruments*

African Charter on Human and Peoples' Rights, adopted by Organization of African Unity on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entry into force on 21 October 1986.

Southern African Development Community Protocol on Gender and Development of 2008, signed by the SADC Heads on 17 August 2008.

### **Case Law**

*S v Makwanyane and Another* 1995 (6) BCLR 665.

*South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs* (CCT54/16) [2017] ZACC 7; 2017 (5) BCLR 641 (CC) (9 March 2017).

*S v Jordan and others* 2006 (6) South Africa 642 (CC).

### **Law Commission Papers**

South African Law Reform Commission Discussion Paper 1 (Project 107) *Sexual Offences Adult Prostitution* (2009).

South African Law Report Commission (Project 107) adult prostitution (2018).

South African Law Reform Commission Report 1 (Project 107) *Sexual Offences Adult Prostitution* (2015).

### **Books**

Currie, Iain & Johan de Waal *The Bill of Rights Handbook* (2005) Juta.

Doezema, Jo 'Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy' in *Global Sex Workers* (2018) ed. Kamala Kempadoo and Jo Doezema. (London: Routledge).

Klenke, Karin *Qualitative Research in the Study of Leadership* (2016) Emerald Group Publishing 355.

Saady, Brian *Decriminalized Prostitution: The Common Sense Solution* 1 ed (2017) Prerogative Publishing, USA.

### Secondary sources

#### **Journal articles**

Andorno, Roberto 'Human Dignity and Human Rights' (2014) *Handbook of global bioethics* 45.

Bal, Matthijs & Matthijs Bal 'A Review of Human Dignity' (2017) *Dignity in the Workplace: New Theoretical perspectives*.

Bhunu, C.P., A.N. Mhlanga & S Mushayabasa 'Exploring the Impact of Prostitution on HIV/AIDS Transmission' (2014) *International Scholarly Research Notices* 2.

Brooks-Gordon, Belinda et al 'Harm Reduction and Decriminalisation of Sex Work: Introduction to the Special Section' (2021) 18 *Springer Nature*.

Crankshaw, Tamaryn L & Jane Freedman 'Sex work or transactional sex? Shifting the dialogue from risk to rights' (2023) 31 *Sexual and Reproductive Health Matters*.

Daalder, Annelies L 'Prostitution in the Netherlands since the lifting of the brothel ban' (2007).

Day, Shelagh 'Prostitution: Violating the Human Rights of Poor Women' (2008) *Action ontarienne contre la violence faite aux femmes*.

Deady, Gail M. 'The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification within the Prostitution Industry' (2011) 17 *WASH. & LEE J.C.R. & SOC. JUST* 515.

Edlund, Lena & Evelyn Korn 'A Theory of Prostitution' (2002) 110 *Journal of Political Economy* 181.

Erbe, Nancy 'Prostitutes: Victims of Men's Exploitation and Abuse' (1984) 2 *Law & Inequality: A Journal of Theory and Practice* 12.

Fick, Nicole 'Police abuse of sex workers when making arrests' (2006) 16 *SA Crime Quarterly* 27.

Fick, Nicole 'Sex Workers Speak Out - Policing the Sex Industry' (2006) 15 *SA Crime Quarterly*.

Graham, Laura 'Governing Sex Work Through Crime: Creating the Context for Violence and Exploitation' (2017) 81.3 *The Journal of Criminal Law* 201.

Gupta, Ruchira & Ruchi Sinha 'Confronting the Demand for Sex-trafficking: A Handbook for Law-enforcement' (2007) *Apne Aap Worldwide*.

- Hayes-Smith, Rebecca & Zahra Shekarkhar 'Why is prostitution criminalized? An alternative viewpoint on the construction of sex work' (2010) 13.1 Contemporary Justice Review 43
- Karim, Quarraisha Abdool, Salim Abdool Karim, Kate Soldan and Martin Zondi 'Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers' (1995) 85(11) American Journal of Public Health 1521.
- Lee, Samuel & Petra Persson 'Human Trafficking and Regulating Prostitution' (2022) 14.3 American Economic Journal: Economic Policy 87.
- Luiz, John M. & Leon Roets 'On Prostitution, STDs and the Law in South Africa: The State as Pimp' (2000) 18.1 Journal of Contemporary African Studies 21.
- Macleod, Jan, Melissa Farley, Lynn Anderson, Jacqueline Golding 'Challenging Men's Demand for Prostitution in Scotland' (2008) Women's Support Project 15.
- Manamela, Thabang 'Towards a Sexually Free South Africa: A Feminist and Constitutional Defence in Favour of Legalising Prostitution through the Right to Bodily Integrity' (2018) 12 Pretoria Student Law Review 95.
- Mathieson, Ane, Easton Branam & Anya Noble 'Prostitution Policy: Legalization, Decriminalization and the Nordic Model' (2015) 14 Seattle Journal for Social Justice 367.
- Mgbako, Chi Adanna, Katherine Glenn Bass, Erin Bundra, Mehak Jamil, Jere Keys & Lauren Melkus 'The case for decriminalization of sex work in South Africa' (2012) 44 Georgetown Journal of International Law 1447.
- Mile, Khauhelo 'Gender Based Violence: A South African Plague' 2020 Rebecca Oppenheimer Internship 2.
- Monto, Martin 'Female Prostitution, Customers, and Violence' (2004) 10 Violence against women 165.
- Nyembe, Nomonde, Rachel Zacharias, Ayesha Krige, Marlise Richter, Lesego Tlhwale & Mateenah Hunter 'Sex Workers and Sex Work in South Africa: A Guide for Journalists and Writers' Sonke Gender Justice, Sex Workers Education and Advocacy Taskforce, Sisonke Sex Workers Movement & Women's Legal Centre (2014) 1.

- Patosalmi, Mervi 'Bodily Integrity and Conceptions of Subjectivity' (2009) 24.2 *Hypatia* 125.
- Peng, Yenwen 'Of course they claim they were coerced: On Voluntary Prostitution, Contingent Consent, and the Modified Whore Stigma' (2005) 7 *Journal of International Women's Studies* 17.
- Potot-Warren, Jade 'Confusing, Dated and Ineffective? Current Sex Work Laws in England and Wales and Proposals for Reform' (2021) 3.1 *The Student Journal of Professional Practice and Academic Research* 4.
- Pudifin, S & S Bosch 'Demographic and Social Factors Influencing Public Opinion on Prostitution: an Exploratory Study in KwaZulu-Natal Province, South Africa' (2012) 15.4 *PER/PELJ*.
- Qayyum, Shahid, Mian Muhammad Ahmed Iqbal, Ali Akhtar, Aamir Hayat, Irfan Mehmood Janjua & Shazia Tabassum 'Causes and Decision of Women's Involvement into Prostitution and its Consequences in Punjab, Pakistan' (2013) 4(5) *Academic Research International* 222.
- Rangasami, Jerusha, Tracey Konstant & SManoek 'Police Abuse of Sex Workers: Data from cases reported to the Women's Legal Centre between 2011 and 2015' (2016) *Women's Legal Centre*.
- Raymond, Janice G. 'Prostitution on Demand: Legalizing the Buyers as Sexual Consumers' (2004) 10.10 *Violence Against Women* 1156.
- Rothman, Emily F. 'Second Thoughts: Should US Physicians Support the Decriminalization of Commercial Sex?' (2017) 19(1) *AMA Journal of Ethics* 110.
- Sanders, Teela & Rosie Cambell 'Criminalization, Protection and Rights: Global Tensions in the Governance of Commercial Sex' (2014) 14.5 *Criminology & Criminal Justice* 535.
- Scoular, Jane & Anna Carline 'A Critical Account of a 'Creeping Neo-Abolitionism': Regulating prostitution in England and Wales' (2014) 14 *Criminology & Criminal Justice* 539.
- Shultziner, Doron 'Human Dignity - Functions and Meanings' (2003) 3.3 *Global Jurist Topics*.

Sigsworth, Romi 'Anyone Can Be a Rapist' (2009) Centre for the Study of Violence and Reconciliation.

Spies, Amanda 'The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform' (2021) 65(3) Journal of African Law 327-249.

Trifolios, Kristie 'Legalizing Prostitution: An Introduction' (2014) Law School Student Scholarship 18.

Weatherall, Ann & Anna Priestley 'A feminist discourse analysis of sex work' (2001) 11(3) Feminism & Psychology 323.

Whelan, Daniel J. 'Indivisible Human Rights' (2010) 69 Global Issues Series.

Wojcicki, Janet 'Race, class and sex: the politics of the decriminalisation of sex work' (1999) 15(42) Agenda 94.

### ***Reports, submissions and papers***

Commission for Gender Equality 'Decriminalising Sex Work in South Africa' (2013) Official Position of the Commission for Gender Equality 1-9.

Donna Evans & Rebecca Walker 'The Policing Of Sex Work In South Africa: A Research Report On The Human Rights Challenges Across Two South African Provinces' (2017) Sonke Gender Justice and SWEAT 1-64.

Elaine Mossman 'International Approaches to Decriminalising or Legalising Prostitution' University of Wellington (2007) prepared for the Ministry of Justice.

Guest Lecture by Dr Karin Chinnian at the University of Cape Town, International Protection of Womens' Rights course, 19 September 2023.

Human Rights Council 'Escalating backlash against gender equality and urgency of reaffirming substantive equality and the human rights of women and girls' (2024) *report of the Working Group on discrimination against women and girls* 2-21.

Human Rights Watch & SWEAT 'Why Sex Work Should be Decriminalised in South Africa'

(2019) available at  
[https://www.hrw.org/sites/default/files/report\\_pdf/southafrica0819\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/southafrica0819_web_0.pdf).

Joint Submission by SECTION27 and the Treatment Action Campaign on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022.

Karabo van Heerden ‘Sonke Annual Report 2021’ Sonke Gender Justice available at  
<https://genderjustice.org.za/publication/sonke-annual-report-2021/>.

Parliamentary Monitoring Group ‘Gender-Based Violence Bills: public hearings day 1’ 20 October 2020 available at <https://pmg.org.za/committee-meeting/31247/>, accessed on 18 September 2023.

South African Institute of Race Relations ‘Comments on the Draft Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022’ 23 January 2023 available at <https://socialjustice.sun.ac.za/downloads/posts/2023-02-comments-on-the-criminal-lawsexual-offences-and-related-matters-amendment-bill-of-2022.pdf>, accessed on 10 October 2023.

Submission on Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022, Helen Suzman Foundation, dated 31 January 2023.

Submission on the proposed Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022, African Policing Civilian Oversight Forum, dated 31 January 2023.

### ***Internet references***

AidsFonds ‘Interview: This Bill Says Sex Workers Are Human Beings’ 23 January 2023 available at <https://aidsfonds.org/work/love-alliance/news/interview-this-bill-says-sexworkers-are-human-beings>, accessed on 23 August 2023.

BusinessTech ‘Ramaphosa signs 3 new crime laws in South Africa’ 31 January 2022 available at <https://businesstech.co.za/news/government/554188/ramaphosa-signs-3-new-crimelaws-in-south-africa/>, accessed on 11 December 2023.

Jo Bindman ‘Redefining Prostitution as Sex Work on the International Agenda,’ Anti-Slavery

International WALNET 13 October 1997,  
<http://www.WALNET.org/csis/papers/redefining.html#1>, accessed on 12 March 2023.

Justina Crabtree ‘South Africa’s Other Pandemic: Femicide Rates Spike as Coronavirus Lockdown Lifts’ CGTN 20 June 2020, available at <https://news.cgtn.com/news/2020-0620/South-Africa-s-femicide-rate-spikes-as-coronavirus-lockdown-lifts>, accessed 26 July 2023.

Liezl Human ‘“Tough Blow” for sex workers as decrim bill delayed’ 7 June 2023 available at <https://www.groundup.org.za/article/sex-work-decriminalisation-bill-heads-back-to-the-drawing-board/>, accessed on 8 August 2023.

Mark Grough & Toby Goldbach ‘Relationship between Pimps and Prostitutes’ available at [https://courses2.cit.cornell.edu/sociallaw/student\\_projects/PimpsandProstitutes.htm](https://courses2.cit.cornell.edu/sociallaw/student_projects/PimpsandProstitutes.htm), accessed 15 April 2023.

Marlise Richter & Monique Huysamen ‘Sex work in South Africa: why both buying and selling should be legal’ 2 March 2023, available at <https://theconversation.com/sex-work-in-southafrica-why-both-buying-and-selling-should-be-legal198742#:~:text=It%20is%20illegal%20to%20buy,and%20what%20still%20needs%20work>, accessed on 12 March 2023.

Marlise Richter, Matthew F Chersich, Fiona Scorgie, Stanley Luchters, Marleen Temerman & Richard Steen ‘Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail’ *Globalization and Health*, 11 February 2010 available at <http://www.globalizationandhealth.com/content/6/1/1>, accessed on 1 June 2023.

Meghan Ott ‘Series: What Does That Mean? Gender-based Violence’ *Women for Women International* 4 June 2021, available at <https://www.womenforwomen.org/blogs/series-whatdoes-mean-gender-based-violence>, accessed 26 July 2023.

Mfanozelwe Shozi ‘Challenges that Remain a Hindrance in Attaining Gender Equality in South Africa’ *Commission for Gender Equality* available at <http://www.cge.org.za/challengesthat-remain-a-hindrance-in-attaining-gender-equality-in-south-africa/>, accessed 30 March 2023.

Parliamentary Monitoring Group ‘World Aids campaign, sex work and the law: the case for decriminalization’ 2010 available at <https://pmg.org.za/call-for-comment/1235/>, accessed on 28 November 2023.

South African Government ‘Minister Ronald Lamola on Criminal Law Amendment Bill of 2022 – decriminalisation of sex work’ 9 December 2022, available at <https://www.gov.za/news/media-statements/minister-ronald-lamola-criminal-lawamendment-bill-2022-decriminalisation-sex#:~:text=On%2030%20November%202022%20Cabinet,23%20of%201957>, accessed on 7 October 2023.

Shona McCombes & Tegan George ‘What Is a Research Methodology? Steps & Tips’ Scribbr 22 June 2023, available at <https://www.scribbr.com/dissertation/methodology/>, accessed 26 July 2023)

Sonke Gender Justice ‘Decriminalisation of Sex Work’ available at <https://genderjustice.org.za/project/policy-development-advocacy/decriminalisation-sexwork/>, accessed on 23 November 2023.

Sonke Gender Justice ‘Asijiki Coalition for the Decriminalisation of Sex Work celebrates President Ramaphosa’s commitment to decriminalise sex work’ 5 June 2019 available at <https://genderjustice.org.za/news-item/asijiki-coalition-for-the-decriminalisation-of-sexwork-celebrates-president-ramaphosas-commitment-to-decriminalise-sex-work/>, accessed on 12 September 2023.

South African Government ‘Minister Ronald Lamola on Criminal Law Amendment Bill of 2022 – decriminalisation of sex work’ 9 December 2022 available at <https://www.gov.za/news/media-statements/minister-ronald-lamola-criminal-lawamendment-bill-2022-decriminalisation-sex#:~:text=On%2030%20November%202022%20Cabinet,23%20of%201957>, accessed on 4 January 2023.

Tariro Washinyira ‘Sex workers welcome government’s decriminalisation plans’ 6 December 2022, available at <https://www.groundup.org.za/article/sex-workers-react-to-governmentsdecriminalisation-plans/>, accessed on 17 September 2023.

The Open Society Foundation ‘Understanding Sex Work in an Open Society’ April 2019, available at <https://www.opensocietyfoundations.org/explainers/understanding-sex-workopen-society>, accessed on 4 April 2023.

Wezi Masuku & Seraphine Kwanje ‘The decriminalising of sex work in South Africa: A brief trajectory overview of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022 1 June 2023 available at <https://www.derebus.org.za/thedecriminalising-of-sex-work-in-south-africa-a-brief-trajectory-overview-of-the-criminallaw-sexual-offences-and-related-matters-amendment-bill-of-2022/>, accessed on 8 August 2023.

### ***Theses***

Beninger, Christina Gender and the Rule of Law in Theory and Practice: Challenges and Prospects for Strengthening Women’s Access to Justice in Gender-Based Violence Cases (unpublished LLM thesis, University of Cape Town, 2022) 15.

Hutchful, Ebenezer Sexual Violence and the Criminal Justice System in Ghana: Exploring the Issues of Victim Protection and Confidentiality in the Courts (unpublished LLM thesis, University of Cape Town, 2019) 6.

Ncube, Mongiwa Pamela Protection Orders in South Africa: The Effectiveness of Implementation and Enforcement for Victims of Gender-based Violence (unpublished LLM thesis, University of Cape Town, 2021) 15.

Ndhlovu, Lumba Criminalisation of Sex Work as a Human Rights Violation Against Women in South Africa (unpublished LLM thesis, University of the Western Cape, 2019) 9.

Ramabulana, Shirley To be or not to be?: The decriminalisation of sex work in South Africa (unpublished MPhil thesis, University of Cape Town, 2021).

Rhoda, Gary The Decriminalisation of Prostitution in South Africa: Towards a Legal Framework (unpublished LLM thesis, University of Western Cape, 2010).

### ***Other***

Office of the High Commissioner for Human Rights, Human Rights: ‘Human Rights: A Basic Handbook for UN Staff’ *United Nations*.