



UNIVERSITY OF CAPE TOWN

**THE SOCIO-LEGAL SIGNIFICANCE OF
DECRIMINALISING SEX-WORK IN SOUTH AFRICA**

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MNKSTA001

Submitted to the University of Cape Town in fulfilment of the requirements for
the Degree LLM Faculty of Law

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DEDICATIONS

I would like to dedicate this research to all sex workers with whom I have been in contact, throughout my years of legal practice. The bravery and courage you have, to do the work you do, with all the odds against you, is what inspires me to advocate for the decriminalisation of sex work. Thank you for trusting me. I will forever be grateful for the lessons you have taught me.

Abstract

This dissertation aims to interrogate the following research question: How would the decriminalisation of sex work model align with the South African human rights framework? The dissertation recommends the decriminalisation model of law reform, as it will fulfil public health goals and respect human rights. The study highlights the systemic patterns of abuse that sex workers in South Africa experience because of the criminalisation of sex work. In response to the research question, an analysis of the impact of criminalisation on sex worker's human rights is offered together with a description and analysis of existing legislative models such as the legalisation model (adopted in the Netherlands), partial criminalisation model (also known as the 'end-demand' model, which is enforced in Sweden) and the decriminalisation model (applied in New Zealand and Australia), as well as how the aforementioned models might benefit sex workers and the broader society. In addition, the dissertation addresses the current legal position and jurisprudence on sex work in South Africa. The impact of the criminal law on sex workers and general society is discussed and the current untenable position created by outdated legislation is highlighted. An analysis of the current legal framework in South Africa that prohibits sex work is provided, and the impact of the current legal framework on sex worker's constitutional human rights is examined. The case precedents on sex worker human rights in South Africa and the existing legal models, as mentioned above, on sex work are also analysed. A consideration of South Africa's compliance obligations under international and regional human rights treaties and the South African Constitution, as well as the statutory approaches adopted in New Zealand, Australia and the Netherlands are further explored.

The intended outcomes of this dissertation are:

- a) To illustrate that the decriminalisation model of sex work is compatible with the human rights framework in South Africa; and
- b) To provide a basis for a proposal for an appropriate legal model for South African policy makers, tasked with formulating and implementing a statutory framework that recognises and protects the human rights of sex workers in South Africa.

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ACRONYMS

AIDS	Acquired Immune Deficiency Syndrome
CC	Constitutional Court of South Africa
CCMA	Commission for Conciliation Mediation and Arbitration
CEDAW	Conventions on the Elimination of all forms of Discrimination against women
CGE	Commission for Gender Equality
COSATU	Congress of South African Trade Unions
CPA	Criminal Procedure Act
HIV	Human Immuno-deficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
LAC	Labour Appeal Court of South Africa
LRA	Labour Relations Act
NGO	Non-governmental organisation
NZPC	New Zealand Prostitutes Collective
PEPFAR	Presidential Emergency Fund for AIDS Relief
PRA	Prostitution Reform Act
PTSD	Post-traumatic stress disorder

SA	South Africa
SADC	South African Development Community
SALRC	South African Law Reform Commission
SAPS	South African Police Service
SOA	Sexual Offences Act
STI	Sexually Transmitted Infection
SWEAT	Sex Worker Education and Advocacy Taskforce
UDHR	Universal Declaration of Human Rights
WLC	Women's Legal Centre

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CHAPTER ONE

INTRODUCTION

1.1. Introduction

This study is significant because it aims to contribute to research that shows how the legal environment impacts on the socio-economic rights of sex workers.

A sex worker is a person who engages in sex work, which means that the person engages in a sexual act in exchange for a reward (either money or in kind). According to the Sexual Offences Act ('SOA 1957'),¹ a sex worker is an individual who has 'unlawful carnal intercourse' or commits an act of 'indecent' with another person for reward.² 'Unlawful carnal intercourse'³ is defined as sexual intercourse with someone, other than a husband or wife, for a reward.⁴ The reward mentioned in the definition is not clearly explained but it is generally considered money.⁵ In this thesis, I am using the term sex work as opposed to the term prostitution. Prostitution is regarded as a derogatory term and encompasses moralistic connotations. However, the term sex work has been widely adopted because it acknowledges that sex work is work.

"In South Africa, it is estimated that there are approximately 153 000 sex workers (figures range between 132 000 and 182 000)."⁶ "Of the 153 000, it is estimated that 138 000 are adult female sex workers, which represents 0.9 per cent of the adult female population in South Africa."⁷

¹ 23 of 1957

² N Fick, "Coping with Stigma, Discrimination and Violence: Sex Workers Talk about their Experiences" (2005), Page 6

³ S20(1)(aA) of the Sexual Offences Act No 23 of 1957

⁴ Fick op cit (n2) 6.

⁵ Fick op cit (n2) 7.

⁶ South African National Aids Council, *Estimating the size of the sex worker population in South Africa* (2013) page 4. Available at http://www.sanac.org.za/publications/cat_view/7-publications/9-reports, accessed on 31 March 2015

⁷ South African National Aids Council, *Estimating the size of the sex worker population in South Africa* (2013) page 4. Available at http://www.sanac.org.za/publications/cat_view/7-publications/9-reports, accessed on 31 March 2015

“However, there are also men and transgender individuals who sell sex.”⁸ “The majority of sex workers are found in large urban areas: 22 per cent in Gauteng, 16 per cent in Kwa-Zulu Natal and 11 per cent in the Western Cape.”⁹

Sex workers work in different environments and the level of control that they have over their work varies.¹⁰ Some sex workers work outdoors, in other words, they work on the street¹¹, others work indoors, which means that they work from massage parlours, bars, or homes designated to sell sex, known as brothels. There is a growing number of sex workers who also use the internet to solicit clients. Criminalisation of sex work results in human rights violations being perpetrated against sex workers¹². The aforementioned human rights violations prompted various international bodies and organisations to call for the decriminalisation of sex work and for sex work to be addressed within a human rights framework.¹³ In this dissertation, I shall consider how a decriminalisation of sex work model aligns with the South African human rights framework.

The international bodies/organisations¹⁴ that all support the decriminalisation of sex work will also be highlighted and discussed.

⁸ Fick op cit (n2) 7.

⁹ South African National Aids Council op cit (n6) 4.

¹⁰ Fick op cit (n2) 7.

¹¹ Fick op cit (n2) 7.

¹² https://www.nswp.org/sites/nswp.org/files/impact_of_criminalisation_pb_prf01.pdf

¹³ UNAIDS 2002. Sex Work and HIV/AIDS. In: UNAIDS (ed.) Technical Update. Geneva; WHO 2011. Preventing HIV in sex work settings in sub-Saharan Africa. Geneva: WHO; WHO 2012. Prevention and Treatment of HIV and other sexually transmitted infections for sex workers in low- and middle-income countries: Recommendations for a public health approach. In: WHO (ed.). Geneva: WHO, UNFPA, UNAIDS and NSW; Grover, A. 2010. Human Rights Council; Fourteenth session; Agenda item 3; "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development"; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010; A/HRC/14/20; Secretariat: The Global Commission on HIV and the Law (2012) "The Global Commission on HIV and the Law - risks, rights and health". In: UNDP (ed.). Geneva: UNDP, HIV/AIDS Group, Bureau for Development Policy; Goodyear et al (2005). Prostitutes are people too. *Lancet*, 366, 1264-5.; *Lancet Special Series on Sex Work and HIV* *The Lancet* 385, no. 9962 (2015): 55G71; Amnesty International (2015) "Decision on State obligation to respect, protect and fulfil the human rights of sex workers" <https://www.amnesty.org/en/policy-on-state-obligations-to-respect-protect-and-fulfil-the-human-rights-of-sex-workers/>

¹⁴ United Nations AIDS (UNAIDS), the World Health Organization ('WHO'), the United Nations Special Rapporteur on Health, the Global Commission on HIV and the Law, and Amnesty International as well as prominent publications like the *Lancet* and the *Canadian Medical Association Journal*

1.2. Historical background to the study

Sex work is one of the oldest professions in the world and similarly has a long history in South Africa.¹⁵ Before 1866, there was no interference in sex work by the authorities and there was no public outcry to eradicate the practice in South Africa. Sex work was viewed as a necessary activity. After 1866, when 13 per cent of the British troops were hospitalised after contracting sexually transmitted infections largely arising from commercial sex workers, the British government placed pressure on the South African legislature to take action against sex work. The British government even threatened to withdraw their troops if the South African government failed to stop sex work.¹⁶

In 1988, the South African legislature introduced the Immorality Act No. 23 of 1957. One of the amendments to the Immorality Act was the inclusion of section 20(1) (a), which prohibited sex work. This amendment exists today in the form of the Sexual Offences Act No. 23 of 1957 ('SOA 1957'). The SOA 1957 continues to criminalise all aspects of the sex industry.¹⁷

The recently enacted Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('SOA 2007') addresses the criminality of clients. Section 11 of the SOA 2007 criminalises the actions of the clients of adult sex workers. It stipulates that an individual who engages the services of a person who is 18 years or older, by offering financial or other reward, favour or compensation for the purpose of engaging in a sexual act (irrespective of whether the act is committed or not), is guilty of the offence of engaging the sexual services of such person.¹⁸

¹⁵ Gardner, J, "Criminalizing the act of sex: Attitudes to adult commercial sex work in South Africa" at 330, accessed online, on 21 April 2017, at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjPg6m9p9jTAhXiIsAKHRo4DjUQFfgmMAA&url=http%3A%2F%2Fwww.hsrepress.ac.za%2Fdownloadpdf.php%3Fpdffile%3Dfiles%252FPDF%252F2249%252F19%2520-%2520The%2520Prize%2520and%2520Price%2520-%2520Chapter%252016.pdf%26downloadfilename%3DThe%2520Prize%2520and%2520the%2520Price%2520-%252016.%2520Criminalising%2520The%2520Act%2520Of%2520Sex%253A%2520Attitudes%2520To%2520Adult%2520Commercial%2520Sex%2520Work%2520In%2520South%2520Africa&usq=AFQjCNE4y5OwIkMXMrGVOPnY1qtAyItFtg&sig2=seLLNbofs0EFfQ7Jaaj2GA>

¹⁶ Gardner op cit (n15) 330

¹⁷ Gardner op cit (n15) 330.

¹⁸ South African Law Reform Commission Discussion Paper 0001/2009 (Project 107) Sexual Offences - Adult Prostitution, at para 2.19. Accessed online, on 21 April 2017, at <http://www.justice.gov.za/salrc/dpapers.htm>

In this dissertation I am going to argue that the criminalisation of sex work is ineffective by associating it with an increase in violence, spread of diseases, and blatant violation of human rights.

1.3. Research context

South Africa has one of the widest disparities in income between the rich and poor in the world, which has steadily increased since 2000.¹⁹ It is estimated that half of all South Africans are living below the poverty line.²⁰ Poverty and inequality in South Africa are characterised by race and gender.²¹ Today, South Africa's population comprises approximately 59 million people.²² South Africa has the highest unemployment rate of about 27.7 percent²³ and the majority of them are female.²⁴ As a direct result of Apartheid and the lack of resources, many poor women in South Africa lack the necessary skills and capacity to obtain 'decent work'.²⁵ Accordingly, for many young black women who have limited education, selling sex for reward is a viable means to support their families. Therefore, many sex workers enter the industry due to economic pressures, with some earning more than they would, if they were to engage in formal work, such as factory work or domestic work.²⁶

¹⁹ IRIN Humanitarian News and Analysis, UN Office for the Co-ordination of Humanitarian Affairs, 7 November 2007 (irin). Statistics SA places the Gini coefficient at 0.72 on a scale of 0 to 1, with 1 being total inequality.

²⁰ Adelzadeh *South African Human Development Report 2003 – The Challenge of Sustainable Development in South Africa: Unlocking People's Creativity* (2003)

²¹ Transformation audit by Institute for Justice and Reconciliation (2007), accessed online www.transformationaudit.co.za, on 21 April 2017

²² Statistics South Africa, 2020 Midyear Population Estimates, accessed <http://www.statssa.gov.za/?p=13453#:~:text=South%20Africa's%20mid%20year%20population,released%20by%20Statistics%20South%20Africa>.

²³ Statistics South Africa, Quarterly Labour Force Survey – QLFS Q1; 2017, accessed on <https://www.statssa.gov.za/?p=9960>

²⁴ A van Wyk, *Are 37.5% of jobless young South Africans black women, and 31.5% white men?* African Check, 19 November 2014. Accessed online at <https://africacheck.org/reports/do-black-women-make-up-37-5-of-unemployed-south-africans-aged-15-34>

²⁵ Bonthuys, C Albertyn, *Gender, Law and Justice* 2007, at p8

²⁶ Bonthuys op cit (n25) 8

When women are employed, they often earn less than men do.²⁷ Women generally work in highly vulnerable jobs such as domestic, casual or seasonal work and in the informal sector. The 2007 Report on Millennium Development states that women comprise 83% of the informal economy, of which 61% are black African women – mostly in survivalist activity.²⁸

“Compared to their male counterparts, women lack access to basic services, such as sanitation, refuse collection and electricity in urban and semi-urban areas, with more women than men living in informal settlements.”²⁹ More women than men also live in rural areas, far from schools, courts, public administration and health services.³⁰

1.4. Statement of the research problem

“The current legal framework in South Africa is conducive to a violation of the human rights of sex workers including the right to freedom from violence,³¹ equality before the law³² access to justice,³³ health,³⁴ unfair labour practices,³⁵ privacy,³⁶ dignity,³⁷ the right not to be detained without a trial³⁸ and the right not to be tortured or treated in a cruel, inhumane or degrading manner.”^{39,40}

The stigma against sex workers creates barriers for them to access rights such as health care

²⁷ Transformation audit op cit (n21)

²⁸ Goal 3 of the South African Government Millennium Development Goals mid-term report 2007 at page 22, accessed online at <http://www.un.org/millenniumgoals/pdf/mdg2007.pdf> on 05 May 2017.

²⁹ Bonthuys opcit (n25) 7.

³⁰ Bonthuys op cit (n25) 8; Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

³¹ Section 12(1)(c)

³² Section 9

³³ Section 35

³⁴ Section 27

³⁵ Section 23

³⁶ Section 14

³⁷ Section 10

³⁸ Section 12

³⁹ Section 12 (1) (d)

⁴⁰ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

and other services.⁴¹ Sloan states that because of criminalisation, sex workers are reluctant to access health care services they are afraid to reveal not only their identity but also their occupation, for fear of discrimination on the part of the service provider.⁴² According to Fick, in her report to the South African Law Reform Commission, sex workers disclosed that they were afraid that if they revealed their occupation, they would be reported and subsequently arrested.⁴³ In addition, Fick's report states that generally sex workers opt to remain invisible to law enforcement, which means that they would work in dangerous places, making it difficult for health service providers to reach them⁴⁴.

The criminalisation of sex work has marginalized sex workers to the extent that their employers or owners of brothels, bars or parlours often abuse them. As a result of criminalisation, traditional labour law rules and practices do not apply to sex workers, making it difficult for them to challenge unfair labour practices. This results in brothels setting their own rules and regulations, which often amounts to exploitation or unfair labour practices.⁴⁵ The kind of regulations that brothels employ is aimed at controlling the behaviour of sex workers for example, many agencies impose fines when sex workers do not comply with their rules.⁴⁶

“Sex worker’s criminal status in society increases their vulnerability to violence in a number of ways.”⁴⁷ Sex workers are vulnerable to physical, sexual and verbal violence perpetrated by a person, who solicits customers for the sex worker in exchange for money, most commonly known as a pimp,⁴⁸ clients, and members of the South African Police Services (SAPS) and people of the general communities in which they operate.

⁴¹ South African Law Reform Commission op cit (n18) at para 2.26

⁴² South African Law Reform Commission op cit (n18) at para 2.26; Sloan “Overview of issues affecting the adult commercial sex work industry” (2000).

⁴³ South African Law Reform Commission op cit (n18), para 2.26; Fick “Sex Workers Speak Out” (2006)

⁴⁴ South African Law Reform Commission op cit (n18), para 2.26

⁴⁵ South African Law Reform Commission op cit (n18), para 2.28

⁴⁶ South African Law Reform Commission op cit (n18), at para 2.28

⁴⁷ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

⁴⁸ A pimp is known as a person who arranges clients for a sex worker and who will in return receive a share of her/his earnings. <https://www.dictionary.com/browse/pimp>

Decriminalisation has been established in other countries, such as New Zealand and New South Wales in Australia,⁴⁹ as the most effective method for remedying the breach of constitutional rights and is a World Health Organization target for all countries⁵⁰.

1.5. Research question

The research question in this dissertation asks “how would the decriminalisation of sex work model align with the South African human rights framework?” In order to answer this research question, the human rights implications of decriminalising sex work in South Africa are analysed. In particular, the following issues are considered: an analysis of the current legal framework that prohibits sex work; the impact of the current legal framework on sex worker’s constitutional human rights; case precedents on sex worker human rights in South Africa; the existing legal models on sex work; compliance obligations under international human rights treaties and the South African Constitution; and the statutory approaches adopted in Sweden, Netherlands, New South Wales and New Zealand.

1.6. Justification for the research

As mentioned previously, due to criminalisation of sex work, sex workers are vulnerable to violence, HIV/AIDS and exploitation.⁵¹ Evidence-based research shows that the decriminalisation model has a multi-layered positive impact on sex workers, which includes better access to health care, better relationships with the police, improved working conditions and it has the potential to reduce HIV/AIDS.⁵² In this dissertation, I argue that a decriminalisation model of sex work can fulfil and protect the constitutional rights of sex workers, mentioned previously in this chapter, which aligns with the human rights framework in South Africa.

48. Sex Workers, World Health Organization Accessed on <https://www.who.int/teams/global-hiv-hepatitis-and-stis-programmes/populations/sex-workers>

⁵¹ UN AIDS. UNAIDS Guidance note on HIV and sex work (updated April 2012). Retrieved from https://www.unaids.org/sites/default/files/sub_landing/files/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf

⁵² <https://www.ourbodiesourselves.org/book-excerpts/health-article/decriminalizing-sex-work-could-reduce-hiv/>

1.7. Research methodology

Desk-top research will primarily be employed to address the research question. Materials considered include relevant academic literature, international and regional treaties, domestic laws and case law. Where relevant, I shall also rely on my insider perspective obtained from working first-hand with sex worker legal issues when I was employed as an attorney at the Women's Legal Centre (WLC) and at the Sex Workers Education and Advocacy Taskforce (SWEAT).

1.8. Scope and limitation of the study

In this dissertation, the legal frameworks of South Africa, New Zealand, Australia, Sweden, and the Netherlands are considered for the regulation of sex work. The aforementioned geographical areas are chosen because they each illustrate one of four legal models to address sex work namely, total criminalisation, partial criminalisation, legalisation and decriminalisation.

Since I have worked in the human rights sector for the protection of the rights of sex workers, my views are biased. To ensure that this study is objective, I have considered multiple arguments and research.

1.9. Structure of the dissertation

The dissertation comprises five chapters. Chapter one is the introductory chapter that introduces the study Chapter two sketches the context for sex work in South Africa. Chapter three analyses the different legal models for the regulation of sex work namely, total criminalisation, partial criminalisation, legalisation and decriminalisation. The aforementioned models are assessed to determine which one offers the most protection for human rights in South Africa. In chapter four, an argument is made for the adoption of a decriminalisation model in South Africa as the best option to align with South Africa's human rights framework. Finally, chapter five offers a summary of conclusions drawn from the whole study and makes recommendations for further research.

CHAPTER TWO SEX WORK IN SOUTH AFRICA

2.1. Introduction

In this chapter, the context of sex work and sex workers is sketched to contextualise the subsequent discussion in chapter 3, in which the different models for regulating the sex work industry and their human rights implications is analysed. In particular, chapter two discusses the definition of sex work; where sex workers operate; why sex workers enter the industry; and common misconceptions about sex workers.

2.2. Definition of sex work

Sex work is broadly defined as the exchange for money or other benefits by one consenting adult for the sexual services of another consenting adult⁵³. The more familiar type of sex work involves an adult man paying an adult woman to have consensual sexual relations with him.⁵⁴

Many sex workers state that they define their services as consensual sex with a condom for reward⁵⁵. Consensual sex refers to sex that all parties involved agree to, both prior to the sexual activity and throughout it.⁵⁶ There are different ways in which sex workers have consensual sex

⁵³ Green, S “What Counts as Prostitution”, Bergen Journal of Criminal Law, Volume 4, Issue 1, 2016, p 65-101, Accessed at https://www.researchgate.net/publication/307444812_What_Counts_as_Prostitution

⁵⁴ Brown, B; Duby, Z; Bekker, LG ‘Sex Workers: An introductory manual for health care workers in South Africa’, Desmond Tutu HIV Foundation 2012, page 6. Accessed at : http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0ahUKEwiq5r7U4PLNAhWjB8AKHY88CTQQFggiMAE&url=http%3A%2F%2Fdesmondtutuhivfoundation.org.za%2Fwp-content%2Fuploads%2F2016%2F05%2F5W-Manual-Sept2012-LR-1.pdf&usq=AF'QjCNFV5ahXt8oUam5yozFxs-r8wg6jeg&sig2=wu7s7_y8QxUzY_6I8SIJPw on 11 January 2016

⁵⁵ Open Society Foundations. “Clearing up Some Myths about Sex Work.” *Open Society Foundations*, 2017, Accessed on www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society; Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

⁵⁶ Marie Stopes, “*Consensual Sex Or Rape? How to Know The Difference*”. Accessed online at <https://www.mariestopes.org.za/consensual-sex-rape-know-difference/> on the 13 November 2018

with clients such as penetrative sex and oral sex, but others may only provide specific types of services, like non-penetrative sex.⁵⁷ The most common services are penile-vaginal penetrative sex, manual masturbation and penile-oral sex. Both male and female, also engage in penile-anal sex with their clients.⁵⁸

Reward could be anything that the sex worker wants.⁵⁹ Most often sex workers request to be paid in cash and not with items such as mobile phones etc.⁶⁰ The amount that sex workers charge vary based on the area and the kind of service requested. “For example, a sex worker who works on the street in a small town may be paid very little, whereas a high-class sex worker who visits clients in hotel rooms in a big city may be paid much more.”⁶¹ “Sex work, however, should not be confused with transactional sex, which occurs when some types of sexual services are exchanged for gifts, shelter or drugs.”⁶²

In South Africa, there are approximately 153 000 sex workers, with a female majority of 138 000, 7000 male and 6000 transgender persons.⁶³ Sex workers in South Africa are a diverse group comprising different genders, race and cultural backgrounds.

⁵⁷ Brown op cit (n52) 6, 14; Manoek, S; Mbwana, J; Ludwig, S; Kheswa, S; Brown, B; van der Merwe, L; ‘Trainers’ Guide to the Police Sensiti sati on Training Manual: How to facilitate Trainings for South African Police Service (SAPS) Offi cers About the Rights of Sex Workers and the LGBTI Community’ Women’s Legal Centre, 2014, page 23

⁵⁸ Brown op cit (n52) 6, 14; Manoek op cit (n55) 23.

⁵⁹ Brown op cit (n52) 17.

⁶⁰ Brown op cit (n52) 17.

⁶¹ Brown op cit (n52) 17; Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

⁶² Brown op cit (n52) 17; Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

⁶³ South African National Aids Council, *Estimating the size of the sex worker population in South Africa* (2013) page 4. Available at http://www.sanac.org.za/publications/cat_view/7-publications/9-reports, accessed on 31 March 2015

2.3. Where sex workers operate

Sex workers operate in different settings namely street-based, venue-based or on the internet.⁶⁴ They also either work alone or in association with others. The areas of work are discussed in the following sections.

2.3.1. Street-based sex work

Street-based sex work occurs when sex workers solicit their clients from street corners, meaning that they walk along streets or highways in a specific area and wait to solicit potential clients. This is the most common way in which sex workers operate because they are free to move and there are no “venue” fees involved. With street-based sex work, the sex worker solicits the client from the street corner and takes him/her to a different location to have sex.⁶⁵

2.3.2. Venue-based sex work

Venue-based sex work occurs when sex workers solicit their clients in a venue such as a massage parlour, bar or club. Venue-based sex work is also referred to as indoor sex work. South African law treats venues in which sex work occurs as brothels, which is defined as “any house or place kept or used for the purposes of prostitution”.⁶⁶ Venue-based sex work often means that a sex worker will be subjected to rules and regulations of an establishment, which are enforced by a manager, who is someone who oversees the day to day operations and functioning of the brothel or brothel owner. In return, a sex worker often receives protection from the owner or manager from the police or violent clients, has a clean space to conduct her business and does not have the burden of seeking out her clients. In order to enjoy the aforementioned benefits, the sex worker usually has to forfeit a percentage of her wages and is subjected to violations of their human right to fair

⁶⁴ Brown op cit (n52) 14, 15.

⁶⁵ Brown op cit (n52) 15

⁶⁶ Section 3 of the Sexual Offences Act 23 of 1957

labour practices, perpetrated by the manager or owner, such as exorbitant fines for arriving work to work, refusing clients, or not working when on their menstrual cycle.⁶⁷

2.3.3. Sex work by advertisement

Sex work by advertisement occurs when a sex worker advertises her services in the adult section of the newspapers or on adult websites. The advertisements are placed by sex workers who either work in a brothel or independently at their private residences. Sometimes, managers or owners of brothels deduct money from a sex workers' salary to cover the advertisements.⁶⁸

2.3.4. Sex workers who work alone or in association with others

Some sex workers may work in association with a manager who organises their clients for them.⁶⁹ The managers⁷⁰ are responsible for attracting the clients and negotiating with them for the sex workers' services.⁷¹ Sex workers, in turn, are obliged to pay the manager a portion of the money they earn from each client.⁷²

2.4. Why sex workers enter the industry

People become sex workers for many different reasons, the most common being unemployment and the need to improve their financial position.⁷³ As mentioned in chapter one, there are a "significant number of women in South Africa who have difficulty finding employment or supporting their families."⁷⁴ Most commonly, sex workers enter the industry because it is more lucrative than low-paying jobs. Sex work does not require formal education or training, which are

⁶⁷ Brown op cit (n52) 15.

⁶⁸ Brown op cit (n52) 15.

⁶⁹ Brown op cit (n52) 15, 16.

⁷⁰ Managers are often referred to senior management staff or the business owner of a brothel.

⁷¹ Brown op cit (n52) 15, 16.

⁷² Brown op cit (n52) 15, 16.

⁷³ Brown op cit (n52) 7.

⁷⁴ Women's Legal Centre, "Lawyer's Manual on Sex Work Litigation Pursuing Justice for Sex Workers", 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

usually required to perform other types of work.⁷⁵ Furthermore, when sex workers work independently, they can conduct their business in a way that gives freedom and flexibility to determine their own working hours and areas of work. An expert study on sex worker rights found that there are often a complex range of reasons and circumstances behind a person's choice to do sex work: Most people choose sex work because they see it as the best option among a limited range of economic opportunities. In this regard, sex workers make calculations and weigh choices – just as all people do who need to make money to care for themselves and their families. For example, many people choose sex work because it offers flexible working hours. This is a significant factor for people who want or need to spend time caring for their children. Sex workers are often self-employed and can choose when, where and how to work. Sex workers can often earn more money in less time than when engaged in other types of work, such as domestic work or manual labor. Finally, for some, earning money from sex work feels more empowering and dignified than cleaning someone's house or performing backbreaking physical labor. Regardless of why people do sex work, they have the right to self-determination, should be treated with dignity and deserve equal protection under the law.⁷⁶

2.5. Common misconceptions about sex workers

There are many misconceptions and stereotypes about sex work and sex workers. Some of the more common myths about sex workers are that they: use drugs and other illicit substances⁷⁷; are trafficked; are HIV positive⁷⁸; are mentally ill; are subjected to violence as an inherent part of the job.⁷⁹ A further misconception is that arresting sex workers will deter or end the supply and demand of sex work⁸⁰.

⁷⁵ Brown op cit (n52) 7.

⁷⁶ Corinne Goldenberg, Sarah Gunther, Anne Lieberman, Jesse Wrenn, Gitta Zomorodi, "Sex Worker Rights: (almost) Everything You Wanted to Know But Were Afraid to Ask" (American Jewish World Service, 2013), 4

⁷⁷ Benoit, Cecilia, and Alison Millar. "Dispelling myths and understanding realities: Working conditions, health status, and exiting experiences of sex workers." (2001).

⁷⁸ Strathdee, Steffanie A., Anna-Louise Crago, Jenny Butler, Linda-Gail Bekker, and Chris Beyrer. "Dispelling myths about sex workers and HIV." *The Lancet* 385, no. 9962 (2015): 4-7.

⁷⁹ Brown op cit (n52)18.

⁸⁰ Michael Shively, Ph.D., Kristina Kliorys, Kristin Wheeler, Dana Hunt, "A National Overview of Prostitution and Sex Trafficking Demand Reduction Efforts, Final Report", June 2012, Accessed at <https://www.ncjrs.gov/pdffiles1/nij/grants/238796.pdf>, Page 78

Often the abovementioned myths exist to stigmatize sex workers as a means to deter people from entering the industry and to send a message that the sex work industry is frowned upon. However, such approaches have largely failed to achieve their intended purpose, and instead introduced cascading effects on sex work, including stigma. Stigmatization of sex work is associated with violence and abuse⁸¹. In the following subsections, I will share the ways in which issues such as drug use, HIV/Aids, mental illness and human trafficking are addressed when referring to the sex work community.

2.5.1 Drugs

Often sex workers find themselves in environments where drugs are easily available or affordable but not all sex workers use drugs.⁸²⁸³ Pimps or managers of brothels may offer drugs to sex workers and encourage them to use drugs so that they can become addicted and therefore compliant with the demands of the managers, even if those demands put their health at risk.⁸⁴

“Those sex workers who use e drugs use them as a coping mechanism; as a way to forget their difficult circumstances; to numb themselves to traumatic events they may have faced; and/or to ease the shame and depression that they may feel about performing sex work.”⁸⁵

Alcohol appears to be more commonly used by sex workers to help them relax before sexual escapades.⁸⁶⁸⁷ In bar or brothel settings, sex workers often have a glass or two of alcohol with

⁸¹ Michael Shively, Ph.D., Kristina Kliorys, Kristin Wheeler, Dana Hunt, “ A National Overview of Prostitution and Sex Trafficking Demand Reduction Efforts, Final Report”, June 2012, Accessed at <https://www.ncjrs.gov/pdffiles1/nij/grants/238796.pdf>, Page 78

⁸² Brown op cit (n52) 18

⁸³ Brown op cit (n52) 18

⁸⁴ Brown op cit (n52) 18

⁸⁵ Brown op cit (n52) 18; Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

⁸⁶ Brown op cit (n52) 18

⁸⁷ Brown op cit (n52) 18

each client.⁸⁸ The excessive use of alcohol among sex workers is also a factor that has reduced their ability to protect themselves against violent clients and pimps.⁸⁹

2.5.2 HIV/AIDS

HIV prevalence among sex workers is significantly higher than in the general population.⁹⁰ Sex workers make up 9% of the total number of new HIV infections worldwide.⁹¹ The HIV incidence among female sex workers is mostly extremely high in eastern and southern Africa. More than 50 percent of sex workers live with HIV in Eswatini (previously known as Swaziland), Lesotho, Malawi, South Africa and Zimbabwe.⁹² In 2013, the prevalence of HIV among sex workers was found to be 50 times higher than in the general population in four countries.⁹³ Yet, not all sex workers are HIV positive or have AIDS⁹⁴.

Although one of the groups most affected by HIV is sex workers, they are also one of the groups most likely to respond well to HIV prevention programs.⁹⁵ Proof of this can be seen in countries such as Cambodia, the Dominican Republic, India and Thailand, where campaigns targeting sex workers and their clients have helped to minimize national HIV prevalence.⁹⁶

“Sex workers are at an increased risk for acquiring HIV through exposure to multiple sexual partners, the higher threat of violence in sexual encounters, riskier sex, the use of illicit substances during sexual encounters and limited access to health care services.”⁹⁷ “Since sex workers are at

⁸⁸ Brown op cit (n52) 18

⁸⁹ Brown op cit (n52)18.

⁹⁰ UNAIDS (2018) ‘Miles to go: closing gaps, breaking barriers, fighting injustices’ Accessed at https://www.unaids.org/sites/default/files/media_asset/miles-to-go_en.pdf on 18 December 2020

⁹¹ UNAIDS (2018) op cit (n87)

⁹² UNAIDS (2018) op cit (n87)

⁹³ UNAIDS (2014) ‘The Gap Report 2014’, Accessed at https://www.unaids.org/sites/default/files/media_asset/UNAIDS_Gap_report_en.pdf on 18 December 2020

⁹⁴ <https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/sex-workers>

⁹⁵ Avert, “Sex Workers, HIV and Aids”, Accessed at https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/sex-workers#footnote5_4apbuyo

⁹⁶ UNAIDS (2018) op cit (n87); Avert, “Sex Workers, HIV and Aids”, Accessed at https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/sex-workers#footnote5_4apbuyo

⁹⁷ Brown op cit (n52) 9; Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

risk of becoming HIV positive”⁹⁸,” the response from the legislature and public at large, is that they are a danger to public health and should be jailed or punished”⁹⁹(such as receiving fines).

While many sex workers strive to always use condoms with their clients, following through on this requires the cooperation of clients, which is not easy for all sex workers to achieve.¹⁰⁰ There are also instances where a client may offer more money to have sex without a condom. In such a situation, the sex worker is forced to weigh the need for income against the risks to her own health. Often the need for immediate survival takes precedence over safer sex practices.¹⁰¹ “Still, not all sex workers engage in unprotected sex.”¹⁰² “In fact, sex workers tend to use condoms at higher rates than the general public.”¹⁰³

2.5.3 Mental Illness

While some sex workers are affected by mental health issues such as anxiety, depression and substance dependency, not all are.¹⁰⁴ There are many reasons why sex workers suffer from mental health issues.¹⁰⁵ Depression and post-traumatic stress disorder are some of the issues that affect sex workers in South Africa. According to the Plus One study, where 508 sex workers in Soweto were surveyed by the Times Select, it showed that over 68 percent of sex workers surveyed suffered from severe depression. Nearly 40 percent suffered from post-traumatic stress disorder. The aforementioned study shows that mental illness is a ‘significant burden’ among sex workers

⁹⁸ Bernard, Edwin J., and Sally Cameron. "Advancing HIV justice: A progress report on achievements and challenges in global advocacy against HIV criminalization." *Amsterdam, The Netherlands: The Global Network of People Living with HIV (GNP+)* (2013); Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

⁹⁹ Brown op cit (n52); Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

¹⁰⁰ Brown op cit (n52) 9

¹⁰¹ Brown op cit (n52) 9

¹⁰² Brown op cit (n52) 1; Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

¹⁰³ Brown op cit (n52) 11; Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

¹⁰⁴ Manoek, S; Mbwana, J; Ludwig, S; Kheswa, S; Brown, B; van der Merwe, L; ‘Trainers’ Guide to the Police Sensitisation Training Manual: How to facilitate Trainings for South African Police Service (SAPS) Officers About the Rights of Sex Workers and the LGBTI Community’ Women’s Legal Centre, 2014, page 25

¹⁰⁵ Manoek op cit (n101) 25

and that female sex workers are vulnerable because they are exposed to poor living and working conditions while afflicted with a serious burden of mental health conditions.¹⁰⁶ The question is not how many sex workers experience mental health issues, but why many suffer from mental illnesses? One reason may be prolonged or repeated exposure to traumatic events such as physical and sexual abuse, which can cause post-traumatic stress disorder (PTSD).¹⁰⁷ Because of the criminalisation of sex work in South Africa, sex workers find it a challenge to seek justice for the violent crimes they experience or to access mental health treatment.¹⁰⁸

2.5.4. Trafficking

Those who advocate for the continued criminalisation or partial criminalisation of sex work assume that sex workers are trafficked. “While some victims of human trafficking are forced to sell sex, not all sex workers are victims of trafficking.”¹⁰⁹ Both sex work and human trafficking are high priority concerns that affect the core of our beliefs, morality, religion, justice, gender and human rights. However, the two issues are regularly conflated. Failure to distinguish between sex work and trafficking increases societal ignorance that ultimately filters through to legislation, law enforcement and social justice work, which unfortunately exacerbates the risks of arrests and harassment to sex workers. Human trafficking is not the same as sex work and often law enforcement will raid brothels, sometimes even legal brothels, looking for victims of human trafficking. These raids are often coupled with grave human rights violations, relating to the rights of arrested or detained persons, like assault and detention with undue cause. Instead law enforcement should work with sex workers to identify victims of trafficking or places where they are often kept to work.

¹⁰⁶ Huffington Post, *Sex Workers Face Depression – PTSD Study*, Accessed on line https://www.huffingtonpost.co.za/2018/07/09/sas-sex-workers-face-depression-ptsd-study_a_23477406/ on 13 November 2018

¹⁰⁷ Brown op cit (n36) 9; Manoek op cit (n101) 25

¹⁰⁸ Manoek op cit (n101) 25.

¹⁰⁹ Brown op cit (n52) 11; Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

In addition to the above misconceptions about sex workers, further myths exist that also need to be debunked. For instance, many people assume that sex workers enter the sex work industry because they were sexually abused during their childhood. The reality is that in South Africa, violence against women and girl children is an epidemic. It is reported that one woman is raped every hour in South Africa while six cases of rape are reported every hour to the police.¹¹⁰ Like many women in South Africa, sex workers may have experienced sexual assault. Yet, the majority of women who experience sexual violence do not necessarily become sex workers.¹¹¹ In fact, anecdotal evidence suggests that sex workers have a variety of educational backgrounds¹¹².

Furthermore, misreporting about the age of sex workers has led to a misconception that sex workers are underage. For instance, one report places ‘the average age of entry into [sex work at] 13’.¹¹³ Audacia Ray from the Red Umbrella Project suggests that the aforementioned statistic appears to emanate from a study about the commercial sexual exploitation of children in North America and is not a true reflection of the broader sex work industry¹¹⁴. In fact, the study indicates that the majority of sex workers are over the age of 18. Therefore, not all sex workers are underage. “Sex workers span a variety of ages.”¹¹⁵

2.6. Conclusion

Sex work occurs through a consensual media. They operate in a number of settings, including streets, venue-based arrangements and online hook-ups. Sex workers are driven into the industry

¹¹⁰ Durban University of technology, *The Abnormal Normality of Rape in South Africa*, Accessed online at <http://journalismiziko.dut.ac.za/feature-review/the-abnormal-normality-of-rape-in-south-africa/> on 13 November 2018

¹¹¹ Brown op cit (n52) 11

¹¹² Ayuste, Ana, Mónica Gijón, Montserrat Payá, and Laura Rubio. "Social work and prostitution: an approach to educational practices." *European Journal of Social Work* 19, no. 2 (2016): 204-218.

¹¹³ The Atlantic, *Is One of the Most – Cited Statistics About Sex Work Wrong?* Accessed online at <https://www.theatlantic.com/business/archive/2014/09/is-one-of-the-most-cited-statistics-about-sex-work-wrong/379662/> on 13 November 2018

¹¹⁴ Wissot, Lauren. “Talking Sex Work with the Red Umbrella Diaries Producer Audacia Ray.” *Filmmaker Magazine*, 12 Nov. 2015, filmmakermagazine.com/96311-talking-sex-work-with-the-red-umbrella-diaries-producer-audacia-ray/

¹¹⁵ Wissot, Lauren op cit (n111); Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

through various media, including advertisements, associations, and recruitment. The reasons for entering the industry remain unclear; however, many consider it the last resort economic incentive. With reduced employment opportunities in South Africa, many sex workers enter the business as a way of survival.

CHAPTER THREE

THE LEGAL MODELS OF SEX WORK

3.1. Introduction

South Africa currently follows the legal model of total criminalization of sex work, which means that it is an offense to sell sex, buy sex, and engage in certain sex work-related behaviour. The South African Law Reform Commission ('SALRC') was mandated to review the current model of total criminalization. In its quest to recommend the South African Parliament, the SALRC researched and considered four legal models that regulate sex work, namely, total criminalization, partial criminalization, legalization, and decriminalization.

The South African Parliament started considering the legislative framework of sex work in 1996 when the Justice Parliamentary Portfolio Committee and the then Deputy Minister of Justice and Constitutional Development instructed the SALRC to consider the position of children affected by sexual violence. In May 1997, a Project Committee was appointed, and an Issue Paper on sexual offenses against children was published for general information and comment.¹¹⁶ As a result of the submissions made, it became clear during the investigation that any proposed changes to the law relating to sexual offences would have a far-reaching effect on the position, not only of children but also of adults as well. The investigation's scope was subsequently expanded to include sexual offenses against adults and renamed 'sexual offenses.' The South African Law Reform Commission published three separate discussion papers:¹¹⁷

¹¹⁶ Parliamentary Monitoring Group, 'Reform of Sexual Offences Act: A briefing by South African Law Commission' 15 South African Law Commission Project 107 Sexual Offences: Process And Procedure November 1999. Accessed on 27 March 2019 South African Law Reform Commission, 'Project 107 Sexual Offences: Process and Procedure' Accessed at <https://www.justice.gov.za/salrc/dpapers/dp102-execsum.pdf> on 07 December 2020.

¹¹⁷ South African Law Reform Commission, 'Project 107: Sexual Offences: Process and Procedure', 2002. Access on, 27 March 2019; South African Law Reform Commission "Discussion paper 149, Project 107: Sexual Offences: Pornography and Children" Accessed at <https://www.justice.gov.za/salrc/dpapers/dp149-prj107-SexualOffences-PornographyChildren2019.pdf> on 07 December 2020; South African Law Reform Commission, "Project 107: Adult Prostitution" Accessed at <https://www.justice.gov.za/salrc/reports/r-pr107-SXO-AdultProstitution-2017.pdf> on 07 December 2020.

1. Substantive Law relating to Sexual Offences process and procedure relating to sexual offence Adult Prostitution (Issue paper published 2001); and
2. Pornography.

In 2009, the SALRC approved the publication of a Discussion Paper on Adult Prostitution titled, ‘Project 107: Sexual Offences: Adult Prostitution’. In the Discussion mentioned above Paper, the SALRC identifies the four legal models mentioned previously: total criminalization, partial criminalization, legalization, and decriminalization. The Discussion Paper aimed to elicit comments for the SALRC to prepare a report and draft legislation. All options presented in the Discussion Paper included a set of questions that sought to elicit public inputs, which would shape legislative proposals to be included in the report on sex work. The following statement preceded the release of the Discussion Paper relating to Project 107: Sexual Offences: Adult Prostitution:

“A report on adult prostitution will follow the release of the discussion paper on adult prostitution. The report on adult prostitution will contain the final recommendations of the Commission and will be accompanied by legislative proposals about adult prostitution. Once approved by the Commission, the report and the Bill will be handed to the Minister for Justice and Constitutional Development for consideration.”¹¹⁸

In this chapter, the above-mentioned four legal models and their human rights implications for sex workers are discussed to identify the model that is the best regular fit for South Africa. Four countries are selected to discuss a model that operates within that country: South Africa for total criminalization, Sweden for partial criminalization, the Netherlands for legalization, and New Zealand for decriminalization. Although Sweden, the Netherlands, and New Zealand are considered to be developed countries while South Africa is regarded as a developing country, the human rights frameworks of the selected countries are similar, providing a basis from which to draw an analysis about the respective legal models and their suitability for the human rights context of South Africa.

¹¹⁸ SALRC Press Statement, 6th May 2009 Accessed at <https://www.justice.gov.za/salrc/progress.htm> on 07 December 2020

3.2. Total Criminalisation

As mentioned in the introductory section, South Africa criminalizes sex work through the Sexual Offences Act 23 of 1957 ('SOA 1957'). The SOA 1957 replaced the Immorality Act 5 of 1927. The Immorality Act prohibited sexual relations between different races and proscribed promiscuity, defined as sex between persons who are not married.¹¹⁹

As mentioned previously, total criminalization refers to a legal framework where selling sex and all related activities is a crime. The laws informing a total criminalization model target all persons involved in the sex work industry and usually imposes a penalty of a fine or imprisonment.

In this section, the legal model of total criminalization is discussed concerning the South African legislative framework, case law, and the human rights implications of the total criminalization model on sex workers.

3.2.1. Domestic Legislation - National and Municipal Legislation prohibiting Sex Work

The primary national prohibition against sex work in South Africa is section 20(1A)(a) of the Sexual Offences Act 23 of 1957 ('SOA 1957'), which states that it is an offense for any person to have unlawful carnal intercourse with a person for reward, or to commit an act of indecency with a person for a reward.¹²⁰ "The SOA 1957 also penalizes brothels' keeping, the procurement of women as sex workers, soliciting by sex workers, and living off the earnings of sex work."¹²¹

¹¹⁹ O'Malley Archives, "1957. Immorality Act No 23 - the O'Malley Archives." *Omalley.nelsonmandela.org*, omalley.nelsonmandela.org/omalley/index.php/site/q/031v01538/041v01828/051v01829/061v01884.htm. Accessed on 07 December 2020

¹²⁰ Manoek op cit (n101) 70.

¹²¹ The Sexual Offences Act 23 of 1957. Accessed at <https://www.justice.gov.za/legislation/acts/1957-023.pdf> on 03 November 2020; Women's Legal Centre, "Lawyer's Manual on Sex Work Litigation Pursuing Justice for Sex Workers", 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

Section 11 of the recently enacted Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('SOA 2007') criminalizes the actions of the clients of adult sex workers throughout South Africa. Section 11 stipulates that when a person engages the services of another person who is 18 years or older to engage in a sexual act for financial or other rewards, favour, or compensation, s/he is guilty of the offense of engaging the sexual services of that person.¹²² The prohibition in section 11 applies regardless of whether the sexual service is provided or not.

Sex work in South Africa is also prohibited by municipal bylaws, which do not necessarily impose a prison sentence but impose heavy fines. It could be liable to a fine or imprisonment for a period not exceeding six months or both a fine and such imprisonment.¹²³

As illustrated in the next section, the criminalisation of sex work significantly impacts the lives of sex workers, especially since the enforcement of the laws exposes sex workers to numerous human rights violations, including freedom from violence¹²⁴, equality before the law¹²⁵, access to

¹²² Manoek op cit (n101) 71.

¹²³ An example of a municipal by-law that prohibits sex work can be found in the Western Cape Municipal By-law relating to Streets, Public Places and the Prevention of Noise Nuisance. Provincial Gazette No 6469, published on 28 September 2007. Accessed at <https://openbylaws.org.za/za-cpt/act/by-law/2007/streets-public-places-noise-nuisances/eng/> on 27 March 2019

¹²⁴ Section 12 of the Constitution of the South Africa. Accessed at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1#:~:text=The%20Constitution%20of%20the%20Republic%20of%20South%20Africa%2C%201996%2C%20was,supreme%20law%20of%20the%20land.&text=South%20Africa's%20Constitution%20is%20one,and%20enjoys%20high%20acclaim%20internationally> on 03 November 2020

¹²⁵ Section 09 of the Constitution of the South Africa. Accessed at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1#:~:text=The%20Constitution%20of%20the%20Republic%20of%20South%20Africa%2C%201996%2C%20was,supreme%20law%20of%20the%20land.&text=South%20Africa's%20Constitution%20is%20one,and%20enjoys%20high%20acclaim%20internationally>. on 03 November 2020

justice¹²⁶, health¹²⁷, fair labour practices¹²⁸, privacy¹²⁹, dignity¹³⁰, not to be detained without a trial and not to be tortured or treated in a cruel and degrading manner¹³¹.

3.2.2. South African Case Law

As indicated in the previous section, sex workers experience a range of human rights violations, mainly caused by the criminalisation of their work. To address the ongoing human rights violations that sex workers experience and to bring the domestic legislation in line with the South African Constitution and South Africa's regional and international obligations, advocates for sex worker rights approached the South African courts in a series of three strategic impact cases. In the first case, *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as*

¹²⁶ Section 33 and 34 of the Constitution of the South Africa. Accessed at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1#:~:text=The%20Constitution%20of%20the%20Republic%20of%20South%20Africa%2C%201996%2C%20was,supreme%20law%20of%20the%20land.&text=South%20Africa's%20Constitution%20is%20one,and%20enjoys%20high%20acclaim%20internationally>. on 03 November 2020

¹²⁷ Section 27 of the Constitution of the South Africa. Accessed at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1#:~:text=The%20Constitution%20of%20the%20Republic%20of%20South%20Africa%2C%201996%2C%20was,supreme%20law%20of%20the%20land.&text=South%20Africa's%20Constitution%20is%20one,and%20enjoys%20high%20acclaim%20internationally>. on 03 November 2020

¹²⁸ Section 23 of the Constitution of the South Africa. Accessed at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1#:~:text=The%20Constitution%20of%20the%20Republic%20of%20South%20Africa%2C%201996%2C%20was,supreme%20law%20of%20the%20land.&text=South%20Africa's%20Constitution%20is%20one,and%20enjoys%20high%20acclaim%20internationally>. on 03 November 2020

¹²⁹ Section 14 of the Constitution of the South Africa. Accessed at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1#:~:text=The%20Constitution%20of%20the%20Republic%20of%20South%20Africa%2C%201996%2C%20was,supreme%20law%20of%20the%20land.&text=South%20Africa's%20Constitution%20is%20one,and%20enjoys%20high%20acclaim%20internationally>. on 03 November 2020

¹³⁰ Section 10 of the Constitution of the South Africa. Accessed at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1#:~:text=The%20Constitution%20of%20the%20Republic%20of%20South%20Africa%2C%201996%2C%20was,supreme%20law%20of%20the%20land.&text=South%20Africa's%20Constitution%20is%20one,and%20enjoys%20high%20acclaim%20internationally>. on 03 November 2020

¹³¹ Section 35 of the Constitution of the South Africa. Accessed at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1#:~:text=The%20Constitution%20of%20the%20Republic%20of%20South%20Africa%2C%201996%2C%20was,supreme%20law%20of%20the%20land.&text=South%20Africa's%20Constitution%20is%20one,and%20enjoys%20high%20acclaim%20internationally>. on 03 November 2020

Amici Curiae ('*Jordan*'),¹³² the criminal laws relating to sex work were challenged on constitutional grounds. After that, in the case before the Western Cape High Court, *The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (Interdict Case)*¹³³ was launched to prohibit South African Police Services members unlawfully arresting and harassing sex workers. The third case, *Kylie v Commission for Conciliation, Mediation and Arbitration and Others, Labour Appeal Court Case (Kylie)*¹³⁴, invoked labour rights to protect sex workers in the employment sector. Each of the aforementioned cases and their outcomes is discussed in the following sections.

The researcher believes that even if South Africa chooses the partial criminalization model, South Africa will continue to waste millions of South Africa rands trying to enforce a law that will result in very few prosecutions or convictions. It will be difficult to enforce because the partial criminalization model requires sex workers to participate actively in the prosecution process by being witnesses.

3.2.2.1. State v Jordan and Others

The three applicants in the *Jordan* case, namely, a brothel owner, an employer of the brothel, and a sex worker, were initially prosecuted in the magistrate's court for contravening section 20(1)(aA) of the SOA 1957, which prohibits the selling of sex. The applicants admitted guilt respectively for brothel-keeping and providing sex for reward but claimed that section 20(1)(aA) of the SOA 1957 is unconstitutional and should be declared invalid because it violates the constitutional rights of

¹³² (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642. Accessed at <http://www.saflii.org/za/cases/ZACC/2002/22.html> on 03 November 2020

¹³³ *The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others* (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed at <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017

¹³⁴ *Kylie v Commission for Conciliation, Mediation and Arbitration and Others, Labour Appeal Court Case No: CA10/08*. Accessed at <http://www.saflii.org/za/cases/ZALAC/2010/8.html> on 03 May 2017

sex workers to equality¹³⁵, human dignity¹³⁶, freedom and security¹³⁷, privacy¹³⁸ and economic activity¹³⁹ as contained in the interim Constitution.¹⁴⁰ The brothel owner and manager were part of the case, in that at the Magistrate court, they were all charged for crimes pertaining to keeping a brothel. As a result, they were the applicants in this case too. The focus of the case was the

¹³⁵ The right to equality is listed in the South African Interim Constitution and provides: 8 Equality (1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

Accessed at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993#8Equality> on 25 January 2021.

¹³⁶ The right to human dignity is listed in the South African Interim Constitution and provides: “10 Every person shall have the right to respect for and protection of his or her dignity.” Accessed at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993#8Equality> on 25 January 2021.

¹³⁷ The right to freedom and security is listed in the South African Interim Constitution and provides “(11) (1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial. (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.” Accessed at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993#8Equality> on 25 January 2021.

¹³⁸ The right to privacy is listed in the South African Interim Constitution and provides: “13 Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.” Accessed at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993#8Equality> on 25 January 2021.

¹³⁹ The right to economic activity is listed in the South African Interim Constitution. Section 26 provides:

(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

¹⁴⁰ At the time that the proceedings were initiated, the interim Constitution was operational in South Africa. *S v Jordan* op cit (n129) para 4.

provision that criminalises the sale of sex by the person, not the 3rd party – which would be the brothel owner.

Since magistrate’s courts do not have jurisdiction to declare statutes unconstitutional, after being convicted and sentenced by the magistrate, the applicants appealed to the Pretoria High Court to have section 20(1)(aA) of the SOA 1957 set aside on the basis that it violates their constitutional rights to gender equality and equality before the law. On 2 August 2001, the High Court held that section 20(1)(aA) of the Act is unconstitutional because the distinction made by the provision between the buyer and seller of sex was “obviously unjustified discrimination between not only sexes but also persons.”¹⁴¹ The High Court also found that the impugned provision was discriminatory because it distinguishes between “a prostitute who received money for her favors and her sister who receives, for rendering similar services, a benefit or reward of a different kind such as a paid holiday weekend.”¹⁴²

Two issues of discrimination were presented in the appeal to the Constitutional Court. First, since section 20(1)(aA) of the SOA 1957 only targets the sex worker and not the customer, it was claimed that there was clear discrimination.¹⁴³ Second, there was sexism against women because the vast majority of sex workers are women, so on the basis of their sex, it was argued.¹⁴⁴ In the first case, most of the Court found that it is fair under the law to handle a sex worker and a client differently since a sex worker is a serial offender and probably not the client.

¹⁴⁵

The majority of the Constitutional Court Bench who heard this matter found that even though there was some discrimination against sex workers, it was justified provided the legitimate interest of the government in prohibiting commercial sex. Also, the majority of the Constitutional Court Bench who heard this matter also found that both the customer and the sex

¹⁴¹ *S v Jordan and Others* 2002 (1) SA 797 (T) at 800E; 2001 (10) BCLR 1055 (T) at 1058A; 2002 (1) SACR 17 (T) at 21B. op cit (n129)

¹⁴² *S v Jordan*, above at 800H; *S v Jordan* op cit (n129).

¹⁴³ *S v Jordan* op cit (n129) para 8

¹⁴⁴ *S v Jordan* op cit (n129) para 18

¹⁴⁵ *S v Jordan* op cit (n129) Para. 10.

worker was responsible for the offense while considering the Riotous Assemblies Act and the common law.¹⁴⁶

The majority of the Court ruled that because the section applies to “any person” who engages in sex for reward, it applies to both male and female sex workers. Thus, most of the Court found that section 20(1)(aA) of the SOA 1957 is gender-neutral and that there is no gender discrimination.¹⁴⁷

The appellants also argued that the law is invalid because it is based on morality, not legitimate state grounds¹⁴⁸. The state countered by arguing that there were many reasons for prohibiting sex work such as sex work: is degrading to women; is conducive to violent abuse of sex workers by customers and pimps; is associated with and encourages the international trafficking in women, which South Africa is obliged by its international law commitments to suppress; leads to child prostitution; carries an intensified risk of the spread of sexually transmitted diseases, especially HIV/AIDS; goes hand in hand with high degrees of drug abuse; has close connections with other crimes, such as assault, rape, and even murder; and is a frequent and persistent cause of public nuisance.¹⁴⁹ The majority of the Court accepted the state’s arguments noting,

“The state contended that the legislation was “designed” to promote the protection or improvement of the quality of life and human development, and as such is sanctioned by section 26¹⁵⁰. Sex work is associated with violence, drug abuse, and child trafficking. These are the legislative facts.¹⁵¹ Furthermore, [measures intended to eliminate the harmful effects of prostitution and brothel keeping are measures designed to protect and improve

¹⁴⁶ S v Jordan op cit (n129) Para. 11-14.

The fact that a man or woman who pays for sex is guilty of criminal conduct and liable for the same penalty as the prostitute must be treated as the distinction made by the clause. The consumer is a socius criminis in common law and thus commits an offense under common law. The Riotous Assembly Act, section 18. Under the Riotous Assemblies Act, the client is responsible for the same punishment that the prostitute is responsible for.

¹⁴⁷ S v Jordan op cit (n129) Para. 9.

¹⁴⁸ S v Jordan op cit (n129) Para 86

¹⁴⁹ S v Jordan op cit (n129) Para. 86

¹⁵⁰ The right to economic activity. Listed in Section 26 of the Constitution of South Africa

¹⁵¹ S v Jordan op cit (n129) Para. 24

life quality. It is not for this Court to pass judgment on the effectiveness or otherwise of choice made by the legislature.”¹⁵²

The appellants further argued that section 20(1)(aA) is discriminatory because only sex workers are prosecuted in practice and not their customers.¹⁵³ The majority of the Court determined that this is a flaw in applying law but does not establish a constitutional defect in the legislation.¹⁵⁴ “The majority of the Court also rejected the appellants’ challenges to section 20(1)(aA) based on economic activity and privacy rights. In relation to this particular aspect, the Court did not elaborate on its reason for this decision, it merely stated that even if the practice of the police and prosecutors is to target the ‘merchants’ and not the ‘customers’ who are not applicable to the issue before us in the present case relating to section 20(1)(aA) of the Act, that is to say if it is appropriate to confirm the order of the High Court finding the section inconsistent with the Constitution.”¹⁵⁵

On the issue of stigmatization of sex workers caused by their criminalization, the majority of the Court reasoned, “if the public sees the recipient of reward as being ‘more to blame’ than the ‘client’, and a conviction carries a greater stigma on the ‘prostitute’ for that reason, that is a social attitude and not the result of the law.”¹⁵⁶

Ultimately, the majority of the Court held that section 20(1)(aA) is not inconsistent with section 8(2)¹⁵⁷ of the interim Constitution.¹⁵⁸ The Court declined to confirm the Western Cape High Court’s order to declare section 20(1)(aA) of the Sexual Offences Act 23 of 1957 invalid.

¹⁵² S v Jordan op cit (n129) Para. 26.

¹⁵³ S v Jordan op cit (n129) Para. 19.

¹⁵⁴ S v Jordan op cit (n129) Para. 19

¹⁵⁵ S v Jordan op cit (n129) Para. 19.

¹⁵⁶ S v Jordan op cit (n129) Para. 16

¹⁵⁷ Section 8 (2) of the Interim Constitution of South Africa (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

¹⁵⁸ S v Jordan op cit (n129) Para. 20

The minority opinion by Judges O'Regan and Sachs concurred in part and dissented in part from the majority. While the majority found section 20(1)(aA) to be consistent with the Bill of Rights in the Constitution, the minority found that the section was unfairly discriminatory because it criminalized the selling and not the buying of sex.¹⁵⁹ The minority first considered the claims of section 9(1) and felt that punishing the actions of only one party but not the other was not irrational for the legislature. It acknowledged, however, the claims of Jordan and the CGE that the Act discriminated as it affected prostitutes (mostly women) unfairly as opposed to their clients (mostly men). The minority based its case here, within the general context of gender roles and did not concentrate as a separate vulnerable group on sex workers:¹⁶⁰

“In the present case, the stigma is prejudicial to women and runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality. To the extent therefore that prostitutes are directly criminally liable in terms of section 20(1)(aA) while customers, if liable at all, are only indirectly criminally liable as accomplices or co-conspirators, the harmful social prejudices against women are reflected and reinforced. Although the difference may on its face appear to be a difference of form, it is in our view a difference of substance that stems from and perpetuates gender stereotypes in a manner which causes discrimination. The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it: she is fallen, he is at best virile, at worst weak. Such discrimination, therefore, has the potential to impair the fundamental human dignity and personhood of women.”¹⁶¹

The minority changed their attention to sex workers in assessing the unfairness of the discrimination, but this was not to accept their vulnerability as a separate group:¹⁶² “There can be no doubt that they are a marginalised group to whom significant social stigma is attached. Their status as social outcasts cannot be blamed on the law or society entirely. By engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community. In using their bodies as commodities in the marketplace, they undermine their status and become vulnerable.”¹⁶³

Justice Sachs and O'Regan, extending the concept of a crime, however, particularly in order to prevent what “may otherwise constitute unfair discrimination, is something that the Court

¹⁵⁹ S v Jordan op cit (n129) Para. 61-63.

¹⁶⁰ S v Jordan op cit (n129) Para 60

¹⁶¹ S v Jordan op cit (n129) para 65

¹⁶² S v Jordan op city (n129) para 65

¹⁶³ S v Jordan op cit (n129) para 66

can do only in extraordinary cases, if ever.”¹⁶⁴ If a criminal offense results in unfair discrimination, there would normally be two ways to prevent discrimination: on the one hand, the elimination of the criminal prohibition and, on the other hand, the expansion of its application to the class otherwise excluded. The choice between these is one that is only usually suitable for the Legislature. In the circumstances of the statutory prohibition in question here, considering the broad variety of possible legislative solutions to the social issues related to prostitution, it is peculiarly one for the Legislature.¹⁶⁵ “They further stated that to declare it unconstitutional would be destructive of the principle of legality which requires certainty as to the definition of crimes, and secondly, it would intrude on the legitimate sphere of the Legislature in an area of considerable public controversy.”¹⁶⁶ Justice Sachs and O’Regan conclude that “In the light of all these considerations, we conclude that section 20(1)(aA), to the extent that it renders criminal the conduct of prostitutes, but not that of customers, constitutes unfair discrimination.”

3.2.2.2. Sex Workers Education and Advocacy Taskforce (SWEAT) Interdict¹⁶⁷

The Sex Workers Education and Advocacy Taskforce (SWEAT) has a 20-year tradition of organizing sex workers, campaigning for South African sex workers, and offering services. The Pan African Alliance of Sex Workers (African Sex Worker Alliance) (ASWA) and a national movement of sex workers named Sisonke have enabled the birth of two movements. ASWA is now a Kenya-based autonomous body, and Sisonke is heading towards South Africa's independence. SWEAT’s vision is a South Africa where liberty, rights, and human dignity can be enjoyed by people who want to sell sex. To discuss the well-being of sex workers, SWEAT uses an evidence-based approach based on human rights. SWEAT supports the wellness idea, which encourages sex workers to be actively interested in being conscious of and making decisions for a

¹⁶⁴ S v Jordan op cit (n129) Para. 45

¹⁶⁵ S v Jordan op cit (n129) para 45

¹⁶⁶ S v Jordan op cit (n129) Para. 46.

¹⁶⁷ The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017

safe and fulfilling life. Wellness goes beyond only the lack of sickness, which encompasses physical, emotional, and social well-being.¹⁶⁸

SWEAT observed large numbers of sex workers in the Western Cape being seized and detained by police without charge under the criminalized regime in South Africa, with the threat of the law being used by law enforcement authorities as a weapon to threaten, harass and monitor sex workers. In response, SWEAT filed an application with the Western Cape High Court on 20 March 2007, under s38¹⁶⁹ of the Constitution, seeking an order to declare that no member of the South African Police Service ('SAPS') or the Cape Town City Police Service ('the City Police') was entitled to arrest staff in the Cape Metropolitan Area for any subsequent reason, and to prohibit and prevent the police from arresting them.

SWEAT claimed that because members of the SAPS and the Cape Town City Police regularly exercised the powers of arrest bestowed on them by Sections 39 and 40 of the Criminal Procedure Act No. 51 of 1977 ('the CPA'), SWEAT was entitled to the relief to arrest sex workers for the ulterior purpose of threatening them rather than for the legal purpose of prosecuting them.¹⁷⁰ SWEAT provided affidavits from former and current sex workers to support their allegation, which included extensive details on mistreatment and illegal behavior by SAPS and the Cape Town City Police.¹⁷¹

For instance, the evidence submitted to the court revealed that sex workers were routinely held in police cells overnight and taken to the court cells of the magistrates the next morning, wh

¹⁶⁸ <http://www.sweat.org.za/>

¹⁶⁹ 38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

¹⁷⁰ The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017 Para 3

¹⁷¹ The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017 Para 5

ere they were released after being detained for a few hours, without attempting to pursue a crime.

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The respondents rejected the appeal, claiming that there were significant factual disputes.¹⁷³ In reply, SWEAT claimed that only as a matter of principle did they request relief from the court, arguing that there was no real factual conflict.

As shown by police reports, SAPS acknowledged that sex workers were rarely punished, such as those from the district of Claremont in Cape Town, which revealed that 106 sex workers were arrested in 2006, but none were prosecuted.¹⁷⁴

The question of the legal theory was whether, in situation where they knew with a strong degree of likelihood that no indictment would follow, member of the SAPS and City Police were not permitted to apprehend and detain sex workers.¹⁷⁵

SWEAT claimed that if the respondents understood that prosecution would not occur but that sex workers were regularly detained anyway, then the police's acts did not serve a valid reason, which in essence made such arrests illegal.¹⁷⁶ Also, SWEAT argued that the facts revealed th

¹⁷² The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017 Para 13

¹⁷³ The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017 para 5

¹⁷⁴ The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017 para 5

¹⁷⁵ The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017 para 5

¹⁷⁶ The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017 para 5

at the arrests made under these conditions were carried out for the ulterior motive of threatening and intimidating sex workers.¹⁷⁷

In their claims, the respondents contradicted themselves. On the one hand, they claimed that as part of their crime reduction duties, the police were obliged to carry out the arrests of sex workers.¹⁷⁸

They further claimed that before pursuing the arrestees, the arrests of sex workers were made to carry out further investigation.¹⁷⁹

On the other hand, they argued that sex workers were arrested because, in the presence of the arresting officers, they committed crimes; thus no further investigation before trial was needed.¹⁸⁰ They also claimed that it would be unprecedented to make an order banning a state agency from performing its constitutional duties with respect to its responsibility to deter crime.¹⁸¹ Finally, they argued that the police had no power over whether charges had been brought, or how long they had detained arrested people.¹⁸²

Fourie J dismissed the respondents' claims and held that the police officers who influenced the sex workers' arrests did not do so with the object or intention needed to prosecute the sex workers. This was so because they knew that no charges would proceed, with a high degree of probability. He concluded that such arrests were, unlawful and issued an order that

¹⁷⁷ The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017 para 2

¹⁷⁸ The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017 para 24

¹⁷⁹ The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017 para 22

¹⁸⁰ The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017 para 22

¹⁸¹ The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017 para 24

¹⁸² The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Accessed on <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html> on 03 May 2017 para 24

SAPS members in the Cape Metro area and the Cape Town City Police were prohibited from arresting sex workers for a reason other than taking the arrested person before a court of law to face trial and arresting sex workers, knowing with a high degree of probability that no charge or trial will be brought against such person.

Furthermore, the Court ordered the respondents to take all reasonably appropriate measures to prevent SAPS and City Police from violating the order, within their respective areas of duty and authority. This judgment is significant in that it prohibits the police from harassing sex workers and arresting them for ulterior purposes.

The legal consequence of the Sweat Interdict is that firstly, the courts acknowledge the practice of unlawful arrests and harassment of sex workers by members of the South African Police. It also acknowledges illegal policing practices used to harass and intimidate sex workers to drive them out of communities. Secondly, a consequence that members of the sex worker community feared was that there would be an increase in entrapment operations, carried out correctly, that would result in conviction and imprisonment. However, since this judgment, the Women's Legal Centre and SWEAT documented the continued arrests of sex workers where police officers have failed to follow the correct procedures, thereby acting in contempt of the judgment.¹⁸³ In light of this, one can argue that the case was successful in highlighting the abuse meted out by police officers, but was not successful in preventing the abuse from occurring because police officers continued to ignore and disobey the law.¹⁸⁴

3.2.2.3. 'Kylie'¹⁸⁵

¹⁸³ Women's Legal Centre "Stop Harassing Us! Tackle Real Crime!" Accessed at <http://wlce.co.za/wp-content/uploads/2017/02/210812-FINAL-WEB-version.pdf> on 07 December 2020. ; Women's Legal Centre "Police Abuse of Sex workers" Accessed at <http://wlce.co.za/wp-content/uploads/2017/02/Police-abuse-of-sex-workers.pdf> on 07 December 2020.

¹⁸⁴ Women's Legal Centre "Stop Harassing Us! Tackle Real Crime!" Accessed at <http://wlce.co.za/wp-content/uploads/2017/02/210812-FINAL-WEB-version.pdf> on 07 December 2020. ; Women's Legal Centre "Police Abuse of Sex workers" Accessed at <http://wlce.co.za/wp-content/uploads/2017/02/Police-abuse-of-sex-workers.pdf> on 07 December 2020.

¹⁸⁵ Kylie is not her real name. It is a pseudonym that was allowed to be used by the Courts. *Kylie v Commission for Conciliation, Mediation and Arbitration and Others*, Labour Appeal Court Case No: CA10/08 Footnote 1 which

The case of *Kylie v Commission for Conciliation, Mediation and Arbitration and Others*¹⁸⁶ concerned a sex worker named ‘Kylie’ who was dismissed from her place of employment – a brothel. “‘Kylie’ was employed at a massage parlour called Brigitte’s in Cape Town.”¹⁸⁷ “She was a full-time employee.”¹⁸⁸ “She provided personal services to clients for a reward.”¹⁸⁹ Her services included “massage, intercourse, pelvic massage, foot fetishes, and dominance”. She worked 14 hours a day and only later during the course of employment was she allowed to take Sundays off. ‘Kylie’ was subject to a system of rules and fines. “Employees who missed work without permission were fined R100.”¹⁹⁰ “A R50 fine was imposed if an employee went to the shop for more than 15 minutes.”¹⁹¹ “If the bath was not cleaned, a R30 fine was imposed.”¹⁹² “Employees caught arguing in front of clients or sleeping while on duty were fined R50.”¹⁹³ ‘Kylie’ lived and worked on the parlour premises. “She was summarily dismissed from her employment for not obeying the rules of the brothel.”¹⁹⁴ In particular, she had allegedly: failed to do sufficient bookings; exercised discretion in terms of clients and conduct (this means that she was declining clients who asked for her); “spent an hour in her room with her boyfriend who didn’t pay for her sexual services;”¹⁹⁵ “hardly ever worked on weekends; failed to adhere to time, which lead to the discontent of other employees; and used drugs.”¹⁹⁶

“In May 2006, Kylie launched a dispute at the CCMA for conciliation, alleging that she had

provides “As the appellant wants her identity to be protected, she is cited as ‘Kylie’, a name by which she was known to the third respondent’s clientele.”

¹⁸⁶ *Kylie v Commission for Conciliation, Mediation and Arbitration and Others*, Labour Appeal Court Case No: CA10/08. Accessed on <http://www.saflii.org/za/cases/ZALAC/2010/8.html>

¹⁸⁷ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

¹⁸⁸ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

¹⁸⁹ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

¹⁹⁰ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

¹⁹¹ Ibid

¹⁹² Ibid

¹⁹³ Ibid

¹⁹⁴ Ibid

¹⁹⁵ Ibid

¹⁹⁶ Ibid

been unfairly dismissed.”¹⁹⁷ Conciliation proceedings took place in June 2006 but the parties were unable to agree. The dispute was referred to arbitration but before that could take place, the Commissioner considered whether or not the CCMA had jurisdiction in the matter since sex work is unlawful in South Africa. Even though Kylie risked prosecution for providing sex work, thereby contravening section 3(a) of the Sexual Offences Act, which states that ‘any person who resides in a brothel’ is deemed to keep a brothel. Keeping a brothel is an offence in terms of section 2 of the Sexual Offences Act, she also contravened section 20(1)(aA) of the Sexual Offences Act because she had ‘unlawful carnal intercourse’ and had committed ‘acts of indecency’ with other people for reward, she still pursued the case to raise the rights violations that she experienced. In December 2006, the Commissioner found that since ‘Kylie’ was engaging in illegal work, “it rendered her contract of employment invalid.”¹⁹⁸ “Therefore, the CCMA did not have jurisdiction over the matter because ‘the basis of the CCMA’s jurisdiction is that there must be a legally enforceable contract’.”¹⁹⁹

In January 2007, ‘Kylie’ launched an application in the Labour Court of South Africa to have the Commissioner’s ruling about jurisdiction reviewed and set aside in terms of section 145(2)(a) of the Labour Relations Act 66 of 1995 (LRA). Kylie argued that although some of the work that she was employed to do was illegal, it is work that is “widely tolerated in our society and is no longer condemned as other crimes still are.”²⁰⁰ She also argued that the criminalization of sex work makes sex workers particularly vulnerable to exploitation by their employers. Therefore, they are all the more in need of protection. “Kylie” argued that the provisions in the LRA are designed to ensure that the constitutional right to fair labour practices is afforded to everyone. When considering the proper interpretation of the LRA’s definition of an ‘employee’, it is clear that the LRA protects everyone, who is in an employment relationship, whether it is also underpinned by an enforceable contract. Therefore, the court should not deny sex workers the protection of the LRA because, even though sex work is unlawful, the protection of sex workers is in line with public policy and does not offend it.

¹⁹⁷ Ibid

¹⁹⁸ Ibid

¹⁹⁹ Ibid

²⁰⁰ Ibid

The Labour Court handed down judgment on the 31st of July 2008. The Court held that the definition of an ‘employee’ in section 213 of the LRA is probably wide enough to include someone whose contract of “employment is unenforceable at common law.”²⁰¹ “However, the Labour Court also held that a sex worker is not entitled to protection against unfair dismissal in terms of the LRA because it would be contrary to a common law principle, which has been entrenched as a founding value of the Constitution that the courts ‘ought not to sanction, or encourage illegal activity’.”²⁰²

In August 2008, ‘Kylie’s’ attorneys filed a notice of intention to apply for leave to appeal to the Labour Appeal Court against the whole judgment and orders made by Acting Justice Cheadle of the Labour Court. On the 11th of March 2010, the matter was heard by three judges in the Labour Appeal Court. ‘Kylie’s’ counsel argued that she is entitled to protection against unfair dismissal in terms of section 185(a) of the LRA for the following reasons: Even if the Court accepts that ‘Kylie’s’ work was illegal under the Sexual Offence Act and that it rendered her contract of employment unenforceable at common law, she is nevertheless entitled to the right to fair labour practices in terms of section 23(1) of the Constitution, which states: ‘Everyone has the right to fair labour practices.’²⁰³

‘Kylie’ argued that because she was in an employment relationship, she qualified for protection against unfair dismissal in terms of section 185(a) of the LRA²⁰⁴ because she was an ‘employee’ as defined in section 213 of the LRA²⁰⁵. “It does not matter that her contract of employment was unenforceable or indeed whether she had any contract of employment at all. Kylie further argued that the common law principle that the courts do not enforce contracts that are contrary to public policy is no more than a principle of the common law.”²⁰⁶ “Kylie further

²⁰¹ Ibid

²⁰² Ibid

²⁰³ Section 23 (1) of the Constitution provides “everyone has the right to fair labour practices.”

²⁰⁴ Section 185 of the LRA states that “every employee has the right not to be subjected to an unfair labour practice.”

²⁰⁵ SECTION 213 of the Labour Relations Act (LRA) provides that an employee is anyone, other than an independent contractor, who works for another person or who assists in conducting the business of an employer.

²⁰⁶ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

argued that it is also more limited in its scope than the Labour Court suggested.”²⁰⁷ *“It is not a founding value of the Constitution. It is subject to the Constitution and any legislation enacted under it. It is accordingly trumped by Kylie’s rights under section 23(1) of the Constitution and section 185(a) of the LRA.”*²⁰⁸

On 28 May 2010, the Labour Appeal Court (“LAC”) handed down a favourable judgment for sex workers. The LAC accepted that when faced with a situation like ‘Kylie’s’, the starting point should be the Constitution and that the illegal activity of a sex worker does not prevent her from enjoying a range of constitutional rights. The Labour Appeal Court held that the right to fair labour practices does vest in ‘everyone’ in an employment relationship, including sex workers, and despite the illegality of their work. In simple terms, this means that sex workers who are employed may approach the Commission for Conciliation Mediation and arbitration for assistance when they are unfairly dismissed or experience unfair labour treatment. The CCMA will not be able to order reemployment or reinstatement, but rather compensation for the violation of the right to fair labour practices.

“The LAC endorsed the Constitutional Court’s comments in the Jordan case that sex workers should not be stripped of their right to be treated with dignity by clients and concluded that this should apply to sex workers as well.”²⁰⁹ Thus, the right to fair labour practices applies to sex workers in an employment relationship. In relation to the court a quo’s finding that giving sex workers a remedy would encourage and sanction illegal activity, the LAC said that the common law principle was not absolute or inflexible and that a court has discretion to its application: *“Manifestly, it would be against public policy to reinstate an ‘employee’ such as appellant in her employ even if she has could show, on the evidence, that her dismissal was unfair. But, that conclusion should not constitute an absolute prohibition to, at least, some protection provided under the LRA, a protection which can reduce her vulnerability, exploitation and the erosion of her dignity.”*²¹⁰ The LAC noted that ‘many sex workers are particularly vulnerable and are exposed

²⁰⁷ Ibid

²⁰⁸ Ibid

²⁰⁹ Kylie case op cit (n182) para 39; Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

²¹⁰ Kylie case op cit (n182) para 52

to exploitation and vicious abuse'. As part of a class of vulnerable employees, sex workers should have the protection of the Labour Relations Act.²¹¹ "The LAC also decided that the CCMA does have jurisdiction to decide the case."²¹²

Based on the Kylie case, sex workers can now approach the relevant CCMA or Bargaining Council or the Labour Court, if they were dismissed or experience an unfair labour practice. "The arbitrator or judge would have to consider whether the sex worker has been treated unfairly and what an appropriate remedy would be."²¹³ It may not mean reinstatement but there are other available remedies such as compensation. The Kylie case is especially important because it recognizes that everyone including the most vulnerable members of society such as sex workers are also deserving of protection under labour law. "Sex workers are particularly vulnerable to exploitation in the employment relationship because of the illegal nature of the work and the conditions that they work under."²¹⁴ For instance, sex workers are not usually paid a fair salary, the state of the brothels is often not good and sex workers are fined for disobeying rules that many would deem irrational such as refusing to work during their menstrual cycles.

3.2.3. Implications of the total criminalisation model on sex workers human rights

"Criminalising sex work in South Africa has not eradicated the sale of sex for a reward. Criminalisation has neither reduced the supply nor the demand for sex work."²¹⁵ In the following section, the researcher will provide you with information on the impact of the criminalisation model in South Africa.

²¹¹ Kylie case op cit (n182) para 41

²¹² Kylie case op cit (n182) para 61; Women's Legal Centre, "Lawyer's Manual on Sex Work Litigation Pursuing Justice for Sex Workers", 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

²¹³ Women's Legal Centre, "Lawyer's Manual on Sex Work Litigation Pursuing Justice for Sex Workers", 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

²¹⁴ Women's Legal Centre, "Lawyer's Manual on Sex Work Litigation Pursuing Justice for Sex Workers", 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

²¹⁵ Ibid

South Africa has spent millions of Rand in an attempt to enforce the laws that prohibit sex work²¹⁶ The South African government spends at least 14 million rands a year to police and prosecute sex work.²¹⁷ In addition to the state wasting millions on trying to enforce the laws prohibiting sex work, the laws outlawing sex work create conditions for exploitation and abuse against sex workers by their employers, clients and the police.²¹⁸

Criminalisation creates a power imbalance between sex workers and several parties, i.e., the South African Police Service, their employers and their clients. In the earlier paragraphs, we highlighted through the case of Kylie, the imbalance that lies between brothel owners/managers and sex workers. The power imbalance that exists is the fact that police officers are the authority who have discretion in the way in which they carry out the laws that prohibit sex work. This is evidenced in the way in which police officers use violence during an arrest by police officers who routinely beat them, pepper spray them, sexually assault them and bribe them. Lastly, there is also a power imbalance in the way clients engage with sex workers, particularly in an environment where they are criminalized. In this part of the dissertation, the researcher will highlight the power imbalance between police officers and sex workers.

“Currently, there is great scepticism by sex workers about the police as an avenue of redress, especially because some police officers are themselves perpetrators of the aforementioned crimes.”²¹⁹ The experiences of sex workers typically testify to human rights violations such as the right of arrested or detained persons and the rights to privacy, equality and dignity that occur during and after arrests as well as the devastating impact on their lives. The human rights violations that

²¹⁶ Julie Pearl, ‘The Highest Paying Customers: America’s Cities and the Costs of Prostitution Control’, 38 *Hastings L.J.* 769 (1987)

²¹⁷ Women’s Legal Centre, ‘Stop Harassing Us! Tackle Real Crime! A report on the human rights violations against sex workers in South Africa’ (2012) Accessed online at <http://wlce.co.za/wp-content/uploads/2017/02/210812-FINAL-WEB-version.pdf> on 07 May 2017

²¹⁸ Chandre Gould and Nicole Fick, “Selling Sex in Cape Town, Sex work and Human Trafficking in a South African City, page 69; Fick N. Sex workers experiences with the local law enforcement in South Africa. *Research for Sex Work.* 2005;8:4-8.; Fick N. Enforcing Fear - Police abuse of sex workers when making arrests. *SA Crime Quarterly.* 2006;16:27-33.; Fick N. Sex Workers Speak Out - Policing and the sex industry. *SA Crime Quarterly.* 2006;15(March):13-18 and Pauw I, Brener L. ‘You Are Just Whores: You Can’t Be Raped’: Barriers to Safer Sex Practices among Women Street Sex Workers in Cape Town. *Culture, health & sexuality.* 2003;Nov - Dec:465-481.

²¹⁹ Women’s Legal Centre op cit (n191)

sex workers experience relate to verbal, physical and sexual assault, unlawful searches, unlawful seizures, unlawful arrest and detention, being detained in inhumane conditions or being subjected to inhumane forms of punishment, such as being doused with cold water and told to drink from the toilet bowl. Many sex workers testify to being harassed, robbed, assaulted or raped by police, as well as being subjected to unlawful arrest, or demands for bribes.²²⁰

“Most sex workers are therefore reluctant to approach the police to report crimes committed against themselves or others.”²²¹ “Unreported crimes of abuse perpetrated by the police against sex workers include verbal abuse, refusal by clients to pay, being robbed, threats of physical assault, physical assault, and rape.”²²² In addition, the existing legal framework is subject to police discretion, which encourages police corruption for example, bribes and demands of sex.²²³

Although South Africa criminalises sex work, in reality, a system of decriminalisation exists because “the police often do not enforce the provisions of the Sexual Offences Act.”²²⁴ Many police officers state “that when they target sex workers, they do so because they are responding to a complaint from a community member.”²²⁵ To satisfy the complaint, the police use municipal by-laws such as ‘loitering, nuisance and importuning a person for the purposes of prostitution’²²⁶ to

²²⁰ Fick, N (2006). ‘Enforcing fear – Police abuse of sex workers when making arrests’. SA Crime Quarterly 2006, 16: 27–33 and ‘Sex Workers Speak Out – Policing and the sex industry’. SA Crime Quarterly 2006, 15 (March): 13-18. Richter, M. et al (2012). ‘Female sex work and international sport events – no major changes in demand or supply of paid sex during the 2010 Soccer World Cup: a cross-sectional study’. BMC Public Health 12:763. ²²⁰ Gould, C. & Fick, N. (2008). ‘Selling sex in Cape Town: Sex work and human trafficking in a South African city’. Pretoria/Tshwane, Institute for Security Studies.

²²¹ Women’s Legal Centre op cit (n191)

²²² Women’s Legal Centre op cit (n191)

²²³ Women’s Legal Centre op cit (n191)

²²⁴ Women’s Legal Centre op cit (n191)

²²⁵ Women’s Legal Centre op cit (n191)

²²⁶ By-Laws South Africa, *Open By-Laws South Africa*, Accessed at <https://openbylaws.org.za/za-cpt/act/by-law/2007/streets-public-places-noise-nuisances/eng/>

arrest and remove the sex worker from the streets.²²⁷ “In these instances, the targets are the most visible elements namely, street-based or outdoor sex workers.”²²⁸

The SOA 1957 and the SOA 2007 are difficult laws to prosecute because they require “intensive and intrusive police methods such as entrapment to secure a conviction.”²²⁹ The laws criminalizing sex work are difficult to enforce because they require evidence to be secured to prove that an agreement for sex for a reward was entered into. The aforementioned agreement is usually made privately between two persons, which makes it difficult to be witnessed by a police officer. As a result, police officers resort to using the municipal by-laws to control the sex work industry and issue huge fines for loitering and being a nuisance.²³⁰

“Procedures required by the municipal by-laws are seldom followed in practice.”²³¹ For instance, often sex workers are arrested because they are known to be sex workers to the police officers; not necessarily because they have been caught committing a crime.²³² This is achieved through a practice called profiling. Profiling occurs when police officers approach women who are dressed provocatively and are assumed to be sex workers. The latter are then photographed, fingerprinted or their personal information is solicited from them. If the person refuses to cooperate, they are fined in terms of the municipal by-laws or are threatened with arrest. In many instances where sex workers are arrested, the arrests are conducted without a warrant and they are charged with ‘loitering’.²³³ “Once arrested, sex workers are usually required to pay a ‘spot fine’ to the arresting officer.”²³⁴ “Alternatively, they are taken to the police cells where they are kept

²²⁷ Women’s Legal Centre op cit (n191)

²²⁸ SWEAT Submission to the South African Law Reform Commission 2009 page 26; Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

²²⁹ SWEAT Position Paper on Sex Work in South Africa (2015) access online at <http://www.sweat.org.za/wp-content/uploads/2016/02/Position-Paper-on-Sex-Work-in-South-Africa-2015-1.pdf> on 07 May 2017; Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

²³⁰ SWEAT Position Paper op cit (n201)

²³¹ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

²³² Women’s Legal Centre op cit (n191)

²³³ Women’s Legal Centre op cit (n191)

²³⁴ Women’s Legal Centre op cit (n191); Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

overnight and on the following day, they are given an option to pay a fine to secure their release.”²³⁵ They are seldom brought to court and do not receive receipts for the fines paid.²³⁶ The amount for the fine is dependent on province and area and range from R300 to R1 000.²³⁷ “Even if the arrest is justified, no charges are properly laid to warrant the arrest.”²³⁸

During research conducted by the Women’s Legal Centre, many sex workers complained of violations of constitutional rights of arrested or detained persons²³⁹ and rights to human dignity²⁴⁰. In this report, the Women’s Legal Centre documented cases wherein sex workers reported that they were not being promptly informed about the reason for their detention; not being allowed to choose and consult with a legal practitioner; not being allowed to challenge the veracity of their detention; not being allowed to communicate with/be visited by their next of kin or a doctor; and not being allowed to report the conditions of detention that were inconsistent with the right to human dignity.²⁴¹ It is important that “these practices of lawlessness by the police are addressed and police officers should rather work with sex workers to hold others accountable.”²⁴² In fact, when “individual police officers perpetrate acts of crime against sex workers such as rape, assault and robbery, the state can be held vicariously liable for their actions.”²⁴³ The state holds indirect responsibility for the actions of their subordinates.²⁴⁴ “For example, one sex worker reported that she was fined for “soliciting” after she left the grocery store even though she was not soliciting clients at the time. The continuous arrests of sex workers for acts they did not commit such as “loitering” and “importun[ing] any person for the purposes of prostitution” highlights a practice

²³⁵ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

²³⁶ Women’s Legal Centre op cit (n191)

²³⁷ Women’s Legal Centre op cit (n191)

²³⁸ Women’s Legal Centre op cit (n191); Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

²³⁹ Section 35 (1) of the South African Constitution

²⁴⁰ Section 10 of the South African Constitution

²⁴¹ Women’s Legal Centre op cit (n191)

²⁴² Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

²⁴³ Ibid

²⁴⁴ K v Minister of Safety and Security (CCT52/04) [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC); [2005] 8 BLLR 749 (CC) (13 June 2005) Accessed at <http://www.saflii.org/za/cases/ZACC/2005/8.html>

of abusing the law to deliberately persecute a specific group of people.”²⁴⁵ The report also details human rights violations during detention where sex workers were subjected to degrading treatment and inhumane conditions in the cells. The conditions of the cells are regarded as inhumane because they are dirty, detained persons receive dirty blankets and mattresses, the toilet is either blocked with human body waste or not working.

Some police officers believe the myth that it is ‘impossible’ for a sex worker to be raped. They are therefore often unwilling to open a case even if a sex worker makes a complaint about being raped.²⁴⁶ Consequently, sex workers, being often abused by the police, are afraid to report crimes when attacked, which makes them easy targets for criminals, unscrupulous managers and domestic partners.²⁴⁷ The fear of arrest by the police also forces sex workers to work in out-of-the-way places where they again are easily targeted for attack.²⁴⁸ Many police officers consider condoms as “evidence” that someone is a sex worker and confiscate them or arrest the person carrying them. Because of the stigma attached to sex work, sex workers are often refused condoms and services by health care workers. The actions by police officers, as mentioned above, together with the stigma associated with sex work and actions of by health care providers, places sex workers at a greater risk of contracting HIV and other STIs.²⁴⁹

²⁴⁵ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

²⁴⁶ Scorgie, F. et al (2012). “Socio-demographic characteristics and behavioural risk factors of female sex workers in sub-Saharan Africa: a systematic review” *AIDS Behav*, 16, 920–33.

²⁴⁷ Sex Workers’ Rights Advocacy Network (2009) "Arrest the Violence: Human Rights Violations Against Sex Workers in 11 Countries in Central and Eastern Europe and Central Asia" Available: <http://www.opensocietyfoundations.org/sites/default/files/arrest-violence-20091217.pdf>

²⁴⁷ IRIN News (2011) “South Africa: decriminalizing sex work only half the battle”. Available: <http://www.irinnews.org/Report.aspx?ReportId=84621>

²⁴⁷

²⁴⁸ Mgbako, C.A. et al (2013) "The Case For Decriminalization Of Sex Work In South Africa" *Georgetown Journal of International Law* 44(4): 1423-1454. Accessed online at <http://www.law.georgetown.edu/academics/law-journals/gjil/recent/upload/zsx00413001423.pdf> on 05 May 2017

²⁴⁹ Mgbako, C.A. et al (2013) "The Case For Decriminalization Of Sex Work In South Africa" *Georgetown Journal of International Law* 44(4): 1423-1454. Accessed online at <http://www.law.georgetown.edu/academics/law-journals/gjil/recent/upload/zsx00413001423.pdf> on 05 May 2017

SWEAT, Sisonke Sex Workers Movement and Women’s Legal Centre (WLC) participated in a seven-country research study to illustrate how the police use condoms as ‘evidence’ against sex workers and its effect on sex workers’ rights to health and access to health services.²⁵⁰ “The key findings include: police confiscate and destroy sex workers’ condoms, putting their health and their clients’ at risk; police cite condom possession as justification to detain or arrest people on charges related to sex work; police harass and abuse sex workers who carry condoms and use the threat of arrest on the grounds of condom possession to extort and exploit them, by either asking them for money or sex in exchange for release; some sex workers opt not to carry condoms as they fear police harassment and detention thereby increasing their risk of exposure to HIV and compromising their health and the health of their sexual partners; police harass and arrest outreach workers, limiting their ability to distribute condoms and educate sex workers about safer sex practices; and police treat condoms as contraband thereby forcing sex workers to choose between safeguarding their health and staying safe from police harassment, or detention.”²⁵¹ Police abuse associated with criminalisation increases sex workers’ vulnerability to health risks. The ways in which police officers risk sex workers health is that they “regularly confiscate condoms from sex workers to use as evidence of sex work and demand unprotected sex from sex workers who seek to avoid arrest.”²⁵² While some sex workers report that they have ceased carrying condoms or sometimes opt not to carry condoms for fear of getting into trouble with police, many sex workers continue to carry condoms to protect their health and the health of their sexual partners, despite the risk of police harassment.²⁵³ When police constantly harass sex workers because they have condoms in their possession, “it will discourages some sex workers from attempting to access health services out of fear that revealing their occupational identity at health clinics will lead to

²⁵⁰ Open Society Foundation, “Criminalizing Condoms - How Policing Practices Put Sex Workers and HIV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe. New York”, Sexual Health and Rights Project; Open Society Foundation, 2012. available at <http://www.opensocietyfoundations.org/reports/criminalizing-condoms>, accessed on 31 March 2015

²⁵¹ Open Society Foundations op cit (n217); Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

²⁵² Open Society Foundations op city (n217); Mgbako op cit (215) 1431

²⁵³ Open Society Foundations op cit (n217)

arrest.”²⁵⁴ When sex workers are arrested, and they are HIV positive, the arrests makes it difficult for them to adhere to their HIV medication. This is one area that illustrates the link between police actions and the direct impact on sex worker's health.

Police officers are not the only people who abuse sex workers. Sex workers are also assaulted by clients, in most cases because of non-payment or condom negotiation. Studies that have documented client resistance to using condoms during the business transaction²⁵⁵ indicate that clients either offered to pay more for unprotected sex²⁵⁶ or demanded paying less for protected sex.²⁵⁷ Clients are more likely to abuse sex workers when they know those sex workers would

²⁵⁴ Open Society Foundations op cit (n217); Mgbako op cit (215) 1431

²⁵⁵ Karim, Q. A., Karim, S. S., Soldan, K. & Zondi, M. 1995. Reducing the risk of HIV infection among South African sex workers: socioeconomic and gender barriers. *Am J Public Health*, 85, 1521-5. Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 27; Pauw, I. & Brener, L. 2003. 'You Are Just Whores: You Can't Be Raped': Barriers to Safer Sex Practices among Women Street Sex Workers in Cape Town. *Culture, Health & Sexuality*, Nov - Dec, 465-481; Pettifor, A., Bekinska, M. E. & Rees, H. 2000. High Knowledge and High Risk Behaviour: A Profile of Hotel-Based Sex Workers in Inner-City Johannesburg. *African Journal of Reproductive Health* 4, 35-43; Campbell, C. 2000. Selling sex in the time of AIDS: the psycho-social context of condom use by sex workers on a Southern African mine. *Social Science & Medicine*, 50, 479-94; Shannon, K., Strathdee, S. A., Shoveller, J., Rusch, M., Kerr, T. & Tyndall, M. W. 2009. Structural and environmental barriers to condom use negotiation with clients among female sex workers: implications for HIV-prevention strategies and policy. *Am J Public Health*, 99, 659-65; Peltzer, K., Seoka, P. & Mashego, T. 2004a. Prevalence of alcohol use in a rural South African community. *Psychol Rep*, 95, 705 – 706; Delany, S. & Nielson, G. 2000. Female sex work: Putting the spotlight on men. *The AIDS Letter*, 1-4; Ramjee, G. & Gouws, E. 2002. Prevalence of HIV among truck drivers visiting sex workers in KwaZulu-Natal, South Africa. *Sex Transm Dis*, 29, 44-9.

²⁵⁶ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 27 accessed online at <http://icrhh.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20june%202013%20monograph%20final.pdf> on 03 May 2017; Agha, S. & Chulu Nchima, M. 2004. Life-circumstances, working conditions and HIV risk among street and nightclub-based sex workers in Lusaka, Zambia. *Cult Health Sex*, 6, 283-99; Varga, C. A. 1997. The condom conundrum: barriers to condom use among commercial sex workers in Durban, South Africa. *African Journal of Reproductive Health*, 1, 74-88; Varga, C. A. 2001. Coping with HIV/AIDS in Durban's commercial sex industry. *AIDS Care*, 13, 351-365; Van Haastrecht, H. J., Fennema, J. S., Coutinho, R. A., Van Der Helm, T. C., Kint, J. A. & Van Den Hoek, J. A. 1993. HIV prevalence and risk behaviour among prostitutes and clients in Amsterdam: migrants at increased risk for HIV infection. *Genitourin Med*, 69, 251-6.

²⁵⁷ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 27 accessed online at <http://icrhh.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20june%202013%20monograph%20final.pdf> on 03 May 2017; Pettifor, A., Bekinska, M. E. & Rees, H. 2000. High Knowledge and High Risk Behaviour: A Profile of Hotel-Based Sex Workers in Inner-City Johannesburg. *African Journal of Reproductive Health* 4, 35-43; Karim, Q. A., Karim, S. S., Soldan, K. & Zondi, M. 1995. Reducing the risk of HIV infection among South African sex workers: socioeconomic and gender barriers. *Am J Public Health*, 85, 1521-5; Blankenship, K. M., West, B. S., Kershaw, T. S. & Biradavolu, M. R. 2008. Power, community mobilization, and condom use practices among female sex workers in Andhra Pradesh, India. *AIDS*, 22.

probably not go to or receive support from the police because of the criminal nature of their work.²⁵⁸ “In addition, a Cape Town study found that street-based sex workers are vulnerable to client abuse as they are forced to operate in isolated areas where they are susceptible to violent interactions with clients because of the covert nature of sex work.”²⁵⁹ Sex workers who work indoors often pay hotel managers a fee for the use of the hotel premises for their work.²⁶⁰ The hotel management, therefore, could be a source of abuse for indoor sex workers because knowing that sex work is illegal, they could be liable to control the sex workers, by not allowing them to leave the hotel.²⁶¹ Sex workers often report incidents of rape by hotel management as well as beatings by hotel security.²⁶² In addition, hotel management may force sex workers to return fees to disgruntled clients.²⁶³

Because of societal taboos around particularly women who have sex with multiple partners, sex workers are highly stigmatised. Stigma is a key factor in the perpetuation of violence against sex workers because they are marked as people who ‘deserve’ abuse.²⁶⁴ “Sex workers face complex and layered levels of stigmatization, social exclusion, deprivation and abuse, coupled with lower levels of access to health care, employment, access to justice and economic advancement.”²⁶⁵ “Since sex work is criminalised, communities often believe abuses against sex

²⁵⁸ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 27 accessed online at <http://icrhh.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20June%202013%20monograph%20final.pdf> on 03 May 2017

²⁵⁹ Pauw & Brener at 472; Mgbako op cit (215) 1431

²⁶⁰ Mgbako op cit (215) 1431

²⁶¹ Mgbako op cit (215) 1431

²⁶² Mgbako op cit (215) 1431

²⁶³ Mgbako op cit (215) 1431

²⁶⁴ Agustin, L. (2013) "The sex worker stigma: How the law perpetuates our hatred (and fear) of prostitutes" *Salon*; Gira Grant, M. (2014) "Playing the Whore: The Work of Sex Work"

²⁶⁴ World Health Organization (2005) "Violence Against Sex Workers and HIV Prevention". Available: <http://www.who.int/gender/documents/sexworkers.pdf>

²⁶⁵ Agustin, L. (2013) "The sex worker stigma: How the law perpetuates our hatred (and fear) of prostitutes" *Salon*; Gira Grant, M. (2014) "Playing the Whore: The Work of Sex Work"; Women's Legal Centre, "Lawyer's Manual on Sex Work Litigation Pursuing Justice for Sex Workers", 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

workers are justified. As a result, sex workers suffer stigma, discrimination and abuse from many facets of society including police, health workers, schools, banks and other service providers”²⁶⁶.

Sex workers are further vulnerable to HIV/AIDS and other sexually transmitted infections.²⁶⁷ For many people, this implies that sex workers are a threat to public health and should be jailed or otherwise punished to protect the public,²⁶⁸ irrespective of the fact that everyone is responsible for safer sex – not just sex workers. A Global AIDS report noted that there is ‘continuing evidence [which] indicates that unprotected paid sex and sex between men are significant factors in the HIV epidemics in several sub-Saharan African countries’.²⁶⁹ The area hardest hit by HIV is East and Southern Africa. It is home to about 6.2% of the world's population, but more than half (54%) of the world's total number of people living with HIV (20.6 million people).²⁷⁰

In 2018, South Africa accounted for over a quarter (240,000) of the new infections in the country.²⁷¹ More than 50 percent of new infections were accounted for by seven other countries: Mozambique (150,000), Tanzania (72,000), Uganda (53,000), Zambia (48,000), Kenya (46,000), Malawi (38,000) and Zimbabwe (38,000).²⁷² Overall, new infections in the region have decreased by 28 percent since 2010.²⁷³ Despite the continuing severity of the epidemic, huge strides have been made towards meeting the UNAIDS 90-90-90 targets. In 2018, 85% of people living with HIV were aware of their status, 79% of them were on treatment (equivalent to 67% of all people

²⁶⁶ Associations between sex work laws and sex workers’ health: A systematic review and meta-analysis of quantitative and qualitative studies Accessed at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6289426/>; Mgbako op cit (215) 1431

²⁶⁷ Open Society Foundations op cit (n217)

²⁶⁸ Open Society Foundations op cit (n217)

²⁶⁹ WHO 2011. Preventing HIV in sex work settings in sub-Saharan Africa. Geneva: WHO; Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 30

²⁷⁰ Avert. “HIV and AIDS in East and Southern Africa Regional Overview.” *AVERT*, 26 Feb. 2019, www.avert.org/professionals/hiv-around-world/sub-saharan-africa/overview.

²⁷¹ Avert op cit (n237)

²⁷² Avert op city (n237)

²⁷³ Avert op cit (n237)

living with HIV in the region), and 87% of those on treatment had achieved viral suppression (equivalent to 58% of all people living with HIV in the region).²⁷⁴

In 1998, HIV prevalence among different female sex worker groups in South Africa ranged between 46 and 69 percent.²⁷⁵ In 2004 to 2005, a Durban study identified 775 women at high risk for HIV infection. Of these, 78.8 percent self-identified as sex workers. After being screened, 59.6 percent were found to be HIV-positive.²⁷⁶ The prevalence of HIV and other sexually transmitted infections (STIs) is, therefore, higher among sex workers than the rest of the population.²⁷⁷ Many sex workers and their clients engage in penetrative sex with multiple partners over a prolonged period, putting them at risk for HIV infection if they do not use condoms.²⁷⁸ In conditions of dire poverty, the prospect of AIDS-related illness may seem less important than the immediate need for money, leading some people to sell sex under risky circumstances.²⁷⁹

Sex workers are often in a subordinate position relative to their clients, due to a disparity in gender, income and/or social class, which could make negotiating condom use a challenge.²⁸⁰ Sex workers may also fear violence from clients if they should demand safer sex.²⁸¹ They often face negative attitudes from service providers including health workers, which could impede their access to condoms and HIV screening or treatment for any other STIs, resulting in increased

²⁷⁴ Avert op cit (n237)

²⁷⁵ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 63; Ramjee, G., Karim, S. S. & Sturm, A. W. 1998. Sexually transmitted infections among sex workers in KwaZulu-Natal, South Africa. *Sex Transm Dis*, 25, 346-9; Rees, H., Bekinska, M. E., Dickson-Tetteh, K., Ballard, R. C. & Htun, Y. E. 2000. Commercial sex workers in Johannesburg: risk behaviour and HIV status. *South African Journal of Science*, 96, 283-284; Williams, B. G., Taljaard, D., Campbell, C. M., Gouws, E., Ndhlovu, L., Van Dam, J., Carael, M. & Avert, B. 2003. Changing patterns of knowledge, reported behaviour and sexually transmitted infections in a South African gold mining community. [Miscellaneous]. *AIDS*, 17, 2099-2107.

²⁷⁶ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 63; Van Loggerenberg, F., Mlisana, K., Williamson, C., Auld, S. C., Morris, L., Gray, C. M., Abdool Karim, Q., Grobler, A., Barnabas, N., Iriogbe, I., Abdool Karim, S. S. & For The, C. A. I. S. T. 2008. Establishing a Cohort at High Risk of HIV Infection in South Africa: Challenges and Experiences of the CAPRISA 002 Acute Infection Study. *PLoS ONE*, 3, e1954.

²⁷⁷ Memorandum submitted to the South African National Aids Council by Women's Legal Centre, SWEAT and Sonke Gender Justice, 2015, page 52

²⁷⁸ Memorandum submitted to the South African National Aids Council op cit (n244) 52

²⁷⁹ Memorandum submitted to the South African National Aids Council op cit (n244) 53

²⁸⁰ Memorandum submitted to the South African National Aids Council op cit (n244) 53

²⁸¹ Memorandum submitted to the South African National Aids Council op cit (n244) 53

susceptibility to HIV infection.²⁸² Sex work often occurs in venues like bars and clubs, where alcohol and drugs are used and sex workers may use these substances to lower inhibitions to make work easier. Intoxication can impair decision-making and result in risky sexual behaviour.²⁸³ Unfortunately, many sex workers do not experience an environment where the health care sector does not stigmatize them, and they are often faced with human rights violations to the rights to privacy and access to health.²⁸⁴ For example, , sex workers would be shamed by the health professional when they seek medical assistance, or they would be denied access to treatment or would be threatened with a report to the police for conducting sex work. For example, sex workers in South Africa, Kenya and Zimbabwe have to pay bribes to health care workers to obtain services or treatment; they are humiliated by health care workers by being laughed at for their work; and health care workers breach their confidentiality regarding their HIV status or the nature of their work.²⁸⁵ Studies in South Africa show that judgmental and discriminatory practices employed by staff of health care facilities is a barrier to effective STI provision and care.²⁸⁶

²⁸² Memorandum submitted to the South African National Aids Council op cit (n244) 53

²⁸³ Memorandum submitted to the South African National Aids Council op cit (n244) 53

²⁸⁴ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 36 accessed online at <http://icrhb.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20june%202013%20monograph%20final.pdf> on 03 May 2017

²⁸⁵ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 36 accessed online at <http://icrhb.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20june%202013%20monograph%20final.pdf> on 03 May 2017; Scorgie, F., Nakato, D., Harper, E., Richter, M., Maseko, S., Nare, P., Smit, J. & Chersich, M. F. 2013. "We are despised in the hospitals": Sex workers' experiences of accessing health care in four African countries. *Culture, Health and Sexuality*, 15, 450-465; Boyce, P. & Isaacs, G. 2011. An Exploratory Study of the Social Contexts, Practices and Risks of Men Who Sell Sex in Southern and Eastern Africa. African Sex Worker Alliance

²⁸⁶ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 36 accessed online at <http://icrhb.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20june%202013%20monograph%20final.pdf> on 03 May 2017; Pauw, I. & Brener, L. 2003. 'You Are Just Whores: You Can't Be Raped': Barriers to Safer Sex Practices among Women Street Sex Workers in Cape Town. *Culture, Health & Sexuality*, Nov - Dec, 465-481; Binagwaho, A., Agbonyitor, M., Mwananawe, A., Mugwaneza, P., Irwin, A. & Karema, C. 2010. Developing human rights-based strategies to improve health among female sex workers in Rwanda. *Health Hum Rights*, 12, 89-100.

Criminalisation impedes successful HIV public health intervention practices.²⁸⁷ Sex workers, their clients and family members make up 19.8 per cent of new HIV infections in South Africa.²⁸⁸ Sex workers face an increased risk of HIV and STI infections because in health services, criminalisation fuels stigma against sex workers and fosters police abuse of sex workers.²⁸⁹ It also dissuades sex worker involvement in the development of health policy decisions that affect them.²⁹⁰

Criminalisation categorises sex workers as criminals, which negatively affects the way that health workers view them.²⁹¹ This leads to discrimination in health care settings that obstructs sex workers' access to services and information.²⁹² Often the negative and disapproving attitudes of health professionals towards sex workers also cause sex workers to delay seeking treatment for STI infections, HIV testing and post-exposure prophylaxis medication.²⁹³ In addition, the isolated

²⁸⁷ Special Rapporteur, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, p. 17, A/HRC/14/20 (Apr. 27, 2010) [hereinafter Special Rapporteur on the right to health].

²⁸⁸ South Africa Centre for Epidemiological Modeling and Analysis, Mode of Transmission Study (2010).

²⁸⁹ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 36 accessed online at <http://icrhb.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20june%202013%20monograph%20final.pdf> on 03 May 2017

²⁹⁰ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 36 accessed online at <http://icrhb.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20june%202013%20monograph%20final.pdf> on 03 May 2017

²⁹¹ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 36 accessed online at <http://icrhb.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20june%202013%20monograph%20final.pdf> on 03 May 2017

²⁹² Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 36 accessed online at <http://icrhb.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20june%202013%20monograph%20final.pdf> on 03 May 2017

²⁹³ Mgbako op cit (n215)

nature of sex work, due to its illegality, increases sex workers' susceptibility to sexual abuse from clients²⁹⁴ and often leaves them hidden from health outreach services that do exist.²⁹⁵

Since sex work is perceived to be a sensitive political issue, very few HIV and AIDS programmes on sex work focus on law reform, despite the fact that criminal law is the single most powerful factor that makes sex workers vulnerable to HIV.²⁹⁶ This also holds true for the multi-billion dollar HIV and AIDS funding organisation PEPFAR (the Presidential Emergency Fund for AIDS Relief), which has made its funding conditional on grant recipients pledging that they will not 'promote or advocate the legalization or practice of prostitution or sex trafficking'.²⁹⁷ These approaches severely hampers effective HIV strategies to reduce the number of new infections and to ensure uninterrupted treatment for those who are HIV positive.²⁹⁸

3.3. Partial Criminalisation (End-demand Model)

This model, known as "end demand" focuses on criminalizing the buyer's side as a means to extinguish sex work. The end demand model does not recognize sex work as ever being a choice and views all sex work as gender-based violence.²⁹⁹

²⁹⁴ Fiona Scorgie et. al., *AFRICAN SEX WORKER ALLIANCE*, "I Expect to be Abused and I Have Fear": Sex Workers' Experiences of Human Rights Violations and Barriers to Accessing Healthcare in Four African Countries, 16 (April 2011); see also WORLD HEALTH ORGANIZATION, Preventing HIV in Sex Work Settings in Sub-Saharan Africa 13 (2011).

²⁹⁵ Ilse Pauw & Loren Brener, 'You are Just Whores—You Can't be Raped': Barriers to Safer Sex Practices Among Women Street Sex Workers in Cape Town, 5 CULTURE, HEALTH & SEXUALITY 465, 474 (2003)

²⁹⁶ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 36 accessed online at <http://icrhhb.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20june%202013%20monograph%20final.pdf> on 03 May 2017

²⁹⁷ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 36 accessed online at <http://icrhhb.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20june%202013%20monograph%20final.pdf> on 03 May 2017

²⁹⁸ Marlise Richter, Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya, 2013, page 36 accessed online at <http://icrhhb.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20june%202013%20monograph%20final.pdf> on 03 May 2017

²⁹⁹ LeMoon, Laura. "Three Myths of the 'End Demand' Model That Hurt People in the Sex Industry." *Medium*, 21 Mar. 2019, medium.com/@lauralemoon/three-myths-of-the-end-demand-model-that-hurt-people-in-the-sex-

This model is based on the criminalization of buyers. The primary goal of the model is to minimize the demand for sex work by punishing the solicitation of sexual services to reduce the overall amount of the illicit sex industry. “Globally, ‘End Demand’ legislation criminalising the purchase of sexual services has proliferated, and its enforcement has increased. In a legal mapping project undertaken by Global Network of Sex Work Projects (NSWP) on behalf of UNAIDS in 2016, in 58 of 188 countries, clients were criminalised or penalised for paying for sex.”³⁰⁰ ‘End Demand’ legislation is often framed as a strategy to promote gender equality and combat trafficking through eradicating sex work.³⁰¹ There are a growing number of countries who have implemented or who are considering implementing this model. “These countries include: Argentina, Canada, Israel, India, Ireland, Northern Ireland, Fiji, Finland, France, Iceland, Nepal, Norway, the Philippines, Scotland, South Africa, South Korea and Sweden.”³⁰²

For the purposes of this dissertation, I have chosen to focus on Sweden as an example of the end-demand model.

In 2014, in favour of the end-demand model, the European Parliament adopted a non-binding resolution urging Member States to criminalize the procurement of prostitution and to give assistance to victims of trafficking in human beings to leave the sex trade. In 1999, the Swedish government introduced the Sexköpslag, which criminalised clients but retained laws criminalising brothels and others profiting from sex work

Advocates for this model, claim that it helps sex workers because it targets the market for sex work, not the sex workers themselves. Reduce the demand, the logic goes, and sex work will go away, along with the human rights abuses many sex workers experience. Unfortunately, the evidence suggests that things are not so simple.³⁰³

industry-4ead6bf189da#:~:text=This%20model%2C%20known%20as%20%E2%80%9Cend. Accessed 7 Mar. 2021.

³⁰⁰ Global Network of Sex Work Projects “the Impact of ‘End Demand’ Legislation on Women Sex Workers POLICY BRIEF Accessed at

https://www.nswp.org/sites/nswp.org/files/pb_impact_of_end_demand_on_women_sws_nswp_-_2018.pdf

³⁰¹ Global Network of Sex Work Projects Policy Brief op cit (n267)

³⁰² Global Network of Sex Work Projects Policy Brief op cit (n267)

³⁰³ Open Society Foundation, “The False Promise of End Demand Laws”, 2 June 2017. Accessed at <https://www.opensocietyfoundations.org/voices/false-promise-end-demand-laws>

From as early as 1847, sex work was allowed in Sweden but it was heavily regulated. This means that sex workers were forced to submit themselves for regular medical examinations, they had to carry cards to prove that they were healthy and they were heavily taxed.³⁰⁴ There were also programmes put in place to assist sex workers who wanted to exit the industry, like housing and vocational programmes.³⁰⁵

In short, partial criminalisation means that everyone involved in the sex industry except sex workers themselves are breaking the law. Therefore, sex workers are allowed to sell sex, but the activities of clients, brothel-owners and others remain illegal.

3.3.1 Legislation

“In 1999, Sweden criminalised sex workers’ clients and maintained the criminalisation of third parties such as brothel-owners, managers, security and support staff.³⁰⁶ The individual selling of sex remained legal.”³⁰⁷

Clients are criminalised under the Swedish Penal Code Chapter 6, section 11, which provides: “*A person who, otherwise than as previously provided in this Chapter, obtains a casual sexual relation in return for payment, shall be sentenced for purchase of sexual service to a fine or imprisonment for at most six months. The provision of the first paragraph also apply if the payment was promised or given by another person*”.³⁰⁸ Previously under the Sex Purchase Act, 1999. Laws requiring a landlord to terminate the lease if a tenant (or others) uses the premises for

³⁰⁴ South African Law Reform Commission Discussion paper op cit (n18) 118.

³⁰⁵ South African Law Reform Commission Discussion paper op cit (n18)118; Kilvington et al 'Prostitution Policy in Europe' 2000.

³⁰⁶ Global Network of Sex Work Projects Policy Brief op cit (n267)

³⁰⁷ Global Network of Sex Work Projects Policy Brief op cit (n267)

³⁰⁸ Sweden Penal Code accessed at <https://www.icj.org/wp-content/uploads/2013/05/Sweden-Penal-code-Chapter-6-with-amendments-eng.pdf>

sex work include: Penal Code chapter 6 s.12.2³⁰⁹; Land Code 12 s. 42.1.9³¹⁰; Condominium Act 7 s.18.8³¹¹. Brothel keepers and procurers are criminalised under the Penal Code chapter 12 s. 12.

³⁰⁹ Penal Code Chapter 6 section 12.2 provides as follows: “A person who promotes or improperly financially exploits a person’s engagement in casual sexual relations in return for payment shall be sentenced for procuring to imprisonment for at most four years. If a person who, holding the right to the use of premises, has granted the right to use them to another, subsequently learns that the premises are wholly or to a substantial extent used for casual sexual relations in return for payment and omits to do what can reasonably be requested to terminate the granted right, he or she shall, if the activity continues or is resumed at the premises, be considered to have promoted the activity and shall be held criminally responsible in accordance with the first paragraph. If a crime provided for in the first or second paragraph is considered gross, imprisonment for at least two and at most eight years shall be imposed for gross procuring. In assessing whether the crime is gross, special consideration shall be given to whether the crime has concerned a large-scale activity, brought significant financial gain or involved ruthless exploitation of another person” Accessed at <https://www.government.se/4a8349/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf>

³¹⁰ Land Code Chapter 12 Section 42 (1)-(9) provides as follows: The tenancy is forfeited and the landlord entitled to repudiate the agreement 1. if, in the case of a dwelling unit, the tenant delays paying the rent by more than one week after the payment day and Section 55 d, subsections five-seven, do not indicate otherwise, (2) if, in the case of non-housing premises, the tenant delays paying the rent by more than two weekdays after the payment day, (3) if the tenant transfers the tenancy without necessary consent or permission or otherwise places another party in his stead or sublets the unit and, after being called upon to do so, does not without delay either rectify the matter or apply for permission and have the permission granted, (4) if the unit is used contrary to Section 23 or 41 and the tenant does not rectify the matter immediately after being called upon to do so, (5) if the tenant or any other party to which the tenancy has been transferred or the unit let causes, through negligence, the occurrence of vermin in the unit or, through omission to inform the landlord of this, contributes to the spread of vermin in the property unit, (6) if the unit is otherwise neglected or the tenant or another party to whom the tenancy has been transferred or the unit sublet neglects any point to be observed under Section 25 in the use of the unit or does not take the care stipulated in that section and the matter is not rectified without delay after being called for, (7) if, contrary to Section 26, admittance to the unit is refused and the tenant cannot show valid excuse, (8) if the tenant neglects a contractual obligation extending beyond his obligations under this chapter and it must be deemed of exceptional importance for the landlord that the obligation be discharged, or (9) if the unit is used wholly or to a substantial extent for economic or suchlike activity which is of a criminal nature or in which criminal procedure forms a not insignificant part or is used for casual sexual relations in return for payment. In cases where the rent is to be paid in advance for more than one month, paragraph 2 of the foregoing shall apply only if the tenant delays payment of the rent for the calendar month by more than two weekdays after the beginning of the month or, in the case of the rent for the first calendar month during the tenancy, after the payment day. Notice of cancellation of a tenancy agreement referring to a dwelling unit under paragraph 6 of the foregoing on account of residential disturbances may not be given before the social welfare committee has been notified as indicated in Section 25 (2). If the question is one of especially grave residential disturbances, the provisions of paragraph 6 of the foregoing shall apply even if no rectification has been called for. In connection with such disturbances, notice of cancellation of a tenancy agreement referring to a dwelling unit may be given without previous notification of the social welfare committee. A copy of the notice shall, however, be sent to the social welfare committee. The provisions now made concerning especially grave disturbances do not apply if it is a party to whom the unit has been sublet with the landlord's consent or permission from the regional rent tribunal who neglects any of the points to be observed under Section 25 in the use of the unit or does not take the care required under the same section. The tenancy is not forfeited if the tenant's misconduct is of minor importance. If the agreement is cancelled on grounds of forfeiture, the landlord is entitled to damages. Accessed at <https://www.government.se/4a8349/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf>

³¹¹ Global Network of Sex Work Projects “Briefing Paper: The Criminalisation of Clients”, Accessed at <https://www.nswp.org/sites/nswp.org/files/Criminalisation%20of%20Clients-c.pdf>

3.3.2. The implications of the partial criminalisation model on sex workers human rights

The partial criminalization model was pioneered by researchers, one of whom was Cecilie Høigård. Through his research, he uncovered harrowing narratives of violence committed against sex workers by clients and others, such as police officers.³¹² The underlying premise of the partial criminalisation model is thus that sex work is inherently exploitative and can never be regarded as work. Commercial sex is regarded as violence against the seller and the distinction between voluntary and coerced sex is denied. It follows that the buyer is always a perpetrator of violence.

The partial criminalisation model represents a refusal in law to accept sex work as legitimate work. Sex work remains underground, reducing access by sex workers to health care and other services. Research and legal experts and community have expressed serious concerns regarding end-demand legislation, as it reproduces the same risks and harms of previous criminalization models whereby targeting clients still leads to rushed transactions and improper screening, increasing risk of violence and HIV/STIs.³¹³ For example, a recent study from France found that end-demand laws had detrimental effects on sex workers' safety, health and overall living conditions—worse than the previous laws against soliciting.³¹⁴ It is irrational to allow someone to use a service but to criminalise the activities surrounding it like buying that service (sex), advertising it or having an agent or manager (to manage clients and advertisements). Sex workers are vulnerable to abuse by police, clients and managers, and do not benefit from the protection of labour laws. One of the explicit goals of end-demand approaches is to increase access to services

³¹² World Health Organization, “Addressing Violence Against Sex Workers” Accessed at https://www.who.int/hiv/pub/sti/sex_worker_implementation/swit_chpt2.pdf

³¹³ Krüsi A, Pacey K, Bird L, Taylor C, Chettiar J, Allan S, et al. Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada: A qualitative study. *BMJ Open*. 2014;4(e005191). 10.1136/bmjopen-2014-005191; Le Bail H, Giametta C. What do Sex Workers Think About the French Prostitution Act? A Study on the Impact of the Law from 13 April 2016 Against the “Prostitution System” in France. Paris; 2018. Available: <https://www.medecinsdumonde.org/sites/default/files/ENGLISH-Synthese-Rapport-prostitution-BD.PDF>

³¹⁴ Le Bail H, Giametta C. What do Sex Workers Think About the French Prostitution Act? A Study on the Impact of the Law from 13 April 2016 Against the “Prostitution System” in France. Paris; 2018. Available: <https://www.medecinsdumonde.org/sites/default/files/ENGLISH-Synthese-Rapport-prostitution-BD.PDF>

and supports for sex workers, yet scientific and legal evidence suggest that criminalization may impede access to services.³¹⁵

Partial criminalization still means that there is a crime, which means that law enforcement will have to be involved. This results in a continued adversarial relationship in that police officers monitor and survey sex workers in order to arrest the criminals – that being their clients. The impact on sex workers is that the police continue to harass and target them in order to “catch” the buyers of sex. Any form of criminalization reinforces stigma, which makes it difficult for sex workers to access health care and social services.

The partial criminalization model also appears to conflate human trafficking with commercial sex work. According to the Sweden government, the criminalisation of the buying of sex is necessary to reduce the demand that drives sex trafficking.³¹⁶

Sex-worker led organization and other organizations such as the Global Alliance Against Traffic in Women, Human Rights Watch and the World Health Organization ‘oppose the Swedish model because it seriously harms people who sell sex, whether those people are working through choice, circumstance or coercion.’³¹⁷ The harm caused by the partial criminalisation model is mainly threefold and includes the following: First, women are stripped of their agency and autonomy because they are treated as minors who are unable to consent to sexual acts. It also views sex workers as victims who need to be rescued.³¹⁸ Secondly, criminalisation of clients causes an

³¹⁵ Csete J, Cohen J. Health benefits of legal services for criminalized populations: The case of people who use drugs, sex workers and sexual and gender minorities. *J Law, Med Ethics*. 2010;38:816–31; Shannon K, Strathdee SA, Goldenberg SM, Duff P, Mwangi P, Rusakova M, et al. Global epidemiology of HIV among female sex workers: Influence of structural determinants. *Lancet*. 2015;385:55–71. 10.1016/S0140-6736(14)60931-4; Amnesty International. Sex Worker’s Rights are Human Rights. 2015.

Available: <https://www.amnesty.org/en/latest/news/2015/08/sex-workers-rights-are-human-rights/>; Global Commission on HIV and the Law. Risks, Rights & Health. New York; 2012.

Available: <http://www.hivlawcommission.org/>

³¹⁶ Michael Shively, Ph.D., Kristina Kliorys, Kristin Wheeler, Dana Hunt, “A National Overview of Prostitution and Sex Trafficking Demand Reduction Efforts, Final Report” June 2012, Accessed at <https://www.ncjrs.gov/pdffiles1/nij/grants/238796.pdf>

³¹⁷ Scot-pep, ‘The Swedish Model’, accessed on

http://www.scotpep.org.uk/sites/default/files/reports/the_swedish_model_summary.pdf

³¹⁸ Michael Shively and others op cit (n283)

adversarial relationship between sex workers and police in that sex workers' clients are arrested or fined for consensual sex and sex workers remain 'guilty by association' thereby making them vulnerable to police harassment.³¹⁹

Thirdly, to evade the police and protect their clients, sex workers often work in isolated areas thereby limiting their time to assess the character of the clients, which places them at risk of being abused by clients.³²⁰ Fourthly, the way in which police officers enforce the law is done in a manner to criminalization discourage sex workers from participating in- and plying their trade. This messaging is often heard by the broader community such as health professionals and members of the public all thereby further stigmatising sex workers.³²¹

The partial criminalisation system has proven to be largely ineffective and detrimental to sex workers. Between 1999 and 2003 (since the end demand legislation was adopted in Sweden in 1999), there were fewer than 500 successful prosecutions of clients.³²² Ann Jordan argues that the Swedish government failed in its goal to reduce or eradicate sex work. Instead, sex workers in Sweden simply moved indoors where they solicit clients online and conduct business in brothels.³²³ Furthermore, the model of partial criminalisation laws, which are laws to allow the sale of sex, but not the purchase of it, led to a decrease in the visibility and access of sex workers to health care services³²⁴, such as medical and psychological services.³²⁵ Due to the reported drop in the demand for services from street-based workers, their willingness to turn clients away is reduced thereby resulting in competition to offer the lowest price to secure the most clients.³²⁶

³¹⁹ Chi Adanna Mgbako op cit (n215) 1434.

³²⁰ Sonke Gender Justice, 'The Swedish Model – Why Partial Criminalisation will not help sex workers' Accessed on <http://www.genderjustice.org.za/video/the-swedish-model-why-partial-criminalisation-of-sex-work-will-not-help-sex-workers-or-sa-society/>

³²¹ Chi Adanna Mgbako op cit (n215) 1434

³²² Chi Adanna Mgbako op cit (n215) 1433

³²³ Chi Adanna Mgbako op cit (n215) 1433.

³²⁴ Global Network of Sex Work Projects, "Briefing Paper 07 Sex Work and the Law. Understanding the legal frameworks and the struggle and for sex work law reforms" Accessed at <https://www.nswp.org/sites/nswp.org/files/Sex%20Work%20%26%20The%20Law.pdf>

³²⁵ Global Network of Sex Work Projects op cit (n291)

³²⁶ The Journal of Global Health, Sex work and the law in South Africa, Accessed at <https://www.ghjournal.org/sex-work-and-the-law-in-south-africa-sweden-and-new-zealand-an-evidence-based-argument-for-decriminalization/>

Ultimately the partial criminalisation model overlooks evidence about the risks that criminalisation forces sex workers to absorb and it fails to support sex worker's security interests.³²⁷

3.4. Legalisation/ Regulation

Regulation (sometimes referred to as legalisation) permits sex work but seeks to control it using regulatory schemes such as licensing of brothels, registration of sex workers or identification of 'red light zones' where sex workers may work. Legalisation means the introduction of laws and policies specific to sex work to formally regulate it.

The Netherlands is offered as an example of regulating the practice of sex work. In the Netherlands, sex work is a legal activity that takes place in sex clubs, behind "display windows", in hotels, in bars, as escort services and on the streets.

3.4.1 Legislation

On October 1st, 2000, the Dutch ban on brothels, which had existed since 1911, was lifted. The exploitation of voluntary sex work is no longer considered a crime, however, any form of forced prostitution, pimping and trafficking will remain in the Penal Code. The amendment to the Criminal Code in the Netherlands brought brothels in line with regulations and policies that applied to commercial businesses.³²⁸ This means that brothels are required to comply with the policy conditions of the Criminal Code in order to receive their licence to operate a brothel and sell sex. There are also conditions that apply specifically to brothels such as the size of brothels, their geographical location and health and safety regulations.³²⁹ As such, brothels must: register with

³²⁷ Angela Campbell, "For sex workers the Nordic model still falls short", May 2014. Accessed at <https://www.theglobeandmail.com/opinion/for-sex-workers-the-nordic-model-still-falls-short/article18713169/>

³²⁸ Dutch Criminal Penal Code 2000. Accessed at <https://www.legislationline.org/documents/section/criminal-codes/country/12/Netherlands/show>

³²⁹ S250a of the Dutch Criminal Penal Code. Accessed at https://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf

local authorities; meet health and safety standards; confirm that they do not hire illegal immigrants (persons without a valid residence permit) and underage persons; have condoms available; and protect sex workers from clients who are unwilling to use condoms.³³⁰ The aforementioned guidelines are published in the Handbook Local Prostitution Policy.³³¹ The most important elements of the policy include:

1. There must be a ‘contract of control’ with a set of agreements between local government, the police and the public prosecution on the correlation between administrative and punitive measures.³³²
2. Local government can organise a licensing system to regulate the sex work sector on the basis of a model published by the Association of Dutch Municipalities.³³³
3. Specific guidelines must be developed for public prosecutors on how to proceed in cases of trafficking in persons and forced prostitution.³³⁴
4. A special guideline must be written on how to legally deal with victims of trafficking.³³⁵
5. A code of conduct must be drafted for civil servants and policemen on how handle sex workers.³³⁶
6. Officials who are responsible for the issuing of licenses to operate a brothel must have access to criminal records to check the background of owners and managers of brothels.³³⁷
7. Sex workers must identify themselves to the police to be protected by the law.
8. Sex workers must undergo mandatory regular health screens.³³⁸

3.4.2. Impact of the legalisation model on sex workers

³³⁰ S250a of the Dutch Criminal Penal Code

³³¹ A L Daalder, “Prostitution in the Netherlands in 2014”, Accessed at <https://www.government.nl/binaries/government/documents/reports/2015/06/01/prostitution-in-the-netherlands-in-2014/prostitution-in-the-netherlands-in-2014.pdf>

³³² A L Daalder op cit (n298)

³³³ AL Daalder op cit (n298) page 28

³³⁴ AL Daalder op cit (n298) page 27

³³⁵ AL Daalder op cit (n298) page 13

³³⁶ AL Daalder op cit (n298) page 13

³³⁷ AL Daalder op cit (n298) page 27

³³⁸ AL Daalder op cit (n298) page 17; Chi Adanna Mgbako op cit (n215) 1435.

For many years, people have argued that the legalization of sex work would be beneficial for sex workers, however the legalization model has unintended consequences for sex workers, in that it leave sex workers tangled up in a mess of burdensome regulations.³³⁹ The legalized model, commonly portrayed as a more inclusive and realistic solution, also criminalizes those sex workers who are unable or unable to perform different bureaucratic duties, and therefore maintains some of the worst harms of criminalization. It overwhelmingly excludes sex workers who, like people who use drugs or who are undocumented, are already oppressed. This makes their position more precarious, thus strengthening the influence of unscrupulous managers.³⁴⁰

Legalisation has failed to address many of the problems associated with criminalisation.³⁴¹ Where countries follow the legalisation model, sex workers are hampered by bureaucratic regulations that turn them into criminals if they don't comply.³⁴²,And the police are unable to enforce a law where the crime is committed in private with consenting adults. First, it requires extensive monitoring to ensure that brothels abide by the day to day government controls.³⁴³ To monitor compliance with the regulations means that police officers spend large amounts of time surveying brothels.³⁴⁴ Second, regimes that require mandatory health checks results in increased stigma against sex workers.³⁴⁵ Targeting sex workers alone to undergo forced mandatory health checks increases the stereotype that they are vectors of disease.³⁴⁶ Finally, it creates a system where one will find illegal brothels, because sex workers do not want to register with the government as they find it discriminatory, which creates an underground community of sex workers who are vulnerable to abuse by clients and other violations including physical abuse from the police.³⁴⁷ Therefore, under legalisation / regulation, unlicensed and illegal sex workers comprise a

³³⁹ Maxwell Tani, "Sex Worker explains the difference between legalizing and decriminalizing prostitution", June 2015. Accessed at <https://www.businessinsider.com/sex-worker-explains-the-difference-between-legalizing-and-decriminalizing-prostitution-2015-6>

³⁴⁰ Maxwell Tani op cit (n306)

³⁴¹ Chi Adanna Mgbako op cit (n215) 1433.

³⁴² Maxwell Tani op cit (n306)

³⁴³ Chi Adanna Mgbako op cit (n215) 1433.

³⁴⁴ Chi Adanna Mgbako op cit (n215) 1435

³⁴⁵ Chi Adanna Mgbako op cit (n215) 1436

³⁴⁶ Chi Adanna Mgbako op cit (n215) 1436

³⁴⁷ Chi Adanna Mgbako op cit (n215) 1436

substantial proportion of the sex worker population.³⁴⁸

3.5. Decriminalisation (non-criminalisation)

Decriminalisation is the absence of criminal sanction against sex work. Decriminalization is often combined with the acceptance of sex work as a legitimate form of work to be approached through labour laws, which address working conditions (where sex workers are recognised as employees) and the rights of sex workers are promoted and fulfilled.³⁴⁹ New Zealand is an example of a country that decriminalizes sex work and for this dissertation, I will use New Zealand as an example in the discussion of decriminalization.

3.5.1 Legislation

The Prostitution Reform Act 2003 (PRA) came into operation three to five years after the Act's commencement in June 2003.³⁵⁰ The purpose of the PRA was to: decriminalise sex work; create a framework to safeguard the human rights of sex workers; protect sex workers from exploitation; promote the welfare and occupational health and safety of sex workers; contribute to public health; a certification system wherein brothel operators can apply for a licence to operate a brothel;³⁵¹ and prohibit persons under the age of 18 years to sell sex. When the legislation was drafted, it was based on a harm reduction approach to sex work, that means that the legislature acknowledged the range of harms and wanted to incorporate a system to mitigate it to ensure that sex workers health and human rights are promoted and protected. Harm reduction consists of a range of public health

³⁴⁸ Chi Adanna Mgbako op cit (n215) 1436

³⁴⁹ South African Law Reform Commission, Discussion Paper, Project 107, 2009, page 13 (Accessed on http://www.justice.gov.za/salrc/dpapers/dp0001-2009_prj107_2009.pdf on 21 January 2016

³⁵⁰ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 200, page 22. Accessed on <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> on 27 January 2016

³⁵¹ New Zealand Ministry of Justice, "Apply for a Brothel Operator Certificate" Accessed at www.justice.govt.nz/licences-certificates/brothel-operator-certification/apply-for-a-brothel-operator-certificate/. Accessed 7 Mar. 2021.

policies specifically designed to reduce the harmful effects of various human behaviour, both legal and illegal.³⁵² The PRA was designed to manage behaviour such as recreational drug use and sexual activity.³⁵³ The legislation shifted from a moralist approach to sex work to a health and human rights approach.³⁵⁴

In order to illustrate how the PRA protects minors and persons who may be forced into the sex work industry, the relevant sections of the PRA are discussed below.

3.5.1.1 Statutory Framework of the Prostitution Reform Act

In this section, I will provide information on the relevant sections of the Prostitution Reform Act, insofar as they relate to the context of my dissertation.

3.5.1.2. Prohibitions on use of persons under 18 years

The Act makes it an offence to receive or facilitate sexual services from minors namely, those who are under the age of 18 years. If convicted, the penalty is between five to seven years Netherlands brought imprisonment (section 149A of the Crimes Act).³⁵⁵

3.5.1.3. Health and safety requirements

³⁵² Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 200, page 22. Accessed on <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> on 27 January 2016

³⁵³ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 200, page 22. Accessed on <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> on 27 January 2016

³⁵⁴ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 200, page 22. Accessed on <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> on 27 January 2016

³⁵⁵ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 200, page 23. Accessed on <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> on 27 January 2016

The PRA includes provisions for business owners in the sex industry to adopt and promote safer sex practices such as providing condoms and lubricants for sex workers to use and putting in place measures to protect sex workers from violent or problematic customers. If businesses fail to adopt the aforementioned practices, they may be liable upon conviction to a fine not exceeding \$10,000.³⁵⁶

The Act goes further to include provisions to ensure that sex workers and their clients adopt and adhere to safer sex practices, failing which upon conviction they could be liable to a fine not exceeding \$2,000. This has been well adhered to and since 2009, only one client has been convicted.³⁵⁷

3.5.1.4. Small owner-operated brothels

The Act makes provision for small owner-operated brothels (SOOBs), which is defined as brothels with no more than four sex workers where each sex worker retains control over his/her earnings.³⁵⁸ This implies that the employee is considered to be an individual employee and therefore not necessarily a brothel employee, so it is not necessary to have a manager to manage the business. Since there is no boss to oversee the sex worker's job, the SOOB does not need to apply for a certificate from an operator.³⁵⁹

³⁵⁶ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 200, page 22. Accessed on <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> on 27 January 2016

³⁵⁷ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 200, page 23. Accessed on <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> on 27 January 2016

³⁵⁸ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 200, page 23. Accessed on <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> on 27 January 2016

³⁵⁹ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 200, page 23. Accessed on <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> on 27 January 2016

3.5.1.5. Brothel operator certification system

The Act provides that every business must register and hold a valid operator's licence. The criteria for obtaining a licence is that the brothel operator must: be over the age of 18, be a citizen or permanent resident of New Zealand or Australia, and not have any disqualifying convictions, such as any sexual offences related to minors. If an operator carries out activities, such as operating a brothel, without a valid certificate, he/she is liable on conviction to a fine not exceeding \$10,000.

3.5.1.6. By-laws

The Act permits territorial authorities to create by-laws in their areas to regulate brothels. For example, by-laws can be created regarding the location of businesses, signage outside of the building/location with the name of the business, and advertising of the business and its services.³⁶⁰ This means that the Act permits municipalities to determine how brothels can advertise their services for the sale of sex.

3.5.2. Impact of the decriminalisation model on sex workers where it is implemented

Decriminalising sex work to reduce harm creates an opportunity to treat sex work as a public health issue, rather than a criminal activity therefore resulting in lower incidences of HIV infection.³⁶¹ Many medical professionals and health organisations agree that the decriminalisation of sex work would be a better way to improve public health.³⁶² Decriminalisation is currently supported by

³⁶⁰ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 200, page 23. Accessed on <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> on 27 January 2016

³⁶¹ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 200, page 22. Accessed on <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> on 27 January 2016

³⁶² Memorandum submitted to the South African National Aids Council op cit (n244) 52

UNAIDS, the World Health Organisation, The Global Commission on HIV and the Law, the South African Commission for Gender Equality and the Lancet Journal.³⁶³

The Prostitution Reform Act Review Committee set up under the Prostitution Reform Act appointed by the government in New Zealand, served a variety of sectors of interest, including sex workers, the religious community, and women, and was chaired by a former police commissioner. It concluded that decriminalisation had a marked effect in safeguarding the right of sex workers to refuse particular clients and practices, chiefly by empowering sex workers through removing the illegality of their work. It also revealed that the legislation, namely the PRA, achieved its desired goal of safeguarding sex workers. For instance, there is a reduction in police corruption in that the focus of police was no longer on the sex worker, but on other crimes. And therefore, this created a better working relationship between sex workers and police officers. Sex workers also have better working conditions,³⁶⁴ improved access to health services,³⁶⁵ can take precautions to stop the spread of STIs,³⁶⁶ enjoy better relations with police,³⁶⁷ experience increased access to justice when they are victims of crime, and enjoy increased confidence and well-being.³⁶⁸ Additionally, there is no evidence that decriminalization led to an increase in sex trafficking,³⁶⁹ the commercial sexual

³⁶³ Memorandum submitted to the South African National Aids Council op cit (n244) 52

³⁶⁴ Ministry of Justice, New Zealand, “3 Directors of Countries” available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/international-approaches/3-directory-of-countries>.

³⁶⁵ Gillian Abel, Lisa Fitzgerald, Cheryl Brunton, The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers, 131-32 (Department of Public Health and General Practice, University of Otago, Christchurch, November 2007)

³⁶⁶ Gillian Abel, Lisa Fitzgerald, Cheryl Brunton, The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers, 135 (Department of Public Health and General Practice, University of Otago, Christchurch, November 2007)

³⁶⁷ Ministry of Justice, New Zealand, “3 Directors of Countries” available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/international-approaches/3-directory-of-countries>.

³⁶⁸ N.Z. Ministry of Justice, Report of the Prostitution Law Review Committee on the operation of the Prostitution Reform Act 2003, 50 (2008).

³⁶⁹ Chandre Gould, Institute for Security Studies, The Need for Evidence to Assess Concerns About Human

exploitation of children³⁷⁰ or an increase in the number of sex workers.³⁷¹

One of the biggest changes is the relationship between sex workers and the police. When criminal penalties were removed, the relationship between police and sex workers transformed from one of ‘prosecutors to protectors’.³⁷² As a result, sex workers in New Zealand reported that they enjoy a better relationship with police, which resulted in more cases against violent clients.³⁷³

There was a gradual building of trust between sex workers and the police, and many organisations, sex workers and brothel owners reported that they saw a decrease in violence.³⁷⁴ Previously, criminalisation made it difficult for sex workers to negotiate condom use and refuse particular clients. However, because of the decriminalisation model, sex workers reported that it is easier for them to refuse clients, which shielded them from potential violence and they could negotiate condom use without it becoming a violent episode.³⁷⁵

Trafficking During the 2010 World Cup, (Mar. 2010), available at http://www.iss.co.za/iss_today.php?ID=917.

³⁷⁰ N.Z. Ministry of Justice, Report of the Prostitution Law Review Committee on the operation of the Prostitution Reform Act 2003, 47 (2008)

³⁷¹ Chi Adanna Mgbako op cit (n215) 1443; N.Z Ministry of Justice, Report of the prostitution law review committee on the operation of the Prostitution Reform Act 2003 13 (2008), available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>., page 40

³⁷² Chi Adanna Mgbako op cit (n215) 1443

³⁷³ N.Z. Ministry of Justice at 57; Dr. Elaine Mossman and Pat Mayhew , Key Informant Interviews Review of the Prostitution Reform Act 2003, section 4, Crime and Justice Research Centre, Victoria University of Wellington (2007), available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/key-informant-interviews/4-welfare-health-and-safety#33> [hereinafter Mossman and Mayhew]. Case for Decriminalisation of Sex Work in South Africa, page 21

³⁷⁴ N.Z. Ministry of Justice at 57; Dr. Elaine Mossman and Pat Mayhew , Key Informant Interviews Review of the Prostitution Reform Act 2003, section 4, Crime and Justice Research Centre, Victoria University of Wellington (2007), available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/key-informant-interviews/4-welfare-health-and-safety#33> [hereinafter Mossman and Mayhew]. Case for Decriminalisation of Sex Work in South Africa, page 21

³⁷⁵ Mossman and Mayhew, section 4.1. The law requires that “all reasonable steps to ensure” safer sex be taken. This promotes safer sex while protecting sex workers by ensuring that if they have been unable to use a condom, due to pressure from their employer or a client, or any other reason, they can talk to someone about it without fear of

The review report on the impact of the PRA Act, recorded that over 70% of sex workers surveyed in New Zealand reported that: the police are more concerned for their safety than before; the police take their complaints seriously; and increased visibility of policing in hot spots deter violence against them and allow the police to respond quicker. However, in New Zealand, the evidence suggests that there was no increase in human trafficking, or the commercial sexual exploitation of children.³⁷⁶

‘In fact, five years after decriminalisation, the Review Committee could find no credible claims of trafficking into forced prostitution in New Zealand.’³⁷⁷

‘Instead, New Zealand’s experience proves that decriminalisation could aid efforts to address trafficking and the commercial sexual exploitation of children by ensuring that brothel owners and clients, who hire children, can still be prosecuted and debt bondage can be challenged in court.’³⁷⁸

‘The working conditions of sex workers such as the hours that they work and the areas in which they work, for example, like the city place sex workers in a unique position to identify suspected cases of trafficking and underage sex workers and to gather information about exploitative or abusive labour conditions.’³⁷⁹

New South Wales in Australia, who also adopted the decriminalisation model found that decriminalisation “achieved the desired result of reducing police corruption.”³⁸⁰ “Studies conducted in New Zealand and New South Wales after decriminalisation, concluded that sex

prosecution for not using a condom. Comment from Dr. Calum Bennachie, New Zealand Prostitutes Collective, Dec. 18, 2011; Chi Adanna Mgbako op cit (n215) 1441

³⁷⁶ Chi Adanna Mgbako op cit (n215) 1441

³⁷⁷ Chi Adanna Mgbako op cit (n215) 1437

³⁷⁸ Chi Adanna Mgbako op cit (n215) 1437

³⁷⁹ Chi Adanna Mgbako op cit (n215) 1437

³⁸⁰ Sandra Egger & Christine Harcourt, Prostitution in New South Wales: the Impact of Deregulation, presentation at Women and the Law: Proceedings of a Conference (Sept. 24–26, 1991).

workers have better working conditions,³⁸¹ improved access to health services,³⁸² take precautions to stop the spread of STIs,³⁸³ enjoy better relations with police,³⁸⁴ increased access to justice when they are victims of crime, and increased confidence and well-being.”³⁸⁵ Additionally, there is no evidence that decriminalisation led to an increase in trafficking into the sex industry,³⁸⁶ the commercial sexual exploitation of children,³⁸⁷ or the number of sex workers.³⁸⁸

3.6 Viability of the Models to the South African Context

While the various models are given, it is critical to assess their workability in the South African

³⁸¹ Ministry of Justice, New Zealand, “3 Directors of Countries” available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/international-approaches/3-directory-of-countries>. [hereinafter Ministry of Justice, New Zealand, “3 Directors of Countries”]

³⁸² Gillian Abel, Lisa Fitzgerald, Cheryl Brunton, *The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers*, 131-32 (Department of Public Health and General Practice, University of Otago, Christchurch, November 2007) [hereinafter Impact Report]; Ministry of Justice, New Zealand, “3 Directors of Countries”.

³⁸³ *Ibid* at 135.

³⁸⁴ Ministry of Justice, New Zealand, “3 Directors of Countries” available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/international-approaches/3-directory-of-countries>. [hereinafter Ministry of Justice, New Zealand, “3 Directors of Countries”]

³⁸⁵ N.Z. Ministry of Justice, *Report of the Prostitution Law Review Committee on the operation of the Prostitution Reform Act 2003*, 50 (2008). Mgbako *op cit* (215) 1431

³⁸⁶ Chandre Gould, Institute for Security Studies, *The Need for Evidence to Assess Concerns About Human Trafficking During the 2010 World Cup*, (Mar. 2010), available at http://www.iss.co.za/iss_today.php?ID=917.

³⁸⁷ Ministry of Justice, New Zealand, “3 Directors of Countries” available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/international-approaches/3-directory-of-countries>. [hereinafter Ministry of Justice, New Zealand, “3 Directors of Countries”]

³⁸⁸ Ministry of Justice, New Zealand, “3 Directors of Countries” available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/international-approaches/3-directory-of-countries>. [hereinafter Ministry of Justice, New Zealand, “3 Directors of Countries”]

Context. A close analysis of each of the models indicate that they have provided disparate results in countries in which they have been implemented. However, situating them to the South African context requires analysis of the applicable laws and sex worker operating environment.

3.6.1 Partial Criminalization and South Africa

Sweden is vastly different to South Africa. In contrast to South Africa, Sweden has high levels of equality, low unemployment and sophisticated social services. Compared to Sweden, in South Africa, a citizen will die 32.33 years sooner, be 179 times more likely to have HIV/AIDS, be 3.2 times more likely to be unemployed, 35.4 times more likely to be murdered and make 71.88 percent less money.³⁸⁹ In South Africa, stigma, violence, police harassment and criminalisation are factors that impede sex workers' access to health care services because they are either discriminated against when they access those services or are denied the services or they avoid going to the clinic in order to avoid persecution. It will therefore take many years and policy changes for South Africa to become similar to Sweden socially.³⁹⁰

Unfortunately, when one compares the two countries, South Africa and Sweden, then South Africa does not fare well in its social policies to support citizens, for example as opposed to South Africa, in Sweden, the life expectancy at birth in Sweden is 81.89 percent while in South Africa it is 49.56 percent.³⁹¹ The GDP per capita in Sweden is \$40,900 while in South Africa it is \$11,500.³⁹² Sweden spends 8.3 times more money on health care, at \$5,319.40 while South Africa spends \$644.60 per capita.³⁹³ Lastly, Sweden has an unemployment rate of 7.90%

³⁸⁹ If it were my home, "Compare Sweden to South Africa", Accessed at <https://www.ifitweremyhome.com/compare/SE/ZA>

³⁹⁰ Moore, Henrietta. "Why Scandinavia Is Not the Model for Global Prosperity We Should All Pursue." *The Guardian*, 1 Dec. 2014, www.theguardian.com/sustainable-business/2014/dec/01/why-scandinavia-is-not-the-model-for-global-prosperity-we-should-all-pursue.

³⁹¹ CIA. "The World Factbook - Central Intelligence Agency." *Cia.gov*, 2018, www.cia.gov/library/publications/the-world-factbook/.

³⁹² World Bank "GDP per Capita (Current US\$) - South Africa | Data." *Worldbank.org*, 2010, data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=ZA.

³⁹³ Peterson-Kaiser Health System Tracker, "How Does Health Spending in the U.S. Compare to Other Countries? - Peterson-Kaiser Health System Tracker, 2018, www.healthsystemtracker.org/chart-collection/health-spending-u-s-compare-countries/.

while South Africa has 25.10%.³⁹⁴ These figures are as a result of policies and practices to ensure that citizens have access to health care and employment. Hence to incorporate a system of laws similar to Sweden, without looking at the social context is just irresponsible in that Sweden is a welfare state because the government of Sweden provides social grants and access to healthcare and resources to allows its citizens to live. . South Africa cannot be compared to it.

3.6.2 Total Criminalization and South Africa

As you have seen above, criminalization has been in existence for many years and it has not achieved its goal of eradicating sex work in South Africa. Instead, the South African government has wasted time and resources by trying to police and prosecute cases related to sex work. It has also resulted in large amounts of police abuse and corruption and has impeded sex worker's access to justice when they are victims of crime. The criminal laws have influenced society's attitudes towards sex workers, which has allowed people to unfairly discriminate against sex workers thereby limiting their access to health services, social services and other services. It has also resulted in people having little or no empathy to the plight of sex workers.

3.6.3 Legalisation and South Africa

In this legal framework, the police are required to enforce regulations in the industry. As a result, there is a continued adversarial relationship between police officers and sex workers. By being street based- sex work in South Africa comes with various consequences, including daily wars with the police. Regulation such as requiring sex workers to carry tags are discriminative. Treating sex workers differently only increases discrimination against them

3.6.4 Decriminalisation and South Africa

³⁹⁴ CIA. "The World Factbook - Central Intelligence Agency." *Cia.gov*, 2018, www.cia.gov/library/publications/the-world-factbook/.

South Africa will follow the decriminalization model if it is sincerely concerned about the human rights, health, and well-being of sex workers. This model is intended to improve the relationship between police, health care providers, and sex workers, as the research above indicates. The researcher will go into greater detail about her recommendation for a decriminalization model in South Africa in the following chapter.

3.7. Conclusion

As we have seen from the research, criminalisation creates a stigma for sex workers and this stigma is reinforced by the police and the general public. Sex worker's criminal status in society increased increases their vulnerability to violence and exacerbates the already widespread occurrence of gender-based violence, which is rife in South Africa. "The total criminalisation model currently adopted and enforced in South Africa forces sex workers to the margins of South African society where they are easy targets for abuse at the hands of the police as well as their clients."³⁹⁵ As illustrated in this chapter, there are different legal frameworks that countries employ to prohibit sex work. Countries choose a model based on their desired outcomes, which is often to eradicate the buyers and sellers of sex. Despite the greatest effort to eradicate the buyers and sellers of sex using legislative means, the research above shows, that sex work will continue irrespective of the legal model. As evidenced in this chapter, where legal models impose sanctions on sex workers, the impact of it, harms sex workers. Further, as evidenced, none of the legal models save for decriminalisation has reached their desired goals. Decriminalisation is established as the most effective method for remedying human rights injustices.

³⁹⁵ Women's Legal Centre, "Lawyer's Manual on Sex Work Litigation Pursuing Justice for Sex Workers", 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

CHAPTER FOUR

WHY THE DECRIMINALISATION MODEL IS THE BEST MODEL FOR SOUTH AFRICA

4.1. Introduction

In the previous section, I supported the decriminalisation model in South Africa. This chapter provides an in-depth reasoning as to why the model was chosen. More precisely, the chapter will address why decriminalization of sex work is a ‘win-win’ solution for South Africa, legal arguments for the same, and the prerequisites required for the implementation of the decriminalization model.

4.2. Why the decriminalisation of sex work is a ‘win-win’ solution for South Africa

As evidenced in New Zealand, the government was successful in reducing violence against sex workers and increasing access to health services. The decriminalisation model will create an environment where crime and corruption by the police will not be therefore, able to thrive. Decriminalisation has wide support among human rights and public health institutions. Decriminalisation will promote sex workers’ economic rights by allowing them to benefit from the existing South African labour and workplace laws. Decriminalisation will help fight the trafficking of people into forced into the sex industry, as well as the commercial sexual exploitation of children as sex workers will no longer fear to identify situations of exploitation and abuse.

As described in paragraph 3.2.3 of Chapter 3, where the research described in detail, the impact of criminalisation on sex workers, we can see in the discussion from paragraph 3.3 of

Chapter 3 regarding partial criminalisation, that New Zealand was able to improve the promotion and protection of sex worker’s human rights using the decriminalisation model.³⁹⁶

As outlined in paragraph 4.3.2.1.7.1 the “South African government is bound by constitutional and international legal obligations to ensure sex workers’ freedom from discrimination and freedom of trade.”³⁹⁷ South Africa is a party to several international and African regional human rights treaties that recognise the right to free choice of work, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and People’s Rights (African Charter), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The International Labour Organisation (ILO) recognises sex work as a form of industry and encourages governments to focus on improving labour and working conditions for voluntary adult sex workers.

South Africa violates this right by criminalising sex work,” because laws against sex work disproportionately affect women”³⁹⁸, although both men and transgender people in South Africa also engage in sex work, albeit in smaller numbers. “Criminalisation also contributes to the stigma and discrimination that all sex workers face from public and private actors.”³⁹⁹ “Criminalisation of sex work violates this right by making sex work, as a form of labour, illegal, therefore, denying sex workers their right to make an autonomous decision to work in the sex work industry.”⁴⁰⁰ “South Africa can fulfil its obligation to protect sex workers by decriminalising sex work, which will end state-sponsored discrimination against sex workers and reduce the stigma against them that fuels the discrimination from private and public actors.”⁴⁰¹ “If South Africa decriminalises sex work, it will fulfil its obligations, under constitutional and international law, by recognising sex

³⁹⁶ Nicolé Fick, Sex Workers Experiences with the Local Law Enforcement in South Africa, 8 RESEARCH FOR SEX WORK 4 (June 2005), available at <http://www.sexworkersproject.org/downloads/R4SW8.pdf> [hereinafter Fick].

³⁹⁷ Commission for Gender Equality, Position Paper on Sex Work”, 16 January 2013, Accessed at <https://www.nswp.org/sites/nswp.org/files/Policy%20Brief%20Position%20Paper%20on%20Sex.pdf>

³⁹⁸ Ibid

³⁹⁹ Ibid

⁴⁰⁰ Ibid

⁴⁰¹ Ibid

work as a legitimate form of labour and acknowledging sex workers' choice to earn their living through sex work."⁴⁰²

"Decriminalisation of sex work will allow sex workers to freely choose their occupation, and in doing so, provide for their families.⁴⁰³ Sex workers choose to do sex work for a variety of reasons. "Some enter the industry out of economic necessity."⁴⁰⁴ "Others enjoy the income and freedom that sex work provides them."⁴⁰⁵

"The South African government is required by its Constitution and international human rights obligations to fulfil sex workers' right to freedom of association."⁴⁰⁶ South Africa's criminalisation of sex work denies this right because sex workers are unable to engage in meaningful unionisation activities, or collective bargaining, when sex work is illegal. Decriminalisation of sex work will fulfil South Africa's legal obligation to sex workers, by allowing them to form professional organisations, to access the protections afforded by South Africa's employment laws, and to challenge unfair labour conditions in court.

The South African Constitution guarantees all South Africans the right to freedom from discrimination, and prohibits non-state actors from discriminating against others on any basis.⁴⁰⁷

"South Africa also has an obligation, under regional and international human rights treaties, to combat all forms of discrimination, including the ICCPR and the African Charter."⁴⁰⁸ South Africa is obligated to combat discrimination against women by several international and African regional treaties, including CEDAW, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Protocol), and the Southern African

⁴⁰² Ibid

⁴⁰³ Ibid

⁴⁰⁴ Mgbako op cit (215) 1431

⁴⁰⁵ Mgbako op cit (215) 1431

⁴⁰⁶ Supra note 402

⁴⁰⁷ South African Constitution Section 9

⁴⁰⁸ ICCPR at art. 26; African Charter at arts. 2, 18.

Development Community (SADC) Protocol on Gender and Development.⁴⁰⁹ The Beijing Declaration and Platform for Action of 1995 also upholds the right to freedom from discrimination.⁴¹⁰ CEDAW, in particular, requires states to repeal “all national penal provisions, which constitute discrimination against women.”⁴¹¹

In paragraph 3.5, the research provided evidence based on the New Zealand model, which shows that under decriminalisation, sex workers would more easily be able to access non-judgemental health services, including condom provision and HIV treatment. They would also be able to carry condoms without fear of arrest. If sex work is decriminalised, there is evidence to suggest that it will have the following positive effects on HIV and public health⁴¹²:

1. It will open up the sex industry and facilitate the flow of HIV information, condoms and lubrication. Sex will not have to take place in illicit and dangerous places and sex workers will be empowered to refuse and report abusive clients, or those clients, who do not want to practice safer sex;
2. Sex workers will be able to enforce their rights. Occupational Health and Safety laws, as well as labour laws, will apply to sex work. This means that sex workers’ bargaining power will increase, with the weight of the law supporting them. They will also have more protection against violence by the police and others;
3. Health care workers, who discriminate against sex workers will be held accountable. This means that health care centres are likely to be more sex worker-friendly and will encourage sex workers to seek health care services and treatment early; and
4. Sex workers will be free to form collectives and unions, share information and speak out on sex worker rights. This will impact on the stigma that attaches to sex work, counter negative stereotypes of sex work and have a positive impact on HIV prevention and care.

⁴⁰⁹ CEDAW at art. 2; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 2, OAU Doc. CAB/LEG/66.6, Sept. 13, 2000 [hereinafter African Women’s Charter]; Southern African Development Community Protocol on Gender and Development art. 3, Aug. 17, 2008.

⁴¹⁰ Beijing Declaration and Platform for Action, Report of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20/Rev.1, Sept. 15, 1995.

⁴¹¹ CEDAW at art. 2(g).

⁴¹² World AIDS Campaign (2010) “Sex Work and the Law. The case for decriminalization”, page 16

In New Zealand, following decriminalisation in 2003, research has indicated that sex workers were more likely to have a personal doctor and to disclose that they are sex workers.⁴¹³⁴¹⁴ Further, the New Zealand government engaged with sex workers and through that consultation, developed guidelines, to help sex workers and brothel owners understand their obligations and rights in respect of workplace safety.⁴¹⁵ New Zealand's PRA requires that all reasonable steps be taken to ensure that all involved adhere to the practise of safer sex. This implies that sex workers can insist of safe sexual practices including the use of condoms. Sex workers and brothel operators have reported that it is easier, currently, to enforce the use of condoms.⁴¹⁶

The Prostitution Reform Act included a mandate to the Ministry of Health to produce posters promoting safer sex, which are displayed in brothels, along with condoms, water based lubricants and other safer sex materials.⁴¹⁷ Massage parlours, brothels, and street based sex workers no longer have to hide their condoms in order to avoid detection by the police. Massage parlours can now call themselves brothels, which reflect the true nature of their business and creates an explicit culture in the work place that supports safer sex.

Sex workers would be able to work more openly, in well-lit public streets, in legal brothels, or their own homes. Their contracts with their clients would be legally enforceable, which would make them less vulnerable to violence and give them more power to negotiate condom use with clients.

Decriminalisation would mean that brothel managers, agents or other employers of sex workers would be accountable to occupational health and safety laws. Employers would have to provide condoms and other safer sex materials, and would not be able to demand that sex workers have unprotected sex with clients. Sex workers would also have more power to refuse drugs and alcohol at work, helping them to maintain safer sex practices.

⁴¹³ Plumridge & Abel, 2000

⁴¹⁴ Abel, Fitzgerald & Brunton, 2007

⁴¹⁵ Mgbako op cit (n215)

⁴¹⁶ Mossman & Mayhew, 2007, pp 33

⁴¹⁷ Mgbako op cit (n215)

“The constant threat of arrest compels sex workers to go to isolated areas with clients, leaving them alone and unprotected if disputes arise over condom use, services, or payment.”⁴¹⁸ In addition, criminalisation may scare away potential clients fearful of a sex work-related charge, but it may not deter clients, who are already criminally inclined.⁴¹⁹

Decriminalising sex work in South Africa will also improve sex workers’ relationships with the police and, therefore, their ability to rely on law enforcement for protection, when they are the victims of, or witnesses to, violent crime. Under criminalisation in South Africa, sex workers, who are victims of crime, cannot rely on the police to come to their aid. They know from experience that approaching the police to report a crime will most likely lead to harassment, abuse, and possibly their arrest.⁴²⁰ Sex workers, who have attempted to report violent crimes have been chased away from the police station or mocked by police, and told that they deserve what happened to them.⁴²¹ Unable to seek protection from the police, sex workers may be forced to rely on protection from other sources, such as brothel managers or pimps, further increasing their dependence on these figures.⁴²²

Decriminalisation will reduce police corruption, thereby improving police and sex worker relations. Police in South Africa often demand bribes from sex workers in exchange for not arresting them, which creates a pattern of economic extortion of the sex workers that poisons sex worker and police interactions⁴²³. Decriminalisation changes the nature of the relationship between sex workers and law enforcement, allowing them to work as allies in the fight against trafficking. South African sex workers who are part of the Sisonke Sex Workers Movement (which is the largest movement of sex workers in South Africa “have publicly confirmed that they are firmly opposed to both trafficking into the sex industry and the involvement of minors

⁴¹⁸ Chi Adanna Mgbako op cit (n215) 1439

⁴¹⁹ Chi Adanna Mgbako op cit (n215) 1439

⁴²⁰ Chi Adanna Mgbako op cit (n215) 1431

⁴²¹ Chi Adanna Mgbako op cit (n215) 1438

⁴²² Chi Adanna Mgbako op cit (n215) 1438

⁴²³ Mgbako, Chi Adanna, Katherine Glenn Bass, Erin Bundra, and Mehak Jamil. "The case for decriminalization of sex work in South Africa." *Geo. J. Int'l L.* 44 (2012): 1423.

in sex work.”⁴²⁴ “Sex workers already investigate suspicious situations on their own and approach individuals they suspect may have been trafficked, in order to find out whether they need help.”⁴²⁵ Sex workers want to help fight trafficking and the commercial sexual exploitation of children, “but are reluctant to identify situations of abuse, out of fear that they would be arrested, or harassed as a result.”⁴²⁶ In addition, under current sex work laws in South Africa, the victims of trafficking, who were coerced into sex work, as well as underage sex workers, can be arrested and prosecuted for sex work related offences.⁴²⁷ Decriminalisation focuses police attention and resources on prosecuting traffickers and brothel owners, or clients, who hire minors. “The state would have to enlist its social services to help survivors of trafficking and underage sex workers.”⁴²⁸

The on-going criminalisation of sex work hampers every aspect of HIV and AIDS prevention, treatment and care. If sex work is decriminalised, there is ample evidence from New Zealand to suggest that it will have far-reaching positive effects on HIV and public health.⁴²⁹

What will decriminalisation in South Africa be like? All prohibitions will be removed; all laws criminalising the buying and selling of sex, as well as the employment of sex workers would be removed. Sex work would be governed by general labour law, meaning that sex workers would be able to organise legally, and employers (e.g. brothel managers) would have to comply with occupational health and safety laws. It would open up the sex industry and facilitate the flow of HIV information, as well as improve access to condoms and lubrication. Sex would not have to take place in illicit and dangerous places, and sex workers would be empowered to refuse and report abusive clients, or those clients, who do not want to practice safe sex. A recent Lancet study estimated that decriminalisation of sex work could avert 33-46%

⁴²⁴ Chi Adanna Mgbako op cit (n215) 1438

⁴²⁵ Chi Adanna Mgbako op cit (n215) 1438

⁴²⁶ Chi Adanna Mgbako op cit (n215) 1438

⁴²⁷ Chi Adanna Mgbako op cit (n215) 1438

⁴²⁸ Chi Adanna Mgbako op cit (n215) 1438

⁴²⁹ World AIDS Campaign (2010) “Sex Work and the Law. The case for decriminalization”, page 16

of new HIV infections among female sex workers in the next decade.⁴³⁰

Sex workers would be able to enforce their rights. Occupational Health and Safety laws, as well as labour laws would apply to sex work. This implies that sex workers' bargaining power would increase, with the weight of the law supporting them. They would also have more protection against violence by the police and others. Health care workers, who discriminate against sex workers, would be held accountable. This implies that health care centres would probably be more sex worker-friendly and would encourage sex workers to seek timely health care services and treatment. Sex workers would be free to form collectives and unions, share information and speak out on sex worker rights. This would affect the stigma attached to sex work, counter negative stereotypes of sex work, and have a positive impact on HIV prevention and care. Sex workers would be empowered to report violence to the police, or even report corrupt police officers, without fear of arrest, or abuse.⁴³¹

Policies could be introduced to encourage cooperation between the police and sex workers, as with other vulnerable communities.⁴³² Street-based sex workers would be able to work in more visible and public areas, reducing their vulnerability to violence. Sex workers would be allowed to advertise more easily, and work independently, or in collectives. This would reduce their reliance on managers and allow them to have more control over their own security arrangements.⁴³³ Sex workers would feel more confident to carry condoms and access health

⁴³⁰ Shannon, K, et al.(2015) "Global epidemiology of HIV among female sex workers: influence of structural determinants." *The Lancet* 385, no. 9962: 55G71

⁴³¹ Mossman, E. & Mayhew, P. (2007) "Key Informant Interviews Review of the Prostitution Reform Act 2003", prepared for the New Zealand Ministry of Justice. Available: <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/key-informant-interviews/documents/report.pdf>

⁴³² Zealand Ministry of Justice (2008) "Report Of The Prostitution Law Review Committee On The Operation Of The Prostitution Reform Act 2003". Available: <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>

⁴³³ Abel, G., Fitzgerald, L., & Brunton, C., (2007). "The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers" Christchurch School of Medicine. Available: <http://www.otago.ac.nz/christchurch/otago018607.pdf>

services, thereby reducing the risk of HIV.

The Congress of South African Trade Unions (COSATU) has called for the decriminalisation of sex work, and has supported the inclusion of sex work into South Africa's job creation strategy. COSATU has encouraged itself and its affiliates in the labour movement to raise awareness about sex work and reduce the stigma associated with the industry.

Lastly, decriminalisation of sex work will assist in the fight to stop human trafficking and the commercial sexual exploitation of women and children, as sex workers, who witness these, will be able to, without fear, approach the police and report their suspicions.

One of the many reasons why South Africa is afraid to follow the model of decriminalisation of sex work is because they are afraid that the decriminalisation will increase sex tourism. This will likely not happen. If you look at statistics, the 2011 census revealed that 3.3 per cent (1.7 million) people were born outside of South Africa. If there are big events, such as the Soccer World Cup, there will not be an increase in sex tourism. The 2010 Soccer World Cup case study revealed great anticipation that there would be an increase in the sex industry during the tournament. There is no evidence that this has happened. Similar fears arose in New Zealand, when it was assumed that many people would be enticed into sex work once decriminalised – research has shown that this was not the case.

When migrants entered South Africa, many engaged in sex work as a temporary job, until they were able to find something else or secure documentation.⁴³⁴ To assume that decriminalisation would lead to sex work becoming this explosive sector with everyone rushing to get involved, is erroneous, because, even with the rights and protection, the stigma continues to exist, and for non-nationals any kind of informal labour remains exploitative and risky. Migrants who come to South Africa do not do so specifically for sex work. Sex work became an option

⁴³⁴ Mgbako op cit (n215)

among very limited other options, in the face of extreme discrimination, in other work places, for non-nationals (not being paid, long hours, abuse etc.).⁴³⁵

A wider and more nuanced debate about how individuals come to sell sex, as well as a discussion on the regulation of non-nationals, xenophobia in the work place, exploitation and abuse and the lack of access to services (particularly health care) that is framed in terms of support, rather than criminalisation, needs to be conducted. These wider issues are ignored when the focus is solely on sex work as sex, and sex workers as victims or criminals. When the Netherlands repealed its long-standing criminal law in the Dutch Penal Code, which banned brothels, and adopted a scheme to regulate sex work, it was revealed that, instead of protecting those, who choose to sell sex, it created more instances of violating the rights of sex workers. While sex workers could work, they had to do so under certain conditions such as, only working in specified zones (and, therefore, committing an offense if they worked outside of these), carrying a health card and going for checks determined by the state etc. Sex workers, therefore, experience reduced freedoms. Legalisation has also created a two-tier system with the regulated Dutch and EU sex workers, who can easily become licensed and the non-EU workers who struggle to become documented. Non-EU sex workers, therefore, have been left open to coercion into poor working conditions and bad pay. I am of the opinion that we should learn from the Netherlands in that, we should not create a system where some sex workers will be working legally and others not. The model indicated that such a system failed to legitimize sex work.

South Africa is also a country which is a destination for many fleeing from their countries of origin, for many reasons, and therefore the migrancy of people should also be taken into consideration. Migrants who struggle to gain access to the city's benefits live and work in insecure enclaves, where they face intersecting disadvantages due to gender roles, race, and nationality.⁴³⁶ Assault, segregation, criminalisation, and various forms of systemic and direct abuse manifest

⁴³⁵ Mgbako op cit (n215)

⁴³⁶ Walker, Rebecca, et al. "Negotiating the City: Exploring the Intersecting Vulnerabilities of Non-National Migrant Mothers Who Sell Sex in Johannesburg, South Africa." *Agenda*, vol. 31, no. 1, 2 Jan. 2017, pp. 91–103, 10.1080/10130950.2017.1338858. Accessed 15 Jan. 2020.

these vulnerabilities.⁴³⁷ Migrant women who sell sex face the stigma and moralization that comes with selling sex illegally, becoming a foreigner, and becoming a single parent.⁴³⁸ In the South African background, there is a strong connection between migration trajectories and trajectories into sex work.⁴³⁹ The majority of migrant sex workers have been discovered to migrate in search of better job prospects, and after migrating, they have chosen to sell sex as the most financially viable choice open to them.⁴⁴⁰ Although non-national migrant sex workers have been shown to have some advantages over their non-migrant counterparts, such as higher education levels and higher earnings per customer, they often report high levels of risk and violence, including police harassment and brutality, as well as difficulties in obtaining health care and less frequent condom use.⁴⁴¹

4.3. Legal arguments that can be placed before the Constitutional Court

The entire Sexual Offences Act of 1957⁴⁴² will have to be challenged, but more specifically, the primary prohibition against sex work, as well as section 11 of the Criminal Law Amendment Act 32 of 2007⁴⁴³. When one brings a challenge such as this, one will have to deal with the *Jordan* judgment first, as the court will be obliged to follow it.

I am of the opinion, that a new challenge will have to be launched, setting out the reasons why the court should not follow the judgment of *Jordan* and place new evidence which shows that the political, legal and social climate has changed since *Jordan*. In addition to this, one may

⁴³⁷ Walker Rebecca op cit (n391)

⁴³⁸ Walker Rebecca op cit (n391)

⁴³⁹ Richter M and Vearey J (2016) 'Migration and sex work in South Africa: Key concerns for gender and health', in J Gideon (ed) *Gender and Health Handbook*, Cheltenham: Edward Elgar Publishing.

⁴⁴⁰ Richter M, Chersich MF, Vearey J, Sartorius B, Temmerman M and Luchters S (2014) 'Migration status, work conditions and health utilization of female sex workers in three South African cities', in *Journal of Immigrant Minority Health*, 16, 7–17. doi: 10.1007/s10903-012-9758-4

⁴⁴¹ Richter M, Chersich MF, Vearey J, Sartorius B, Temmerman M and Luchters S (2014) 'Migration status, work conditions and health utilization of female sex workers in three South African cities', in *Journal of Immigrant Minority Health*, 16, 7–17. doi: 10.1007/s10903-012-9758-4

⁴⁴² Sexual Offences Act of 1957

⁴⁴³ Extensively amends the laws relating to sexual offences including by re-enforcing penalties and providing extra protection for children and persons with disabilities

consider instituting a new challenge and later in this chapter, I will lay out the arguments with specific reference to the Constitutional rights afforded to sex workers.

4.3.1. Legal Basis to overturn a Constitutional Judgment

The doctrine of legal precedent, also referred to as doctrine of *stare decisis* states that the rules or principles laid out in previous judgments have to be followed. Therefore the court must abide or adhere to decided cases. Therefore, although the Constitutional Court does have the power to overturn its previous decisions, it will not do so, lightly. In *Daniels v Campbell*,⁴⁴⁴ Moseneke J listed three situations, in which a court may overrule its previous decisions:

- (1) where the court is satisfied that its previous decision was wrong;
- (2) where the point was not argued; or
- (3) where the issue is in some legitimate manner distinguishable.

4.3.1.1. Arguments to Overrule Jordan

These three exception was first mentioned in the case of *Harris and others v Minister of the Interior and Another* 1952 (2) SA 428 (A) at 452-4, where the court outlined the exceptions. The case of *Daniels*, the applicants had to bring arguments to show that their case was legitimately distinguishable from a previous one in which the court considered similar facts and made a judgment. Should a new case be brought before the Constitutional Court, it would have to be ‘legitimately distinguishable’ from the previous *Jordan* case. A new application would be distinguishable on the basis that:

- ‘the question of rationality was not ruled upon by the Constitutional Court;
- in the intervening period other legislative enactments have been introduced, to address most of the social ills referred to by the state in *Jordan*; and

⁴⁴⁴ *Daniels v Campbell and Others* (CCT 40/ 03) [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) (11 March 2004)

- the assertion that the remaining social ills are attributable to commercial sex *per se*, is disputed.’⁴⁴⁵

4.3.1.2. Did the Constitutional Court consider the question of rationality?

The rationality doctrine requires that all legislation have a minimum threshold of rationality, implying a rational connection between the decision taken and the reasons given for it⁴⁴⁶. If there is no rational connection between the sections in the Sexual Offences Act and the social ills the state claims it wants to prevent, then the legislation fails to meet the rationality requirement. According to SWEAT, the State “fail[ed] to meet the requirement of rationality in that they lack the required relationship between the stated purpose and the means to achieve such purpose, namely the criminal proscription”.⁴⁴⁷ SWEAT indicated that the court should reconsider this fundamental finding that outlawing commercial sex is an important legitimate constitutional purpose. In its judgment, the majority assumed that the appellants and amici accepted the factual accuracy of the “social ills” the state discussed. SWEAT further states that the “State paints a picture of sex workers as a class of persons who are degraded, abused, involved directly and indirectly in criminality and who are the vectors of disease. Hence, it is argued, that the prohibition on sex workers is justified. It will be submitted that the social ills allegedly associated with or inherent in sex work identified by the State, even if correct, cannot justify the prohibition in question.”⁴⁴⁸ SWEAT further contends that the “social ills” are attributable to the criminalisation, rather than the sex work itself. The social ills of which the State identified is the degradation of

⁴⁴⁵ Pillay’s Opinion “Revisiting the Decision of the CC in *S v Jordan*” for the Commission for Gender Equality, Para. 36.

⁴⁴⁶ Smith, Anne. “Equality constitutional adjudication in South Africa.” *African human rights law journal* 14, no. 2 (2014): 609-632.

⁴⁴⁷ Submissions By Sex Workers Education And Advocacy Task Force, Centre For Applied Legal Studies And The Reproductive Health Research Unit, 6.12.3

⁴⁴⁸ *S v Jordan*..... Submissions By Sex Workers Education And Advocacy Task Force, Centre For Applied Legal Studies And The Reproductive Health Research Unit, Para 1.16.3. Accessed at <https://collections.concourt.org.za/bitstream/handle/20.500.12144/2131/Amicus%20Curiae%20Heads%20of%20Argument%20%28SWEAT%2c%20CALs%2c%20RHru%29-678.pdf?sequence=6&isAllowed=y>

women, the violent abuse of sex workers, trafficking in women, child prostitution, the spread of sexually transmitted diseases, drug abuse, related crimes and public nuisance.⁴⁴⁹

There have been significant changes in the legal landscape since the decision in *Jordan*, including the application of the final Constitution amendments to the Sexual Offences Act, and the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“Sexual Offences Amendment Act”) wherein section 11 criminalises the purchasing of sex. Further, the Children’s Amendment Act 41 of 2007⁴⁵⁰ together with the Sexual Offences Amendment Act, includes provisions to protect children from sexual abuse and exploitation. In addition, The Prevention and Combating of Trafficking in Persons Act 7 of 2013 was enacted in order to address the trafficking of persons.

4.3.1.3 International evidence indicates that “Social ills” are the result of criminalisation

Though South Africa and New Zealand are different in many ways, in particular with regards to the culture, landscape and policies. However, because both countries were colonised by the British, there are similarities in our laws. Based on evidence from New Zealand and Australia, it is highly likely that decriminalisation of sex work in South Africa will positively affect violence against sex workers. As stated in paragraph 3.5.1, “in June 2003, New Zealand became the first country to

⁴⁴⁹ S v Jordan..... Submissions By Sex Workers Education And Advocacy Task Force, Centre For Applied Legal Studies And The Reproductive Health Research Unit, Para 6.32. Accessed at <https://collections.concourt.org.za/bitstream/handle/20.500.12144/2131/Amicus%20Curiae%20Heads%20of%20Argument%20%28SWEAT%2c%20CALs%2c%20RHRU%29-678.pdf?sequence=6&isAllowed=y>

⁴⁵⁰Children’s Amendment Act 41 of 2007 Accessed a https://www.gov.za/sites/default/files/gcis_document/201409/a41-070.pdf

decriminalise sex work, when it passed the Prostitution Reform Act ('PRA')."⁴⁵¹ One of New Zealand's key objectives in decriminalising sex work was to improve sex workers' safety.⁴⁵²

Decriminalisation in New Zealand empowered sex workers to protect themselves from violence, by enabling them to enforce their rights, refuse dangerous clients, and insist on safer sex practices.⁴⁵³ Additionally, decriminalisation in New Zealand and the Australian state of New South Wales, improved relations between police and sex workers, and empowered sex workers to seek the assistance of law enforcement, to protect them from violence.⁴⁵⁴ In addition, evidence from different countries suggests that the legal status of sex work has no bearing on demand. In New Zealand, neither the number of sex workers, nor the number of brothels, changed significantly after decriminalisation, indicating that decriminalisation did not increase the demand for sex work.⁴⁵⁵ A study conducted in Australia also found that the legal status of sex work had little, or no, effect on the demand for sex work.⁴⁵⁶

⁴⁵¹ New Zealand Ministry of Justice, Report of the Prostitution Law Review Committee on the operation of The Prostitution Reform Act 2003, 13 (2008), available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> [hereinafter N.Z. Ministry of Justice].

⁴⁵² New Zealand Ministry of Justice, Report of the Prostitution Law Review Committee on the operation of The Prostitution Reform Act 2003, 13 (2008), available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> [hereinafter N.Z. Ministry of Justice].

⁴⁵³ N.Z. Ministry of Justice at 46. Gillian Abel et al., DECRIMINALISATION OF SEX WORK IN NEW ZEALAND, Slide 27, 28; Table 6.2, 6.3, *on file with author* [hereinafter Abel]. Mossman and Mayhew, section 4.1. The law requires that "all reasonable steps to ensure" safer sex be taken. This promotes safer sex while protecting sex workers by ensuring that if they have been unable to use a condom, due to pressure from their employer or a client, or any other reason, they can talk to someone about it without fear of prosecution for not using a condom. Comment from Calum Bennachie, New Zealand Prostitutes Collective, Dec. 18, 2012.

⁴⁵⁴ N.Z. Ministry of Justice at 57; Dr. Elaine Mossman and Pat Mayhew, *Key Informant Interviews Review of the Prostitution Reform Act 2003*, section 4, CRIME AND JUSTICE RESEARCH CENTRE, VICTORIA UNIVERSITY OF WELLINGTON (2007), available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/key-informant-interviews/4-welfare-health-and-safety#33> [hereinafter Mossman and Mayhew].

⁴⁵⁵ Glenn Laverack and Amanda Whipple, *The Sirens' Song of Empowerment: a Case Study of Health Promotion and the New Zealand Prostitutes Collective*, 17 GLOBAL HEALTH PROMOTION 37 (2010). See also Gillian Abel, Lisa Fitzgerald and Cheryl Brunton, *The Impact of Decriminalisation on the Number of Sex Workers in New Zealand*, 38 J. SOC. POL. 515-31 (2009); N.Z. Ministry of Justice at 40-41.

⁴⁵⁶ Basil Donovan, et al., *The Sex Industry in Western Australia: A Report to the Western Australia Government* vii, 6, 9 (2010); Danny Rose, *Legal or not, sex industry powers on*, SYDNEY MORNING HERALD, Oct. 6, 2010, <http://www.smh.com.au/national/legal-or-not-sex-industry-powers-on-20101005-1669t.html>.

4.3.2. Bring a New Case

Sex workers, enjoy the same legal rights as all other people in South Africa. These rights are recognized in the Constitution of South Africa, in other sources of South African law and policy, as well as in international treaties and organizations to which South Africa is a signatory and member. Another option for consider for a legal challenge, is to institute a new case and use the provisions of the Final Constitution of South Africa as opposed to the Interim Constitution, which was used the case of *Jordan*.

4.3.2.1 Constitutional Rights

The Constitution of the Republic of South Africa, 1996 is the supreme law of South Africa. Section 7(2) of the Constitution dictates that “The state must respect, protect, promote and fulfill the Bill of Right’s rights,” which implies that government officials and the police must respect the rights guaranteed in the Constitution. This means that even if sex workers contravene the laws that prohibit the sale of sex, they still retain their rights under the Constitution. Even though sex work is illegal in South Africa, a sex worker’s constitutional and human rights should always be preserved. The human rights entrenched in the South African Constitution relevant to sex work include equality (s9),⁴⁵⁷ human dignity (s10),⁴⁵⁸ freedom and security of the person (s12),⁴⁵⁹

⁴⁵⁷ Section 9 of the South African Constitution provides as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed Chapter 2: Bill of Rights 6 to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

⁴⁵⁸ Section 10 of the South African Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”

⁴⁵⁹ Section 12 of the South African Constitution provides:

- (1) Everyone has the right to freedom and security of the person, which includes the right—
 - (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;

privacy (s14)⁴⁶⁰, and freedom of trade, occupation, and profession (s22).⁴⁶¹ Further, Section 8(1) clarifies that our Bill of Rights applies horizontally to the whole of the common law even when operating between two private individuals.⁴⁶² Therefore, members of the community are thus bound by the terms in the Constitution and should respect the right of sex workers too. When engaging with sex workers, the following sections of the Bill of Rights should be considered in particular:

4.3.2.1.1 Right to Equality

Section 9(1) provides that “Everyone is equal before the law and has the right to equal protection and benefit of the law.” Formal equality, also known as equality of treatment, states that all people in the same position should be treated equally and that people should not be treated differently based on subjective attributes like religion, race, or gender.⁴⁶³ This formulation is consistent with Aristotle's original principle of equality, which states that identical cases should be viewed equally.⁴⁶⁴ It is the most common and least controversial view of equality, and it serves as the philosophical framework for the legal definition of direct discrimination.⁴⁶⁵ Substantive equality is the preferred definition of equality.⁴⁶⁶ “A substantive approach to equality moves the emphasis of the right to equality from a negative right of non-discrimination to a constructive right of

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.

⁴⁶⁰ Section 14 of the South African Constitution provides:

Everyone has the right to privacy, which includes the right not to have—

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or (d) the privacy of their communications infringed.

⁴⁶¹ Section 22 of the South African Constitution provides that “[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

⁴⁶² [Deeksha Bhana](#), “The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution”. Accessed at on 03 November 2020

⁴⁶³ “Equality Constitutional Adjudication in South Africa (Chapter 14 Vol 2) [2014] AHRLJ 30.” *Saflii.org*, 2014, www.saflii.org/za/journals/AHRLJ/2014/30.html.

⁴⁶⁴ AHRLJ 30 op cit (n418)

⁴⁶⁵ AHRLJ 30 op cit (n418)

⁴⁶⁶ AHRLJ 30 op cit (n418)

substantive equality.”⁴⁶⁷ “It accomplishes this by ensuring that laws and regulations do not perpetuate the subordination of groups already experiencing social, political, or economic disadvantage, and by requiring that laws recognize persons as substantive equals, acknowledging and accommodating differences.”⁴⁶⁸ “Substantive equality is concerned with removing obstacles that prohibit such groups from engaging in the workplace or celebrating their diverse cultures and traditions by examining the impact of legislation, policies, and practices on a marginalized person or community.”⁴⁶⁹ The substantive equality approach considers indirect discrimination in its study, reflecting on the effect of laws or policies and going beyond conformity to substance.⁴⁷⁰

For the new litigation, the equality argument should place emphasis on an approach that examines the lived realities of women sex workers. A purposive approach to constitutional interpretation means that s9 must be read as grounded on a substantive conception of equality. According to the Constitutional Court⁴⁷¹,

We need...to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.⁴⁷²

Substantive equality requires an examination of the actual social and economic conditions of groups and individuals, in order to determine whether the Constitution’s commitment to equality is being upheld. One of the most important indications that the substantive conception of equality

⁴⁶⁷ AHRLJ 30 op cit (n418)

⁴⁶⁸ AHRLJ 30 op cit (n418)

⁴⁶⁹ AHRLJ 30 op cit (n418)

⁴⁷⁰ AHRLJ 30 op cit (n418)

⁴⁷¹ I Currie, J de Waal, Bill of Rights Handbook 5ed, 2005, page 233

⁴⁷² President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) para 41

is envisaged by the Constitution, is the declaration in s9(2) that ‘equality includes the full and equal enjoyment of all rights and freedoms.’⁴⁷³

“At issue in the *Jordan* case was the constitutionality of sections of the Sexual Offences Act, which criminalised the ‘sex worker’ for sex work, but not the ‘client’, or the keeping, or managing of a brothel.”⁴⁷⁴ “While the Constitutional Court unanimously upheld the constitutionality of the brothel provisions,⁴⁷⁵ there was a split of six to five with respect to whether the criminalisation of the ‘sex worker’, but not the ‘client’ amounted to unfair discrimination against women.”⁴⁷⁶ Justice Ngcobo, writing for the majority, found that the provision was constitutional, as section 20(1)(a) was gender-neutral and differentiating between the dealer and the customer was a common distinction made by statutes.⁴⁷⁷ Justices Sachs and O’Regan, writing for the minority, found that the section constituted unfair discrimination based on sex, as it applied only to the conduct of the sex workers,⁴⁷⁸ who are overwhelmingly female, and patrons, [who] are overwhelmingly (though not exclusively) male [and are] relatively more powerful and socio economically privileged.⁴⁷⁹

The judgments drew upon a number of foreign and local sources.⁴⁸⁰ The minority judgment considered whether the differentiation was unfair, by viewing the relevant legislation within the social reality of South Africa.⁴⁸¹ “Such an approach, which has been described as a ‘contextual’ or

⁴⁷³ I Currie, J de Waal, *Bill of Rights Handbook* 5ed, 2005, page 233 footnote 13

⁴⁷⁴ *Jordan op cit* (n129) para 58, per O’Regan J and Sachs J; Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, *African Human Rights Law Journal*, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁷⁵ The purpose of the Act was to outlaw commercial sex. All the judges unanimously held that the right to human dignity was not violated.

⁴⁷⁶ Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, *African Human Rights Law Journal*, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁷⁷ *S v Jordan op cit* (n129) para 10; Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, *African Human Rights Law Journal*, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁷⁸ *s v Jordan op cit* (n129) paras 59 & 68; Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, *African Human Rights Law Journal*, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁷⁹ Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, *African Human Rights Law Journal*, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁸⁰ Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, *African Human Rights Law Journal*, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁸¹ Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, *African Human Rights Law Journal*, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

‘super context’ approach,⁴⁸² has the hallmarks of substantive equality. “As Albertyn and Goldbatt state,⁴⁸³ Contextual analysis [shifts] the legal enquiry from an abstract comparison of ‘similarly situated’ individuals to an exploration of the actual impact of an alleged rights violation within the existing socio-economic circumstances.”⁴⁸⁴

Unfortunately, the *Jordan* case illustrates that the court missed an opportunity to advance gender equality.⁴⁸⁵ “It was a ‘missed opportunity’, as the majority ignored the social reality, which is that sex workers tend to be primarily uneducated women from poor socio-economic backgrounds.”⁴⁸⁶ “Not only did the majority judgment foster gender inequality, but also, as Simpson argues, it had the potential to impair the dignity of women.”⁴⁸⁷

“In stark contrast, the minority’s ‘contextual’ or ‘super context’ approach allowed for the broader social context to be taken into consideration, and revealed how the impugned law portrayed the female sex worker as the ‘social outcast’,⁴⁸⁸ “and the male client as ‘having done the sort of thing that men do.’⁴⁸⁹ The minority judgment is an exemplar of how courts should approach indirect discrimination. This approach requires examining the effects of what appears to

⁴⁸² P de Vos ‘A bridge too far? History as context in the interpretation of the South African Constitution’ (2001) 17 South African Journal on Human Rights 1 7-8; <http://www.ahrlj.up.ac.za/smith-a>

⁴⁸³ C Albertyn & B Goldbatt ‘Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality’ (1998) 14 South African Journal on Human Rights 248 260.

⁴⁸⁴ Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, African Human Rights Law Journal, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁸⁵ Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, African Human Rights Law Journal, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁸⁶ Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, African Human Rights Law Journal, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁸⁷ J Simpson ‘Stereotyping sex workers: S v Jordan & Others’ paper submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women’s Human Rights, Faculty of Law, University of Toronto, 6 March 2009, http://www.law-lib.utoronto.ca/diana/2009_symposium_papers/simpson_paper.pdf; Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, African Human Rights Law Journal, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁸⁸ S v Jordan op cit (n129) para 64; Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, African Human Rights Law Journal, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁸⁹ S v Jordan (n299) para 64; Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, African Human Rights Law Journal, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

be “facially-neutral criteria and looking at the disproportionate effect it may have on vulnerable groups.”⁴⁹⁰

“The failure of the majority judgment, by upholding the constitutionality of criminalising the sex worker, but not the client, ‘reinforces and perpetuates sexual stereotypes which degrades the sex worker but does not equally stigmatise the client, if it does at all’.”⁴⁹¹ “In so doing, this case, and others, illustrates a simple trend; the delay and denial of equality will be guaranteed, if a formal approach is continually adopted in equality rights adjudication.”⁴⁹²

4.3.2.1.2 Right to Human Dignity

Human dignity is a central value of the ‘objective, normative value system’ established by the Constitution.⁴⁹³ Section 10 specifically asserts that ‘Everyone has inherent dignity’, thereby confirming ‘that respect for human dignity, and all that flows from it, is an attribute of life itself, and not a privilege granted by the State.’ The recognition of the right to dignity means that the intrinsic worth of human beings is acknowledged; all human beings are entitled to be treated as worthy of respect and concern. The Constitutional Court in *Makwanyane*, stated as follows:

The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in chapter 3.⁴⁹⁴

There is a fundamental relationship between the right to equality and the right to dignity.⁴⁹⁵ It is submitted that the two are in fact inextricably linked, and the violation of dignity compounds the

⁴⁹⁰ Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, African Human Rights Law Journal, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁹¹ *S v Jordan* op cit (n129) para 72; Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, African Human Rights Law Journal, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁹² Anne Smith, ‘Equality Constitutional Adjudication in South Africa’, African Human Rights Law Journal, Accessed on <http://www.ahrlj.up.ac.za/smith-a>

⁴⁹³ I Currie, J de Waal, Bill of Rights Handbook 5ed, 2005, page 272

⁴⁹⁴ *S v Makwanyane* 1995 (3) SA 391 CC para 328

⁴⁹⁵ I Currie, J de Waal, Bill of Rights Handbook 5ed, 2005, page 272

unfair discrimination that sex workers face. “Under criminalisation, sex workers suffer the indignity of discrimination, police abuse, health services stigma, as well as other violations.”⁴⁹⁶

In the *National Coalition for Gay and Lesbian Equality case*⁴⁹⁷, the criminalisation of sodomy was seen as limiting a gay person’s rights not only to equality and freedom, but also to dignity, preventing their achievement of self-identification and self-fulfilment, by targeting one of the ways in which gay people give expression to their sexual orientation.⁴⁹⁸ In this case, sexual conduct was described as being part of ‘the experience of being human’ in the analysis leading up to the finding that the sodomy laws violated the dignity right protected in section 10.⁴⁹⁹

4.3.2.1.3 Right to Freedom and Security of the person

There is almost an infinite variety of ways, in which human beings exploit their bodies for commercial gain. This is integral to the concept of freedom. The 1996 South African Constitution carves out a specific right of bodily integrity, or autonomy. Section 12(2)(b) states that, “Everyone has the right to bodily and psychological integrity, which includes the right – b. To security in and control over their body”. This connotes the capacity for individuals to take decisions concerning their own bodies, including the right to use their bodies, even through sexual means, for commercial gain.⁵⁰⁰

Section 12(1)(c) of the Constitution advocates the right to freedom and security of the person, and more particularly, the right to be free of all forms of violence from either public or private sources. Section 12(2) entrenches the right to bodily and psychological integrity, which includes ‘the right to security in and control over their body’. This right is of particular importance

⁴⁹⁶ I Currie, J de Waal, *Bill of Rights Handbook* 5ed, 2005, page 272; Commission for Gender Equality, *Position Paper on Sex Work*, 2013, Accessed at <https://www.nswp.org/sites/nswp.org/files/Policy%20Brief%20Position%20Paper%20on%20Sex.pdf>

⁴⁹⁷ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC),

⁴⁹⁸ *National Coalition for Gay and Lesbian Equality op cit* (n452) paragraph 36.

⁴⁹⁹ *National Coalition for Gay and Lesbian Equality op cit* (n452) para 28

⁵⁰⁰ Bishop, Michael, and Stuart Woolman. "Freedom and Security of the Person." *Woolman, S. Roux, T., Bishop, M.(eds). Constitutional Law of South Africa* 2 (2007): 40-41.

because of the high levels of gender-based violence endured by sex workers. The courts, however, have acknowledged that violence against women not only violates their right to bodily integrity and security of the person, but also their human dignity. In *Van der Merwe*,⁵⁰¹ the Constitutional Court (CC) observed that,

“There is no doubt that in our society domestic violence and economic vulnerability are gendered in nature. Both are a sad sequel to patriarchy.”⁵⁰²

Additionally, in *Carmichele*,⁵⁰³ the CC recognised that “sexual violence and the threat of sexual violence go to the core of women’s subordination in society. It is the single greatest threat to the self-determination of South African women.”⁵⁰⁴ In *Masiya*,⁵⁰⁵ Nkabinde J reiterated the widely accepted notion that “sexual violence and rape not only offends the privacy and dignity of women but also reflects the unequal power relations between men and women in our society”.⁵⁰⁶

The right to freedom from violence, therefore, imposes an obligation on the state in relation to sex workers. In *Van Eeden*,⁵⁰⁷ this Court observed that:

‘Section 12(1)(c) requires the State to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violations of the right. The subsection places a positive duty on the State to protect everyone from violent crime.’⁵⁰⁸ (Emphasis added)

4.3.2.1.4 Right to Privacy

⁵⁰¹ *Van der Merwe v Road Accident Fund and Another* (Women’s Legal Centre Trust as Amicus Curiae) 2006 (4) SA 230 (CC).

⁵⁰² *S v Baloyi* (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC) (“Baloyi”) at footnote 46.

⁵⁰³ *Carmichele v Minister of Safety and Security and Another* (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC).

⁵⁰⁴ *Carmichele op cit* (n458) para 62. See also *K v Minister of Safety and Security* 2005 (9) BCLR 835 (CC) at para 18.

⁵⁰⁵ *Masiya v Director of Public Prosecutions, Pretoria and Another* (Centre for Applied Legal Studies and Another, Amici Curiae) 2007 (5) SA 30 (CC).

⁵⁰⁶ *Masiya op cit* (n460) at para 29.

⁵⁰⁷ *Van Eeden v Minister of Safety and Security* (Women’s Legal Centre Trust, as Amicus Curiae) 2003 (1) SA 389 (SCA).

⁵⁰⁸ *Van Eeden op cit* (n462) Para 13.

Section 14 comprises two parts.⁵⁰⁹ The first part guarantees a general right to privacy, the second part protects against specific infringements of privacy, namely, searches and seizures and infringements of the privacy of communications.⁵¹⁰ All of these apply to sex workers in that, the act of the exchange of sex for reward is done in a private setting, often the way in which they are searched by police officers infringes on their rights to privacy, their communications are private in that their cell phones are used to communicate not only with each other in relation to clients, but to managers / brothel owners, or clients directly. A person's sexuality is a deeply personal and private part of life. In the case of the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*⁵¹¹, it was described as part of the 'experience of being human'. It involves decisions about an individual's body, as well as, how s/he conducts sexual relationships.⁵¹² It is a sphere of activity, in respect of which, an individual is, at least generally, entitled to be alone⁵¹³. It represents a sphere of personal autonomy, in which the law, normally, may not interfere.⁵¹⁴ In the case of the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, Ackermann J stated the following:

'Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationship without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.'⁵¹⁵

⁵⁰⁹ I Currie, J de Waal, Bill of Rights Handbook 5ed, 2005, page 315

⁵¹⁰ I Currie, J de Waal, Bill of Rights Handbook 5ed, 2005, page 315

⁵¹¹ National Coalition for Gay and Lesbian Equality v Minister of Home Affairs (n433) paragraph 32

⁵¹² Bishop, Michael, and Stuart Woolman. "Freedom and Security of the Person." *Woolman, S. Roux, T., Bishop, M.(eds). Constitutional Law of South Africa 2* (2007): 40-41

⁵¹³ Bishop, Michael, and Stuart Woolman. "Freedom and Security of the Person." *Woolman, S. Roux, T., Bishop, M.(eds). Constitutional Law of South Africa 2* (2007): 40-41.

⁵¹⁴ Bishop, Michael, and Stuart Woolman. "Freedom and Security of the Person." *Woolman, S. Roux, T., Bishop, M.(eds). Constitutional Law of South Africa 2* (2007): 40-41

⁵¹⁵ National Coalition for Gay and Lesbian Equality v Minister of Home Affairs (n452) paragraph 32

Sachs J emphasised, in his concurring judgment of the case of the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, that privacy does not give individuals a blanket permission to do anything they choose to, as long as it is in private, and further noted that:

‘(t)here are very few democratic societies, if any, which do not penalize persons for engaging in inter-generational, intra-familial, and cross-species sex, whether in public or in private. Similarly, in democratic societies sex involving violence, deception, voyeurism, intrusion or harassment is punishable (if not always punished), or else actionable, wherever it takes place (there is controversy about prostitution and sado-masochistic and dangerous fetishistic sex). The privacy interest is overcome because of the perceived harm.’⁵¹⁶

In the case of *Bernstein and Others v Bester and Others NNO1996 (2) SA 751 (CC)*, this Court held that:

‘...it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.’⁵¹⁷

Section 20(1)(aA) criminally prohibits sex work, absolutely, whether it takes place in a wholly private manner, or whether it takes place in the public domain. The sex worker has an objectively reasonable and legitimate expectation to the protection of her/his privacy that is violated by this prohibition.⁵¹⁸ There is no real or perceived harm, other than possibly a moral harm, as perceived by some sectors that can legitimately be mitigated by imposing a criminal prohibition.⁵¹⁹ In actual

⁵¹⁶ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (n452) para 118

⁵¹⁷ *Bernstein and Others v Bester and Others NNO1996 (2) SA 751 (CC)* at paragraph 67

⁵¹⁸ Heads of Argument, SWEAT, CALS and RHRU, available at <http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/6e5PfqEGJE/MAIN/285780028/523/518>, accessed on 31 March 2015, para 8.9. Also at *Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC)* at para 75

⁵¹⁹ Heads of Argument, SWEAT, CALS and RHRU, available at <http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/6e5PfqEGJE/MAIN/285780028/523/518>, accessed on 31 March 2015

fact, the evidence as listed in Chapter 3, reveals that harm is caused by imposing such prohibition.⁵²⁰

4.3.2.1.5 Right to fair labour practice

The Constitution does not provide a list of people, who are ineligible for the protections afforded, regarding fair labour practises. ‘Everyone’ is protected; therefore, people employed to work in the sex industry are not, or should not be, excluded. They are also not excluded as “employees” for purposes of the Labour Relations Act 66 of 1995 . Section 2 of the LRA provides for five categories of employees to whom the LRA does not apply. Sex workers, who are employees, are not excluded. This was confirmed in the *Kylie* case,⁵²¹ where the LAC held that sex workers are employees for purposes of the LRA.

In many cases, sex workers are employed by owners and managers of brothels to perform various sexual services for clients. The usual arrangement is that the brothel controls the way the sex worker works, her/his hours of work and provides the premises. In these cases, the sex worker will usually be paid a salary, based on the amount of income s/he generates for the brothel. Therefore, a clear employment relationship of employer-employee exists between many brothel owners and the sex workers.

4.3.2.1.6 Rights of arrested, detained and accused persons

As a result of the criminalisation of sex work in South Africa, many sex workers report that their rights, contained in section 35 of the Constitution (which sets out the rights of arrested, detained and accused persons), are often violated. As stated earlier, section 20(1)(aA) of the 1957 SOA does not criminalise the individual for being a sex worker. This section requires positive action from

⁵²⁰ Heads of Argument, SWEAT, CALS and RHRU, available at <http://www.constitutionalcourt.org.za/uhtbin/cgiirsi/6e5PfqEGJE/MAIN/285780028/523/518>, accessed on 31 March 2015

⁵²¹ *Kylie v Commission for Conciliation Mediation and Arbitration and Others* op cit (n182)

the sex worker, which is, to enter into an agreement to perform a sexual act for reward, perform a sexual act in a public place,⁵²² or to solicit (or importune) any person for the purpose of prostitution, or immorality.⁵²³ Due to the difficulties in proving this offence, many police officers use illegal policing practices to arrest sex workers. Many sex workers are arrested purely because they are known to be sex workers, because they are dressed provocatively, or because they have condoms in their possession.

Often, when sex workers are arrested, the constitutional protocol is not observed, which are: the right to be brought to court, as soon as reasonably possible, but not later than 48 hours after the arrest; the right to be informed of the reason for their arrest and detention; and the right to be released from detention, if the interests of justice allow this. In terms of section 35(1) of the Constitution, South African courts have been very clear that the right to personal liberty is one of the most fundamental rights that a person can claim. The courts have repeatedly highlighted that arrest is drastic and may have far-reaching consequences for the detainee.

Before police officers actually arrest a sex worker, they should assess the evidence that they may have, does it in fact, satisfy the requirements of the offence. “In the case of *Mabona and Another v Minister of Law and Order and Others*,⁵²⁴ Jones J considered how a reasonable person should analyse, assess and evaluate the evidence at his/her disposal, when deciding whether the reasonable suspicion s/he holds is reasonable”⁵²⁵:

‘It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination

⁵²² Western Cape By-Laws By-law Relating to Streets, Public Places and the Prevention of Noise Nuisances, 2007, Reg 3(f)

⁵²³ Western Cape By-Laws By-law Relating to Streets, Public Places and the Prevention of Noise Nuisances, 2007, Reg 3 (j)

⁵²⁴ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658 E-G. See also *S v Purcell-Gilpin* 1971 (3) SA 548 (RA) at 554 C-D

⁵²⁵ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty.⁵²⁶

‘However, the suspicion must be based on solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.’⁵²⁷

“The judge in *Mabona* states that, before an arrest is made, the police officer should assess the evidence placed before him/her.”⁵²⁸ Anecdotal evidence suggests that sex workers are arrested simply because the police know that the women are sex workers, and not necessarily, because they had committed an offence.

Section 35 of the Constitution at section 35(2)(e) provides a right to humane conditions of detention. In order to give effect to the s35 constitutional right, SAPS was mandated to enact domestic legislation and policy to ensure that their practices uphold, promote and protect arrested and detained person’s rights. Accordingly, SAPS has enacted Standing Orders to ensure that their practices comply with the Constitution.

As previously stated, the SOA of 1957 and 2007 are very difficult laws to enforce, hence many police officers resort to using municipal by-laws. According to Regulation 23 of the Western Cape By-Law relating to public spaces, it states that even if the sex worker is guilty of the offence, the by-laws set out procedures relating to the arrest of a person that has allegedly violated the by-law:

1. “The appropriate response would be to give such person a written notice to stop the offending activity and only if s/he fails to adhere to the terms of the notice, can the person be fined, or given a notice to appear in court”,⁵²⁹

⁵²⁶ *Mabona* op cit (n479) para 135

⁵²⁷ *Mabona* op cit (n479) 658F-H

⁵²⁸ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

⁵²⁹ *Ibid*

2. Where a person has been fined, they should have an opportunity to make representations if they feel such fine was incorrectly levied against them, similar to the current system allowed for traffic fines;
3. Where a fine has not been paid, after it becomes due, arrests would be allowed only as a last resort, if necessary, to be able to secure a person's attendance in court. In most cases, a summons would be sufficient to ensure attendance in court.

As previously mentioned, national laws banning sex work have proved difficult to enforce, and officers have often relied on local by-laws. The by-laws should be declared unconstitutional, according to the researcher, because they are incompatible with the principles of the Constitution, especially in terms of how they are implemented.

Previously, when considering the validity of the by-laws, the court in the case of *Fedsure Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,⁵³⁰ and *City of Cape Town and Other v Robertson and Other*,⁵³¹ specifically Fedsure, confirms that the passing of by-laws is a proper legislative act.” This is significant, as it entails that, while by-laws can be challenged on grounds of legality, including consistency with the Constitution, they cannot be challenged on administrative review grounds.”⁵³²

However, the new position under the Constitution was usefully summarized by Moseneke J in *Robertson* at para 60:

The Constitution has moved away from a hierarchical division of governments power and has ushered in a new vision of government in which the sphere of local government is interdependent. ‘inviolable and possesses the constitutional latitude within which to define and express its unique character’ subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statue otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys ‘original’ and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. Now the conduct of a municipality it not always invalid only for the reason that no legislation

⁵³⁰ 1999 (1) SA 374 (CC).

⁵³¹ 2005 (2) SA 323 (CC).

⁵³² Women's Legal Centre, “Lawyer's Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

authorizes it. Its power may derive from the Constitution or from legislation of a competent authority or from its own laws.

In *Fose v Minister of Safety and Security*,⁵³³ Kriegler J held in a concurring judgment that the supremacy clause, namely section 2 of the Constitution⁵³⁴ automatically made any unconstitutional law or conduct, a nullity.⁵³⁵ In other words, the consequence of constitutional supremacy is that such laws or conduct, are invalid. Invalidity follows a matter of law from the fact of inconsistency, whereas a remedy is awarded by a court in order to resolve a dispute between the parties before it. “Therefore, the applicant must allege that law or conduct is inconsistent with the Constitution.”⁵³⁶

“Section 172(1) provides that, when deciding a constitutional matter, the court must declare that any law, or conduct, that is inconsistent with the Constitution is invalid to the extent of its inconsistency.”⁵³⁷ Invalidity, therefore, follows from inconsistency with the Constitution, by declaring the law, or conduct, to be invalid, a court grants a remedy. “A court is obliged to declare a law, or conduct, invalid.”⁵³⁸ “A good example of a successful challenge to a by-law is found in the case of *City of Cape Town v Ad Outpost*.”⁵³⁹ “The by-law challenged in this case, required that any person, who intends to display a sign must make a written application for prior approval from the municipality.”⁵⁴⁰ The conditions for approval required that the sign describe the trade or activity conducted on the site. The by-law, therefore, effectively prohibited third party advertising on vacant land. Ad Outpost challenged this by-law, based on the right to freedom of expression, and the Cape Town High Court upheld their claim. The Court held that the by-law breached Ad

⁵³³ 1997 (3) SA 38 (CC) para 27.

⁵³⁴ “*This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*”.

⁵³⁵ Fose op cit (n484) para 94

⁵³⁶ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

⁵³⁷ Ibid

⁵³⁸ Ibid

⁵³⁹ 2000 (2) SA 733 (C); Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

⁵⁴⁰ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

Outpost's right to freedom of expression, and was too extensive and rigid in its approach to be saved as reasonable and justifiable in an open and democratic society, as per section 36(1) of the Constitution. Accordingly, the by-law was declared invalid.

Similarly, in the case of *Joseph and Others v City of Johannesburg and Others*⁵⁴¹ a by-law was held to be unconstitutional and, therefore, invalid. In this case, the by-law in question⁵⁴² permitted the local authority, responsible for providing electricity to citizens, to disconnect power without notice being provided to consumers. It was argued successfully that, in accordance with the Constitution and the Promotion of Administrative Justice Act 3 of 2000, citizens receiving electricity from the local authority had a right to receive this basic municipal service, and a right to the observance of procedural fairness, should a decision be taken which, would materially and adversely affect this right. Therefore, to the extent that the by-law purported to do away with the procedural fairness requirement of notification prior to disconnection, it was unconstitutional and invalid.

“However, in order to eradicate the conduct perpetrated by the Police, the declaration of invalidity may not be enough. Positive action may be required from government and, therefore, it may be necessary to grant a mandamus, or even a structural interdict.”⁵⁴³

4.3.2.1.7 Rights in Other South African Sources of Law

Both in policy discussions and other court cases, the government and judiciary have been clear that the right to personal liberty is, unquestionably, one of the most fundamental rights that a person is entitled to assert. In order to safeguard this right for sex workers, a reform is necessary. In 2009, the South African Law Reform Commission (“SALRC”) released a “Discussion Paper on “Adult Prostitution.” In the Discussion Paper, the SALRC stated:

⁵⁴¹ 2010 (4 SA 55 (CC).

⁵⁴² I have narrowed discussion to one of the by-laws in question only, for illustrative purposes. In the case more than one by-law was challenged.

⁵⁴³ Women's Legal Centre, “Lawyer's Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

Notwithstanding this debate on the meaning of prostitution, South Africa's involvement in the International, African, Regional and United Nations instruments, discussed above, means that the current legal position of prostitution is in need of comprehensive review. It is clear that South Africa's international obligations to realise various rights such as dignity, security of the person, equality and equal access to the law and access to health care, as well as to provide effective remedies for violations of rights, must inform the decisions of the legislature.

The case of *Kylie v Commission for Conciliation, Mediation and Arbitration and Others*⁵⁴⁴ confirmed that, when dealing with sex workers, “the starting point should be the Constitution and the illegal activity of a sex worker does not prevent sex workers from enjoying a range of Constitutional rights.”⁵⁴⁵ “The Labour Appeal Court (“LAC”) held that the right to fair labour practices does vest in ‘everyone’ in an employment relationship.”⁵⁴⁶ The LAC endorsed the Constitutional Court's comments from *Jordan* where the court said that sex workers should not be stripped of their right to be treated with dignity by clients, and concluded that this should apply to employers, as well.

4.3.2.1.7.1 South Africa's obligation to ratify and enforce international laws

The South African Constitution and international agreements such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recognize universal human rights for every human being protected by law. In addition to these international instruments, there are regional instruments which also recognizes human rights for all, such as: The regional and international instruments mentioned above highlight South Africa's obligation to uphold all people's rights and its particular commitment to protect women from violence. The legal instruments guarantee that all people have the right to be free from exploitation, equality, dignity, health, and work under equitable and satisfactory circumstances. South Africa has signed and ratified many international treaties of human rights. This means that

⁵⁴⁴ *Kylie v Commission for Conciliation, Mediation and Arbitration and Others* op cit (n182)

⁵⁴⁵ Women's Legal Centre op cit (n531)

⁵⁴⁶ Women's Legal Centre, “Lawyer's Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

the government of South Africa has taken on the obligation to respect, protect and fulfil the fundamental human rights spelled out in the treaties mentioned above, which indicates that everyone should be treated with dignity and afforded protection of rights. I submit that these include sex workers who are part of our society. Section 39 of the South African Constitution states that the courts and other judicial bodies must recognize international and foreign law when interpreting the Bill of Rights.

In general, international human rights law puts obligations on states concerning all persons, not only citizens. The Universal Declaration of Human Rights (UDHR),(2) the International Covenant on Civil and Political Rights (ICCPR),(3) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)(4), generally referred to as the "International Bill of Human Rights" since they form the basis of international human rights law, confer on "all" the vast majority of the rights they enumerate.⁵⁴⁷

The ICCPR guarantees 'all peoples,' and, therefore, all sex workers, certain civil and political rights. These include:

- the right to life (Art. 6);
- the rights to liberty and security of the person (Art.9);
- the right not to be subjected to arbitrary arrest or detention (Art. 9);
- the right to equality before the law and equal protection under the law (Art. 26); and
- the right to an effective remedy for violations of rights or freedoms, notwithstanding that the violation has been committed by persons acting in an official capacity (Art. 2.3).

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which South Africa has signed and ratified,⁵⁴⁸ calls on States to eliminate all forms of discrimination against women, defined in Article 1 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 [...]

⁵⁴⁸ International Covenant on Civil and Political Rights: New York, 16 December 1966

of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field

“Article 6 of CEDAW states that parties must take all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women.”⁵⁴⁹ Additionally, Article 21 of CEDAW empowers the UN Committee on CEDAW to make suggestions and general recommendations regarding the Convention’s implementation. In General Recommendation 19, the Committee specifically addressed the issue of violence against women, including sex workers, which states that, “Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.”

In a report by the Special Rapporteur, the United Nations Human Rights Council analysed the effects of criminalisation, advocating for ‘decriminalisation, along with the institution of appropriate occupational health and safety regulations, safeguards the rights of sex workers’.⁵⁵⁰ The report also recommended that States should ‘repeal all laws criminalising sex work and practices around it, and to establish regulatory frameworks, within which sex workers can enjoy the safe working conditions, to which they are entitled.’⁵⁵¹

In the annual report of the United Nations High Commissioner for Human Rights, the Secretary General also analysed the impact of criminalisation on the rights of sex workers and recommended that all states ‘reform and monitor laws that impede effective HIV responses, including removing punitive criminal laws, used repressively against sex workers.’⁵⁵²

⁵⁴⁹ Women’s Legal Centre, “Lawyer’s Manual on Sex Work Litigation Pursuing Justice for Sex Workers”, 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

⁵⁵⁰ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, 27 April 2010, page 14, para. 46. It can be accessed on the internet, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>

⁵⁵¹ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, 27 April 2010, page 14, para. 76 (b). It can be accessed on the internet, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>,

⁵⁵² Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary General Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Page 15, para 50 (a). Also accessed on <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-69.pdf>

Additionally, the Global Commission on HIV and the Law made similar recommendations regarding sex workers and health risks, suggesting that, rather than punishing consenting adults involved in sex work, countries must ensure safe working conditions for sex workers and their clients', as well as access to effective HIV and health services and commodities.⁵⁵³ Lastly, the International Labour Organization recognizes sex workers as a form of industry and encourages governments to focus on improving labour and working conditions for voluntary adult sex workers.⁵⁵⁴

Other relevant international agreements include International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR), to which South Africa was ratified in 2015.⁵⁵⁵ "Parties to the ICESCR are obligated to take steps towards the realization of rights, including the right to work."⁵⁵⁶ "This implies the right of everyone to an opportunity to earn his living by work, which he freely chooses or accepts, with appropriate safeguards for this right (Art. 6.1)."⁵⁵⁷ In addition, the right to enjoy just and favourable conditions of work is expected, including a fair wage and decent living, in safe and healthy working conditions (Art. 7).

The Declaration on the Elimination of Violence against Women of 1993 provides for Parties to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women, receive training to sensitize them to the needs of women. The Beijing Declaration and Platform for Action of 1995 is an additional "effort to eliminate all forms of discrimination against women in both public and private life."⁵⁵⁸

South Africa is also a party to several key regional agreements to address women's rights, and in particular the issue of violence against women. The African Charter on Human and People's Rights of 1986 guarantees the rights of all individuals to equality, dignity, and work under equitable and satisfactory circumstances, health and freedom from exploitation. "Additionally, the

⁵⁵³ Global Commission on HIV and the Law, "Risks, Rights & Health", UNDP, HIVAIDS Group (New York: 2012) (www.hivlawcommission.com)

⁵⁵⁴ International Labor Organization, *The Sex Sector : the Economic and Social Bases of Prostitution in Southeast Asia*, 1998

⁵⁵⁵ United Nations. "International covenant on economic, social and cultural rights." Treaty Series 933 (1966): 3-12.

⁵⁵⁶ Women's Legal Centre, "Lawyer's Manual on Sex Work Litigation Pursuing Justice for Sex Workers", 2014 Accessed at http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf

⁵⁵⁷ Ibid

⁵⁵⁸ Ibid

Protocol to the African Charter on Human and People's Rights on the Rights of Women of 2005 emphasizes the need to promote and protect women's rights."⁵⁵⁹ "It calls for an end to violence against women, and specifically recognizes protection from sexual violence, as inherent in the right to dignity."⁵⁶⁰ The Addendum to the 1997 Declaration on Gender and Development by Southern African Development Community ("SADC") Heads of State or Government of 1998 strongly condemns all forms of violence against women and children, while the SADC Protocol on Gender and Development of 2008 "calls for the empowerment of women, the elimination of discrimination and the achievement of gender equality."⁵⁶¹ South African courts have consistently applied the rule in Section 233, which specifies that "each court must prefer any fair interpretation of legislation that is consistent with international law to any alternative interpretation that is inconsistent with international law when interpreting any legislation.' Furthermore, section 231 provides that every international agreement becomes law in the Republic when it is adopted by national legislation. Still, if it is inconsistent with the Constitution or an Act of Parliament, the law in the Republic is a self-executing provision of an agreement accepted by Parliament. It further explains that the Republic is bound by international agreements that were binding on the Republic when this Constitution took effect.

In *S v Makwanyane* 1995 (3) SA 391 (CC), former Chief Justice Chaskalson of the Constitutional Court stated that International public law would include both non-binding and binding rules. Both can be used as instruments of interpretation under the section International agreements and customary international law accordingly provide a structure for the role of international law in South African health law and policy-making through which [the Bill of Rights] can be evaluated and interpreted, and for that reason, tribunal decisions delaying comparable instruments.

In the *Grootboom* case, Justice Yacoob of the Constitutional Court said that an interpretation guide could apply to international law, but the weight to be applied to and specific concept or rule of international law may vary.

⁵⁵⁹ Ibid

⁵⁶⁰ Ibid

⁵⁶¹ Ibid

However, where South Africa is bound by a relevant principle of international law, it may be directly applicable.

4.3.3 Conclusion

The aim of this chapter was to provide reasons why the researcher is of the opinion that the decriminalisation is the best model for South Africa and to provide ways in which South Africa could change that, namely, through a parliamentary process or through litigation. I particularly highlighted litigation, since the parliamentary process through the SALRC has taken more than a decade thus far.

Chapter 5

Conclusion

This section provides the conclusion of the study and final recommendations of the study.

As evidenced, the decriminalization of sex work has produced beneficial results in New Zealand and Australia—countries that were used for comparative analysis. Decriminalization has wide appeal among human rights groups and public health institutions. Criminalizing adult, voluntary, and consensual sex – including the commercial exchange of sexual services – is incompatible with the human right to personal autonomy and privacy.

As shown in the analysis, in the countries that the model has been adopted such as New Zealand and Australia, decriminalisation has helped reduce the number of people in forced sex and provided wide-ranging benefits for sex workers. Additionally, South Africa is constitutionally bound by international bodies by International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and People’s Rights (African Charter), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The International Labour Organizations (ILO) indicated sex work as an industry and has encouraged the government to focus on improving Labour and working condition for voluntary sex workers. Criminalization of sex work violates the basic rights of the sex workers and has been a source of justification for state sponsored attacks on sex workers.

By decriminalizing sex work, South Africa will be fulfilling its obligations under various laws, including constitutional and international law, recognizing the sex work as legitimate form of labour. It will further allow sex workers to freely choose their occupation and provide for their families. It will improve sex workers' legal security as well as their freedom to exercise other important rights, such as access to justice and health care. The protection, dignity, and equality of sex workers are enhanced by legal recognition of their profession. This is a vital step in the process of de-stigmatizing sex work.

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Universal Declaration of Human Rights.

1.2 Regional Instruments

African Charter

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

SADC Protocol on Gender and Development

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