

A TOUCHSTONE DOCUMENT OF PEER-REVIEWED ACADEMIC EVIDENCE ON THE
DECRIMINALISATION OF SEX WORK

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The Asijiki Coalition for the Decriminalisation of Sex Work (“Asijiki”) is a group of sex workers, activists, advocates and human rights defenders who advocate for law reform for the decriminalisation of sex work in South Africa. See www.asijiki.org.za

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LIST OF ABBREVIATIONS/ACRONYMS

AIDS	Acquired Immune-Deficiency Syndrome
COSATU	Congress of South African Trade Unions
HIV	Human Immunodeficiency Virus
ILO	International Trade Organisation
LGBTI	Lesbian, Gay, Bisexual, Trans, Intersex
NSP	National Strategic Plan
PRA	Prostitution Reform Act 28 of 2003 (New Zealand)
SALRC	South African Law Reform Commission
SANAC	South African National AIDS Council
STI	Sexually Transmitted Infection
SWEAT	Sex Workers Education and Advocacy Taskforce
UN	United Nations
WHO	World Health Organisation
WLC	Women's Legal Centre

EXECUTIVE SUMMARY

This document considers and summarises the research, evidence and arguments for the decriminalisation of sex work. Decriminalisation is the removal of all criminal laws directed towards the agreed sale of sex between adults.

There is now powerful evidence that decriminalisation is the best legal model for protecting the safety, health and human rights of sex workers. Decriminalisation lessens stigma and the resulting discrimination of sex workers. It also makes it easier for people to stop selling sex if they wish to do so. In contrast, the existing legal model of criminalisation has been shown to make sex workers more at risk of violence and abuse, especially by police officers. Criminalisation also makes it difficult for sex workers to get health services and makes them more at risk of HIV, which is of great concern in a country like South Africa, where sex workers and their clients form an extremely large number of new HIV infections.

This report will set out the evidence on sex work and the law by covering peer-reviewed, academic articles on the impact of the criminal law on safety and health issues, individual sex workers and for the sex worker population as a whole. It will set out the case for why the criminal law should be removed from adult, voluntary sex work and seriously discuss the case for legalisation and partial criminalisation of sex work.

1 INTRODUCTION

The debate over the legal status of sex work in South Africa is at crisis point. In May 2017, after nearly two decades of delay, the South African Law Reform Commission (SALRC) released its Report on “Adult Prostitution”.¹ This Report basically recommends that things stay as they are in South Africa, i.e. the full criminalisation of sex work. In other parts of government and civil society, however, it is largely agreed that criminalisation is deeply harmful and that decriminalisation would do more to protect the human rights of sex workers and the general public.

The Asijiki Coalition – a collective of over 70 organisations and individuals arguing for decriminalisation of sex work – published a detailed response to the SALRC Report in 2018.² The present document serves as a full and thorough summary of the large amount of academic and medical evidence supporting decriminalisation.

It is worth noting that Asijiki is by no means alone in its support for decriminalisation. Many local and international organisations have publicly expressed similar support. From a labour point of view, the Congress of South African Trade Unions (COSATU) has stated its support for decriminalisation,³ noting that “[a] key argument for unionists would be against the criminalisation of sex work and in support of the self-organisation of sex workers to campaign for better health care and work safety”.⁴ The Federation of Unions of South Africa (Fedusa) has also stated its support.⁵ Internationally, although the International Labour Organisation (ILO) does not have an official position on decriminalisation, it has argued that more government recognition and regulation of the industry is needed to improve working conditions,⁶ and that criminalisation reduces “opportunities to access sex workers with HIV services as they are driven into hiding”.⁷

Decriminalisation is also supported by a number of organisations promoting public health, including: UNAIDS,^{8,9} the World Health Organisation (WHO),¹⁰ the Global Commission on HIV and the Law,¹¹ *Medecins du Monde* (Doctors of the World),¹² the UN Development Programme,¹³ the United Nations Special Rapporteur on Health,¹⁴ the UN Population Fund, and the Southern African HIV Clinicians Society,¹⁵ as well as the *Lancet* medical journal.¹⁶

Furthermore, in producing its 2007-2011 National Strategic Plan (NSP), the South African National AIDS Council (SANAC) was explicit in its support for decriminalisation.¹⁷ In later NSPs, this is expressed more diplomatically, with the 2012-2016 NSP merely stating that “Decriminalisation of sex work is a matter that has been a subject of debate and society should continue to deliberate on the matter until final resolution”,¹⁸ and the 2017-2022 NSP “urg[ing] that the process to resolve the legal reform matters related to the Sexual Offences Act be addressed as soon as possible”.¹⁹ However, in other documents, this view continues to be expressed more directly, with the Sex Worker HIV Plan stating that it is “important to secure political commitment for the decriminalisation of sex work to achieve public health goals and to safeguard human rights”.²⁰

Many major human rights organisations around the world have come out in favour of decriminalisation, including Human Rights Watch,²¹ Amnesty International,²² the Global Alliance Against Traffic in Women (GAATW)²³ and others. Locally, the South African Commission for Gender Equality²⁴ also supports sex work decriminalisation.

In the political realm, newly-elected African National Congress (ANC) President, Cyril Ramaphosa, then in his capacity as national Deputy President and Chair of SANAC, has remarked, “We cannot reclaim the morality of society by excluding the most vulnerable. Whatever views we might have about sex workers, whatever beliefs we have about sex workers, whatever statutes are on our law books about the legality of sex work... We cannot deny the human and unalienable rights of people who engage in sex work”.²⁵ He also registered his agreement with the long-standing slogan of the movement for sex workers’ rights, stating that “sex work is essentially work”.²⁶ In line with this view, the ANC resolved at its 2017 party conference that it would support decriminalisation.²⁷

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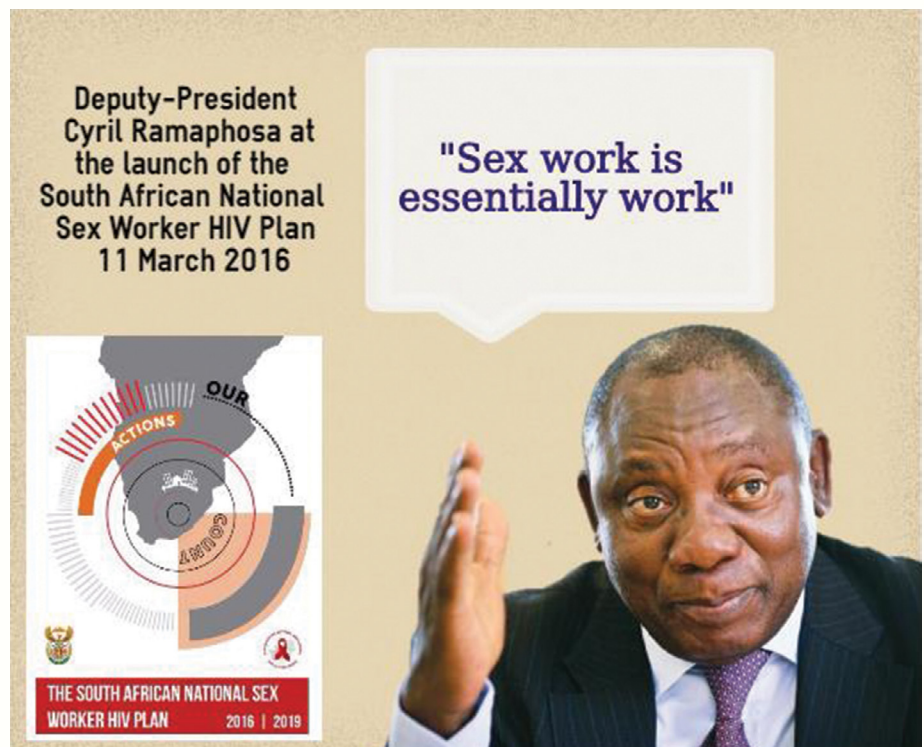
18. SANAC (2012) 'National Strategic Plan on HIV, STIs and TB 2012-2016'. Available at: <http://sanac.org.za/wp-content/uploads/2015/11/4-National-Strategic-Plan-for-HIV-STIs-and-TB-2012-2016.pdf>
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32. Global Network of Sex Work Projects. "Where our members work". Available at: <http://www.nswp.org/members>
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In the same vein, the Parliamentary Multi-Party Women's Caucus (MPWC) has strongly supported decriminalisation, openly criticising the SALRC report.²⁸ The High Level Panel on key legislation, chaired by former national President Kgalema Motlanthe, recently issued a detailed report to Parliament, which included a recommendation that Sexual Offences legislation "should be amended to decriminalise prostitution in order to remove the unintended consequences arising from the criminalisation of prostitution for those who sell sex".²⁹

Furthermore, former Constitutional Court Judge Zak Yacoob has publicly stated that, "I think making sex work criminal is wrong. It is against the [prostitutes'] right to make their own decisions. [Prostitutes] are the most vulnerable people as far as HIV is concerned. We cannot solve the HIV crisis without decriminalising sex work. So I think that is an issue which I would love the court to reconsider in the constitutional era of today."³⁰ Additionally, Justice Edwin Cameron remarked at the 2016 International AIDS Conference that "sex work is work" and "laws that criminalise sex work are a profound evil."³¹

Finally, there are many organisations around the world that are led by sex workers or represent sex workers, and these overwhelmingly advocate for decriminalisation.³² In South Africa, Sisonke is the largest sex worker-led organisation, with a presence in all nine provinces and offices in five, as well as 500 members who campaign for decriminalisation.³³ In the context of South Africa's constitutional democracy – which prizes the dignity of all people, and the right of all people to have a say in government and the policies which affect them – this point is particularly relevant. The voices of sex workers themselves need to be heard the loudest.

It is worth reading the position statements of all the above-mentioned organisations, to see why they support decriminalisation. In the remainder of this document, we will give an overview of some of the evidence and arguments, showing that decriminalisation is necessary to protect the safety and well-being of sex workers, as well as the general public of South Africa.



2 WHAT IS SEX WORK DECRIMINALISATION?

Background to sex work and the law in South Africa

The laws around sex work in South Africa have changed over time since European colonisation.³⁴ Earlier laws, under the Dutch East India Company (VOC), were mainly about stopping workers and other settlers from taking part in “immoral conduct” (acting sinfully), including drinking and gambling, as well as sex with enslaved women. During the British colonial period, sex work was also ruled by laws against “vagrancy” (homelessness), or failing to have an income that was acceptable to the community. Later on, the Cape government brought in a version of the Contagious Diseases Prevention Act from Britain. This gave magistrates the power to force women believed to be sex workers to have unpleasant medical examinations and then put them in prison if they were found to have sexually transmitted infections (STIs).

The direct criminalisation of sex work itself came from a supposed need to stop sex between different races, rather than commercial sex as such.³⁵ Thus, the Betting Houses, Gaming Houses and Brothels Suppression Act 36, brought in by the Cape Colony in 1902 and then copied in the other South African colonies, did not ban the sale of sex generally, but specifically punished white women who sold sex to black men. The reason for this law being introduced was the migration of white women from Europe who were happy to offer sexual services to white and black men alike, which created the expected fears about “miscegenation”(mixing blood/race).³⁶

In the united republic of South Africa, the banning of sex between different races was continued by the Immorality Act of 1927, the Prohibition of Mixed Marriages Act of 1949, the Immorality Amendment Act of 1950 and finally the Immorality Act of 1957. While later renamed the Sexual Offences Act, the rules laid out in the 1957 law, which ban the sale of sex (for people of all races), managing of brothels and ‘living on the earnings’ of commercial sex, remain in force in South Africa today. As in the 1902 Act, the penalties associated with the 1957 Act fell mainly on the sex workers and managers, rather than their clients. This was changed by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which then criminalised clients as well. Thus, the situation today is that almost all acts of buying, selling and assisting of the sale of sex are criminalised in South Africa.

Commercial sex is also banned by municipal by-laws in various cities around South Africa. For instance, under Cape Town’s By-Law relating to Streets, Public Places and the Prevention of Noise Nuisances of 2007,³⁷ it is forbidden for any person in a public place to “solicit or importune (ask) any person for the purpose of prostitution or immorality”. Leaving out the vague reference to “immorality”, in eThekweni (Durban) it is nevertheless forbidden to “solicit or importune any person for the purpose of prostitution”.³⁸

The constitutionality of sex work criminalisation

The constitutionality of the laws criminalising the sale of sex and keeping a brothel (sections 20(1)(aA), 2, 3(b) and 3(c) of the amended Sexual Offences Act) was challenged in the case of *S v Jordan*,³⁹ which was heard by the Constitutional Court in 2002. The majority opinion of the Court, written by Justice Ngcobo, is that these laws are constitutional, on the grounds that commercial sex “is associated with violence, drug abuse and child trafficking” and that the state has a legal duty to end these problems.⁴⁰ No one linked to this debate about commercial sex work disagrees that commercial sex is often linked to various problems, including those listed by Justice Ngcobo. What is not agreed on, however, is the way these problems come about, and the best way to end them. Against this background, it is important to note that the judgement written by Ngcobo is careful to avoid comment on whether the criminalisation of commercial sex is in fact the most *effective* way of ending these problems or of serving society more broadly. In the judgement, Ngcobo says:

“Courts are concerned with legality, and in dealing with this matter I have had regard only to the constitutionality of the legislation and not to its desirability. Nothing in this judgment should be understood as expressing any opinion on that issue.”⁴¹

The direct criminalisation of sex work itself came from a supposed need to stop sex between different races, rather than commercial sex as such.

34. Gaum, L. (2003). Turning Tricks: A Brief History of the Regulation and Prohibition of Prostitution in South Africa. *Stellenbosch Law Review*, 14(3), pp. 319-336.

35. Ibid.

36. Lewin, J. (1960) “Sex, colour and the law” Available at: South African History online, <http://www.sahistory.org.za/sites/default/files/DC/asapr60.11/asapr60.11.pdf>

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39. *S v Jordan and Others 2002* (6) SA 642 (C). Available at: <http://www.saflii.org/za/cases/ZACC/2002/22.html>

40. Ibid at para 24.

41. Ibid at para 30

In the same way, because of the growing academic evidence of the harm done by criminalising sex work (some of which is summarised in this document), it is possible that in future the Court might choose to reverse the decision of Jordan and say the relevant laws are unconstitutional.

That is to say, the Court agrees that the relevant laws in place may be harmful compared to other possible options, but it does not claim the power to overturn the legislation on that basis.

For the Court to accept the law in this way shows some doubt or uncertainty about the effects of the laws in question. In cases where the facts are not doubted, the Court has been willing to overrule policy which it regards as unsound/irrational, given the State's responsibility to uphold the constitutional rights of South African citizens. For instance, in the case of *Minister of Health and Others v Treatment Action Campaign and Others*,⁴² the Court agreed that the drug Nevirapine is in fact successful in preventing mother-to-child transmission of HIV when it ordered the Government to make Nevirapine available in public hospitals and clinics. In the same way, because of the growing academic evidence of the harm done by criminalising sex work (some of which is summarised in this document), it is possible that in future the Court might choose to reverse the decision of *Jordan* and say the relevant laws are unconstitutional.

In Canada, sex work has until recently been controlled by a model of "partial criminalisation", meaning that buying and selling sex is legal, but certain surrounding activities are criminalised (this is defined in more detail in the following section). However, in the recent case of *Canada v Bedford*,⁴³ the Supreme Court ignored/struck down these aspects of criminalisation precisely because they increase the danger to sex workers so much more than their intended social benefit. The Justices write:

*"The prohibitions all heighten the risks the applicants face in prostitution – itself a legal activity. They do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky – but legal – activity from taking steps to protect themselves from the risks."*⁴⁴

In response to this judgement, the Conservative federal government changed the criminal law to remove criminal penalties against sellers of sex but brought in penalties against buyers (the so-called Swedish model) and also serious limitations on advertising sexual services.⁴⁵ As these laws are also harmful to sex workers (see section 8, below), it is unclear whether they would be constitutional; but, as of the time of writing, they have not yet been tested in court.

Legal definition of decriminalisation

To understand what is meant by decriminalisation, it is important to understand the various other legal models in place in different countries around the world. Although the details vary from place to place, these various approaches can be grouped into five categories. Note that the types of words used here are a little different to those used in the SALRC issue paper,⁴⁶ discussion paper⁴⁷ and final report on "adult prostitution", but that the types of legal approach are mostly the same.

In South Africa, decriminalisation would involve the reversal/repeal of sections 2-11, 12A, 17, 19 and 20 of the Sexual Offences Act 23 of 1957 as a whole, as well as relevant municipal by-laws. Decriminalisation works well with some legal measures applied specifically to commercial sex, such as rules relating to where brothels and other sex businesses are allowed, as well as rules that make sure that brothels provide safer sex materials (such as condoms) and education (such as printed information).

(see table on page 7)

Decriminalisation in New Zealand

The best existing legal model for sex work decriminalisation is New Zealand's Prostitution Reform Act (PRA)⁴⁸ – decriminalisation is for this reason sometimes referred to as 'the New Zealand Model'. The major rules of the PRA are as follows:

- Criminal penalties linked to the voluntary buying and selling of sex (which in New Zealand prior to 2003 related to 'collective working' or 'brothel-keeping' and selling sex in a public place or 'soliciting') are reversed/repealed.
- Commercial sex work deals are made legal and enforceable, allowing sex workers to sue if they are not paid. However, there is also a specific rule that "a person may, at any time, refuse to provide, or to continue to provide, a commercial sexual service to any other person", meaning that no-one can legally demand sexual services, even if a payment has been made.

42. 2002 (5) SA 721 (C).

43. 2013 SCC 72.

44. Ibid. Available at: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do>

45. Levitz, S. (2014). "Controversial prostitution law introduced on day of action on violence against women" *The Canadian Press*, 3 December 2014. Available at: https://www.thestar.com/news/canada/2014/12/03/controversial_prostitution_law_introduced_on_day_of_action_on_violence_against_women.html

46. South African Law Reform Commission (2002) 'Issue Paper 19. Sexual Offences: Adult Prostitution'. Available at: http://www.justice.gov.za/salrc/ipapers/ip19_prj107_2002.pdf [Accessed 25 September 2017].

47. South African Law Reform Commission (2009) 'Discussion Paper 0001/2009. Sexual Offences: Adult Prostitution'. Available at: http://www.justice.gov.za/salrc/dpapers/dp0001-2009_prj107_2009.pdf [Accessed 25 September 2017].

48. Act 28 of 2003. Hereinafter referred to as the 'PRA'.

Legal definitions	
Full criminalisation	(“total criminalisation” in the SARLC documents): The buying and selling of sex are criminalised, as are surrounding activities such as running a brothel, advertising the sale of sex or otherwise making sex work possible. As described above, this is the current situation in South Africa, as well as in other countries like the USA (except the state of Nevada), Russia and China.
Partial criminalisation	this involves criminalisation of surrounding activities (discussed as a form of “partial criminalisation” in the SALRC documents). The buying and selling of sex are not in themselves against the law, but surrounding activities like working together in groups, managing or employing sex workers and selling/soliciting for commercial sex outdoors may be criminalised. This is presently the status quo in countries like the United Kingdom, India, Italy and Brazil. A variation of this is criminalisation of clients and surrounding activities (another form of “partial criminalisation”, also called the Swedish or Nordic model). As above the sale of sex is not in itself against the law, but in this case buying sex, and various other activities (as under partial criminalisation above) are. This is the situation in Canada (as described above), Sweden, Norway and the Republic of Ireland.
Legalisation (“regulation” in the SALRC documents)	All commercial sex activities (including running brothels and promoting/advertising services) are possibly legal, but only in particular situations. Sex workers may have to register and have compulsory health checks, while businesses may have to be in particular locations and obey other rules. Breaking these rules may be either a criminal or administrative offence. Legalisation is the situation in countries such as the Netherlands, Germany, Turkey and Bangladesh.
Decriminalisation (“non-criminalisation” in the SALRC documents)	All criminal penalties linked to the voluntary sale of sex between adults are removed, while keeping penalties related to force/coercion and the commercial sexual abuse/exploitation of children. Sex work is covered by the general laws for all businesses, with minor differences to deal with the specific issues of the sex industry. Decriminalisation is the situation in New Zealand and the Australian state of New South Wales.

In summary, it is not being claimed that the PRA is perfect or that it should simply be imported to South African law without discussion or revision. However, in general terms, the New Zealand Model offers a very sound basis for sex work decriminalisation.

- Criminal penalties for the sexual abuse of children are strengthened, including penalties for buying sex from children directly and for assisting or being paid for the sale of sex by children.
- Several rules for managed brothels are included, such as the need to register with government, provide safer sex materials (such as condoms) and follow other health and safety rules.
- It is agreed that up to four sex workers can work by themselves in ‘small owner-operated brothels’ (SOOBs) without any need to register.

It could be argued that there are some problems with the PRA. For instance, the limit that only four sex workers can work in a SOOB before they have to register may seem random, when a greater number of workers who work less often could disrupt neighbours less and need less control and management. It might seem to make more sense to link registration to the number of clients served, income earned or other business factors. In summary, it is not being claimed that the PRA is perfect or that it should simply be imported to South African law without discussion or revision. However, in general terms, the New Zealand Model offers a very sound basis for sex work decriminalisation.

As required under the PRA, the effect of the law was studied three years after it came into being, during 2006. The resulting report included results from long interviews with sex workers, as well as other data.⁴⁹ The report concluded that the PRA had little effect on the numbers of people entering the sex industry, with numbers remaining the same overall. However, later research proved that there was some movement of workers from the managed to the independent sector, as intended by the rules for SOOBs in the PRA.⁵⁰ Also in the report, most sex workers felt that they had better legal and labour rights under decriminalisation. This meant that they felt more able to refuse particular clients and were more likely to report crimes to the police. The researchers did not find any negative impacts of the PRA on the health or safety of sex workers.^{51 52}

49. Abel, G., Fitzgerald, L. and Brunton, C. (2007) ‘The impact of the Prostitution Reform Act on the health and safety practices of sex workers: Report to the Prostitution Law Review Committee’. Christchurch: University of Otago. Available at: <http://www.otago.ac.nz/christchurch/otago018607.pdf>

50. Abel, G., Fitzgerald, L. and Brunton, C. (2009). The impact of decriminalization on the number of sex workers in New Zealand. *Journal of Social Policy*, 8(3), pp. 515-531.

51. Abel, G. et al. (ed.) (2010) *Taking the crime out of sex work: New Zealand sex workers’ fight for decriminalisation*.

52. Abel, G. (2014). A decade of decriminalization: Sex work ‘down under’ but not underground. *Criminology and Criminal Justice*, 14(5), pp. 580-592.

One research study in 2010 found that, although most of the female sex workers surveyed had not completed secondary school, they earned an average income a lot greater than the average income of all employed South Africans, including up to six times more than domestic workers.

Work and opportunity

Discussions about sex work often end up as political and moral debates about whether it is a 'good' or a 'bad' thing. Our belief is that sex work is simply a means of earning a living for many people and, as such, it is neither good nor bad in and of itself. A small number of people are lucky enough to love their work, and would do it unpaid if they could afford to. Other people dislike their work and only do it because they have no other options for earning a living. Some people are forced to work by the threat of violence, debt and other coercive measures.

However, for most working people, including sex workers, their job is something they have chosen from a limited set of options. People with many talents, formal qualifications and social connections will have more options, and have a greater chance of finding well-paying, secure and enjoyable work. People who are less advantaged will have far fewer options – particularly during an economic crisis when unemployment rises. In the context of South African history, we should remember that people disadvantaged by race, class, disability and so on are especially likely to find it hard to get work.

South Africa has a relentlessly high rate of unemployment,⁵³ due to lack of skills, a history of economic development which excluded the majority of people, as well as other complex factors. The result is that many people live in poverty. Indeed, a recent report⁵⁴ concludes that, after declining between 2006 and 2011, poverty rates in South Africa are increasing again. Women are more likely to be poor than men, with black African women the poorest of all. On average, households headed by women earn 36% less money per year than households headed by men. This is largely because women are generally not able to do as much paid work as men, they earn less per hour of paid work, and they are responsible for much more unpaid domestic work. Poverty is also strongly related to education levels, with 79.2% of people without formal education living in poverty compared to 4 – 8% of people with tertiary qualifications.⁵⁵

In this situation, it is no surprise that sex work is a fairly attractive option to many South African women. A recent survey concluded that, as of 2015, there are probably around 150 000 sex workers in South Africa, of whom approximately 91% are cisgender women, 5% cisgender men and 4% transgender (mostly trans women).⁵⁶ Sex work is also appealing because there is no need for formal qualifications or to meet any bureaucratic requirements. It also pays quite well and usually in cash right there and then.

One research study in 2010 found that, although most of the female sex workers surveyed had not completed secondary school, they earned an average income a lot greater than the average income of all employed South Africans, including up to six times more than domestic workers.⁵⁷ This is especially unusual considering that the average income of employed women in South Africa is less than that of men.,⁵⁸ A similar survey conducted in Cape Town in 2007 found that, depending on their level of education, sex workers earned between 1.5 and 5.4 times more than they had made in their previous jobs.⁵⁹

Unsurprisingly, 76% of sex workers in the study described above reported that their main reasons for selling sex were financial. Sex work may allow people to save, for instance to start a small business or build a house.^{60, 61} In addition, the majority of sex workers in South Africa work independently (i.e. without managers or "pimps"), either indoors or on the street.⁵³ This may be appealing to many people, as it means that one is not dependent on a boss and can choose one's own working conditions. Another specific advantage is that sex work allows for flexible working times and so is well-suited to people who also have another job or need to care for children or relatives. The same survey of Cape Town sex workers revealed that each supported on average two dependents, most of whom were children.⁵³ A 2010 survey of female sex workers in Johannesburg, Rustenburg and Cape Town found that migrant sex workers often had even greater numbers of dependents, with internal migrants having an average of three dependents and cross-border migrants an average of four.⁶²

53. Statistics South Africa. (2014). "Employment, unemployment, skills and economic growth". Available at: http://www.statssa.gov.za/presentation/Stats%20SA%20presentation%20on%20skills%20and%20unemployment_16%20September.pdf
54. Statistics South Africa. (2017) "Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015". Available at: <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf/>
55. Ibid.
56. Konstant, T. L., et al. (2015). Estimating the Number of Sex Workers in South Africa: Rapid Population Size Estimation. *AIDS and Behavior*, 19(1), pp. 3-15.
57. Richter, M., et al. (2013). Characteristics, sexual behaviour and risk factors of female, male and transgender sex workers in South Africa. *South African Medical Journal*, 103(4), pp. 226-251.
58. Statistics South Africa. (2010) "Monthly earnings of South Africans". Available at: <http://www.statssa.gov.za/publications/PO2112/PO21122010.pdf>
59. 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.
60. Ahlburg, D. & Jensen, E. (1998). "The Economics of the Commercial Sex Industry" In: Ainsworth, M., Fransen, L. & Over, M. (eds). *Confronting AIDS: Evidence from the Developing World*. Brussels, European Commission. Available at: http://ec.europa.eu/development/body/theme/aids/limelette/pdfs/confront_aids_all.pdf
61. Mgbako, C. (2016). *To Live Freely in This World: Sex Worker Activism in Africa*, pp. 40-43.
62. Richter, M. et al. (2014) Migration Status, Work Conditions and Health Utilization of Female Sex Workers in Three South African Cities. *Journal of Immigrant and Minority Health*, 16(1), pp. 7-17.

In stating that sex work is work, we are by no means denying that sex work is often entered into by people with few options. This means they may do the work despite finding it difficult or unpleasant. Their existence on the edges of society also means that they are placed at great risk when it comes to securing safe and decent working conditions while doing sex work. They are therefore often at risk of violence, exploitation, HIV infection and other harms.

We definitely do not wish to deny or minimise these harms. The point we wish to make is that sex workers cannot be protected from these harms by trying to ban sex work or make it more difficult. Even if such a legal ban was successful, it would only limit the options of people who may have few choices to begin with. More commonly, legal bans on sex work do not in fact prevent it from taking place. As pointed out by Harcourt and Donovan, the buying and selling of sex have probably only been substantially reduced under conditions of extreme social repression that are both impossible and undesirable in democratic societies; such examples include Afghanistan under the Taliban regime and China during the Cultural Revolution.⁶³ In most cases, the main effect of legal bans is simply to push sex workers further into the shadows, worsening their working conditions and so increasing harm.

Some people defend laws criminalising sex work by claiming that, unlike in most other jobs taken up by people with few choices, many or even most sex workers are forced/ coerced into selling sex. As argued in detail in Asijiki's response to the SALRC Report, these claims are not supported by any substantive empirical evidence. The vast majority of sex workers in South Africa are competent adults who are working consensually (albeit often from within a limited set of options). However, the mere fact that someone has chosen to do a job does not mean that the working conditions are good or cannot be greatly improved. Because our aim is to help sex workers, we should not deny their own abilities by trying to prevent them from working. Rather, we should support them in their struggle for better working conditions in the work that they have chosen.

Decriminalisation and labour rights for sex workers

South African law has strong protections for formally employed workers, under section 23 of the Constitution ("everyone has the right to fair labour practices"),⁶⁴ the Basic Conditions of Employment Act 75 of 1997 and other legislation. However, even sex workers who are employed in fairly formal and stable workplaces, such as brothels and massage parlours, often treated unfairly, including: having an enormous part of their earnings taken in fees, being made to work long hours, the possibility of random or unfair dismissal and being made to see clients who they dislike or are abusive.⁵³

In the case of *Kylie vs CCMA & Others*,⁶⁵ the South African Labour Court ruled that sex workers are protected by South African labour law, despite their work being against the law. However, in practice, stigma and criminalisation mean that sex workers are often unable to gain protection from labour and occupational health and safety laws. Due to stigma, very few people are willing to take legal action that might result in them being publicly identified as sex workers. This is a major reason why even erotic dancers, whose work is not illegal, sometimes also face exploitative conditions.^{66, 67}

Another reason why it is difficult for sex workers to insist on their labour rights is that, under criminalisation, brothels are illegal and so many sex worker employees do not want to draw any official attention to them, for fear they will be shut down. They are, in effect, forced to choose between a job with abusive working conditions and no job at all. In New Zealand, the fact that brothels are legal means that sex workers are more able to challenge abusive working conditions. For instance, in a recent case, a brothel worker successfully sued her employer for sexual harassment.⁶⁸ The increased public overview of brothels would also make their managers more likely to apply health and safety standards before any complaints are made. Comparing Australian states with different laws on sex work, it has been found that decriminalisation improves access to health services and other work-related health and safety standards compared to criminalised states.⁶⁹

Sex work criminalisation also makes it more difficult to detect cases of genuine coercion, trafficking and the sexual abuse of children. Since all brothels and agencies are illegal under criminalisation, all of them do their best to avoid the police. Under decriminalisation, these businesses would generally be much more visible and it would be much more obvious if a particular brothel or agency was trying to hide abusive



The point we wish to make is that sex workers cannot be protected from these harms by trying to ban sex work or make it more difficult. Even if such a legal ban was successful, it would only limit the options of people who may have few choices to begin with.

However, in practice, stigma and criminalisation mean that sex workers are often unable to gain protection from labour and occupational health and safety laws.

63. Harcourt, C., & Donovan, B. (2005). The many faces of sex work. *Sexually Transmitted Infections*, 81(3), pp. 201-206.

64. Constitution of the Republic of South Africa, 1996.

65. 2010 (4) SA 383 (LAC).

66. South African Human Rights Commission (2014) "Investigation into possible human rights abuses of dancers at Mavericks Gentleman's Club". Available at: <http://www.sahrc.org.za/home/index.php?ipkContentID=62>

67. Sanders, T. & Hardy, H. (2012). Devalued, deskilled and diversified: explaining the proliferation of the strip industry in the UK. *The British Journal of Sociology*, 63(3), pp. 513-532.

68. Judgment available at: <https://www.justice.govt.nz/assets/Documents/Decisions/2014-NZHRRT-6-DML-v-Montgomery-and-MT-Enterprises-Ltd.pdf>

69. Harcourt, C., et al. (2010). The decriminalisation of prostitution is associated with better coverage of health promotion programs for sex workers. *Australian and New Zealand Journal of Public Health* 34(4), pp. 482-486.



Another reason why it is difficult for sex workers to insist on their labour rights is that, under criminalisation, brothels are illegal and so many sex worker employees do not want to draw any official attention to them, for fear they will be shut down.

working conditions. This means that police and government would also be able to focus limited resources on the small number of cases where abuse is involved, rather than trying to control sex work generally. For instance, since 2003, the New Zealand police have easily charged the few brothel owners who have employed children.⁷⁰

Moreover, clients^{71, 72} and sex workers themselves are often the only people who will have contact with someone who is under-age, trafficked or otherwise forced into selling sex. This means they are often well placed to report suspected abuse. In many situations, sex workers have been very successful at both reporting abuses and directly stopping abuse.⁷³ However, under criminalisation, both sex workers and clients will be unlikely to contact the police for fear of being arrested themselves.

It should also be remembered that improved wages and working conditions are not only achieved by government or court action, but also by bargaining between workers and employers. However, stigma and criminalisation make it difficult for sex worker employees to unionise or engage in collective bargaining. Stigma means that few sex workers are willing to publicly form a union or join an existing union, thus undermining their right to organise. Moreover, the secret nature of many brothels means that the workers cannot easily be reached by union organisers or other people trying to assist workers. As noted above, labour unions in South Africa have already expressed support for the labour rights of sex workers, suggesting the possibility that sex workers might readily be able to join existing union structures if their work was decriminalised.

Thus, decriminalisation will improve the ability of sex workers who have employers, agents or managers to enforce the rights due to them. However, as noted above, the majority of sex workers in South Africa work independently. This means that their working conditions are not set by employers, but are, in fact, the result of their relationships with clients, healthcare providers, the police and other state institutions, as well as the general public. As we argue in the rest of this document, although decriminalisation by itself will never be enough to improve working conditions for sex workers, it is an essential first step towards improving these relationships.

70. New Zealand Ministry of Justice (2008) 'Report Of The Prostitution Law Review Committee On The Operation Of The Prostitution Reform Act 2003'. Available at: <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>
71. Eve, C. (2017). "Sordid world of sex slavery gang's Plymouth brothel exposed as eight jailed" *Plymouth Herald*, 10 November 2017.. Available at: <https://www.plymouthherald.co.uk/news/plymouth-news/sordid-world-sex-slavery-gang-755064> [Accessed 23 April 2018].
72. Beattie, M. (2005) "Customers help stamp out Turkey's sex slaves" *The Independent*, 28 December 2005. Available at: <http://www.independent.co.uk/news/world/europe/customers-help-stamp-out-turkeys-sex-slaves-520866.html>
73. Jana, S., et al. (2014). Combating human trafficking in the sex trade: can sex workers do it better? *Journal of Public Health*, 36(4), pp. 622-628.

4

STIGMA AND VIOLENCE

The nature of sex work stigma

Stigma can be thought of as a process of 'social spoiling', whereby a person or group of people is believed to have or deserve an inferior social status.⁷⁴ A person given such a stigmatised identity is not treated as a whole person with complex characteristics, but is assumed to have wholly negative traits. This is sometimes also called a stereotype. People who are stigmatised are frequently rejected and may suffer from discrimination and violence.

Sex workers are a highly stigmatised group, in large part because they are seen to challenge social norms around sexual monogamy, i.e. having only one sexual partner. This is especially the case for women.^{75, 76, 77, 78} Rather strangely, sex workers, especially if they are poor women of colour, are also stigmatised or discriminated against as helpless 'victims', with foreign men often cast as evildoers.^{79, 80}

Sex workers are therefore both viewed as evil attackers of the existing and agreed social order – who deserve violence or punishment in return – and also as something like naughty children, who need to be punished or coerced 'for their own good'. Neither label respects sex workers as whole people who have their own lives and their own reasons for doing the work they do.

One person can suffer from many stigmas and be discriminated against in several ways, depending on the various identities they have and what people think about them. Many sex workers in South Africa are migrants and have come from other countries.⁸¹ The violence and discrimination suffered by migrants in South Africa is well known.⁸² People who use drugs are heavily stigmatised and sex workers are often thought to use drugs. People who use drugs, in turn, are thought to sell sex, so people in both groups are often doubly stigmatised.⁸³ HIV is a source of stigma and, again, sex workers are often thought to be HIV positive.⁸⁴ Transgender people, particularly trans women of colour, are thought to be selling sex and may suffer from harassment and even random arrest on this basis.^{85, 86} In South Africa, with its history of oppression on the basis of race, gender and class, these factors can also increase stigma against sex workers. Working-class women of colour are far more likely to be described as sex workers and targeted for violence and discrimination, whereas middle-class white people who sell sex are often able to work 'unseen'.

The sad truth is that many marginalised people sell sex for the very reason that other work choices are not open to them. For instance, sex work is how many transgender people survive because they often suffer gender-based discrimination in employment, housing and other services, and may be thrown out by their families and have to survive on the edges of society.⁸⁷ The difficulty of obtaining a work permit or asylum status in South Africa – even when a person is legally allowed – means that many foreign migrants remain without proper papers and so cannot do formal work.⁸⁸

In addition, many people who are homeless lack the stability to hold onto a formal job and so may depend on sex work for income. And, as pointed out in the previous section, although women and people of colour are not actual minorities in South Africa, they usually earn less than men and white people and so find it more difficult to earning a living from formal work. In summary, someone may choose to do sex work just because other choices are not open to them, due to discrimination and stigma, and then be further stigmatised and discriminated against because of this choice.

Stigma and violence against sex workers

People who commit violence and abuse against stigmatised people like sex workers often believe that their actions are fair, or even that sex workers 'deserve' to be treated badly. In the rest of this section, we give some examples and statistics to show how much abuse is suffered by sex workers at the hands of clients and members of the public generally. We deal separately with abuse committed by the police in the following section, as this raises other issues about state power and access to justice and fair treatment under the law.

74. Goffman, E. (1968). *Stigma - Notes on the Management of Spoiled Identity*.
75. WHO (2005) 'Violence Against Sex Workers and HIV Prevention'. Available at: <http://www.who.int/gender/documents/sexworkers.pdf>
76. Scorgie, F., et al. (2013). Human rights abuses and collective resilience among sex workers in four African countries: a qualitative study. *Globalization and Health*, 9(1), pp. 33-46.
77. Agustín, L. (2013). "The sex worker stigma: How the law perpetuates our hatred (and fear) of prostitutes" *Salon*, 18 August 2013. Available at: http://www.salon.com/2013/08/17/the_whore_stigma_how_the_law_perpetuates_our_hatred_and_fear_of_prostitutes_partner/
78. Gira Grant, M. (2014). *Playing the Whore: The Work of Sex Work*.
79. Doezema, J. (1999). Loose women or lost women? The re-emergence of the myth of white slavery in contemporary discourses of trafficking in women. *Gender Issues*, 18(1), pp. 23-50.
80. Kempadoo, K. (2001). Women of Color and the Global Sex Trade: Transnational Feminist Perspectives. *Meridians*, 1(2), pp. 28-51.
81. Statistics South Africa. (2010), supra note 59; Gould & Fick (2008), supra note 60.
82. Human Rights Watch (2009) "'No Healing Here": Violence, Discrimination and Barriers to Health for Migrants in South Africa'. Available at: <https://www.hrw.org/sites/default/files/reports/SA.pdf>
83. Ditmore, M.H. (2013) 'When sex work and drug use overlap: Considerations for advocacy and practice'. Harm Reduction International. Available at: http://www.ihra.net/files/2014/08/06/Sex_work_report_%C6%924_WEB.pdf
84. UNAIDS (2009/2012) 'UNAIDS Guidance note on HIV and sex work'. Available at: http://www.unaids.org/sites/default/files/media_asset/JC2306_UNAIDS-guidance-note-HIV-sex-work_en_0.pdf
85. Amnesty International USA (2005) 'Stonewalled: Police abuse and misconduct against lesbian, gay, bisexual and transgender people in the U.S.'. Available at: <https://www.amnesty.org/download/Documents/84000/amr511222005en.pdf>
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87. Global Network of Sex Work Projects (2014) 'Briefing Paper: The Needs and Rights of Trans Sex Workers'. Available: <http://www.nswp.org/sites/nswp.org/files/Trans%20SWs.pdf>
88. Landau, L. (2007). Discrimination and development? Immigration, urbanisation and sustainable livelihoods in Johannesburg. *Development Southern Africa*, 24(1), pp. 61-76.

89. McDougall, A. (2015). "Constitutional rights apply to sex workers too". *Ground Up*, 22 January 2015. Available at: https://www.groundup.org.za/article/constitutional-rights-apply-sex-workers-too_2610/
90. Ibid.
91. Segar, S. (2014). "He came up to me and just klapped me" *IOL News*, 18 October 2014. Available at: <http://www.iol.co.za/news/crime-courts/he-came-up-to-me-and-just-klapped-me-1.1767030>
92. Seger, S. (2014). "More trouble for Kenilworth 'klapper'" *IOL News*, 25 October 2014. Available at: <https://www.iol.co.za/news/crime-courts/more-trouble-for-kenilworth-klapper-1.770599>
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95. Shaikh, N. (2015) "Residents at war over sex workers". *IOL News*, 9 July 2015. Available at: <http://www.iol.co.za/news/crime-courts/residents-at-war-over-sex-workers-1.1882679>
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99. Salfati, C.G., James, A.R. & Ferguson, L. (2008). Prostitute Homicides: A Descriptive Study. *Journal of Interpersonal Violence* 23(4), pp. 505-543.
100. Wechsberg, W.M., et al. (2006). Substance Use, Sexual Risk, and Violence: HIV Prevention Intervention with Sex Workers in Pretoria. *AIDS and Behavior*, 10(2), pp. 131-137.
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102. Coetzee, J., et al. (2017). Cross-sectional study of female sex workers in Soweto, South Africa: Factors associated with HIV infection. *PLoS ONE*, 12(10): e0184775.
103. Mgbako, C.A., et al. (2013). The Case For Decriminalization Of Sex Work In South Africa. *Georgetown Journal of International Law*, 44(4), pp. 1423-1454.

It is not only 'criminals' who prey on sex workers (though this certainly is the case). 'Normal' people often actively participate in violence against stigmatised groups as well. The Kenilworth area of Cape Town is a good example. In recent years, street-based sex workers have been working more in this area. As a result, in 2014, local residents formed an organisation called KRAP (Kenilworth Residents Against Prostitution).⁸⁹ Even the name of this organisation is cruel, as it sees sex workers as "crap" that should be removed from the streets. Despite the fact that a sex worker was found murdered nearby in August of that year, the local councillor for the area also saw sex workers simply as a problem to be dealt with, rather than a vulnerable group. In response to a request from SWEAT to act as a go-between for sex workers and residents, he replied: "Prostitution is still illegal in South Africa and I am not going to assist you with an illegal activity. I am going to do everything in my power to rid the area of prostitutes who are responsible for bringing down the tone of the area".⁹⁰

During this period of extreme ill feeling in late 2014, a Kenilworth local who was a member of a "security committee" (news reports do not say if this was KRAP or another organisation) was arrested for brutally assaulting a woman in the street.⁹¹ He publicly defended his actions by claiming that he believed she was a sex worker, as if that would have excused the attack. The woman in question is in fact a working-class black woman who works as a domestic worker. This shows that marginalised people are more likely to suffer anti-sex worker violence, whether they sell sex or not. After the arrest, it became known that this man had harassed and assaulted another woman in the area before, who was in fact a sex worker.⁹²

Sadly, this type of response by locals and councils towards sex workers - that they are "crap" that should be removed, including by violence - is shockingly common. Hilary Kinnell has recorded how the people of Balsall Heath in Birmingham, UK launched a vigilante campaign of harassment against street-based sex workers in the area.⁹³ This action was at least silently supported by politicians, with the UK Home Secretary describing the vigilante patrols as "a good example to all of how a community can take pride in itself".⁹⁴ In South Africa, locals in the Durban neighbourhood of Glenwood have been accused of similar physical violence against sex workers.⁹⁵

The quite low-level harassment and physical abuse recorded in these cases exists side by side with the more serious violence committed against sex workers. The most serious crime is, of course, murder. A study of (mostly street-based) female sex workers in Colorado, USA, found that they were 17 times more likely to suffer violent deaths than a matched group of women in the general population.⁹⁶ Looking at cases in the UK where a sex worker has been murdered and charges successfully brought, Kinnell points out that 62% of those charged are clients,⁹⁷ and a similar figure (65%) was found in British Columbia, Canada.⁹⁸ It has been suggested that the majority of these crimes are unplanned, resulting from disputes over money or services when at least one party (usually the client) is highly emotional.⁹⁹

Sex workers are also at risk of less severe forms of violence. Kinnell reports survey data from the UK showing that assaults on sex workers are about equally likely to be due to clients (34% of cases), "pimps", partners or other family members (34%) and others (including vigilantes, muggers, sexual attackers and drug dealers - 31%).⁸⁶ She also confirms that sex workers are often targeted for theft or robbery, as they are known to carry cash and be scared of calling the police (see more on this below). Many criminals may pose as clients to get the sex worker to an out-of-the-way place where robbery or even sexual assault may be easier.

There have been several studies of violence against sex workers in South Africa, where levels of violence are generally even higher than those in the UK. In a survey of 93 female sex workers in Pretoria, researchers found that, in the previous year, 61% had been physically assaulted by a partner and 44% by a client. They also found that 19% had been cut and 39% robbed or refused payment by a client. Furthermore, 27% had been raped by a client, 19% by a partner and 15% gang raped.¹⁰⁰

A survey of sex workers in Cape Town, Johannesburg and Durban found that around half had been physically assaulted in the previous year (except Durban, where the rate was 14.1%) and around 20% had been sexually assaulted.¹⁰¹ A survey in Soweto found that slightly more than half of female sex workers had suffered sexual violence from intimate partners (56.7%) and others (54%) in the previous year.¹⁰² Although intimate partner violence in South Africa is generally very high, sexual jealousy and a lack of police protection make female sex workers especially at risk of this form of abuse.¹⁰³

However, male sex workers in South Africa are also at risk of violence and abuse, including sexual violence.¹⁰⁴

Outdoor sex workers are at very high risk of experiencing violence, as they can be attacked by passers-by, and often work in out-of-the-way places where criminals know they can attack them without much risk of being caught.^{105, 106}

Decriminalisation and destigmatisation

The decriminalisation of sex work will not, by itself, end stigma and the resulting discrimination and violence against sex workers. While it exists, however, criminalisation does boost stigma and heighten its effects. Many sex workers successfully avoid stigma by hiding details of their occupation from their friends, community and even their immediate families. This secretive behaviour might, however, suddenly become impossible if they are arrested and detained. Making sex workers “criminals” also marks them as outside accepted social norms. Once a person is so marked, violence and other forms of abuse come to be seen as fair game, whether it is from the justice system or simply ordinary citizens. By decriminalising sex work, the government would send a very important signal that sex workers are not a threat to our communities and that violence against them is not justified, nor will it be accepted.

Decriminalisation of sex work would also help to break down harmful ideas about sex workers that create stigma. Few people know anyone who is open about being a sex worker, which means that the negative views they have about sex workers are never corrected. Decriminalisation will make it easier for sex workers to publicly challenge simplistic labels and discrimination, as well as demand their rights. History tells us that people with other marginalised identities have been more able to secure their rights when they have been able to live openly. This is true, for instance, for LGBTI people and people living with HIV/AIDS. In particular, LGBTI people have only been able to live openly in great numbers – and so begin breaking down stigma – after homosexuality was decriminalised in the places where they lived. Similarly, decriminalisation will be an important part of the process of helping people recognise sex workers as fellow members of the community and, indeed, as members who are often at high risk and in need of support, not violence and rejection.

In a survey of 93 female sex workers in Pretoria, researchers found that, in the previous year, 61% had been physically assaulted by a partner and 44% by a client.

The sad truth is that many marginalised people sell sex for the very reason that other work choices are not open to them.

Decriminalisation will make it easier for sex workers to publicly challenge simplistic labels and discrimination, as well as demand their rights.

104. Boyce, P. and 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. Available at: http://www.plri.org/sites/plri.org/files/male_sex_work_boyce_isaacs.pdf

105. Plumridge, L., & Abel, G. (2001). A Segmented Sex Industry in New Zealand: Sexual and Personal Safety of Female Sex Workers. *Australian and New Zealand Journal of Public Health*, 25, pp. 78-83.

106. Thamm, M. (2015). "Life at the margins: Cape Town's sex workers leverage Women's Month to highlight violence" *Daily Maverick*, 5 August 2015. Available at: <http://www.dailymaverick.co.za/article/2015-08-05-life-at-the-margins-cape-towns-sex-workers-leverage-womens-month-to-highlight-violence/>



One survey of sex workers in Cape Town found that seven out of nine street-based sex workers had been physically assaulted by the police, including being beaten in jail cells at the police station.

107. Decker, M. R., et al. (2015). Human rights violations against sex workers: burden and effect on HIV. *The Lancet*, 385(9963), pp. 186-199.

108. Whisnant, R. (2013). "Feminist Perspectives on Rape" in Zalta, E.N. (ed) *The Stanford Encyclopedia of Philosophy*, Available at: <http://plato.stanford.edu/archives/fall2013/entries/feminism-rape/>

109. Fick, N. (2006). Sex Workers Speak Out - Policing and the sex industry. *SA Crime Quarterly*, 15, pp. 13-18; Fick, N. (2006). Enforcing fear - Police abuse of sex workers when making arrests. *SA Crime Quarterly*, 16, pp. 27-33

110. Arnott, J. & Crago, A. (2009) 'Rights Not Rescue: A Report on Female, Male, and Trans Sex Workers' Human Rights in Botswana, Namibia, and South Africa'. Open Society Institute. Available at: https://www.opensocietyfoundations.org/sites/default/files/rightsnotrescue_20090706.pdf

111. Manoek, S. (2012) "'Stop Harassing Us! Tackle Real Crime!': A Report On Human Rights Violations By Police Against Sex Workers In South Africa'. Women's Legal Centre. Available at: <http://www.sweat.org.za/wp-content/uploads/2016/02/Stop-Harrasing-Us-Tackle-Real-Crime.pdf>

112. De Sas Kropiwnicki, Z. (2011). "'Their own way of having power': Female Adolescent Prostitutes' Strategies of Resistance in Cape Town, South Africa" in Dewey, S. & Patty, K. (eds.) *Policing pleasure: Sex work, policy, and the state in global perspective*.

113. De Sas Kropiwnicki, Z. (2012). The Politics of Child Prostitution in South Africa. *Journal of Contemporary African Studies*, 30(2), pp. 235-265

The effects of stigma and criminalisation (making something against the law) cannot always be easily separated. As stated above, criminalisation of a given activity increases the stigma linked with it. Moreover, stigma may also deepen criminalisation, in that the police will target groups who are stigmatised (even if many other people are also breaking the law). Violence and other abusive practices are generally more common in criminalised than in non-criminalised situations.¹⁰⁷ It is therefore worth examining specifically how the law criminalising sex work causes and increases harms against sex workers.

There are three major policing issues that combine in various ways to increase sex workers' vulnerability to violence, theft and other crimes. The first is that the police themselves are negative towards sex workers and so abuse their power or simply commit crimes against them. The second issue is that police action against sex workers, even when lawful, stops sex workers from using their own means of protecting themselves from crime. The third issue is that the police seldom want to look into crimes committed against sex workers, especially when these are committed by other police officers. This is made worse by both police abuse of sex workers, which makes them distrustful of police and so less likely to report crimes in the first place. The resulting low rate of prosecutions increases sex workers' risk of experiencing crime because criminals are aware that they are unlikely to be punished. We now turn to examine these factors in detail, with relevant research.

Police violence against sex workers

Although, as pointed out above, sex workers are at risk of violence, exploitation and abuse from many sources, they are especially likely to be abused by police officers. In this context, a feminist view on sexual violence offers tells us something important, namely that violence is not simply about physical force, but also about social and official power.¹⁰⁸ Police officers hold power over sex workers - not only because they are usually physically stronger than them and have weapons - but also because they have the legal power to arrest them. The threat of arrest can be used to demand money, sex and other favours from sex workers. Moreover, the police are even less likely to follow up on reports of violence committed by fellow police officers.

The result of this power difference is that police officers can abuse sex workers whenever they want and do so. It is possible to list examples at length, but a few will have to do here. One survey of sex workers in Cape Town found that seven out of nine street-based sex workers had been physically assaulted by the police, including being beaten in jail cells at the police station.¹⁰⁹ Other forms of abuse mentioned to researchers included: rape and sexual assault; being forced to have sex under the threat of arrest; extreme use of force during arrest, including the unnecessary use of pepper spray; verbal abuse, including racial and women-hating abuse; unlawful arrest; and the denial of rights while under arrest, including being held longer than allowed by law, being denied the right to contact family and being prevented from taking medication. The use of pepper spray as an instrument of torture comes up repeatedly in other reports as well, including being used on the genitals.^{69, 110}

Another study, focusing on Cape Town and Johannesburg, found that 70% of the 308 sex workers surveyed had suffered some sort of abuse at the hands of police.¹¹¹ All the abuses discussed above are mentioned in this report, as well as additional abuses: for instance, using police dogs to scare sex workers away from their place of work, and shooting at them with rubber bullets. Finally, although people under the age of 18 who sell sex are formally seen as victims of sexual exploitation rather than criminals under existing South African law, the police often fail to take account of this and continue to arrest and illegally abuse them.^{112, 113} Given the large amount of evidence of abuse, it is not surprising that 30% of sex workers surveyed in Cape Town, Johannesburg and Rustenburg reported some sort of 'negative interaction' (such as being assaulted or forced to pay a bribe) with police in the previous year, with only 1% reporting any kind of 'positive interaction' (such as being warned about a potential danger).⁵⁶

Even when police arrest sex workers legally, it is often by force, including handcuffing and time in jail. This use of force is shocking and usually completely unnecessary, because

sex workers are generally not violent or a danger to the public. In addition, sex workers are paid cash in hand and do not earn money if they are not working. So being arrested, especially at 'busy' times around the weekend, means that sex workers may suffer major financial losses and must either work longer hours to make up the loss or then have difficulty in supporting themselves and their dependents.¹⁰³

Moreover, even supposedly lawful arrests are usually carried out with the aim of harming or harassing sex workers, rather than protecting the public. It is difficult to prove that someone has paid money for sex, so the police often go after sex workers under by-laws around 'loitering' and 'public nuisance'.¹¹⁴ These offences are a matter of opinion, so enforcement is often unfair. Stigma is very likely to enter into arrest decisions, as people who 'look like' sex workers (often working-class women of colour in public places) are more likely to be arrested. Moreover, although the laws on buying and selling sex supposedly criminalise sex workers and their clients equally, in fact clients are not seen as a source of 'public nuisance' in this way and so are hardly ever arrested. Finally, sex workers who are arrested under by-laws are very seldom charged or prosecuted, indicating that the main aim of the police is simply to harass them. The Western Cape High Court has ruled that the police have been regularly arresting sex workers without planning to charge them, which is in fact illegal.¹¹⁵

Law enforcement increases the risk of violence

The ongoing lawful and unlawful targeting of sex workers by the police increases sex workers' risk of experiencing violence in several ways. The first is simply that it reduces trust, making sex workers less willing to report crimes. This makes it less likely that criminals will be arrested and stopped from committing crimes in the first place. *National Ugly Mugs*, an organisation collecting reports from sex workers in the UK about violent crimes committed against them, records that policing districts that strongly enforce 'prostitution' laws see a lot fewer sex workers willing to make formal complaints to the police than in districts that choose not to enforce these laws.¹¹⁶ In South Africa, Sonke Gender Justice has recently compiled an extensive report on the relationship between sex workers and the police, looking at five sites in Gauteng and two in Limpopo.¹¹⁷ They have recorded serious crimes committed by police officers against sex workers at every one of these sites including physical and sexual assault, torture, unlawful arrest and detention, and corrupt demands for money. Unsurprisingly, only 24% of sex workers asked by the researchers say they trust the police, with 41% trusting them "not at all", and 74% of sex workers saying they avoid the police.

The second way in which police enforcement against sex workers and their clients increases risk for them comes from the fact it very seldom reduces the amount of sex being sold, but merely moves it elsewhere or changes the way work happens. In practice, this often means moving sex workers from areas where they are quite safe to ones where they are more at risk, and upsetting the ways they protect themselves from violence. This applies particularly to street-based or outdoor workers, who are known from international research to be at higher risk more often than indoor workers.¹¹⁸ This is the same in South Africa, with 39% of outdoor workers in one research study having suffered violence from clients, compared to 20% of indoor workers.⁵³

In response to these conditions, outdoor sex workers come up with many ways to increase their safety.^{86, 119} For instance, a sex worker will usually prefer to have a long conversation with a new client before going to a private place with him, looking for signs of his being drunk, rude and nervous (all of which can lead to violence), and agreeing on payment, sexual services and what protection will be used. In situations where either or both parties are breaking the law, the fear of arrest limits the time for this negotiation, increasing the risk of violence and being forced into unprotected sex.¹²⁰

If given the option, street-based sex workers also prefer to work in groups, on busy public streets. This gives safety in numbers, and also makes sure that there are people around to see when a client goes away with a worker. In areas where clients mostly use cars, sex workers often record the licence plate when a co-worker goes away with a client.⁸⁶ In the same way, when they are not likely to be breaking the law themselves, sex workers may prefer to work near to CCTV cameras, as the knowledge they have been recorded will put off violent clients. All of these ways of working are made more difficult by sex work being unlawful, because this forces sex workers to work alone and in out-of-the-way places where they are not likely to be seen by the police or can hide quickly if they see the police coming.



In practice, this often means moving sex workers from areas where they are quite safe to ones where they are more at risk, and upsetting the ways they protect themselves from violence.

114. Gould, C. (2011). Trafficking? Exploring the relevance of the notion of human trafficking to describe the lived experience of sex workers in Cape Town, South Africa. *Crime, Law and Social Change*, 56(5), pp. 529-546.
115. *The Sex Worker Education and Advocacy Taskforce v Minister of Safety and Security and Others* 2009 (6) SA 513 (WCC) (20 April 2009). Available at: <http://www.saflii.org/za/cases/ZAWCHC/2009/64.html>
116. Feis-Bryce, A. (2015). *National Ugly Mugs: Fighting stigma, saving lives*. Presentation at the Sex Worker Open University Conference, London, November 2015.
117. Evans, D. & Walker, R. (2017). 'The Policing Of Sex Work In South Africa: A Research Report On The Human Rights Challenges Across Two South African Provinces'. Sonke Gender Justice and Sex Work Education and Advocacy Taskforce. Available at: <http://genderjustice.org.za/publication/the-policing-of-sex-work-in-south-africa/> [Accessed 5 April 2018].
118. Deering, K.N., et al. (2014). A systematic review of the correlates of violence against sex workers. *American journal of public health* 104(5), pp. 42-54.
119. Sanders, T. (2005). *Sex Work: A Risky Business*.
120. Alexander, P. (1998). Sex work and health: a question of safety in the workplace. *Journal of the American Medical Women's Association* 53(2), pp. 77-82.

Many police officers believe the myth that it is “impossible” for sex workers to be raped or simply believe that they don’t deserve justice. These police officers are therefore often unwilling to open a criminal case even if a sex worker lays a complaint about abuse.

121. “Attacks on prostitutes soar after vice ‘driven underground’ by law” (2008) The Scotsman, 16 April 2008. Available at: <http://www.scotsman.com/news/attacks-on-prostitutes-soar-after-vice-driven-underground-by-law-1-1164904>
122. Alexander (1998), *supra* note 121.
123. Taylor, D. & Townsend, M. (2014) “Mariana Popa was killed working as a prostitute. Are the police to blame?” *The Guardian*, 19 January 2014. Available at: <http://www.theguardian.com/society/2014/jan/19/woman-killed-prostitute-police-blame>
124. Shannon K., et al. (2009). Structural and environmental barriers to condom use negotiation with clients among female sex workers: implications for HIV-prevention strategies and policy. *American Journal of Public Health*, 99(4), pp. 659-65.
125. Lowman (2000), *supra* note 99.
126. McLean, M. quoted in O’Kane, M. (2002) “Mean Streets”. *The Guardian*, 16 September 2002. Available at: <http://www.theguardian.com/media/2002/sep/16/crime.comment>
127. 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*, 5(6), pp. 465-481.
128. Scorgie, F., et al. (2012). Socio-demographic characteristics and behavioral risk factors of female sex workers in sub-Saharan Africa: a systematic review. *AIDS Behav*, 16, pp. 920-933.
129. 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 at: <http://www.opensocietyfoundations.org/sites/default/files/arrest-violence-20091217.pdf>
130. “South Africa: decriminalizing sex work only half the battle” (2009) *IRIN News*, 29 May 2009. Available at: <http://www.irinnews.org/Report.aspx?ReportId=84621>
131. Ridgway, G. quoted in Fernandez, M. (2011) “Prostitutes’ Disappearances Were Noticed Only When the First Bodies Were Found” *New York Times*, 7 April 2011. Available at: <http://www.nytimes.com/2011/04/08/nyregion/08bodies.html>
132. Information about December 17th commemoration ceremonies around the world are available at: <http://www.december17.org/>

This is shown by the experience of Edinburgh, UK, where a high-profile police clean-up of clients in 2007 meant that sex workers could not talk with clients on busy streets, but had to make plans to meet them privately. The result was that the level of attacks on sex workers nearly doubled.¹²¹ Similar experiences have been reported in the United States, where the ongoing effect of police clean-ups is that sex workers are able to take less time to talk and are more likely to take “out-calls” to clients’ houses or hotel rooms. The result is lower levels of condom use and increased violence.¹²² More recently in London, UK, the death of Mariana Popo was blamed on enforcement action, which forced her to work alone on a fairly quiet street in London.¹²³

Another thing worth mentioning is that sex workers are generally safer when working in an area they know well. This allows them to work in groups with friends who they trust, and to see regular clients who they know are not violent. If enforcement action moves them away into areas they do not know, they are more likely to end up working alone and to take a chance on new clients. This is shown by a few studies from Canada. One study found that sex workers are far more likely to be forced into sex without a condom when they have been pushed out of their usual working areas by increased general policing, or because of charges against them as individuals.¹²⁴ Another found that the rate of sex workers being murdered in Canada increased sharply after 1980, at the same time as increased enforcement moved sex workers into new areas to work.¹²⁵

Police refusal to protect sex workers

Stigma not only drives people to abuse sex workers directly, but affects whether the police and the general public are likely to prevent or punish crimes committed against them. A senior police detective in the UK has said:

“Your general man in the street, I think, genuinely doesn’t care if a prostitute gets murdered. And if you speak to any senior detectives throughout this country, the first decision they make when they find a naked prostitute who’s been murdered is whether to tell the press she’s a prostitute. Because you think, right, if I go to the press and say that a 19-year-old single mother has been brutally murdered in the street, then I’m going to get the shock, horror, I’m going to get people interested... If I say that a 19-year-old prostitute’s been found stripped naked and murdered in a red-light area, the public think it’s one of those things, isn’t it, hazard of the job.”¹²⁶

Stigmatised attitudes towards sex workers are also shamefully common amongst the police and other authorities in South Africa. Many police officers believe the myth that it is “impossible” for sex workers to be raped or simply believe that they don’t deserve justice. These police officers are therefore often unwilling to open a criminal case even if a sex worker lays a complaint about abuse.^{127, 128} The Women’s Legal Centre (WLC) has also recorded cases in which prosecutors decided not to prosecute violent assaults against sex workers, even though there would have been enough evidence to do so.¹⁰⁵

This refusal to provide justice to sex workers further increases the risk of violence against them. Both sex workers and the people who might wish to abuse them are aware that sex workers are unlikely to report crimes and are unlikely to be taken seriously if they do. This essentially gives people permission to be violent or abusive towards sex workers without any fear of anything happening to them. The result is that sex workers are easy targets for robbers, clients who are violent or wish not to pay, as well as corrupt managers, abusive domestic partners and even serial killers.^{129, 130.}

As Gary Ridgway, a well-known serial killer in the United States, terrifyingly said: “I picked prostitutes because I thought I could kill as many of them as I wanted without getting caught.”¹³¹ In fact, he is believed to have murdered at least 48 women before he was finally caught. To remember the date of Ridgway’s sentencing in December 2003, the 17th of December is now known around the world as International Day to End Violence Against Sex Workers, with events often including a reading of the names of sex workers who are known to have been murdered in the previous year.¹³²

Decriminalisation, improved policing and empowering sex workers

So criminalisation of sex workers and their clients works in several ways to make sex workers more at risk of violence:

- it gives the police more power to commit abuses directly;
- it stops sex workers from using their usual ways to protect themselves; and
- it gives criminals permission to hurt sex workers without any fear of arrest.

Decriminalisation (making sex work lawful) would have some immediate positive effects, as police officers would no longer be able to use the threat of arrest to harass or exploit sex workers. More importantly, however, decriminalisation could form the basis for a change in official, community and cultural ways of thinking. Currently, police officers view it as part of their job to prevent sex work from happening, which makes them see sex workers as a nuisance, rather than as a group at risk who need special protection.¹³³

This is shown by the example of New Zealand, where sex workers report that they are much more likely to report crimes to the police since the decriminalisation of sex work in 2003.^{134, 135} Successful policing within a given community requires that the police are trusted by that community, which is not possible if members of that community have an ongoing bad relationship with the police.¹³⁶ Sex workers in New Zealand also say that checking out clients has become easier since 2003, as they can work more openly and take longer to discuss services.¹³⁷

Strangely, even when the law enforcement approach seeks to reduce the ‘nuisance’ issues sometimes linked to street-based sex work – noise, litter, public sexual behaviour and so on – it usually does not work as well as more cooperative approaches based on human rights and decriminalisation. For instance, police targeting of sex workers seldom stops them from working, but only forces them to work in different areas, at different times and sometimes even for longer hours.¹³⁸ This not only reduces safety, but may have the accidental effect of moving ‘nuisance’ issues to areas that were previously unaffected.

In the UK, discussions between sex workers and other community members have been much more successful at making sure that different people’s concerns are met.¹³⁹ For instance, in the city of Leeds, UK, the creation of a “managed area” where street-based sex work is allowed meant finding a middle ground whereby sex workers agreed to work in a particular area and only for particular times of the day.¹⁴⁰ This scheme has generally been supported by sex workers, although they have complained from the beginning that there are not places to actually have sex in the area, a fact that helped cause the murder of a sex worker who left the managed zone with a client in 2016.¹⁴¹

Looking again at the very important issue of safety, international experience has shown that there are many ways in which the police can really help stop violence against sex workers. For instance, violence against street sex workers can be reduced by better lighting, CCTV cameras and increasing police patrols in areas where they commonly work.^{142, 143} These measures can only work if sex workers have friendly, trusting personal relationships with the police who work in their area. Trust allows sex workers to feel free to work in ‘managed areas’ without the risk of being arrested or harassed by the police, or having their identities recorded or made public.

To take another example, since 2006 the police in Merseyside, UK have decided to treat violence against sex workers as hate crimes and work hard to arrest criminals. In 2010, 67% of rapes against sex workers resulted in criminal verdicts, compared to only 6.5% for the general population.¹⁴⁴ This success has only been possible because the police have agreed to sharply reduce enforcement of laws against soliciting and other ‘prostitution’ offences. This has created increased trust between sex workers and the police.^{145, 146} In South Africa, the draft Prevention and Combating of Hate Crime and Hate Speech Bill¹⁴⁷ includes ‘occupation’ as a protected characteristic, opening up the possibility that crimes against sex workers may one day be pursued with that in mind.

What these examples of better policing show is the harm done by stigmatising ideas about sex workers being ‘other’ or ‘outside’ the community. Sex workers are people too and would prefer to work with the police and other members of the community to address common concerns, if given the chance. Indeed, if they are allowed to organise and given enough resources, sex workers can do a far better job of ‘policing’ the sex industry than police officers! This is shown by the self-regulating board of the Durbar Mahila Samanwaya Committee (DMSC) in West Bengal, India, which has been extremely successful at preventing minors and people forced into the sex industry from being exploited.¹⁴⁸ It is likely that such friendly sex worker-police relationships are possible when laws change - that is, the current legal system (which clearly provides a space for police to harass and abuse sex workers) needs to be replaced with decriminalisation.

- Manoek, S. (2014). ‘Police Sensitisation Training Manual: A Guide for South African Police Service (SAPS) Officers to the Rights of Sex Workers and the LGBTI Community’. Women’s Legal Centre. Available at: http://www.wlce.co.za/images/sex_workers/POLICE%20manual%20LONG%20v3.pdf
- Mossman, E. & Mayhew, P. (2007) ‘Key Informant Interviews Review of the Prostitution Reform Act 2003’, prepared for the New Zealand Ministry of Justice. Available at: <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/key-informant-interviews/documents/report.pdf>
- New Zealand Ministry of Justice (2008), supra note 71.
- Alliance for a Safe and Diverse DC (2008) ‘Move Along: Policing Sex Work in Washington, DC’. Available at: <https://dctranscoalition.files.wordpress.com/2010/05/movealongreport.pdf>
- Armstrong, L. (2014). Screening clients in a decriminalised street-based sex industry: Insights into the experiences of New Zealand sex workers. *Australian & New Zealand Journal of Criminology*, 47(2), pp. 207-222.
- Hester, M. & Westermarland, N. (2004). ‘Tackling Street Prostitution: Towards a holistic approach’. UK Home Office. Available at: <http://dro.dur.ac.uk/2557/1/2557.pdf?DDD34+dss4ae+dss0nw+dul0jk>
- Ibid.
- Sanders, T. and Sehmbi, V. (2015). ‘Evaluation of the Leeds Street Sex Working Managed Area’. University of Leeds. Available at: <http://www.nswp.org/sites/nswp.org/files/Executive%20Summary%20Leeds,%20U%20of%20Leeds%20-%20Sept%202015.pdf>
- Fletcher, R. (2016). ‘The Realities of the UK’s First ‘Legal’ Red Light District’. *Vice*, 11 February 2016. Available: https://www.vice.com/en_uk/article/8gk3ea/holbeck-leeds-sex-work-scheme-policing-austerity
- Van Doorninck, M. & Campbell, R. (2006) ‘Zoning Street Sex Work’ in Campbell, R. and O’Neill, M. (eds) *Sex Work Now*.
- Sanders T. & Campbell, R. (2007). Designing out vulnerability, building in respect: violence, safety and sex work policy. *British Journal of Sociology*, 58, pp. 1-19.
- Jacobs, R. (2014) ‘Policing Prostitution - The Merseyside Hate Crime Model That Prioritises Protection of Sex Workers’ *Huffington Post*, 7 April 2014. Available at: http://www.huffingtonpost.co.uk/ruth-jacobs/prostitution-law-merseyside-model_b_4731381.html
- Campbell, R. (2014) ‘Not getting away with it: Linking Sex Work and Hate Crime in Merseyside’, in Chakraborti, N. & Garland, J. (eds) *Responding to Hate Crime: The Case for Connecting Policy and Research*.
- Jacobs, R. (2013) ‘In the Booth with Ruth - Rosie Campbell OBE, Former Coordinator of Armistead Street & Portside Sex Work Projects’. Available at: <http://ruthjacobs.co.uk/2013/05/29/rosie-campbell-chair-uk-network-sex-work-projects-uknswp-national-ugly-mugs-advisory-group-former-coordinator-armistead-street-portside-interview/>
- Draft available at: <http://www.justice.gov.za/legislation/hcbill/B9-2018-HateCrimesBill.pdf> [Accessed 23 April 2018].
- Jana, S. et al. (2014), supra note 74.

Although in principle anyone can be infected with HIV, in reality, it most severely affects the most socially marginalised and stigmatised in any given community.

These multiple elements of social marginalisation can combine to make sex workers – particularly female sex workers – and their clients especially at risk of HIV.

149. UNAIDS (2010) 'Getting to zero: 2011-2015 strategy'. Available at: http://www.unaids.org/sites/default/files/sub_landing/files/JC2034_UNAIDS_Strategy_en.pdf
150. WHO (2014) 'HIV prevention, diagnosis, treatment and care for key populations'. Available at: http://apps.who.int/iris/bitstream/10665/128049/1/WHO_HIV_2014.8_eng.pdf?ua=1
151. Ackermann, L. & de Klerk, G. (2002). Social factors that make South African women vulnerable to HIV infection. *Health Care for Women International*, 23(2), pp. 163-172.
152. Stoebenhau K, et al. (2011). More than just talk: the framing of transactional sex and its implications for vulnerability to HIV in Lesotho, Madagascar and South Africa. *Globalization and Health*, 7(34), pp. 1-15.
153. Wojcicki, J.M. (2002). "She Drank His Money": Survival Sex and the Problem of Violence in Taverns in Gauteng Province, South Africa. *Medical Anthropology Quarterly*, 16(3), pp. 267-293.
154. Coetzee, et al. (2017), supra note 103.
155. Graham, A.C. (2009). 'Making Prevention Work: Lessons from Zambia on Reshaping the U.S. Response to the Global HIV/AIDS Epidemic'. Sexuality Information and Education Council of the United States. Available at: http://www.siecus.org/_data/global/images/Zambia%20Final%20PDF%206%2018%202009.pdf
156. Sex Workers' Rights Advocacy Network (2009), supra note 130.
157. Reproductive Health & HIV Research Unit, Sociology of Work Unit of the University of the Witwatersrand & Vrije University Amsterdam (2002). 'Women at Risk: A study of sex work in Hillbrow, Johannesburg'.
158. Sexual Violence Research Initiative (2014) 'Sexual Violence and HIV'. Available at: <http://www.svri.org/hiv.htm>
159. WHO (2005), supra note 76.
160. UNAIDS (2009/2012), supra note 85.
161. Wechsberg, et al. (2006), supra note 101.

Social marginalisation and the risk of HIV

It has been said that "beyond its health impact, HIV acts as a lens that magnifies the ills of society and the weaknesses in our social systems".¹⁴⁹ Although in principle anyone can be infected with HIV, in reality, it most severely affects the most socially marginalised and stigmatised in any given community. Social marginalisation (the pushing of certain groups of people to the edges of society) increases risk because it limits choices. Someone who is poor may not be able to get condoms or other find other ways to protect him- or herself against HIV infection, and might not be able to afford healthcare. Stigma means that some people are denied access to the healthcare to which they have a right. Marginalised people are more likely to be financially dependent on others or generally have less social power and influence. This often means they cannot ask for condom use with sexual partners. They are also at risk of sexual violence, which in turn increases the risk of infection.

The WHO has identified certain 'key populations' who are most at risk of HIV.¹⁵⁰ These include sex workers and their clients, but also people who use drugs, men who have sex with men, transgender people, prisoners and foreign migrants. SANAC has also adopted the 'key populations' approach, although it also mentions other population groups who are particularly at risk of HIV and other STIs in the South African context. For instance, under the heading of 'key populations', it includes people living in urban informal settlements, adolescent girls and young women, and mine workers.¹⁸

The inclusion of girls and young women reflects well-established research indicating that the marginalised social and economic position of women in South Africa makes them at greater risk of becoming HIV-positive than men.¹⁵¹ Various authors have shown that negotiated sexual relationships exist that do not look like commercial sex work, but upon which many women are nevertheless financially dependent.¹⁵² The power dynamics of these relationships reduce women's ability to ask for condom use and indeed to refuse sex – with social norms sometimes actively supporting men in raping women for whom they have done financial favours.¹⁵³

Sex workers are often members of one or more other key population groups. Transgender people, men who have sex with men, people who use drugs, young women and migrants are all considerably more likely to sell sex than other groups. Moreover, as pointed out in section 4 above, many other people who are not officially listed as key populations but who are nevertheless socially marginalised – for instance, working-class and homeless people – are also more likely to sell sex. Due to criminalisation, sex workers are also more likely to be imprisoned. These multiple elements of social marginalisation can combine to make sex workers – particularly female sex workers – and their clients especially at risk of HIV. A recent study of sex workers in Soweto revealed various factors linked to social marginalisation that greatly increased the risk of HIV infection, including: having failed to complete secondary schooling (2.8 times more likely to become infected), having migrated from outside Gauteng (2.3 times the risk), and having more than five clients in a day (1.9 times the risk).¹⁵⁴

There are also various factors specific to commercial sex that make sex workers particularly at risk of HIV. Many sex workers and their clients have penetrative sex with multiple partners over a long period of time, putting them at risk of HIV infection if they do not use condoms. In conditions of serious poverty, the chance of AIDS-related illness may seem less important than the immediate need for money, leading some people to sell sex under risky conditions.¹⁵⁵ Sex workers are often in an especially weak position compared to their clients, due to differences in gender, income or social class, which can make it difficult for them to ask for condom use. Sex workers are often especially at risk of rape and other forms of sexual violence,^{156, 157} which is a risk factor for HIV transmission.¹⁵⁸ And fear of violence from clients may stop sex workers from trying to demand safer sex.^{159, 160} Finally, sex work often occurs in venues like bars and clubs where alcohol and drugs are used. Sex workers may use these substances to make work easier. Being drunk or on drugs can, however, also negatively impact decision-making and result in risky sexual behaviour.¹⁶¹

Reports of HIV prevalence, which is the amount of HIV cases in the population at a given time, prove that these factors make sex workers more at risk of HIV. The Soweto study, carried out in 2016, found a prevalence of 53.6% among the female sex worker

participants.¹⁴⁸ A study carried out between 2013 and 2014 reported that HIV prevalence among female sex workers in Johannesburg is around 71.8%, in Cape Town 39.7% and in Durban 53.5%.¹⁶² These numbers are far higher even than the prevalence rate of 36% in women between 30 and 34, which is the highest risk group in the population as a whole.¹⁶³ Moreover, the three-city survey found an alarmingly high rate of new infections: of women who had tested negative for HIV within the 12 months prior to taking the survey, 8.8% in Johannesburg, 18.3% in Cape Town, 8.7% in Durban tested positive at the time of the survey.

This shows clearly that public health measures to protect sex workers from HIV are failing. Indeed, the survey also found that very few sex workers had contact with peer educators or other sources of HIV prevention information. In 2011, SANAC reported that 19.8% of all new HIV infections in South Africa are linked to sex work – including sex workers themselves (5.5%), clients (11.5%) and partners of clients (2.8%) – with clients of sex workers about three times more likely to be HIV-positive than other men.¹⁶⁴ This is an alarmingly high rate of HIV transmission, given that sex workers amount to, at most, about 0.5% of the adult population.

Decriminalisation and public healthcare

Despite the serious burden of HIV and other STIs suffered by sex workers, criminalisation and stigma continue to make their access to healthcare difficult. Sex workers often face judgement and negative attitudes from service providers, including health workers, which can make it difficult to get condoms and other preventative measures, as well as HIV screening. Interviews with sex workers in Kenya, Zimbabwe, Uganda and South Africa between 2010 and 2011 found that many had been refused service at clinics or hospitals.¹⁶⁵ Even if we look at only the South African sites, a few examples include a transgender sex worker being refused treatment after being gang-raped; sex workers being refused condoms or being limited in the number they are allowed to take; and sex workers being tested for HIV without their agreement. Sex workers also mostly said that female condoms and water-based sexual lubricant were almost impossible to get from public health services.

It is also common for some South African police officers to take condoms from people they believe are sex workers. The police may also arrest people carrying condoms, seeing this as ‘evidence’ that they are sex workers.¹⁶⁶ There are reports of police burning down informal condom distribution sites set up by sex workers,¹⁶⁹ and even hassling health workers employed to give out condoms and educate sex workers.¹⁶⁷ This behaviour on the part of the police puts off sex workers from carrying condoms, and so increases the chances they will engage in unprotected sex. In one study, more than a third of sex workers in Cape Town were found not to be carrying condoms, for fear of being arrested.¹⁶⁸

Moreover, as pointed out by Cyril Ramaphosa, in his capacity of chairperson of SANAC, it creates a really stupid situation where “We have one organ of the state providing a very necessary service and another organ of the state taking that very service away”.¹⁶⁹

Stigma can also make it difficult to get treatment for other STIs, which can result in increased risk of HIV infection.¹⁷⁰ Sex workers who are HIV positive also face barriers to getting and keeping to treatment.¹⁷¹ An alarmingly small amount of sex workers who are HIV-positive are also on anti-retroviral therapy, which treats HIV (23.4% in Johannesburg, 45.3% in Cape Town and 35.9% in Durban), relative to the overall proportion of HIV-positive people in South Africa who are receiving treatment.¹⁵⁶ Lack of access to treatment also increases transmission of the disease, because people who are HIV-positive but not on anti-retroviral treatment are much more infectious than people who are being properly treated.

In light of the extreme health risks suffered by sex workers and their clients, and the extent to which the marginalisation of sex workers adds to the spread of HIV/AIDS in South Africa, it is good to see the proposals of the South African National Sex Worker HIV Plan published by SANAC in 2016.¹⁹ The Plan would like to see a large investment in resources for peer educator services to bring correct information about HIV prevention to sex workers. It also aims to help sex workers achieve 95% condom use with clients and their partners. It further seeks to follow UNAIDS and WHO guidelines by making sure that 90% of sex workers know their HIV status, that 90% who are HIV-positive are on treatment and that 90% of those on treatment reduce their viral load. In line with this, it seeks to provide “universal test and treat” (UTT) services for sex workers, i.e. starting anti-retroviral treatment as soon as possible after an HIV-positive diagnosis is confirmed, as opposed to waiting for CD4 counts to drop below a particular level. It also wants to provide Truvada to sex workers as a form of pre-exposure prophylaxis (PrEP), to prevent HIV infection.

Despite the serious burden of HIV and other STIs suffered by sex workers, criminalisation and stigma continue to make their access to healthcare difficult.

162. University of California, San Francisco (UCSF), Anova Health Institute & Wits Reproductive Health and HIV Research Institute. (2015). ‘South African Health Monitoring Study (SAHMS), Final Report: The Integrated Biological and Behavioural Survey among Female Sex Workers, South Africa 2013-2014’. San Francisco: UCSF. Available at: <http://www.health-e.org.za/wp-content/uploads/2016/03/South-African-Health-Monitoring-Survey-An-Integrated-Biological-and-Behavioural-Survey-among-Female-Sex-Workers-South-Africa-2013-2014.pdf>
163. Shisana O., et al. (2014). ‘South African National HIV Prevalence, Incidence and Behaviour Survey, 2012’. Cape Town: HSRC Press. Available at: <http://www.hsrc.ac.za/en/media-briefs/hiv-aids-stis-and-tb/sabssm4-launch>
164. Gorgens, M. and Fraser-Hurt, N. (2011) ‘South Africa HIV Epidemic, Response and Policy Synthesis’ Prepared for SANAC. Available at: https://www.researchgate.net/publication/304252639_Know_your_HIV_epidemic_KYE_report_review_of_the_HIV_epidemic_in_South_Africa
165. Scorgie, F., et al. (2013). “We are despised in the hospitals”: sex workers’ experiences of accessing health care in four African countries. *Culture, Health & Sexuality*, 15(4), pp. 450-465.
166. Open Society Foundations (2012) ‘Criminalizing Condoms: How Policing Practices Put Sex Workers and HIV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe’. Available at: <http://www.opensocietyfoundations.org/sites/default/files/criminalizing-condoms-20120717.pdf>
167. 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, pp. 763-775.
168. Cassim, Z. (2012) ‘Corrupt police abuse, exploit sex workers’. Corruption Watch. Available at: <http://www.corruptionwatch.org.za/content/corruptpolice-abuse-exploit-sex-workers>
169. “Sex workers have right to dignity” (2016) *IOJ News*, 11 March 2016. Available at: <http://www.ioj.co.za/news/south-africa/gauteng/sex-workers-have-right-to-dignity-1996919>
170. WHO (2005) ‘Toolkit For Targeted HIV/ Aids Prevention And Care In Sex Work Settings’. Available at: <http://whqlibdoc.who.int/publications/2005/9241592966.pdf>
171. Global Network of Sex Work Projects (2014) ‘Global Briefing Paper: Sex workers’ access to HIV treatment around the world’. Available at: <http://www.nswp.org/sites/nswp.org/files/Global%20Briefing%20-%20Access%20to%20HIV%20Treatment%20-%20English.pdf>



One study finds that approaches to HIV prevention where sex workers are actively involved in designing and running programmes are very successful, but that this is easily upset by criminalisation and stigma.

Altogether, this research provides really strong evidence that decriminalisation would, combined with effective public measures, also greatly reduce the transmission of HIV in South Africa.

It is important to note that, in line with the proposals of the WHO, UNAIDS and other international health bodies, the SANAC Plan supports sex work decriminalisation. This would not, by itself, remove all the factors that put sex workers at high risk of HIV infection. It would, however, make many support programmes far easier. The decrease in stigma would make it easier to provide non-judgemental health services, including condom provision and HIV treatment.¹⁷² Decriminalisation would also remove the reason for the police to take condoms or hassle people found carrying them. As argued above, decriminalisation would also greatly reduce the risk of sexual violence and the power imbalance between sex workers and clients, meaning that sex workers would feel more able to insist on condom use. Combined with effective regulation of brothels, escort agencies and other employers of sex workers, decriminalisation would mean that condoms and other safer sex materials would be more reliably provided. Sex workers would also have more power to refuse drugs and alcohol at work, helping them to keep practising safer sex.¹⁷³

A recent series on “HIV and Sex Workers” in the well-regarded *Lancet* journal has showcased important research showing that decriminalisation would have a major impact on HIV transmission.¹⁷⁴ One study in this series included medical evidence about HIV transmission in the context of sex work into a model that involved the various role-players in sex work: sex workers, clients, police, health workers, etc. Using this model, they worked out that decriminalisation would be the single most powerful weapon against HIV transmission, reducing the number of new infections among female sex workers and their clients by between 33% and 46% within a decade, depending on the country.¹⁷⁵

Another modelling study in the same series reveals that condom distribution programmes in South Africa have already greatly reduced the rate of HIV transmission in sex work contexts and that further interventions (including pre-exposure prophylaxis and quicker access to treatment) could result in large further improvements.¹⁷⁶ One study finds that approaches to HIV prevention where sex workers are actively involved in designing and running programmes are very successful, but that this is easily upset by criminalisation and stigma.¹⁷⁷ Altogether, this research provides really strong evidence that decriminalisation would, combined with effective public measures, also greatly reduce the transmission of HIV in South Africa.

172. WHO (2013) ‘Implementing comprehensive HIV/STI programmes with sex workers: practical approaches from collaborative interventions’. Available at: http://www.who.int/hiv/pub/sti/sex_worker_implementation/en/

173. Global Network of Sex Work Projects (2010) ‘Only rights can stop the wrongs: The smart persons guide to HIV and sex work’. Available at: http://www.nswp.org/sites/nswp.org/files/Smart%20Guide%20to%20HIV%20and%20Sex%20Work_0.pdf

174. *The Lancet* (2014) “HIV and Sex Workers”. Available: <http://www.thelancet.com/series/hiv-and-sex-workers>

175. Shannon, K., et al. (2015). Global epidemiology of HIV among female sex workers: influence of structural determinants. *The Lancet*, 385(9962), pp. 55–71.

176. Bekker, L., et al. (2015) Combination HIV prevention for female sex workers: what is the evidence? *The Lancet*, 385(9962), pp. 72 – 87.

177. Kerrigan, D., et al. (2015). A community empowerment approach to the HIV response among sex workers: effectiveness, challenges, and considerations for implementation and scale-up. *The Lancet*, 385(9963), pp. 172 – 185.



7 LEAVING SEX WORK

Problems with 'diversion' and 'exiting' programmes

Worldwide, many governments and non-governmental organisations aim to help people who sell sex to leave sex work and get other employment or retire. If approached respectfully, this could be a worthy aim. Although, as pointed out in section 3, there are various reasons why sex workers choose their work and many of them think of it as short-term and hope to move on to other things sooner or later. However, the criminalisation and stigmatisation of sex work can often make it more difficult to leave. Stigma makes employers unwilling to hire former sex workers. This problem can be especially severe if a sex worker ends up with a criminal record, which can often be viewed by potential employers.¹⁷⁸

Many so-called 'exiting' programmes can be unhelpful, or even have the opposite effect, if they fail to understand the reasons why people start and continue with sex work. The belief is that sex work simply cannot be something people do willingly and so the only reasonable response by outsiders must therefore be to 'rescue' sex workers. Laura Agustin has pointed out that programmes of this sort were first created in Europe and North America in the late 19th century, often by the women of the new middle-classes and often with an openly religious motive. She has argued that an important in-built aim of these programmes has always been to reinforce the 'virtuous' identities of the people, especially women, who run them.¹⁷⁹ To justify and provide a contrast to this virtuous image of themselves, they endorse stigmatising ideas about sex workers, namely that they are lazy, child-like or simply 'immoral'. They then place themselves in a parental role and feel justified in ignoring sex workers' preferences and ability to act for themselves 'for their own good'.¹⁸⁰

In accordance with the ideas of 'respectable' womanhood built in to many exiting programmes, the focus is often on moving sex workers into low-paid unskilled work, especially work that is thought of as suitable for women, like garment manufacture or (in South Africa) producing beadwork.^{181, 182, 183} This focus ignores the fact that many of the women concerned could have chosen those sorts of jobs on their own, but chose sex work because (in many cases) it offers better wages and working conditions. Indeed, as pointed out in section 3, many sex workers in South Africa report earning several times what they had earned in other forms of work. This point is shown by a recent study of street and indoor sex workers in London, UK, which found that many stayed in sex work even when offered other career choices, including some who had university degrees.¹⁸⁴

This is not, of course, to deny that many sex workers dislike their work and would prefer another job if it was available. But this is normally difficult for various *practical* reasons. Poverty, homelessness, the need to support family and other dependents, and even expensive drug habits mean that many sex workers cannot simply leave until either these issues are sorted out or they can find a job that offers similar earnings and flexibility.¹⁸⁵ However, many exiting programmes fail either to address these problems or guarantee other employment. Instead, they focus on giving sex workers moral/religious instruction or other forms of 'motivation' to leave, or even follow the model of 'rehabilitation' for violent criminals. In either case, sex work is seen as a criminal or otherwise undesirable activity of which sex workers ought to be ashamed. Thus these programmes only serve to further stigmatise sex workers, without making it any easier for them to actually find other employment.

The providers of services that do seek to address other issues, by providing counselling, health services, skills training and treatment for problematic drug use, are too often judgemental about sex work (and therefore sex workers). This puts off sex workers from using these services or undermines their self-esteem if they do choose to continue using them. Moreover, under so-called 'diversion' schemes, sex workers are often forced into being part of such programmes by the threat of criminal penalty. This is not only a form of violence in itself, but it also treats sex workers as criminals rather than as vulnerable people at risk who may need specialised services.^{186, 187} The element of force makes sex workers resent and mistrust service providers, as well as making them less likely to talk to counsellors about risky or illegal behaviour, weakening the effectiveness of these important services in the long run.¹⁸⁸

Many so-called 'exiting' programmes can be unhelpful, or even have the opposite effect, if they fail to understand the reasons why people start and continue with sex work.

178. Global Network of Sex Work Projects (2014) 'Sex Work And The Law: Understanding Legal Frameworks and the Struggle for Sex Work Law Reforms'. Available at: <http://www.nswp.org/resource/briefing-paper-sex-work-and-the-law-understanding-legal-frameworks-and-the-struggle-sex>
179. Agustin, L. (2007). *Sex at the Margins: Migration, Labour Markets and the Rescue Industry*.
180. Wahab, S. (2002). "For Their Own Good?": Sex work, social control and social workers, a historical perspective. *Journal of Sociology and Social Welfare*, 29(4), pp. 39-58.
181. Richter, M. (2012). 'Sex Work as a test case for African feminism'. Open Society Initiative of South Africa. Available at: <http://www.osisa.org/buwa/regional/sex-work-test-case-african-feminism>
182. Alvi, S. (2014) "The High Cost of Cheap Clothes". *Vice News*, 24 December 2014. Available at: <https://news.vice.com/video/the-high-cost-of-cheap-clothes>
183. Dlamini, D & Shackleton, S. (2016). "Sex work activism in South Africa: a struggle for visibility". *Open Democracy*, 9 March 2016. Available at: <https://www.opendemocracy.net/beyondslavery/sws/dudu-dlamini-sally-jean-shackleton/sex-work-activism-in-south-africa-struggle-for-visibility>
184. Ward, H. & Day, S. (2006). What happens to women who sell sex? Report of a unique occupational cohort. *Sexually Transmitted Infections*, 85(2), pp. 413-417.
185. Sanders, T. (2007). Becoming an Ex-Sex Worker: Making Transitions Out of a Deviant Career. *Feminist Criminology*, 2(1), pp. 74-95.
186. UK Network of Sex Work Projects (2009) 'Response To Home Office "Tackling The Demand For Prostitution: A Review (2008)" and "Policing And Crime Bill (2008)". Available at: <http://www.uknswp.org/wp-content/uploads/demandResponse.pdf>
187. Sanders, T. (2009). Controlling the "anti sexual" city: Sexual citizenship and the disciplining of female street sex workers. *Criminology and Criminal Justice*, 9(4), pp. 507-525.
188. Wahab, S. (2006). Evaluating the Usefulness of a Prostitution Diversion Project. *Qualitative Social Work*, 5(1), pp. 67-92.

Moreover, under so-called 'diversion' schemes, sex workers are often forced into being part of such programmes by the threat of criminal penalty. This is not only a form of violence in itself, but it also treats sex workers as criminals rather than as vulnerable people at risk who may need specialised service.

Decriminalisation would make it easier for people who want to stop selling sex to do so. As argued above, decriminalisation would make sex workers less at risk of violence, stigma and social isolation, which are the very things that can often make it difficult to access support structures and achieve a more stable life.

Finally, there is often also an unrealistic expectation that people stop selling sex abruptly and permanently, when it often makes more sense for them to reduce involvement gradually. This gives them time to build up savings, complete drug treatment, form social connections in 'normal' society, etc. Many sex workers will try to leave several times before succeeding permanently.¹⁸⁹ A survey of sex workers in Cape Town found that 70% of indoor workers and 75% of street workers already worked 'on and off', showing that many of them would probably slowly reduce their involvement if their financial situation improved.⁵³

More suitable support services and decriminalisation

There is a need for good support services for sex workers, but these should not guess at what sex workers need. They should instead start by asking sex workers what they need and then try to support sex workers in realising their own goals, even if these include continuing with sex work.¹⁹⁰ They should also be active in fighting stigma in the community. This would help sex workers get support from networks, fight social isolation and even contact possible employers. This also shows sex workers that service providers are 'on their side' and therefore builds trust. All services should be provided in a non-judgemental way and at flexible times. The most at-risk and marginalised sex workers (such as the homeless, drug-using or homeless sex workers) may lead chaotic lives and will not manage to attend services that require compulsory attendance at particular times, giving up drugs, registration and other measures.^{132, 191} Training for sex workers should also not be purely directed towards finding them other employment, but should also help them in solving challenges that they may face while continuing to sell sex. Some examples of such broadly useful skills might include budgeting and financial planning, conflict resolution and language skills.

Decriminalisation would make it easier for people who want to stop selling sex to do so. As argued above, decriminalisation would make sex workers less at risk of violence, stigma and social isolation, which are the very things that can often make it difficult to access support structures and achieve a more stable life. Criminalisation means that sex workers are forced to work in the underground economy, where they may become involved in other crimes or become dependent on criminals and/or drugs. This makes it more difficult to become part of society, and means they may still have a criminal record even if their prostitution convictions are removed. As pointed out above, people usually start sex work or increase the amount of sex work they do because of financial difficulties. These can be worsened by fines, being robbed of earnings by police officers and by time spent off work in jail, in court or in compulsory diversion programmes. In one case, a New York sex worker was forced to miss college classes in order to attend counselling ordered by a diversion programme and eventually dropped out of higher education – an obviously negative outcome.¹⁹² Decriminalisation would make it easier to provide flexible, non-judgemental services, since service providers would no longer be "supporting criminality". This means sex workers would be more likely to access support, training and counselling.¹⁹³

189. Benoit, C. & Millar, A. (2001). 'Dispelling myths and understanding realities: working conditions, health status, and exiting experiences of sex workers'. Available at: <http://www.safersexwork.ca/wp-content/uploads/2014/06/DispellingMythsReport.pdf>

190. Mayhew, P., & Mossman, E. (2007). 'Exiting prostitution: Models of best practice'. Prepared for the New Zealand Ministry of Justice. Available at: <http://courts.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/exiting-prostitution-models/documents/report.pdf>

191. Mcnaughton, C.C., & Sanders, T. (2007). Housing and Transitional Phases Out of "Disordered" Lives: The Case of Leaving Homelessness and Street Sex Work. *Housing Studies*, 22(6), pp. 885-900.

192. Chen, M. (2015) "Why Do Sex-Work Diversion Programs Fail?" *The Nation*, 25 September 2015. Available at: <http://www.thenation.com/article/why-do-sex-work-diversion-programs-fail/>

193. Rekart, M. L. (2005). Sex-work harm reduction. *The Lancet*, 366(9503), pp. 2123-2134.

8 PROBLEMS WITH OTHER LEGAL MODELS

In this report so far, we have presented a great deal of evidence showing that criminalisation has a negative effect on the human rights of sex workers. Some supporters of criminalisation do not deny this, but simply claim that it is acceptable to harm sex workers in the pursuit of other goals. Sometimes this may be said in openly moral or religious terms, with sex workers viewed as either evil-doers who deserve to be punished or (as in the examples from section 4) simply as dirty social misfits who need to be ‘cleaned up’. We hope that both of these arguments are clearly offensive – sex workers are human beings, often the most marginalised human beings in any given society. They deserve *more*, not less, care and support from the state and civil society.

Some people try to defend criminalisation on these grounds, arguing that arresting sex workers ‘helps’ them. This is unlikely, given the horrors routinely inflicted on sex workers by police officers and in jail. As we argued in section 7, sex workers are more likely to benefit from services that are suited to their needs and in which they can join voluntarily.

So, full criminalisation of sex work is clearly a deeply problematic legal model. Even by its own standards, it has not achieved its goal of reducing or ending sex work. However, two legal models other than decriminalisation are being actively promoted in the international discussion around sex work law: the ‘Swedish model’ and legalisation/regulation. It is therefore worth looking at the problems linked to these models before concluding.

Problems with the ‘Swedish model’ (criminalising clients)

The criminalisation of the buying of sex is known as the ‘Swedish model’ because Sweden was the first country to bring in some version of this law in 1999. It is also named the ‘Nordic model’ because Norway and Iceland followed in 2009, before being copied by other countries like Canada, France, Northern Ireland (within the UK) and the Republic of Ireland.

Although the Swedish or Nordic model is sometimes represented under the slogan ‘decriminalise the seller, criminalise the buyer’, this does not usually clearly describe the legal changes actually being proposed. France is an exception, as it included a ban on buying sex and the decriminalisation of soliciting (selling sex) in the same legislation¹⁹⁴ (although soliciting may continue to be penalised under municipal by-laws¹⁹⁵). In Iceland, both buying and selling sex were decriminalised in 2007¹⁹⁶ followed shortly by the re-criminalisation of buying in 2009. However, in Sweden itself, selling sex had already been decriminalised as far back as 1918,¹⁹⁷ although activities like brothel-keeping continued to be criminalised. Thus, the ‘Sex Buyer Law’, as it is called in Sweden, simply added a layer of criminalisation to what was already a system of partial criminalisation. Similarly, when the Nordic model was brought in in the Republic of Ireland in 2015, the bans on brothel-keeping and soliciting remained in force.¹⁹⁸ Canada’s sex buyer law also includes a new ban on ‘communicating for the purpose of selling sexual services in a public place’,¹⁹⁹ which would primarily target sex workers themselves.

These various laws targeting sex workers continue to be actively applied, despite the speechifying around decriminalisation. In Ireland, for instance, sex workers who choose to work together continue to be prosecuted under ‘brothel-keeping’ laws, even in cases where the police agree “both women were not under pressure and were operating the brothel of their own free will”.²⁰⁰ Non-criminal measures are also used in a punishing fashion against sex workers in Nordic model countries. As Amnesty International has recorded in detail, officials in Norway have made a planned effort to remove sex workers from their homes, with the police running ‘Operation Homeless’ over a period of four years.²⁰¹ The same report also tells how police in Norway have pursued migrant sex workers for deportation (expulsion from the country) after they reported crimes, and have used condoms as evidence of criminal activity, warning workers off safer sex measures just as they do under fully criminalised regimes.



194. “What you need to know about France’s new prostitution law” (2016) *The Local*, 6 April 2016. Available at: <https://www.thelocal.fr/20160406/all-you-need-to-know-about-frances-new-law-on-prostitution>
195. Lyon, W. (2017) “Sex work in France, one year on” *Feminist Ire*, 17 April 2017. Available at: <https://feministire.com/2017/04/17/sex-work-in-france-one-year-on/>
196. “Prostitution legal in Iceland” (2007) *Iceland Review*, 27 March 2007. Available at: <http://icelandreview.com/news/2007/03/27/prostitution-legal-iceland>
197. Yttergren, A. & Westerstrand, J. (2016). The Swedish Legal Approach to Prostitution. Trends and Tendencies in the Prostitution Debate. *Nordic Journal of Feminist and Gender Research*, 24(1), pp. 45-55
198. Criminal Law (Sexual Offences) Act, 1993. Available at: <http://www.irishstatutebook.ie/eli/1993/act/20/enacted/en/print.html>
199. Canada, Protection of Communities and Exploited Persons Act S.C. 2014, c. 25. Available at: http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2014_25/FullText.html
200. Maguire, S. (2017) “€18k in wired cash receipts found at brothel” *Irish Examiner*, 21 January 2017. Available at: <https://www.irishexaminer.com/ireland/18k-in-wired-cash-receipts-found-at-brothel-440160.html>
201. Amnesty International (2016) ‘The Human Cost Of ‘Crushing’ The Market: Criminalization Of Sex Work In Norway’. Available at: https://www.amnestyusa.org/files/norway_report_-_sex_workers_rights_-_embargoed_-_final.pdf



A street-based sex worker who has not seen enough clients may work later into the night and also work in a more isolated location, making him/her doubly vulnerable.

In Sweden, even EU citizens (who normally have the right to live and work in the country) have been deported if found to be selling sex. Making the case for deportation in one case, the national Ombudsman for Justice concluded that “prostitution is to be regarded as a dishonest means of support according to the law”.²⁰² Thus, in contradiction to Nordic model supporters’ claims that sex workers will be “treated as victims” under the law, the reality has been that state authorities have continued to criminalise sex workers by the various legal means that remain available.

Even supposing that the Nordic model could be put into place in a way that in fact removed legal penalties from sex workers themselves, the core idea of criminalising clients causes harm in its own right. There are several things linked together here. The first is that the law does in fact put off some potential clients, which is a positive thing in the view of the people proposing it. However, in practical terms it means that most sex workers will find it harder to earn money. If s/he is to meet her/his material needs, s/he must stay out on the street for longer and possibly accept clients s/he would otherwise refuse (because they seemed aggressive, drunk or rude). S/he may also feel compelled to provide services s/he would prefer not to. The second factor is that the law successfully puts off otherwise law-abiding men, so the remaining clients are on average more comfortable with criminal behaviour. Thirdly, the clients who remain are more likely to be nervous of arrests, meaning that sex workers who still wish to earn a living must be willing to work more secretly. This may, for instance, mean working in darkened alleys rather than brightly-lit, well-travelled streets. Or, because a sex worker’s flat is more likely to be known to the police, it may mean going to clients’ houses instead. In both cases, a sex worker is more at risk of violence. Fourth, clients are likely to be aware that sex workers now have fewer options and will use this bargaining power to further drive down prices or demand riskier sex acts.

These various factors also combine. A street-based sex worker who has not seen enough clients may work later into the night and also work in a more isolated location, making him/her doubly vulnerable. S/he may then agree to meet with one of the more violent and disrespectful men who still continue to buy sex, because s/he has so few options. Aware that s/he is desperate for money, he may demand unprotected sex.

These effects on sex workers are not simply theoretical, but have been observed by various Swedish government agencies, many of whose findings have been brought together in a Norwegian government report.²⁰³ For instance:

“There are now fewer clients and it is reckoned that a larger part of them are ‘dangerous’. For instance, they now want ‘rougher things’ and have more peculiar demands (for instance more rough sex) or are prepared to pay more for unprotected sex.” (p. 12, originally from the Swedish National Board of Health and Welfare)

“Those prostitutes who are still working in street prostitution experience a tougher existence. This is partly caused by the increased flow of heroin, but also by the decreasing number of clients. This tougher competition means that the prostitutes lower their prices, are prepared to take more clients and are prepared to give the service without protection.” (p. 13, originally from the Swedish police)

The Swedish National Board also carried out more recent research, which found that:

“...fear among clients (that) makes it harder to use safe meeting places. Instead, the meeting places have become more out of the way, such as wooded areas, isolated stairwells and office premises, where clients do not risk discovery.”²⁰⁴

Reversing the claim that the Nordic model would reduce the role of managers or ‘pimps’, the same report also found that:

“...the law against purchasing sexual services has resulted in a larger role and market for pimps, since prostitution cannot take place as openly.”²⁰⁵

When researchers spoke to street sex workers at a time when the city of Vancouver actively criminalised sex buyers (prior to the national ban on the purchase of sex), they gave similar accounts of how the change compromised their safety²⁰⁶:

202. Wahlberg, K. (2012) ‘Trafficking in human beings for sexual and other purposes. Situation report 13’. Swedish National Police Board. Available at: https://polisen.se/Global/www%20och%20Intrapolis/Informationsmaterial/01%20Polisen%20nationellt/Engelskt%20informationsmaterial/Trafficking_1998_/Trafficking_report_13_20130530.pdf
203. Norwegian Ministry of Justice and the Police (2004) ‘Purchasing Sexual Services in Sweden and the Netherlands: Legal Regulation and Experiences’, p. 46. Available at: https://www.regjeringen.no/globalassets/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216-purchasing_sexual_services_in_sweden_and_the_nederlands.pdf
204. Socialstyrelsen (2008) ‘Prostitution in Sweden 2007’, p. 48. Available at: https://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/8806/2008-126-65_200812665.pdf
205. Ibid at 47.
206. Krüsi A., et al. (2014) Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study. *BMJ Open*, 4(6), pp. 1-10.

“While they’re going around chasing johns away from pulling up beside you, I have to stay out for longer [...] Whereas if we weren’t harassed we would be able to be more choosy as to where we get in, who we get in with you know what I mean?”

“It pisses me off that they [the police] are there because basically what it comes down to is the shortest time that I’m out there, the shorter I’m on the street and the better I’m paid. But you [police] stand out there and you fuck up my business and scare away my dates. The longer I’m out there my chances of getting sick, raped, robbed, beat up whatever are greater so.”

All these results shouldn’t be surprising if we agree that sex workers, especially street-based workers, are one of the more marginalised groups in society. They usually choose to sell sex because they have few other options to meet their basic material needs. Sex buyers, in contrast, only want to have sex. This imbalance of need basically gives buyers power over sellers, which is increased in the context of a ‘buyer’s market’ (as a Norwegian government report describes the situation there, following passage of the law).²⁰⁷ A buyer’s market means it is the sex worker who must sort of problems in negotiating sex – even if the problem is a criminal law applied to the client, and even if this negotiation means compromising her own safety. Supporters of the Swedish model innocently believe they can solve this power imbalance by the blunt means of criminal law, whereas in fact they only make it worse.

Problems with legalisation/regulation

Legalisation appeals to many people as a fair and reasonable compromise between criminalisation of the sex industry and the “free for all” envisaged to follow from decriminalisation. Thinking along these lines, the argument is that the sex industry is both unavoidable (‘the world’s oldest profession’) and also too chaotic and criminal to be treated like any other industry – it must somehow be managed.

There are several problems with this view. The main one is that decriminalisation represents a ‘free for all’. In fact, the eventual goal is for sex work to be regulated by the same standards of any other industry, including criminal laws applying to sexual violence and other forms of coercion. The other major failing of legalisation is that it makes sex workers less than human. They are seen primarily either from the view of clients and managers, i.e. as a source of income or of sexual services; or they are seen, from the view of conservative sexual morality, as a nuisance or threat to public morals that must somehow be ‘contained’. What is missing is the human rights perspective, which views sex workers primarily as members of an at-risk population, who desperately need services and to be given the means to secure their rights.

The biggest single problem with legalisation is simply that the various requirements for working legally may be beyond the means of many or even most people who need to sell sex. To work legally, many legalised systems require some sort of registration with local or national government. Many sex workers are understandably unwilling to make themselves known in this way, given the stigma still attached to their work, the possibility of this information somehow being leaked or compromised, or even being shared with other countries where sex work remains criminalised. This has recently become a major point of controversy in Germany, with the so-called Prostitutes Protection Act of 2017 requiring all sex workers to register with the national government under their real names, and also tell their local government where they plan to work.²⁰⁸ This law also requires compulsory counselling for sex workers who wish to register and the licensing of ‘prostitution businesses’, even where this are just two sex workers working together.

Registration and licensing requirements have a particular impact on those without the legal right to work in any given country (since they cannot produce relevant documents), as well as those who are homeless (without a permanent address) or who do not have the finances to proceed through the registration process or find a suitable place to work. Thus, while fairly wealthy sex workers are able to work legally under this system, the most marginalised are pushed to the fringes and remain criminalised.

Research conducted in the Australian state of Queensland found that illegal sex workers suffered much greater risks of violence and harassment by the police than workers in the legal sector, as a direct consequence of this regulation.²⁰⁹



The biggest single problem with legalisation is simply that the various requirements for working legally may be beyond the means of many or even most people who need to sell sex.

207. Rasmussen, I. et al. (2014) ‘Evaluation of Norwegian legislation criminalising the buying of sexual services (English summary)’. p. 3 Available at: https://www.regjeringen.no/contentassets/0823f01fb3d646328f20465a2afa9477/evaluating_sexkjoeplsloven_2014.pdf

208. Herter, A. & Fem, E. (2017). ‘Protected Protection, Pointless Provisions – Overview Of The German Prostitutes Protection Act’. ICRSE. Available at: http://www.sexworkeurope.org/sites/default/files/userfiles/files/ICRSE_Overview%20of%20the%20German%20Prostitutes%20Protection%20Act_May2017_EN_02.pdf

209. Woodward, C. & Fischer, J. (2005). ‘Regulating the world’s oldest profession: Queensland’s experience with a regulated sex industry’ Research for Sex Work, 8 (June 2005). Available at: <http://www.nswp.org/sites/nswp.org/files/research-for-sex-work-8-english.pdf>

Another common element of legalisation schemes is requiring sex workers to be regularly tested for HIV and other STIs, and then preventing them from working if they test positive.

A related problem is that legalisation often passes responsibility for regulating sex work to local government, who may choose to limit the operation of sex businesses for moralistic reasons rather than in the interests of sex workers. Moreover, because it is usually difficult to acquire a licence under legalised regimes, large brothels are more easily able to fulfil the various requirements than small businesses or independents. Thus, bargaining power is shifted from the (largely female) workforce to (mostly male) brothel bosses and managers. This is why sex worker publication *Tits and Sass* has declared, in reference to the legal regime in Nevada, USA, that “Legalization serves the Man”.²¹⁰

In the Netherlands, city authorities chose to freeze the number of sex businesses at the moment of legalisation in 2000. Those who already owned businesses were therefore given immense power over their workers, who had no real option of seeking employment elsewhere or starting their own businesses, leading to regular breaches of labour rights.²¹¹ This has also led to a growth in the illegal sector, with the number of licensed businesses declining and an increase in the number of illegal venues like sex clubs and saunas, and in the number of independent escorts operating without a licence.²¹²

Another common element of legalisation schemes is requiring sex workers to be regularly tested for HIV and other STIs, and then preventing them from working if they test positive. This seems sensible on the face of it, as a way to limit the spread of disease. But compulsory testing breaches the basic rights to personal choice and (assuming the results will be shared with enforcement authorities) medical privacy. It also creates enormous problems if negative consequences follow from testing HIV positive. In one case in the Australian Capital Territory (Canberra), a male sex worker was arrested for working while HIV positive under the legalisation regime in place there, with the result that the number of sex workers getting tested dropped sharply.²¹³ Even if sex workers could be made to test regularly, it is worth remembering that they usually cannot be prevented from working, only from working *legally*. Removing the licence of HIV-positive workers will therefore merely make them work in secret, where they will be less likely to access condoms, antiretroviral medication and other healthcare support that reduces the risk of spreading STIs.

It is simply a result of prejudice and stigma to imagine that the sex industry is by nature chaotic, and can only be ‘controlled’ by penalties. Under decriminalisation, the negative side-effects of sex work could be more effectively controlled in a more caring way by working *with* sex workers. Sex workers are, for instance, just as concerned about their health as any other people and will therefore welcome HIV-prevention and other services that are offered in a straightforward and non-judgemental way. Similarly, as pointed out in section 5, sex workers have no more desire for conflict with the local community than any other workers. It is therefore not necessary to have unusually strict licensing laws to force sex workers away from areas where people live, as is the case in many legalisation regimes. Simply providing safe places to work in commercially practical locations will often remove most of the problems associated with street-based sex work, along with simple services like litter bins and public toilets.

210. Mansfield, B. (2014). “Nevada’s Brothels: Legalization Serves The Man”. *Tits and Sass*, 22 April 2014. Available at: <http://titsandsass.com/nevadas-brothels-legalization-serves-the-man/>

211. Wagenaar, H. & Altink, S. (2012). Prostitution as Morality Politics or Why It Is Exceedingly Difficult To Design and Sustain Effective Prostitution Policy. *Sexuality Research and Social Policy*, 9(3), pp. 279-292.

212. S. Biesma, S., et al. (2006) ‘Verboden bordelen. Evaluatie opheffing bordeelverbod: niet legale prostitutie (English Summary: *Prohibited brothels. Evaluation of the lifting of the ban on brothels: illegal prostitution*)’. WODC, IntraVal. Available at: <https://www.wodc.nl/onderzoeksdatabase/1204c-evaluatie-opheffing-bordeelverbod-deelproject-3.aspx>

213. Guide to Australian HIV Laws and Policies for Healthcare Professionals. (no date). “Sex Work”. Available at: <http://hivlegal.ashm.org.au/index.php/guide-to-australian-hiv-laws-and-policies-for-healthcare-professionals/sex-work>

9 CONCLUSION

Given the massive body of evidence that supports the removal of the criminal law from sex work for public health and human rights reasons, together with the distinct lack of evidence showing the same benefits for other legal models, it is necessary to conclude that South Africa is best served by the decriminalisation of sex work.



Sex workers are, for instance, just as concerned about their health as any other people and will therefore welcome HIV-prevention and other services that are offered in a straightforward and non-judgemental way. Similarly, as pointed out in section 5, sex workers have no more desire for conflict with the local community than any other workers.

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This report sets out the evidence on sex work and the law by covering peer-reviewed, academic articles on the impact of the criminal law on safety and health issues, individual sex workers and for the sex worker population as a whole. It describes the case for why the criminal law should be removed from adult, consensual sex work and analyses the pitfalls of legalisation and partial criminalisation of sex work.

