

# **“WHAT HAPPENED TO THE EVIDENCE?”**

**A CRITICAL ANALYSIS OF THE SOUTH AFRICAN LAW REFORM COMMISSION’S REPORT ON  
‘ADULT PROSTITUTION (PROJECT 107)’ AND LAW REFORM OPTIONS FOR SOUTH AFRICA**

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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](http://www.asijiki.org.za)

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## EXECUTIVE SUMMARY

After close to twenty years of inquiry, the South African Law Reform Commission (SALRC) submitted its report on Adult Prostitution (Project 107: Sexual Offences: Adult Prostitution) in June 2015 to the Department of Justice. This report appeared in the public domain only in May 2017, when the Commission released its findings in conjunction with the Department of Justice.

In a 530-page report, the SALRC ultimately supports continued criminalisation of sex work in South Africa. This conclusion is defended by a limited presentation of the evidence, problematic theoretical assumptions and logically unsound argument, as this analysis points out. The Report states upfront that a goal of law reform should be to “prevent, deter or reduce prostitution”. This immediately establishes a bias against any legal option that does not share this aim, such as decriminalisation of sex work where the primary aim of this policy is to improve safety and working conditions, not to reduce the buying or selling of sex. This bias is also expressed in other ways, for example in the decision to use the terminology of “prostitution” and “prostitutes” as opposed to the more respectful and generally accepted “sex work” and “sex workers”.

More substantially, it is clear from the overall pattern of argument that the authors of the Report set out to make a case for criminalisation. Argument and evidence that would tend to support decriminalisation are presented extremely briefly, often followed immediately by extensive counter-argument. Similarly, authors who support criminalisation are quoted at length, whereas supporters of decriminalisation are paraphrased briefly or not mentioned at all. The views of sex workers are barely quoted.

It is suggested repeatedly in the Report that decriminalisation is undesirable because it cannot *completely* prevent the harms associated with the sale of sex. This is taken to be an argument in favour of criminalisation, which is illogical. Criminalisation has clearly increased these harms and has also failed even in the goal of reducing or stopping sex work in South Africa and elsewhere in the world. Moreover, setting the impossible goal of completely preventing harm means that the Report fails to address the wide-ranging literature on how the harms that all parties agree are associated with sex work can be effectively reduced. The safety of sex workers is considerably improved, for instance, if they are able to screen clients and work in well-lit public areas, both of which are made more difficult by criminalisation. Instead of engaging with this literature, the Report relies almost exclusively on a single United Kingdom Home Office report on the topic, which is itself biased and unsound in several crucial respects.

At a theoretical level, the Report relies on a shallow description of sex work as “exploitation”, without any deeper study of the nature of work and economic oppression in a post-apartheid capitalist state. The argument put forward is essentially a form of special pleading, beginning from an undefended assumption that sexual labour is different from other kinds of labour. This then proceeds directly to the conclusion that sex work is uniquely abusive, without considering that it may be a relatively appealing option

to someone with limited economic opportunities. Simply closing off one option (or making it more dangerous) does not, in itself, provide other options to marginalised people. A related theoretical weakness is the Report’s reliance on the so-called “radical feminist” literature, which proceeds from the assumption that all commercial sex is violence. This is extremely damaging because it blurs the essential distinction between consensual and non-consensual sex and so ignores the demand from sex workers for protection against the latter.

In the Report there is also a consistent pattern of explaining state violence towards sex workers. At one point, sex workers who object to being arrested are dismissed as “hysterical”, despite the well-documented fact that sex workers in South Africa are frequently subject to random and unlawful arrest, as well as severe and illegal abuse by the police. Even where arrest is lawful, the use of state force against citizens should be viewed as a last resort, to be undertaken with due seriousness and after carefully considering other options. The casual approach adopted toward this matter in the Report is unsettling.

The Report supports biased studies regarding the extent of sex trafficking and other coercive practices in the sex industry without presenting sufficient evidence, despite the ample literature pointing out the process problems in and sheer mathematical and demographic unlikelihood of these studies. Other academic researchers generally agree that, while coercive practices are a problem in the sex industry, the vast majority of sex work is conducted by adults who work voluntarily.

There are other major factual errors – including the misreporting of legislation and court judgements – which tend to cast doubt on the general quality of the research undertaken for the Report. This is reinforced by a failure to mention in any detail the extensive academic literature on the connections between sex work criminalisation and HIV transmission, essentially dismissing the growing scientific consensus (and the view of international organisations like the WHO and UNAIDS) that decriminalisation would improve public health. Finally, the Report adopts an undue focus on the alleged extent to which sex work decriminalisation would harm tourism, relying on unsound evidence in doing so.

In summary, the Report is disappointing and does a disservice to the SALRC as an institution. It is outdated, leaves out essential academic research and is strongly biased in favour of one legal approach. This is in direct opposition to its stated purpose “to review the fragmented legislative framework that currently regulates adult prostitution... to consider the need for law reform in relation to adult prostitution... and to decide which legislative model accords with government’s goals and strategies”

The authors of this response to the Report are therefore forced to conclude that the SALRC has failed in its duty as the body tasked to provide objective recommendations for the development, improvement, modernisation or reform of the law. The careful analysis in the following pages sets out why.

### Our seven main conclusions in point form are as follows:

1. The Report appears to support the criminalisation of sex work without presenting clear and comprehensive arguments for and against it or adequately considering the harms associated with full criminalisation in South Africa.
2. It suggests sex work is simply exploitation, partly due to an unbalanced reliance on so-called radical-feminist literature, which assumes all commercial sex is violence.
3. It draws very little on the voices of sex workers – the parties most affected by law reform.
4. It promotes biased and problematic studies on the extent and nature of sex trafficking and coercive practices in the sex industry, without presenting sufficient evidence.
5. It fails to report in any detail important studies linking public health improvements, particularly with regard to HIV, to the decriminalisation of sex work.
6. It fails to report in any detail important studies linking public health improvements, particularly with regard to HIV, to the decriminalisation of sex work.
7. It puts undue focus on the alleged extent to which decriminalisation would harm tourism, again relying on unsound evidence to do so.

## ACRONYMS

<b>AIDS</b>	Acquired Immune Deficiency Syndrome
<b>FPI</b>	Family Policy Institute
<b>HIV</b>	Human Immuno-Deficiency Virus
<b>LGBTI</b>	Lesbian, Gay, Bisexual, Transgender, Intersex
<b>NSP</b>	National Strategic Plan
<b>PRA</b>	(New Zealand) Prostitution Reform Act 28 of 2003
<b>SALRC</b>	South African Law Reform Commission
<b>SANAC</b>	South African National AIDS Council
<b>SWEAT</b>	Sex Work Education and Advocacy Taskforce
<b>UN</b>	United Nations
<b>WHO</b>	World Health Organisation



# 1 INTRODUCTION

## Background to the ‘Adult Prostitution’ project

This analysis is a systematic examination of the South African Law Reform Commission (SALRC) Report on Adult Prostitution,<sup>1</sup> published on 26 May 2017 (hereafter “the Report”). The SALRC is a body constituted under the Ministry of Justice and Constitutional Development, established in terms of the South African Law Reform Commission Act 19 of 1973. Under this Act, the primary function of the SALRC is to “study and investigate all [branches of the law of the Republic] in order to make recommendations for the development, improvement, modernisation or reform thereof”.<sup>2</sup> More recently, the SALRC has described its mission as “the continuous reform of the law of South Africa in accordance with the principles and values of the Constitution to meet the needs of a changing society operating under the rule of law”.<sup>3</sup>

The Report has been prepared as the fourth “arm” of Project 107 of SALRC, a long-running effort to reform the law around sexual offences. The overall project was established in 1996 at the request of the then-Minister of Justice, Dr Dullah Omar, with the narrower aim of investigating “Sexual Offences By and Against Children”. However, in 1997, the scope of the project was expanded and it was renamed simply “Sexual Offences”. The first arm of this Project was focused on consolidating and amending much of the existing substantive law on sexual offences, whereas the second arm focused on procedural matters. Work on both these arms was essentially completed with the promulgation by Parliament of the Sexual Offences Amendment Act of 2007. The third, ongoing arm of the Project is focused on offences related to pornography and the sexual abuse of children. The fourth arm is focused specifically on “Adult Prostitution”. These third and fourth arms did not result in legal changes in the Sexual Offences Amendment Act of 2007, as it was felt that these concerned more complex and controversial issues and so more consideration and consultation was needed.

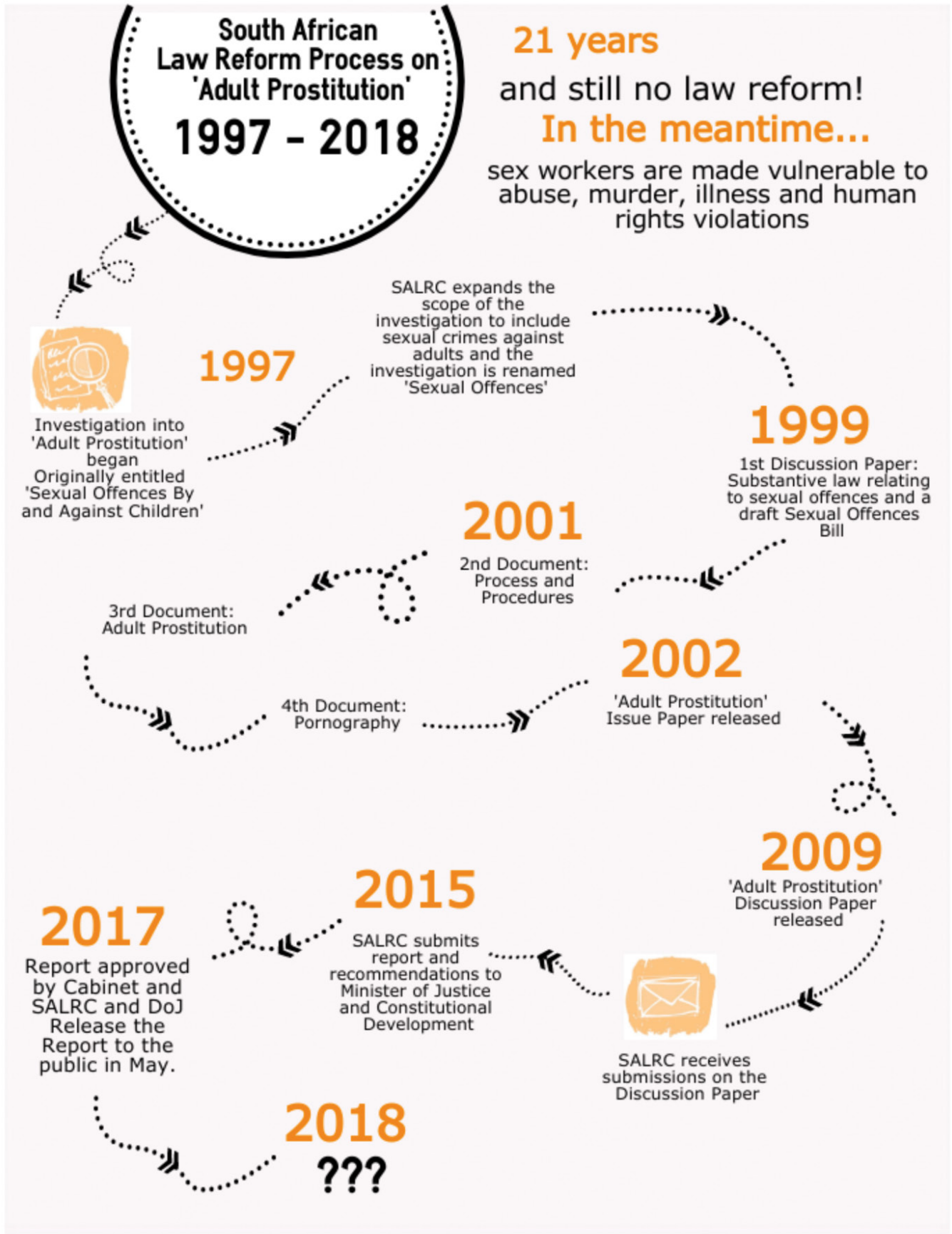
This fourth arm of the Project (the “Adult Prostitution” component) has previously resulted in the publication of two reports by the SALRC, namely: Issue Paper 19 of 2002<sup>4</sup> and Discussion Paper 0001/2009.<sup>5</sup> These publications did not make substantive recommendations concerning the law on adult sex work, and do not contain draft bills. It is the usual practice of the SALRC to include a draft Bill in its Discussion Paper to elicit comments from the public on the legislation it wants to propose. This was not the case with the “Adult Prostitution” arm of the Project.

The Issue Paper discussed three possible legal models for the regulation of sex work in South Africa, later expanded into four possibilities in the Discussion Paper.

- The first model discussed in the Discussion Paper is total criminalisation, that is the criminalisation of people buying and selling sex, as well as anyone facilitating the sale of sex. This is the legal status quo in South Africa.
- The second option is partial criminalisation, under which the selling of sex is not in itself criminalised, but offering the sale of sex in public (“soliciting”), having more than one person sell sex from a given venue (“brothel-keeping”), buying sex, and/or facilitating the sale of sex are criminalised.
- The third option is regulation (also called “legalisation”), under which buying, selling and facilitating the sale of sex are all legal, but only under specific conditions.
- The fourth option introduced in the Discussion Paper is non-criminalisation (also called “decriminalisation”), under which there are no criminal penalties or other special rules governing the buying or selling of sex or surrounding activities, with consensual paid sex being governed by the same laws as any other commercial transaction.



1. Project 107: Sexual Offences: Adult Prostitution, June 2015 (Released 26 May 2017). Available at: <http://salawreform.justice.gov.za/reports/r-pr107-SXO-AdultProstitution-2017.pdf> [Accessed 19 January 2018].
2. South African Law Reform Commission Act 19 of 1973, section 4.
3. South African Law Reform Commission. “Vision, Mission and Value Statement”. Available at: <http://www.justice.gov.za/salrc/vision.html> [Accessed 18 September 2017].
4. 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](http://www.justice.gov.za/salrc/ipapers/ip19_prj107_2002.pdf) [Accessed 25 September 2017].
5. 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](http://www.justice.gov.za/salrc/dpapers/dp0001-2009_prj107_2009.pdf) [Accessed 25 September 2017].



SWEAT infographic on timeline of the SAHRC

## Language and Terminology

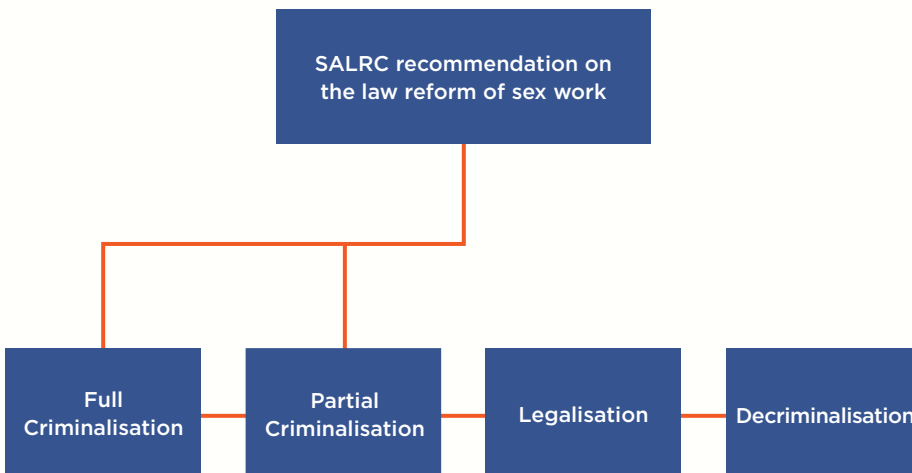
From the outset, it is worth making a brief note on terminology, to avoid confusion. In general, the preferred general term for anyone who provides a commercial consensual sexual service is “sex worker”. This includes erotic dancers, pornography performers, and erotic masseurs, in addition to people who provide “full” sexual contact to clients. However, for simplicity’s sake, in this document the authors use the terms “sex work” and “sex worker” to refer more specifically to the commercial sale of “full” sexual services and the people who sell these services, respectively. This is the terminology generally preferred in the industry<sup>6</sup> and specifically by the people concerned. It is therefore not respectful to use other terms. It is also the terminology recommended by international organisations such as the World Health Organisation (WHO) and UNAIDS. In particular, the authors do not refer to “prostitution” or “prostitute”, except where quoting verbatim, as these terms are deemed derogatory and offensive. For more detail on terminology, see the discussion in section 3 below.

## Structure and general approach of this document

The majority of this document will be devoted to critically analysing the SALRC’s Final Report and its recommendations. However, the authors take it that all parties to this debate are sincerely concerned about the safety and well-being of sex workers, as well as the good of South African society at large. The disagreements arise from differing ideas about how these broad aims are to be achieved. Nevertheless, the authors believe that, in light of the increasing evidence and arguments that are now available, the case for decriminalisation is overwhelming. This report should be read in conjunction with Asijiki’s Companion Report, which summarises the current state of peer-reviewed, academic research on the impact of criminalisation on public and individual safety and health, as well as the impact of the decriminalisation of sex work.

It should be noted at the outset that this document is strongly critical of the SALRC Report. This is not simply because the authors disagree with its conclusions, but because of the strong impression given, when reading the Report, that its authors did not effectively apply their minds to the complicated question of sex work law reform, suggesting that their conclusions were essentially a foregone conclusion. From a close reading of the 530-page report, it is clear that the evidence and arguments relevant to this issue have been reviewed selectively, with the implicit or explicit aim of defending the ongoing criminalisation of sex work. The writing is of the sort that might be expected from a lobbying or campaigning organisation founded on specific religious principles and seeking to further an explicit conservative social project. It is consequently extremely disturbing, considering its role as an official Report of a statutory body intended to inform the drafting of legislation in this country.

In responding to the SALRC Report, this document initially takes the approach of addressing broad themes or areas of concern, focusing on issues such as biased terms of reference, assumptions and presentation of evidence and arguments. It then goes on to address some of the more specific theoretical and logical errors present in the report, as well as factual errors and other points of criticism. It ends with a brief conclusion.



**It should be noted at the outset that this document is strongly critical of the SALRC Report.**

6. Nicolette Naidoo (2009) *Report on the 1st African Sex Worker: Building Solidarity and Strengthening Alliances*. Reproductive Health and HIV Research Unit, Sex Workers Education and Advocacy Taskforce, Hillbrow, 3-5 February 2009.

## 2

## BIASED AIMS AND TERMS OF REFERENCE OF THE SALRC REPORT

**It is clear that the Commission had determined in advance that any proposed legislation should be judged at least partially by the degree to which it is likely to reduce or even end the buying and selling of sex... this clearly shows bias towards prohibitionist models.**

In the initial summary of the Report, it is stated that an aim of the Report is to “identify alternative policy and legislative responses that might regulate, prevent, deter or reduce prostitution.” (paragraph 2). Similarly, at paragraph 1.10, respondents from the public are asked to state “how their preferred legislative option would affect the following issues: reduce the demand for prostitution...”. This approach is further articulated in the statement that “The Commission hopes that this response will guide and equip functionaries and larger society in a quest to prevent, deter and reduce prostitution.” (para 1.127).

It is worth distinguishing attempts to suppress sex work by criminalising the various parties involved in it – attempts the authors would describe as “prohibitionist” – from a more general view that the buying and selling of sex is a symptom of social inequality and that, in some sense, society would be better off without it. One can be sympathetic to this more general “abolitionist” view, while still regarding criminal law as an unethical and counterproductive means to achieve the overall end. This distinction is, however, blurred in the Report, which points to the more general context in stating “the ideal would be a transformed society where no person is faced with the option of engaging in prostitution to combat poverty” (para 1.14) but then focuses on criminal law in its actual practical recommendations, as opposed to issues like poverty and inequality.

It is clear that the Commission had determined in advance that any proposed legislation should be judged at least partially by the degree to which it is likely to reduce or even end the buying and selling of sex. One obvious criticism of this goal is that it is simply unrealistic. Sex work has been documented in just about every country in the world and has possibly only ever been successfully suppressed in contexts like Mao-era China, where the state was willing to use totalitarian means to control the population.<sup>7</sup>

Moreover, stating the reduction of commercial sex as a goal for legislation clearly shows bias towards prohibitionist models. Supporters of decriminalisation have never argued that it would reduce the amount of commercial sex work in the short term. Promoters of decriminalisation support programmes like poverty reduction and the creation of job opportunities that may have the indirect effect of reducing the number of people selling sex. Our view regarding legislation is that, like many commercial activities, the buying and selling of sex are neither good nor bad in and of themselves, but that various harms and benefits might arise because of where and how these activities take place. Thus the amount of sex that is being sold is simply irrelevant, especially placed alongside serious concerns about the working conditions for the people who choose to sell sex, which currently include the risks of serious violence and abuse.

7. MS Cohen, et al. (1996). Successful Eradication of Sexually Transmitted Diseases in the People's Republic of China: Implications for the 21st Century. *The Journal of Infectious Diseases*, 174(2), pp. 223-229.

### 3 STIGMATISING LANGUAGE ABOUT SEX WORKERS

One of the most troubling passages in the Report concerns “categories of people who enter prostitution” (paragraph 2.6). This passage quotes, without comment, the views of an author who “lists a few categories of people who enter prostitution”. Among the factors stated are “defects in their moral character” and “low intelligence and physical and/or mental problems”. That these remarks pass without comment is testimony to the stigmatised view of sex workers that is silently accepted in the Report and expressed in the choice of language. One of these choices concerns the terminology referring to sex workers and sex work itself.

At paragraph 1.60, the Report states that it will use the terms “prostitute” and “prostitution” to describe sex workers and commercial sex work, respectively. This is justified on the grounds that it is “useful to connote a specific category of the overall concept of the ‘commercial sex industry’, which may include masseurs and lap dancers” and that “many people providing sex for reward do not identify themselves as ‘sex workers.’” At paragraph 2.3 the use of the term “prostitute” is discussed again and it is stated that “the term is not meant to stigmatise or marginalise any person.”

This last claim is puzzling, since the term “prostitute” has only been in use in the English language since the late 17th century and has always had a derogatory meaning.<sup>8</sup> In current usage, the term is often used as a shorthand for immoral or unprincipled behaviour. As stated by the Concise Oxford English Dictionary (11th Edition) “prostitute” can be used as a verb meaning to “put to an unworthy or corrupt use for the sake of gain”.

The terms “sex work” and “sex worker”, in contrast, were coined in the late 1970s specifically in order to avoid the negative overtones that exist around the term “prostitute” and other terms.<sup>9</sup> This more respectful terminology has been widely adopted in South Africa and is used by major international and South African organisations, including: Human Rights Watch,<sup>10</sup> Amnesty International,<sup>11</sup> UNAIDS,<sup>12</sup> WHO<sup>13</sup> and SANAC.<sup>14</sup> It is also the terminology preferred by sex workers themselves, internationally<sup>15</sup> and in South Africa.<sup>16</sup> The WHO and UNAIDS explicitly note that “prostitution” is a stigmatising term.

However, since the term “sex work” is favoured by those supporting decriminalisation, perhaps it was felt that this was not a sufficiently ‘neutral’ term in writing this report. It is also true that “sex work” is sometimes intended as a general term to include many forms of commercial erotic service, some of which would not fall under the standard definition of the term “prostitution” and are not currently criminalised under laws banning “prostitution” in South Africa. However, there are several accepted ways to describe someone whose work involves sexual contact with clients that does not suffer either of these defects. At various points, the Report itself uses the terms “people providing sex for reward” (para.1.60) (para 1.60), “people who sell sex” and “people who sell sexual services”(paras 1.33, 2.67, 2.167, etc.), any of which would be acceptable if used consistently.

It is also striking to note that, when the Report discusses the problem of choosing an appropriate term for the clients of sex workers, it opts for “buyer” as a “neutral” choice (paragraph 3.6). Evidently it is regarded as acceptable to talk about “prostitutes” but not about “johns”, “punters” or any of the other stigmatising terms commonly used for the clients of sex workers. In any case, if clients are “buyers”, it would seem entirely logical, and clear within the context of the Report, to refer to sex workers as “sellers”. Not only would this have been respectful, but it would have been more in keeping with the terminology used elsewhere in the Report, and the stated rationale for using that terminology. So the Report has failed to use recognised, neutral and appropriate terminology, despite its ready availability and the documented impact of using historically derogatory language in this setting.

Another problematic piece of terminology is the reference (at paragraphs 2.374 and 3.18) to a “person being bought for sex”. It implies that to buy sex from someone is essentially to buy that person, or equally that to sell sex is to sell *oneself*, as opposed to one’s time or a specific service. This sort of language is closely linked to women-hating or anti-feminist ideas of sexuality, which understand a woman’s sexual behaviour as central to her value as a human being.



8. Rictor Norton (2014) “The History of the Word “Prostitute”. *Gay Literature and History: Essays by Rictor Norton*. Available at: <http://rictornorton.co.uk/though15.htm> [Accessed 10 December 2017].
9. Carol Leigh ‘Inventing Sex Work’ In: Jill Nagle (ed) *Whores and other Feminists* (1997).
10. Human Rights Watch (2014) ‘World Report 2014’. Available at: [https://www.hrw.org/sites/default/files/wr2014\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/wr2014_web_0.pdf) [Accessed 19 January 2018].
11. Amnesty International (2015) ‘Global movement votes to adopt policy to protect human rights of sex workers’. Available at: <https://www.amnesty.org/latest/news/2015/08/global-movement-votes-to-adopt-policy-to-protect-human-rights-of-sex-workers/> [Accessed 13 September 2017].
12. UNAIDS (2002) ‘Sex Work and HIV/AIDS: UNAIDS Technical Update’. Available at: [http://data.unaids.org/publications/IRC-pub02/jc705-sexwork-tu\\_en.pdf](http://data.unaids.org/publications/IRC-pub02/jc705-sexwork-tu_en.pdf) [Accessed 15 October 2017].
13. World Health Organisation Department of HIV/AIDS (2012) ‘Prevention and Treatment of HIV and other sexually transmitted infections for sex workers in low- and middle-income countries: Recommendations for a public health approach’. Available at: [http://www.who.int/iris/bitstream/10665/77745/1/9789241504744\\_eng.pdf](http://www.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf) [Accessed 15 October 2017].
14. South African National AIDS Council (2013) ‘National Strategic Plan for HIV Prevention, Care and Treatment for Sex Workers’. Available at: <http://sanac.org.za/wp-content/uploads/2015/12/National-Sex-Worker-Strategy-Version7-20Nov2013-final-draft.pdf> [Accessed 12 December 2017].
15. Global Network of Sex Work Projects. “Where our members work”. Available at: <http://www.nswp.org/members> [Accessed 14 August 2017].
16. Sex Workers Education and Advocacy Taskforce (2015) ‘Position Paper On Sex Work in South Africa’. Available at: <http://www.sweat.org.za/position-paper-on-sex-work-in-south-africa/> [Accessed 15 October 2017].



**Although women-hating conceptions of female sexuality and the language that accompanies it remain commonplace in South African society, the authors are troubled by their appearance in an official Report by the SALRC.**

In this situation, for a woman to engage in sex with more than one person or in some other way that is considered socially 'deviant' is essentially immoral and means that she has permanently damaged herself or reduced her worth. In addition to being an unsound way to think about sexuality, the women-hating idea expresses various unfair and unreasonable double standards. Firstly, men are not usually thought of as being permanently damaged by having non-normative sex. Secondly, various other abilities or skills that might be thought of as fundamental to a person's identity are not understood to be damaged in the same way by being offered as part of a commercial service. For instance, it is not common to refer to a psychotherapist who offers deep emotional insight for a fee, or a minister of religion who draws a salary in exchange for performing religious rituals, as having been "bought".

Although women-hating conceptions of female sexuality and the language that accompanies it remain commonplace in South African society, the authors are troubled by their appearance in an official Report by the SALRC. In a progressive constitutional democracy like South Africa, law and policy should be made with a view to promoting the independence and dignity of individuals. This means respecting the fact that different people may have different understandings of sexuality and what sexual behaviour is suitable for themselves.

Some people may indeed view it as important to their identity and sense of worth to only have sex under certain circumstances, such as within marriage or a monogamous relationship. Other people may still think of sex as fundamental to their identity, but feel that this is compatible with having sex under more casual circumstances, either for enjoyment or material reward. Still others may not view sex as special or fundamental to their identity at all. All these differing individual conceptions of the role of sexuality should be respected. Again, neutral terminology such as "a person who sells sexual services" would be more appropriate in recognising that someone could offer such a service without necessarily compromising anything of lasting value to themselves.

## 4 BIASED PRESENTATION OF ARGUMENTS

With the exception of section G of Chapter 1 (paragraphs 1.96-1.128), which is simply a history of the recent debate over legal models, the space given to different arguments and the pattern of argument in the Report appear to show bias in favour of the continued criminalisation of sex work. Arguments or considerations that might support decriminalisation appear not to be accepted or considered; whereas arguments or considerations that might support criminalisation are often left unquestioned or simply repeated as fact. There seems to be very limited space given to research respondents with differing views. The overall impression of bias is so severe that it is arguably in contravention of the SALRC's goal of upholding the value of impartiality in the execution of its duties.<sup>17</sup>

In paragraph 2.193, the Report recognises that all the respondents – irrespective of the legal model they supported – affirmed the statement that “sex workers are exposed to harm and vulnerable to abuse”. In naming the respondents who saw continued criminalisation as the answer to reducing such harm, the Report cites 14 respondents and more than “1000 endorse submissions” (footnote 659). However, the report only cites five respondents as proponents of decriminalisation (footnote 660). Many respondents have been omitted from this count, with a bias towards excluding those supporting decriminalisation, for example: Sisonke National Sex Work Movement.

To take one example of biased presentation of arguments, consider section C of Chapter 2 (paragraphs 2.4 - 2.114) where various “Theoretical approaches to prostitution in respect of prostitutes” are discussed. The first part of this section (paragraphs 2.8 - 2.51) considers “A theoretical approach to prostitution as an economic contract (work)”. This would be a natural place for the positive arguments of decriminalisation supporters to be considered, albeit under a heading that is so narrow as to be misleading. There is no consideration, for instance, of “A theoretical approach to sex work as an exercise of bodily autonomy”, with reference to feminist theories around this issue. Nor is there “A theoretical approach to the criminalisation of prostitution as a human rights violation”, with reference to the stated positions of major human rights organisations who support decriminalisation. Nor is there “A theoretical approach to the stigmatisation and criminalisation of sex workers as an expression of misogyny (women hating)”.

The actual positive arguments for decriminalisation are discussed extremely briefly, essentially only in paragraphs 2.8 - 2.10. The majority of the rest of this section (paragraphs 2.11 - 2.32) is then spent considering sex work from the perspective of existing labour and contract law - again very narrowly, under the assumption that conditions of employment for sex workers would remain essentially the same even if the criminal law were to radically alter. For example, paragraph 2.19 states that “the benefits for prostitutes of being recognised as employees and being able to access labour rights and benefits are self-evident. Currently, prostitutes are not able to access these rights and benefits for a number of reasons; however, not all of these reasons are associated with the fact that prostitution is criminalised.” It is puzzling and short-sighted to suggest that the behaviour of sex workers is unlikely to change under a different legal regime (i.e. if sex workers were afforded labour rights, it is more likely that they would ensure that they had written employment contracts with brothel owners).

At no point in the remainder of section C, Chapter 2 are the arguments for decriminalisation given a serious hearing. At paragraph 2.51 a supporter of decriminalisation is paraphrased for three sentences, followed by seven sentences of counter argument. At paragraph 2.43, a “contested” report by the International Labour Organisation is mentioned briefly, but counter arguments by Janice Raymond are offered immediately. Similarly, at paragraph 2.50, SWEAT's position is discussed briefly, and Raymond is again offered as a counter argument in the same paragraph. This is particularly striking because arguments very similar to Raymond's are then given in the following section, “Prostitution in the context of exploitation”.

This section concerning exploitation then repeats many claims made in a paper by Liz Kelly et al., none of which are subjected to any degree of critical analysis, counter

**...the space given to different arguments and the pattern of argument in the Report appear to show bias in favour of the continued criminalisation of sex work... The overall impression of bias is so severe that it is arguably in contravention of the SALRC's goal of upholding the value of impartiality in the execution of its duties.**

**It is puzzling and short-sighted to suggest that the behaviour of sex workers is unlikely to change under a different legal regime.**

17. South African Law Reform Commission. “Vision, Mission and Value Statement”. Available at: <http://www.justice.gov.za/salrc/vision.html> [Accessed 18 September 2017].



**Instead of investigating the economics or market conditions of sex work, the discussion relies heavily on pro-criminalisation speechifying and sources.**

argument or contrary evidence from other sources. For example, paragraph 2.54 states that “these choices, however, take place in conditions not of the women’s own choosing, and within which there are few if any options that do not include the potential of sustaining harm or of having one’s rights compromised. Some of these dangers are inherent in the institution of prostitution and are thus impervious to change through law or policy... Kelly et al state that the legal framework does not affect the level of this type of violence, merely where it takes place.” This would be an ideal opportunity for a balanced review to offer a counter argument to these claims, yet the SALRC Report fails to do so.

Another example of bias towards criminalisation is found in paragraphs 2.330 - 2.346, which address concerns about the relationship between sex work and trafficking. SWEAT’s view in support of decriminalisation is summarised in a single sentence at the beginning of 2.330:

*“SWEAT refutes claims that a link exists between non-criminalised prostitution and trafficking, and submits that non-criminalising prostitution would inhibit crimes such as trafficking.”*

None of the reasoning behind this claim is expanded upon in the Report, nor is any of the evidence cited in support of it given. The remainder of this section (paragraphs 2.330 - 2.346) then rehearses in great detail the claims made by opponents of decriminalisation, including subjective opinion that is not supported by any evidence. Moreover, various footnotes in this section of the Report mention evidence in support of these respondents’ views, a courtesy that is not granted to supporters of decriminalisation.

Furthermore, at paragraph 1.104, it is stated that South Africa’s 2010 UN Country Progress Report<sup>18</sup> “boldly, *but without deliberation or explanation*, identifies the continued criminalisation of ‘sex work’ as a barrier to HIV prevention and treatment”. In fact, the referenced report goes into quite some detail about sex work and suggests decriminalisation as the solution to South Africa’s current laws which “promote stigmatisation and discrimination” of sex workers.

The same sort of bias is also evident in the first part of Chapter 3, which focuses on “Prostitution as an economic contract” (paragraphs 3.11 - 3.20). Instead of investigating the economics or market conditions of sex work, the discussion relies heavily on pro-criminalisation speechifying and sources. It then turns very quickly to the negative personality characteristics that are claimed to be common among clients. For instance, at paragraph 3.16, it is stated that “money supposedly gives such buyers the right and opportunity not to be polite or considerate of the prostitute’s wishes.” At 3.18, we are told that “the person being bought for sex” is “expendable”. Whatever the merits of these claims, they have nothing to do with economics. However, this type of speechifying does anticipate the arguments made in the following section - “Prostitution in the context of violence and exploitation” - indicating that the Report’s aim is not to neutrally weigh various theories and evidence, but to advance a particular theory which has been decided in advance. This too is evidenced by the concluding statement in paragraph 3.20 that “a change in the law away from criminalisation would provide recourse after the fact, but would not change the reality faced by prostitutes due to the personal nature of their interaction with buyers. The Commission is of the view that non-criminalisation or regulation could therefore not be justified in South Africa on the strength of this theory alone.” So even where decriminalisation is shown to have benefits to sex workers, it is quickly dismissed as a viable legal option.

18. UNAIDS (2010) ‘UN Country Progress Report on the Declaration of Commitment on HIV/AIDS (2010), South Africa’. Available at: [http://data.unaids.org/pub/report/2010/southafrica\\_2010\\_country\\_progress\\_report\\_en.pdf](http://data.unaids.org/pub/report/2010/southafrica_2010_country_progress_report_en.pdf) [Accessed 16 November 2017].

## 5 FAILURE TO PROVIDE THE FULL PERSPECTIVE OF SEX WORKERS

At paragraph 1.31, it is stated that the Commission,

*“engaged in closed specific workshops with adult prostitutes from the Western Cape, Gauteng and North West Province. A special effort was made to render the debates as inclusive as possible, which included the Commission’s researchers embarking on a night tour to interview prostitutes on the street; prostitutes in brothels and brothel owners, and caregivers in a rescue centre for young prostitutes and abused children rescued from the streets of Pretoria.”*

However, the sex workers presumably interviewed in these evidence-gathering efforts are barely quoted in the final Report. Focusing on Chapter 2, there are only a handful of occasions when evidence from these efforts is mentioned: some remarks by a brothel owner and house mother (i.e. not actual sex workers) are referred to respectively at paragraphs 2.19 and 2.328; at paragraph 2.56, there is a very brief remark that some sex workers working in Hillbrow have complained about suffering abuse from clients and the police – none of these sex workers’ remarks are quoted verbatim; there is a statement confirmed by the Commission researchers at paragraph 2.441 that “prostitutes controlled by pimps are also used as a conduit to supply buyers with drugs”; and at paragraph 2.448 it is stated that “Commission researchers were present at numerous workshops and meetings where several prostitutes said that they experience disassociation from what is happening”.

Putting aside these exceptions as well as a single reference to Ms Linda Dumba (a sex worker currently working at Sisonke) and Thandi (a sex worker in Hillbrow)<sup>19</sup>, the only people identified as sex workers who are mentioned or quoted in the Report were participants in the “Rocking Chair documentary”, as are various members of the production crew for this documentary (who are not themselves identified as sex workers). The sex workers in question are Lana (quoted at paragraphs 2.207, 2.355, 2.420, 3.88); Jody (quoted at paragraphs 2.211 – 2.212, 2.217, 2.275, 2.421 and 2.449); Amy (quoted at paragraphs 39, 2.418, 2.441, 2.449 and 2.467); an unnamed woman at 2.419; and Noleen, a former sex worker (quoted at paragraphs 2.438, 2.441 and 2.449). The documentary in question is not explicitly named and cited in the Report, but some investigation reveals that a film entitled “Behind the Mask” on the topic of sex work was produced by the production company Rocking Chair.<sup>20</sup> This film was produced and directed by Antoinette McDonald for the Christian Broadcasting Network (CBN). CBN is a US-based television network founded by well-known ‘televangelist’ Pat Robertson in 1961 with the aim of “reach[ing] the world with a message of hope from the Bible”.<sup>21</sup> The regional affiliate of CBN in East and Southern Africa is called Go-Tell and also claims responsibility for the documentary, stating that,

*“Our documentary for Turning Point, “Behind the Mask”, is now complete. Besides airing on TP, the DVD will be used for advocacy purposes with the SA Law Reform Commission and the churches, to make people aware of the dangers of drugs, prostitution and human trafficking in South Africa ahead of the 2010 World Cup.”<sup>22</sup>*

Interestingly, Go-Tell describes the Family Policy Institute (FPI) – another explicitly Christian institution which gave evidence to the SALRC as part of its research – as a “partner organisation”<sup>23</sup> and Errol Naidoo, director of FPI, appears prominently in the documentary.

Given the organisational affiliations between Rocking Chair, the CBN and the FPI, and the numerous references to the Christian faith in “Behind the Mask”, it is clear that a major motivation of the film-makers is to provide a conservative Christian perspective on sex work in South Africa. This perspective is strongly influenced by the idea that sex is only proper within heterosexual marriage, as argued by Naidoo in the film. Along these lines, the FPI is also well-known for opposing feminism, gay rights and abortion rights.<sup>24</sup> In this context, it seems very likely that the film-makers selected as informants sex workers and former sex workers who were sympathetic to the Christian perspective and also to the film-makers’ opposition to decriminalisation. This is not to deny the validity of these women’s experiences or perspective, but simply to note that it might not be a fully representative sample of the views of sex workers in South Africa generally.



19. Two of the Hillbrow sex worker submissions to the SALRC were published in the journal *Agenda* – Felicia and Muchaneta. (2009). Sex workers’ stories. *Agenda*, 23(82), pp. 113-114.
20. Documentary is available to view at: <https://www.youtube.com/watch?v=Rtxj06Wx1K0&list=PL0089EDC7BA2341A2>
21. Christian Broadcast Network. (2015). “About CBN”. Available at: <http://www1.cbn.com/about> [Accessed 27 August 2017].
22. Go-Tell. (2009). “WorldReach Highlights 091010”. Available at: [http://www.go-tell.org/resource/collection/0816931C-A7B5-4B7D-95C2-E1A44556943E/CBN\\_WORLDREACH\\_Highlights\\_091010.doc](http://www.go-tell.org/resource/collection/0816931C-A7B5-4B7D-95C2-E1A44556943E/CBN_WORLDREACH_Highlights_091010.doc)
23. Go-Tell (2015). “Recommended links”. Available at: [http://www.go-tell.org/general/recommended\\_links.asp](http://www.go-tell.org/general/recommended_links.asp)
24. Faranaaz Parker (2012) ‘Preacher blames gays for Marikana shooting’ *Mail & Guardian*, 22 August 2012. Available at: <http://mg.co.za/article/2012-08-22-blame-the-gays-for-marikana-says-trending-preacher> [Accessed 27 August 2017].

No sex workers other than those associated with Rocking Chair are quoted at any length in the Report. In fact, the only sex workers not associated with Rocking Chair who are quoted verbatim, rather than paraphrased, is the former sex worker Stef, who also happens to be in favour of criminalisation, and Thandi, who is quoted as saying that “we are trapped” in footnote 1437. If any systematic attempt was made to canvas sex workers on their views regarding legal models, or on any of the substantive issues raised in Chapter 2 of the Report, this is not recorded in the Report.

Overall, it is apparent that the Report uses evidence from only a small selection of sex workers and former sex workers, quoting almost entirely from a small number of women who have chosen to align themselves with religious supporters of criminalisation. There is no detailed discussion of the workshops held with sex workers in the Western Cape, Gauteng or North West. Moreover, it appears that out of the eight workshops held, sex worker representatives were only in attendance at two of them (Annexure C of the report).

A vital principle of socially responsible policy-making is captured by the slogan “nothing about us without us!”. That is, the people who are likely to be most affected by any policy should be consulted extensively before decisions are made and ideally should actually guide the direction of policy. This principle has clearly not been respected in the Report and the authors of this response suspect that this is because of a concern that genuine consultation would have revealed that many or most sex workers in South Africa support decriminalisation. There are many organisations around the world that are led by sex workers or represent sex workers. These overwhelmingly advocate for decriminalisation.<sup>25</sup> In South Africa, SWEAT and Sisonke fall into this category. Yet despite the fact that both organisations’ members did attend some of the workshops held by SALRC, and a meeting between SWEAT, SALRC and Sisonke was held in 2010 (paragraph 3.82), there is very little reference to the views of sex workers who are members of or affiliated with these organisations.

Instead, the authors of the Report have taken the biased approach of selecting quotes from a few sex workers or former sex workers who happen to support the view they wish to defend.

**Overall, it is apparent that the Report uses evidence from only a small selection of sex workers and former sex workers, quoting almost entirely from a small number of women who have chosen to align themselves with religious supporters of criminalisation.**

25. Global Network of Sex Work Projects. “Where our members work”. Available at: <http://www.nswp.org/members> [Accessed 2 September 2017].

## 6 RESISTANCE TO IMPROVING WORKING CONDITIONS FOR SEX WORKERS

### An illogical bias in favour of criminalisation

The Report repeatedly (and correctly) points out that violence and other forms of abuse against sex workers occur in every legal model and working environment. However, from there it draws the illogical conclusion that criminalisation is the best available solution for these harms.

The logical error arises from subtly treating two issues – the harms resulting from sex work and the legal status of sex work – as if they are independent, when in fact they are deeply connected. Thus, evidence for the general proposal that “sex work is harmful” is used to support the claim that sex work itself needs to be reduced or stopped by any means necessary. On these grounds, criminalisation is viewed as the ‘best’ option because it is supposed to reduce the occurrence of sex work. There are several weaknesses in this reasoning.

The first is simply that there is very little evidence that decriminalisation substantially influences the number of people selling sex. After the decriminalisation of sex work in New Zealand, for instance, there was no significant increase in this figure.<sup>26</sup> It is also clear that criminalisation in South Africa has failed in stopping the sale of sex – even though it has been the law in South Africa since the Immorality Act of 1957 (later renamed the Sexual Offences Act).

Although the assumption of independence is never directly stated in the Report, there are nevertheless various points at which the proposal that decriminalisation would reduce harm is questioned. For instance, it is stated that decriminalisation would not “automatically” confer labour rights to sex workers (paragraphs 32 and 4.289), nor would it “magically” address or alter the balance of power between sex worker and client (2.496 and 3.133), or “neatly excise” (2.457) sex work from various criminal activities. We are also told that decriminalisation is not the “panacea” for curbing the spread of HIV (2.114).

In the discussion around these statements in the Report, it is also argued repeatedly that the harms suffered by sex workers arise primarily from economic, social or cultural conditions and that the legal framework in which sex work occurs is a less important factor. This claim is dubious on its own merits, since there are many ways in which criminalisation harms sex workers directly, for instance by increasing police violence against them (see below). To take another example, on the question of violence against sex workers, it is stated that a sex worker “is virtually powerless... to prevent him [the client] assaulting her” (paragraph 3.117) and “due to the intimate and private nature of the service provided, non-criminalisation would not protect prostitutes from violence and coercion” (3.121).

However, there are many contexts in which people are alone together in private – just about any couple engaging in *non-commercial* sexual activity, for example – and in which they are at least somewhat protected by the knowledge that they are protected by the law if violence does occur. Under criminalisation, sex workers are reluctant to report abuse and crimes to the police, because they fairly fear they will not be taken seriously or, even worse, will be abused or arrested themselves. Abusive clients are fully aware that this protection is denied to sex workers and they are more vulnerable as a result. These are only a few of the most obvious ways in which the harms of sex work are *not* independent of its legal status, but are in fact worsened by criminalisation.

But, even if it is not accepted that the legal framework governing sex work can substantially influence working conditions, it is puzzling to see this used as an argument *in favour of one particular legal model*, i.e. full criminalisation. If the legal framework makes little difference one way or the other, then surely we should be indifferent as to which model we adopt? Indeed, by this logic, perhaps we should actually endorse decriminalisation, since it at least does not involve arresting anyone or require spending valuable police time to enforce. However, the fact that in the Report this argument is taken to support criminalisation makes it clear that different standards of proof are being applied to the supporters of the different legal models.

**...in the Report , it is also argued repeatedly that the harms suffered by sex workers arise primarily from economic, social or cultural conditions and that the legal framework in which sex work occurs is a less important factor. This claim is dubious on its own merits, since there are many ways in which criminalisation harms sex workers directly...**

26. Gillian M. Abel, Lisa J. Fitzgerald, and Cheryl Brunton (2009). The Impact of Decriminalisation on the Number of Sex Workers in New Zealand. *Journal of Social Policy*, 38(3), pp. 515-531.



**It is therefore particularly striking to notice that the Report does not even present an argument that full criminalisation has reduced the harms associated with sex work... There is, however, powerful proven evidence that criminalisation does significantly increase harms to sex workers, while decriminalisation reduces them.**

To be clear, it has never been claimed by supporters of decriminalisation that it or any other policy or intervention, would “automatically” or “magically” end any of the harms associated with sex work. This is a major misrepresentation and reads as an attempt to unfairly shift the burden of proof. To be believed, the supporter of decriminalisation must show that this intervention “magically” removes all harms. In reality, sex work exists in almost every human society and is linked to harm to different degrees in different situations. It is simply unrealistic to suppose either that sex work itself can be stopped, or that any and all harms linked to it could be removed quickly and completely. It is therefore misleading to argue as if this is the standard of success that supporters of decriminalisation must achieve.

Rather what is at issue is how harms could best be *limited or reduced*, especially the many harms currently affecting sex workers themselves. On this point, criminalisation, decriminalisation and the various other legal alternatives should be assessed on equal terms, as possible strategies for reducing harm. It is therefore particularly striking to notice that the Report does not even present an *argument* that full criminalisation has reduced the harms associated with sex work. There is no reference to empirical work discussing what has happened in jurisdictions going from another legal model to full criminalisation or vice versa. Equally there is no substantial theoretical discussion of the mechanisms by which full criminalisation might theoretically reduce harms (minor exceptions include paragraph 2.207: “Lana believes that retaining the current law that criminalises prostitution would curb the proliferation of further exploitative acts”, and paragraph 2.208: “criminalisation informs and protects individuals from making decisions that would be detrimental to their wellbeing”). It is simply argued that sex work is associated with harms, that it is not a legal form of work and the conclusion for full criminalisation is assumed to follow without further reasoning.

There is, however, powerful proven evidence that criminalisation does significantly increase harms to sex workers, while decriminalisation reduces them. The Report itself seems to be aware of the benefits of decriminalisation as it quotes the New Zealand Prostitution Law Reform Committee at length, but the evidence presented here does not seem to feature in the Report’s internal logic – “many of the social evils predicted by people opposed to the decriminalisation of prostitution were not experienced during the period of operation of the Act. On the whole, the Act had been effective in achieving its purpose. The Committee was confident that the vast majority of people involved in the sex industry were better off under the new Act than previously.” (paragraph 2.176). There are also substantial reasons, based on an understanding of people’s incentives and behaviour, to believe that decriminalisation changes power structures and incentives in ways that are likely to improve outcomes. Some of this evidence is discussed in the remainder of this section. Again, to be the best policy option, decriminalisation does not need to “magically” eliminate all harms, but only go some way towards limiting and reducing them.

## **Criminalisation makes it difficult for sex workers to screen clients**

One of the major arguments used by supporters of decriminalisation is that allowing street sex workers to work openly and in public means they typically have more time to ‘screen’ clients, i.e. to negotiate services and price, and to assess whether a client is likely to be violent or disrespectful. Under criminalised conditions, both parties are likely to be nervous of police attention, and so there is pressure to conclude negotiations quickly and move to a private location.<sup>27</sup> That decriminalisation would allow more time for screening is not disputed in the Report, but it is argued that better screening does not do anything for the risk of violence or abuse.

For instance, at paragraph 2.479, it is stated that,

*“While it is fair to say that a prostitute might be able to avoid a ‘bad date’ up front by negotiating details such as payment, services to be performed, and condom use, it is equally likely that the customer could pass muster at an early stage only to turn violent once the transaction is underway.”*

Similarly, at paragraph 2.482, it is stated that,

*“The idea of screening, however, does not really address the problem of violence in prostitution. This theory merely accepts that violent buyers exist... As in all relationships, it is difficult – if not impossible – to assess a partner’s proclivity to*

27. A Krusi, et al. (2014). Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada – a qualitative study. *British Medical Journal Open*, 4(6), pp. 1-10.

*violence at the outset. Women living in poverty do not always have the luxury of refusing buyers they feel nervous about.”*

Again, the implication is that the supporter of decriminalisation must be assigned the burden of demonstrating a *total removal* of harm. Street sex workers must be able to *perfectly* distinguish violent from non-violent clients in advance, and must be *perfectly* at liberty to refuse any client they don't like. No-one endorses such an unlikely view. However, it simply defies common sense to think that sex workers are incapable of making *any* assessment of whether or not a potential client is likely to be violent, or to weigh up the value of the transaction against the perceived risk in individual cases. It is commonplace in ordinary human interactions that someone who is disrespectful, aggressive or seems drunk at the outset of an interaction is more likely to become violent later on. Similarly, all else being equal, a person who politely agrees to the terms of a transaction in verbal negotiations (what services are to be delivered and at what price, whether a condom is to be used, etc) is more likely to be compliant than someone with whom the terms have not even been discussed. It is not, in other words, “equally likely” that a client who appears compliant will be violent than one who does not.

The various strategies that street sex workers use to screen potential clients are well documented and it would be a serious mistake to ignore their agency and intelligence in the matter of their own survival and well-being.<sup>28, 29</sup> It is also an error to neglect the ways in which the legal status of sex work can make screening easier or more difficult when it does occur. For instance, street sex workers tend to look out for nervousness on the part of a potential client, since this may be a sign he intends violence; but this clue is less helpful in contexts where soliciting is criminalised (the client may simply be nervous about the prospect of arrest). Furthermore, studies have shown that under criminalisation sex workers take risks due to the limited time for screening clients – the fear of arrest encourages sex workers to limit the time negotiating with clients in public spaces, therefore increasing the odds of engaging in unprotected sex.<sup>30</sup> Notably, sex workers in New Zealand say that screening has become easier since sex work was decriminalised there in 2003.<sup>31</sup>

## Criminalisation pushes sex workers into more dangerous working contexts

Another major argument used by proponents of decriminalisation is that the risk of violence in sex work differs depending on the context in which it takes place. Indoor work is generally safer than outdoor work and outdoor work is generally safer when conducted in well-lit, busy public places than in dark and out-of-the-way places. The Report denies this argument, relying heavily on a report written by Kelly et al commissioned by the UK Home Office.<sup>32</sup> For instance, Kelly et al are the only authority mentioned for the following claims at paragraph 2.54:

*“Some of these dangers are inherent in the institution of prostitution and are thus impervious to the change through law or policy. Some data suggest that in formalised or extensive sex industries where most transactions take place indoors, levels of violence are similar to those experienced in street settings... Kelly et al state that the legal framework does not affect the level of this type of violence, merely where it takes place. They also suggest that in certain settings, more prostitutes report violence against them because of the local climate of trust that has been built by state agencies, individuals, or services; in such instances, higher levels of reporting are not the result of the legislative model applied.”*

Since the Report relies so heavily on Kelly et al, it is worth examining in detail the claims made about violence in that report (especially pages 40-43). The crucial passages in Kelly et al are the following:

*“The levels of violence sustained by women in prostitution are now widely acknowledged as disproportionate and whilst setting has some influence on its scale and seriousness, there is no evidence to date that any setting renders prostitution ‘safe’” (p. 43)*

*“With respect to safety, the question of potential displacement needs to be considered. It may be that the men most likely to commit violence – and certainly the most dangerous men who select women who sell sex as targets for murder – view street zones as a preferred location. Were street sex markets to disappear however, these perpetrators are likely to target through a different setting.” (p. 43)*

**The various strategies that street sex workers use to screen potential clients are well documented and it would be a serious mistake to ignore their agency and intelligence in the matter of their own survival and well-being.**

28. Teela Sanders. (2005). Sex Work: A Risky Business.
29. Hilary Kinnell. (2008). Violence and Sex Work in Britain.
30. P Alexander. (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.
31. Lynzi Armstrong. (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.
32. Liz Kelly, Maddy Coy, and Rebecca Davenport. (2009). 'Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries'. Child & Woman Abuse Studies Unit, London Metropolitan University. Available at: [http://www.turnoffthredlight.ie/wp-content/uploads/2011/02/Shifting\\_Sands\\_UK-HOME-Office.pdf](http://www.turnoffthredlight.ie/wp-content/uploads/2011/02/Shifting_Sands_UK-HOME-Office.pdf) [Accessed 21 August 2017].



**The third quote demonstrates a major confusion by Kelly et al in their understanding of violence committed against sex workers.**

*“The lower levels of violence frequently attributed to indoor prostitution are not found consistently in research. Indeed some data (Di Nicola et al, 2005) suggests that in more extensive sex industries, where most transactions take place indoors, levels of violence are similar to those found in street settings elsewhere. This suggests that there are men (and some women) - who buy sex and/or manage and profit from sex businesses - who use violence to control women/get what they want/express misogyny and that precisely where they enact this violence is a function of the structure of local prostitution regimes. To the extent that this is the case the legal framework will not affect levels of violence, merely where it takes place. This analysis concurs with the views of women who sold sex, interviewed for the evaluation of the New Zealand reforms (PLRC, 2008) – that legal reform would not and could not protect them from violence. We also found little strong evidence that different prostitution regimes affect willingness to report assaults. It seems more likely that enhanced reporting is the outcome of local climates of trust built between women who sell sex and state agencies/ individuals/ services.” (p 59)*

*“A failure across most prostitution regimes, highlighted by Wagenaar (2008), has been to underestimate the structure, power and vested interests in the sex industry, including deeply embedded exploitative practices. These have proved impervious to change across all regimes, and cannot be wished away.” (p. 61)*

There are a few issues worth noting here. In the first quote, we again see the weak reasoning which states that the correct aim of legislative reform is to make sex work “safe” (as opposed to merely *safer*). In the second quote, we see the assertion that improving the safety of some sex workers is likely to result in other sex workers being targeted for violence. This assertion is highly speculative and is not supported by any additional reasoning or evidence. It also ignores the widely acknowledged fact among criminologists that all crime is to some extent opportunistic and that certain crimes will simply become less common as they become more difficult or risky for the criminal. To take a simple example, steep decreases in vehicle theft since the early 1990s in many countries are widely attributed to the increased availability of security features like central locking.<sup>33</sup> So reforms that improve personal security for sex workers will reduce violence against sex workers, even if these improvements are only gradual or only help a subset of sex workers (e.g. street sex workers).

The third quote demonstrates a major confusion by Kelly et al in their understanding of violence committed against sex workers. The report compiled by Di Nicola<sup>34</sup> is specifically a study of *trafficked* prostitution in the EU – focusing on cases brought to the attention of national prosecuting authorities – and the violence and coercion under discussion is that which occurs in the context of these highly exploitative working environments. While all violence and coercion should be addressed with the utmost urgency, it should also be recognised that violence used by traffickers to control an exploited workforce is quite different in its character and motivation from that directed at sex workers by clients, criminals imitating clients or other members of the public.

For one, victims of trafficking comprise a relatively small proportion of the people selling sex in most countries (see the discussion of this below), and so this type of violence affects only a minority. Violence against trafficking victims is also systematic, in that it is used over a sustained period of time to extract labour mainly from people who are already marginalised due to poverty, immigration status, drug use, the illegality of sex work itself, etc. The solution to this problem must therefore address the causes of marginalisation, for instance by reforms to immigration law and by labour organising. Increased policing is likely to make a difference only at the margins. In contrast, the majority of sex workers who work independently or in cooperative employment relations may still suffer opportunistic violence and this can be addressed quite significantly by better policing and access to justice – for example, monitoring of sex work venues, sustained efforts to prosecute crimes against sex workers and ensuring that sex workers are able to enforce contracts. A better, cooperative relationship between sex workers and law enforcement would increase safety.

The claim made by Kelly et al in the fourth quote is clearly considered important, since it is repeated essentially verbatim in the Report (paragraph 2.65):

33. Graham Farrell, et al. (2011). The crime drop and the security hypothesis. *Journal of Research in Crime and Delinquency*, 48(2), pp. 147-175.

34. Andrea Di Nicola, et al. (2005). ‘Study on National Legislation on Prostitution and the Trafficking in Women and Children’. Brussels: European Parliament. Available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2005/360488/IPOL-JOIN\\_ET\(2005\)360488\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2005/360488/IPOL-JOIN_ET(2005)360488_EN.pdf) [Accessed 4 October 2017].

*“Kelly et al report that a failure across most prostitution regimes has been the underestimation of the structure, power and vested interests of the sex industry, including deeply entrenched exploitative practices. These have proved impervious to change across all regimes and cannot simply be wished away.”*

This, again, is an example of the reasoning under which the supporter of decriminalisation is expected to offer total resolution to a social harm in order to be taken seriously. To repeat, no-one is suggesting that “exploitative practices” can be “wished away”, but rather that decriminalisation represents the start of a process by which sex workers might be able to secure labour rights and other legal protections. In any case, the Wagenaar article<sup>35</sup> cited by Kelly et al actually provides an example of how *legalisation or regulation* (as opposed to decriminalisation) has produced abnormal and unintended consequences. In this article, Wagenaar points out that many city authorities in the Netherlands decided to ‘cap’ the number of brothels at the number that existed when legalisation came into effect. This paved the way for an “oligopoly” of established brothel owners who essentially control the market and are not willing to improve working conditions for sex workers, while limiting the entry of entrepreneurs (including former sex workers) who would potentially be better employers. It is disturbing to see this lack of attention to the detail of research findings, firstly by Kelly et al, and then simply repeated verbatim in the SALRC Report.

At paragraph 2.64 of the Report, again citing only Kelly et al, it is stated that:

*“The number of prostitutes having pimps has not decreased in non-criminalised settings. When coupled with the virtual absence of prosecutions for exploitation of prostitution offences, this finding has profound implications and appears to challenge the claim that force and coercion have been reduced by non-criminalisation. The model in New Zealand, in which two or three women organise together independently of pimps, brothels or an organised sex business, has been no more effective. Most women selling sexual services lack the capital to buy and convert a property themselves; the majority of prostitutes lack the resources to set up their own business.”*

Kelly et al support the claim which is repeated in the final sentence of the quoted passage by reference to a paper by Hubbard et al, who do indeed state that “the majority of prostitutes lack the financial resources to set up their own business”.<sup>36</sup> However, Kelly et al fail to mention that Hubbard et al are *also* talking specifically about the Netherlands, where, as pointed out above, unduly strict regulations do indeed make it difficult to open a sex business. The New Zealand legislation is specifically intended to avoid creating such barriers to entry, by allowing sex workers to work cooperatively under the “small owner-operated brothel” system without any need for licensing. Moreover, a detailed survey of sex workers in New Zealand carried out in 2006 (i.e. three years after the passage of the reform) did in fact find that a larger percentage of sex workers were working independently than in 1999.<sup>37</sup>

Finally, as conceded by Kelly et al but not repeated in the Report, there *are* in fact significant differences in the violence experienced by sex workers in different settings and under different legal frameworks. In a survey conducted in New Zealand in 2006, 13.4% of women selling sex on the street report physical assault and 5.3% report rape by a client (or person posing as a client) in the previous 12 months, compared to figures of 7.3% and 1.5% of women in private indoor settings.<sup>38</sup> Other forms of violence, including having money stolen and being held against their will, follow a similar pattern. In South Africa, a survey of sex workers revealed that 39% of street-based sex workers had experienced physical violence from clients at some point, compared to 20% for indoor workers.<sup>39</sup> A systematic review of the literature on violence and sex work “found evidence of the role of the work environment in shaping risks for violence among sex workers, with data from three countries showing sex workers in street or public-place environments to be at highest risk of violence”.<sup>40</sup>

The same review also found that “there was consistent evidence of an independent link between policing practices (e.g. arrest, violence, coercion) and elevated rates of physical or sexual violence against sex workers.” Moreover, it has been demonstrated repeatedly that safety for street sex workers can be improved considerably by installing improved lighting, CCTV cameras and other security measures in outdoor areas where they work.

**To repeat, no-one is suggesting that “exploitative practices” can be “wished away”, but rather that decriminalisation represents the start of a process by which sex workers might be able to secure labour rights and other legal protections.**

**Finally, as conceded by Kelly et al but not repeated in the Report, there are in fact significant differences in the violence experienced by sex workers in different settings and under different legal frameworks.**

35. Wagenaar, H. (2008). ‘Prostitution policy is too morally charged’. European Urban Knowledge Network. Available at: [http://sampac.nl/EUKN2015/www.eukn.org/Interviews/Archive/2008/%E2%80%9CProstitution\\_policy\\_is\\_too\\_morally\\_charged%E2%80%9D.html](http://sampac.nl/EUKN2015/www.eukn.org/Interviews/Archive/2008/%E2%80%9CProstitution_policy_is_too_morally_charged%E2%80%9D.html) [Accessed 6 October 2017].
36. Phil Hubbard, Roger Matthews, and Jane Scoular. (2008). Regulating sex work in the EU: prostitute women and the new spaces of exclusion. *Gender, Place & Culture*, 15(2), pp. 137-152.
37. Abel, et al. (2009) *supra* note 26.
38. Gillian Abel, Lisa Fitzgerald, and Cheryl Brunton. (2007). ‘The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers: Report to the Prostitution Law Review Committee’. University of Otago, Christchurch School of Medicine. Available at: <http://www.otago.ac.nz/christchurch/otago018607.pdf> [Accessed 8 September 2017].
39. Chandre Gould & Nicole Fick (2008). *Selling sex in Cape Town: Sex work and human trafficking in a South African city*.
40. KN Deering, et al. (2014). A systematic review of the correlates of violence against sex workers. *American Journal of Public Health*, 104(5), pp. 42-54.

## Work and exploitation in South Africa

The term 'exploitation' is used throughout the Report, in various contexts, although the only definition offered is on page 201 in a footnote (no. 937): "Exploitation is defined by the Shorter Oxford English Electronic Dictionary as 'an attempt to gain advantage over or to subdue a person.'" It is never given a formal legal definition, nor is this brief definition explained any further.

In so far as the term has a well-defined legal meaning in South Africa, this is found in the Sexual Offences Amendment Act of 2007, where it is used specifically to refer to the purchase of sex from a child or mentally disabled person, or the enabling of such a transaction. In fact, 'commercial sexual exploitation' is defined as "engaging the services of a child to perform a sexual act or to produce child pornography as contemplated in section 17 or 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, for a financial or other reward payable to the child, the parents or guardian of the child or any other person." In the Prevention and Combating of Trafficking in Persons Act of 2013, exploitation is defined by reference to practices like slavery, forced labour and the removal of body parts.

Given that we are mainly discussing mentally competent adults who are acting voluntarily, it seems unlikely that we are supposed to understand the term "exploitation" in the Report as having any specific legal force as in the legislation quoted above. It should therefore be understood as a term of moral disapproval and we must examine how it is used in the Report to understand precisely what supposed evil is being addressed.

At paragraph 7, it is stated that the Commission identified three central themes to the debate aimed at legislative reform on adult prostitution, including "whether prostitution is work or exploitation". Thus it is clear that the authors of the Report believe that the question of exploitation is central, and also that to understand the selling of sex as a form of exploitation is incompatible with understanding it as a form of work. In paragraph 1.2 it is claimed that "There are generally two poles of thought and very little in between, the first being that prostitution is work and should be non-criminalised and recognised as such, and the second being that prostitution is inherently exploitative and therefore needs to be criminalised." It is notable that not all supporters of decriminalisation consider sex work to be non-exploitative, and in fact some recognise the 'inherent exploitation' as defined elsewhere in the Report (i.e. employment options as a product of social marginalisation). However, these proponents nevertheless consider decriminalisation as a means to reduce violence and other harms against sex workers. Therefore, it is inaccurate to posit a neat divide between sex work as work and the need for decriminalisation, and sex work as exploitation and the need for criminalisation.

At paragraph 43, it is stated that "prostitution in its many guises – even 'voluntary' – clearly exploits women and men who provide sexual services". At paragraph 2.496, it is stated that,

*"The Commission is of the opinion that... [e]ven what appears to be chosen or self-initiated involvement in prostitution is usually a symptom of the inequality and marginalisation which are the daily lived experiences of many impoverished women. In the Commission's view, the exploitation of a person's lack of alternatives does not amount to a considered exercise of choice."*

At paragraph 2.53, it is stated that,

*"Marxist feminists advocate that a prostitute is a victim of the economic system, and that prostitution degrades the dignity of humans caught in involuntary servitude to a system that unconscionably exploits people."*

From these passages, it is clear that the authors of the Report are using "exploitation" primarily to describe forms of employment that a person enters into because they are poor and socio-economically marginalised and so lack other options.



**Therefore, it is inaccurate to posit a neat divide between sex work as work and the need for decriminalisation, and sex work as exploitation and the need for criminalisation.**

A similar theme arises in the use of the term “coercion” and related concepts. For instance, in paragraph 28, it is stated that “selling sexual services is often the result of a choice made in severely limiting socio-economic circumstances, and in a context of social inequality.” Similarly, in paragraph 2.52:

*“Economic marginalisation can be viewed as a relatively subtle form of coercion, which implies that even if a woman appears to freely choose prostitution (over a life of poverty) as the most lucrative form of employment available to her, this choice is not really made voluntarily.”*

There is certainly no denying that many people in South Africa are poor, and this has come about in large part through land expropriation, economic and social marginalisation, the deliberate withholding of education, and many other racist and oppressive policies enacted by past colonial and apartheid authorities. So it is true that many South Africans are vulnerable to labour exploitation and economic coercion in the sense described. Moreover, labour exploitation was not a by-product of these policies, but often precisely the intended effect. For instance, beginning in 1906 in the province of Natal, many black South Africans were made to pay an annual ‘poll tax’, which would only be paid in cash from the proceeds of waged labour.<sup>41</sup> The explicit motivation of this policy was to increase the supply of black South Africans willing to take jobs at businesses owned by whites, especially the expanding mines in the Witwatersrand, and so reduce the amount the owners of these businesses would need to pay their workers.<sup>42</sup> Similarly, under apartheid, the legislation preventing black people from living in cities unless they were employed was intended to make them dependent on employers. These policies, and their long-lasting socio-economic consequences, have made South African workers extremely vulnerable to exploitation by people who currently possess wealth and privilege.

However, what is interesting about the statements made in the Report on the topic of exploitation is that they draw on radical arguments that have been levelled against capitalism, colonialism and other systems of oppression generally, but the authors have chosen to apply them narrowly to sex work. For instance, the article by Sarah Bromberg<sup>43</sup> cited in paragraph 2.53 of the Report quotes only part of a statement of Karl Marx, with the complete version stating:

*“Prostitution is only a specific expression of the general prostitution of the labourer, and since it is a relationship in which falls not the prostitute alone, but also the one who prostitutes – and the latter’s abomination is still greater – the capitalist, etc., also comes under this head”.*<sup>44</sup>

That is to say, Marx himself argues that *all* workers are exploited under the capitalist system, that sex work is only a specific expression of this tendency, and that the ultimate blame rests with the capitalist. But if work under capitalism – especially the South African version of capitalism – often amounts to exploitation, it is puzzling that the categories of “work” and “exploitation” are placed in opposition to each other in the Report. According to Marxist philosophy and the implicit philosophy adopted in the Report, all or most work under these conditions is by definition “exploitation”.

## Double standards applied to sex work

Putting mining and other forms of menial, relatively poorly paid labour side-by-side with sex work, it is also rather puzzling that the latter is singled out as an example of extreme exploitation. If economic marginalisation were consistently viewed as a form of coercion, then almost any work undertaken by poor and marginalised people would be thought of as involuntary. But this standard is clearly not being applied consistently – elsewhere in the Report (paragraph 2.450), poorly paid employment in the agricultural sector is described as “menial but decent”. The choice to participate in this work is not described as “a relatively subtle form of coercion”.

If anything, the specific historical conditions of South Africa would suggest that workers in these sectors are far more directly exploited than sex workers. After all, while colonial and apartheid policies were created specifically in order to benefit the owners of mines, there is no corresponding evidence of labour being directed into the sex industry. Nevertheless, the people who migrate to work on the mines are seen as having agency. There are no widespread calls to prevent men from doing this kind of work ‘for their own good’. In contrast, the agency of people who migrate to the cities in order to earn money by selling sex is constantly questioned. For instance, they are often labelled as ‘trafficked’ even when they migrate voluntarily.<sup>45</sup> How can this discrepancy be explained?

**But if work under capitalism – especially the South African version of capitalism – often amounts to exploitation, it is puzzling that the categories of “work” and “exploitation” are placed in opposition to each other in the Report.**

41. Sean Redding. (2000). A Blood-Stained Tax: Poll Tax and the Bambatha Rebellion in South Africa. *African Studies Review*, 43(2), pp. 29-54.
42. South Africa History Online. “The glitter of gold”. Available at: <http://www.sahistory.org.za/archive/glitter-gold> [Accessed 16 October 2017].
43. Sarah Bromberg. (1997). ‘Feminist Issues in Prostitution’. Available at: <http://www.feministissues.com/issues.pdf> [Accessed 15 July 2017].
44. Karl Marx. (1932). *Economic and Philosophic Manuscripts of 1844*. Available at: <https://www.marxists.org/archive/marx/works/download/pdf/Economic-Philosophic-Manuscripts-1844.pdf> [Accessed 15 July 2017].
45. Nandita Sharma. (2005). Anti-trafficking rhetoric and the making of a global apartheid. *NWSA Journal*, 17(3), pp. 88-111.

**So there is another double standard, in that abuse present in other forms of work is treated as such, presumably to be dealt with via criminal sanctions and improved workers' rights rather than removing an entire economic sector. In sex work, however, the only option considered is simply removing it.**

It is certainly not predicated purely on physical risk, as mining and sex work are comparably dangerous. Although working conditions in mines are steadily improving through improved regulation and worker activism, mining remains a very dangerous job in South Africa. There were 84 deaths out of approximately 424 000 miners employed in South Africa 2014, giving a rate of 0.19 deaths per thousand workers per year.<sup>46,47</sup> In comparison, out of approximately 150 000 sex workers in South Africa, at least 30 were killed in the year to June 2015, resulting in a very similar rate of 0.2 deaths per thousand workers per year.<sup>48,49</sup> It should be emphasised that no-one should suffer the risk of assault, serious injury or death at work. Just as society should pursue policies – like decriminalisation and improved policing – to improve the safety of sex workers, more serious efforts must be made to improve safety in mines.

The authors of this response would like to suggest that the difference in how miners and sex workers are viewed may be partly due to gender prejudice. The people who work in mines are predominantly men, whereas sex workers are predominantly women. Culturally, it is assumed that men know what they are doing when they make economic decisions, even when they entail risk. Women, in contrast, are assumed to need 'protection' from their own decisions.

Moreover, it remains an assumption that 'sex is different', particularly when it involves women having sex outside of a monogamous heterosexual relationship. We see this attitude reflected, for instance, at paragraph 2.452 of the Report, where it is stated that "there is no other profession in which an individual uses their body and sexual intimacy in a comparable way." This statement is self-evident – using one's body and sexual intimacy in providing a commercial service is what it *means* to be a sex worker. We could equally say of musicians that 'there is no other profession in which an individual uses their musical abilities in a comparable way'. It is simply presupposed that sex is in some way intrinsically different to other kinds of services or performances, in a way that renders it illegitimate. This presupposition – which is central to the logic and arguments made in the Report – is never defended or even explicitly stated. Any sort of employment involves some sort of action on the part of the employed person. Mining is generally more physically demanding than sex work, while the nanny, priest and psychotherapist draw more deeply on their emotional resources in doing their job.<sup>50</sup> So some argument must be offered before it can simply be accepted that specifically *sexual* activity is uniquely problematic.

In paragraphs 2.448 - 9 of the Report, it is stated that "the sexual acts [involved in sex work] are often violent, degrading and abusive", implying that this is 'part of the job' in some sense. However, while horrific, many of the cases described immediately thereafter clearly represent abuse – where the supposed client has gone beyond the agreed service in order to attack the sex worker. This abuse is no more 'part of the job' than an agricultural worker being beaten by their employer, although in both cases the unequal economic relationship between the parties is crucial in enabling this abuse. So there is another double standard, in that abuse present in other forms of work is treated as such, presumably to be dealt with via criminal sanctions and improved workers' rights rather than removing an entire economic sector. In sex work, however, the only option considered *is* simply removing it.

## Sex work and feminised labour

As pointed out above, it is important to challenge the women-hating or anti-feminist preconception that a woman's value depends on her (lack of) sexuality. This preconception underlies the idea that a woman who sells sexual services is necessarily more exploited than a man who works on a mine or a woman who depends on her husband for income. The idea is that she is sacrificing something more valuable than merely her time and labour. This understanding fails to respect people's ability to form their own attitudes towards sex, including sex outside of conventional monogamous relationships.<sup>51</sup> It is, of course, up to the individual to decide if they would find it undignified or intolerable to sell sex, but it cannot simply be assumed that this applies equally to everyone. It should especially not be assumed in the context of a Report by the SALRC that is considering this issue as a matter of law.

It is also important to challenge the assumption that women are less able than men to make independent choices in their own interests. Almost everyone is 'forced' by the capitalist system to work (or to be dependent on someone who works), but the choices of women – especially poor women of colour, who have migrated for work – within these limitations are not respected.<sup>52, 53</sup> Many authors have offered a more

46. 'Fatalities at South Africa's mines drop' (2015) *SAInfo*, 27 January 2015. Available at: <http://www.southafrica.info/news/business/mine-deaths-27115.htm> [Accessed 26 July 2017].
47. Statistics South Africa. (2015). 'Quarterly Labour Force Survey Quarter 1, 2015'. Available at: <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2015.pdf> [Accessed 26 July 2017].
48. 'Sex workers often "easy targets" for abuse' (2015) *RDM Newswire*, 15 June 2015. Available at: <http://www.sowetanlive.co.za/news/2015/06/15/sex-workers-often-easy-targets-for-abuse> [Accessed 27 July 2017].
49. TL Konstant, et al. (2015). Estimating the Number of Sex Workers in South Africa: Rapid Population Size Estimation. *AIDS and Behavior*, 19(1), pp. 3–15.
50. Martha Nussbaum. (1999). *Sex and Social Justice*.
51. Laurie Shrage 'Feminist Perspectives on Sex Markets' In: EN Zalta (ed) *Stanford Encyclopedia of Philosophy* (2015). Available at: <http://plato.stanford.edu/archives/fall2015/entries/feminist-sex-markets/> [Accessed 2 August 2017].
52. Kamala Kempadoo. (2001). Women of Color and the Global Sex Trade: Transnational Feminist Perspectives. *Meridians*, 1, pp. 28–51.
53. LM Agustin. (2007). *Sex at the margins*.

thorough Marxist feminist analysis of sexual labour, attempting to understand it within the context of capitalism.<sup>54,55</sup> They point out that women have often been limited to unpaid forms of work, including domestic and emotional labour. They are often also expected to perform sexual labour for male partners, providing sexual pleasure without any expectation of enjoyment themselves. These forms of unpaid 'reproductive labour' are necessary to support paid 'productive labour' in the capitalist economy, and yet are systematically undervalued. Often they are thought of as things that should be done 'for love', and are not recognised as work at all. When they are undertaken for pay – as in working as a nanny, waitressing and paid domestic work – wages are consistently low. This systematic undervaluation of 'women's work' is a major reason why poverty is highly feminised in South Africa.<sup>56</sup>

It is therefore significant that sex work is one of the few forms of paid labour in South Africa that offer a relatively decent wage to women in this country who lack formal qualifications, as well as enough time and flexibility to deal with family responsibilities. The Report acknowledges this in paragraph 2.446, stating that sex workers earn considerably more money than women in "other kinds of low-skill, labour-intensive and female-dominated work". Sex workers respond to exploitative conditions and the feminisation of poverty, on the one hand, by refusing to take up low-paid jobs in domestic service (which are often not available in any case). A favourite song used by sex workers at demonstrations in South Africa says: "My mother was a kitchen girl; My father was a garden boy; That's why I'm a sex worker".<sup>31</sup> On the other hand, sex workers defy the undervaluation of women's paid and unpaid labour by making visible the sexual and emotional labour that women are often expected to perform for free ('for love') and demanding a fair wage for it.

In short, the distinction between work and exploitation suggested in the Report is empirically and theoretically unfounded. Most of the work undertaken in South Africa – especially work done by poor, uneducated black women – exists within the exploitative terrain created by colonialism, apartheid and capitalism. In many cases, work simply *is* exploitation. Nevertheless, even under conditions of limited choice, people may still opt for sex work as better than the existing alternatives (including poorly paid jobs, an abusive relationship or unemployment). It is therefore strange to suggest that the exploitation in sex work could be reduced by criminalising either employers, clients or the worker herself. Even if this succeeds in its own terms – by putting an end to sex work – it simply means that the worker is now marginalised *and* without a source of income. It would make no sense to suggest criminalisation as a 'solution' to the exploitation of miners or domestic workers, or the domination of women in the home, and it makes no sense to suggest it for sex work. The Commission's suggestion of diversion programmes linked to full criminalisation also does not deal with this contradiction, unless these programmes somehow promise to upend the economic marginalisation of the people passing through them.

Ultimately, labour exploitation in South Africa can only be ended by ending the poverty which constrains people's choice of whether to work and what work to do. In the meantime, society must respect people's economic decisions, and try to support them in obtaining better working conditions, improving safety and earning higher wages in whatever work they decide is most suitable for themselves. In terms of sex work, this means that society should support the decriminalisation of sex work, the organising efforts of sex workers and better enforcement of the laws that should be protecting sex workers from violence and poor working conditions.



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**Ultimately, labour exploitation in South Africa can only be ended by ending the poverty which constrains people's choice of whether to work and what work to do.**

54. Ann Ferguson, Rosemary Hennessy and Mechthild Nagel 'Feminist Perspectives on Class and Work' In: EN Zalta (ed) (2018) *The Stanford Encyclopedia of Philosophy*. Available at: <http://plato.stanford.edu/archives/win2010/entries/feminism-class/> [Accessed 4 February 2018].

55. M Merteuil. (2015) 'Sex Work Against Work'. *Viewpoint Magazine*, 31 October 2015. Available at: <https://viewpointmag.com/2015/10/31/sex-work-against-work/>

56. Johanna Kehler. (2001). Women and Poverty: A South African Experience. *Journal of International Women's Studies*, 3(1), pp. 41-53.

57. The authors are hesitant to use this terminology uncritically, as there are other strands of “radical” feminist thinking – like the Marxist feminists cited above – who do not share the presuppositions of this movement. “Radical feminists” share some assumptions with conservative thinkers about the nature of human sexuality, and in fact have sometimes allied themselves with Christian organisations in attempting to further criminalise the sex industry.
58. JG Raymond. (1999). ‘Legitimizing Prostitution as Sex Work’: UN Labour Organization (ILO) Calls for Recognition of the Sex Industry’. Coalition Against Trafficking in Women. Available at: <http://www.catwinternational.org/Home/Article/61-legitimizing-prostitution-as-sex-work-un-labour-organization-ilo-calls-for-recognition-of-the-sex-industry> [Accessed 29 September 2017].
59. JG Raymond. (1995). ‘Prostitution is rape that’s paid for’. *Los Angeles Times*, 11 December 1995. Available at: [http://articles.latimes.com/1995-12-11/local/me-12813\\_1-human-rights](http://articles.latimes.com/1995-12-11/local/me-12813_1-human-rights) [Accessed 19 January 2018].
60. Melissa Farley. (2000). ‘Prostitution: Factsheet on human rights violations’. San Francisco: Prostitution Research and Education. Available at: <https://rcasa.wordpress.com/2011/08/12/rcasa-friday-facts-prostitution-factsheet-on-human-rights-violations-part-1/>
61. Jody Raphael & Deborah L. Shapiro. (2004). Violence in Indoor and Outdoor Prostitution Venues. *Violence Against Women*, 10(2), pp. 126–139.
62. JG Raymond, et al. (2002). ‘A Comparative Study of Women Trafficked in the Migration Process’. Coalition Against Trafficking in Women. Available at: <http://www.catwinternational.org/Content/Images/Article/96/attachment.pdf>
63. JG Raymond. (2004). Prostitution on Demand: Legalizing the Buyers as Sexual Consumers. *Violence Against Women*, 10(10), pp. 1156–1186.
64. Melissa Farley, et al. (1998). Prostitution in Five Countries: Violence and Post-Traumatic Stress Disorder. *Feminism & Psychology*, 8(4), pp. 405–426.
65. Melissa Farley. (2004). Bad for the Body, Bad for the Heart”: Prostitution Harms Women Even if Legalized or Decriminalized. *Violence Against Women*, 10(10), pp. 1087–1125.
66. Jan Macleod, et al. (2008). ‘Challenging Men’s Demand for Prostitution in Scotland’. Women’s Support Project. Available at: <http://www.prostitutionresearch.com/ChallengingDemandScotland.pdf> [Accessed 4 February 2018].
67. Katri Eespere. (2007). ‘The hidden side of prostitution: sex buyers speak’. Ministry of Social Affairs of the Republic of Estonia. Available at: [https://www.sm.ee/sites/default/files/content-editors/eesmargid\\_ja\\_tegevused/Sooline\\_vordoiguslikkus/Inimkaubandus\\_ja\\_prostitutioon/the\\_hidden\\_side\\_of\\_prostitution\\_sex\\_buyers\\_speak.pdf](https://www.sm.ee/sites/default/files/content-editors/eesmargid_ja_tegevused/Sooline_vordoiguslikkus/Inimkaubandus_ja_prostitutioon/the_hidden_side_of_prostitution_sex_buyers_speak.pdf)
68. Swedish Institute. (2010) ‘Selected extracts of the Swedish government report SOU 2010:49: ?The Ban against the Purchase of Sexual Services. An evaluation 1999–2008’. Available at: [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the\\_ban\\_against\\_the\\_purchase\\_of\\_sexual\\_services\\_an\\_evaluation\\_1999-2008\\_1.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_ban_against_the_purchase_of_sexual_services_an_evaluation_1999-2008_1.pdf)
69. Valeria Costa-Kostritsky. (2014). ‘On Malmkillnadsgatan’. London Review of Books Blog. Available at: <http://www.lrb.co.uk/blog/2014/01/20/valeria-costa-kostritsky/on-malmkillnadsgatan/> [Accessed 13 August 2017].
70. R Weitzer. (2005). Flawed Theory and Method in Studies of Prostitution. *Violence Against Women*, 11(7), pp. 934–949.
71. Raymond (2004), supra note 63.

Many of the sources cited heavily in the Report – and whose conclusions are essentially endorsed – come from a strain of “radical feminist” thinking concerning commercial sex.<sup>57</sup> Under this so-called radical feminist framework, commercial sex is by definition an act of violence against the seller and the distinction between voluntary and coerced sex work is denied. It follows that the buyer is always the violent party. For instance, in an article cited in the Report, Janice Raymond argues that:

*“As with slavery, prostitution per se is abuse, exploitation and an oppressive institution. Sexual exploitation violates the human rights of anyone subjected to it, whether adult or child.”<sup>58</sup>*

In an earlier article, the same author stated this position more boldly, asserting that “Prostitution is rape that’s paid for”.<sup>59</sup> Melissa Farley, another author cited in the Report has stated that “Prostitution is... sexual harassment... rape... battering...”.<sup>60</sup> Raphael & Shapiro (2004), in an article cited in the Report, state that “These men [clients] must be viewed as batterers rather than customers and appropriate remedies designed”.<sup>61</sup> Several other articles cited in the Report rely on the radical feminist approach, including those by Raymond,<sup>62,63</sup> Farley<sup>64,65,66</sup> and Eespere.<sup>67</sup> Although it is not possible to critique all of this work in detail here, it is worth making a few remarks about the general approach.

Firstly, although these authors are motivated by justified outrage at the violence and abuse suffered by sex workers, their analytical framework is problematic. It is not plausible that *all* clients are violent, otherwise the reported occurrence of abuse would be far higher (100% of sex workers would report a violent incident in the last year, as opposed to the actual figures of 13.4%, 39%, etc.). So, in any given time period, it is true to say that *some* sex workers suffer violence at the hands of *some* clients. It follows that the amount of violence would be considerably reduced if sex workers were able to avoid this subset of ‘bad clients’ or if these violent men were promptly arrested after committing crimes. Redefining *all* sex work as violence not only directly contradicts what sex workers themselves say (i.e. that some clients are violent, but most are not), but also allows those adopting a radical feminist framework to dismiss even attempting common sense remedies. Despite the clear evidence that sex work can be more or less safe depending on the circumstances (see section 6, above), the only goal these authors regard as worth pursuing is the total removal of all commercial sex.

Paradoxically, followers of this approach are therefore willing to contemplate policies that make sex workers *less* safe, so long as they also somewhat reduce the number of people selling sex, since a reduction in sex work is a reduction in ‘violence’ by definition. For instance, the official state evaluation of the law criminalising clients in Sweden acknowledges that sex workers oppose it and think it leads to increased stigma and police harassment, but goes on to remark:

*“For people who are still being exploited in prostitution, the above negative effects of the ban that they describe must be viewed as positive from the perspective that the purpose of the law is indeed to combat prostitution.”<sup>68</sup>*

Similarly, the head of Sweden’s anti-trafficking unit has been quoted as saying “I think of course the law has negative consequences for women in prostitution but that’s also some of the effect that we want to achieve with the law... It shouldn’t be as easy as it was before to go out and sell sex.”<sup>69</sup>

Researcher on sex work, Ronald Weitzer (2005), has also pointed out that much of the research under discussion contains serious flaws.<sup>70</sup> For example, unlike the systematic methods employed by many researchers to survey as many sex workers as possible in a given area, or at least take a representative sample from the population, these researchers instead use samples of convenience. Bias is often introduced in the specific sample chosen, for instance in the decision to interview women who are in prison, using specialised services or who have been identified as trafficking victims (and are thus likely to have experienced especially coercive or violent situations), or women who have chosen to affiliate themselves to abolitionist organisations (this problem is also discussed in reference to the Report, in section 5). Weitzer notes that, in an article cited in the Report,<sup>71</sup> the author attempts to describe “men’s attitudes and treatment of women in prostitution” without actually interviewing any men.

## 9 RATIONALISATION OF POLICE ABUSE AND STATE COERCION

There is extensive documentation of severe and systematic abuse committed by police officials against sex workers, internationally and in South Africa. However, in the Report, issues around police abuse are dealt with comparatively briefly, in paragraphs 2.57 - 2.63, 2.217 - 2.225, 2.96 - 2.100 and 2.454. These paragraphs mainly outline remarks made by respondents, and then (in 2.454) offer some opinions on which submissions seem most plausible. No reference is made to the copious research that has been conducted on this topic (which is provided in detail in Asijiki's Companion Report).

In light of this failure to meaningfully mention research, it is somewhat puzzling to see the Report confidently state that,

*"Allegations of police brutality and extortion are not unique to prostitution. They should be dealt with as a police problem that requires corrective measures to be taken. The chances of a change in the law addressing this abuse of power are negligible."* (paragraph 2.454)

This statement not only belies the detailed literature on the topic, but also common sense. The criminal law as it stands gives police officers the power to arrest sex workers and it is this power that they frequently abuse. Simple logic suggests that removing this power would also limit, at least to some extent, the potential for abuse of power.

The Report claims to present various respondents' views on this issue. However, in paragraphs 2.217 - 2.225 (which reflect respondents' views on police brutality), only six respondents are referred to, and four of them claim that police brutality is a separate issue to law reform (i.e. decriminalisation will not resolve the issue) and that it is often a reaction to the sex workers' behaviour. The one respondent mentioned as seeing the link between police brutality and the legal dispensation is given one sentence. There are clear omissions of respondents here. For example, the Women's Legal Centre has done a study on police abuse of sex workers – their research would undoubtedly have formed part of their submission to SALRC, yet it is not present in this section of the Report.

Furthermore, at paragraph 1.31, it is stated that the "Commission's researchers embark[ed] on a night tour to interview prostitutes on the street", which is certainly an admirable endeavour. However, at paragraph 2.329, a conversation between the Commission's researchers and the police "during a night tour of Pretoria in September 2009" is recorded into evidence. Although it is not clear, this passage seems to imply that the police accompanied the researchers while they were conducting this tour, and thus casts doubt on the prospect that sex workers and other informants would have given frank answers to the researchers regarding police brutality and abuse. It is noteworthy that, in contrast, virtually no conversations with actual sex workers conducted on this tour are mentioned as evidence in the Report, which emphasises the Report's failure to represent the voices of sex workers.

The Report also gives space to the harmful and stigmatising attitudes of police officers and others responsible for enforcing 'prostitution' laws. At paragraph 2.61, a politician is quoted arguing that "the areas where sex workers work, slum very badly". This is presumably a reference to the alleged public nuisance and decline in property values associated with street sex work, but it is unclear why these issues are of comparable importance to the severe human rights abuses suffered by sex workers, which are described immediately above this quote, in paragraphs 2.57 - 2.60. At paragraphs 2.63 and 2.221, when dealing with allegations of severe abuses committed by the police against sex workers, the Report appears satisfied with the claim that this is the work of a few "bad apples" and that much of the alleged abuse in fact results from sex workers resisting arrest.

At paragraph 2.454, the Report gives credence to the (unsubstantiated) claim that police coercion comes about because sex workers are often under the influence of drugs and alcohol and become "hysterical and uncontrollable" when faced with arrest. The use of this language in the Report is disquieting, particularly because "hysterical" is a term that is applied almost exclusively to women and has a long history of being used



**The criminal law as it stands gives police officers the power to arrest sex workers and it is this power that they frequently abuse.**

**In summary, the matter under discussion is the clearly documented fact that sex workers have been and continue to be beaten, raped, extorted and otherwise seriously abused by police officers in South Africa.**

**That the authors of the Report advocate compulsory diversion programmes suggests, firstly, that there is little genuine faith that these programmes are likely to offer participants job prospects that match their earnings from sex work.**

to dismiss and discredit the complaints of women.<sup>72</sup> The encounters between the police and sex workers described in the Report have a clear political dimension – the sex workers under discussion may be angry in response to arbitrary arrest, harassment and extrajudicial violence and abuse at the hands of the police. To describe their behaviour as “hysterical”, however, is to presuppose that this anger is irrational rather than a result of legitimate grievances, and so essentially excuses human rights violations committed by the police.

In summary, the matter under discussion is the clearly documented fact that sex workers have been and continue to be beaten, raped, extorted and otherwise seriously abused by police officers in South Africa.<sup>73</sup> Alleging that sex workers are sometimes drunk and that they sometimes become emotional when being arrested (often by the very same police officers who have committed this abuse) is irrelevant and insulting. It amounts to an implication that the victims of abuse are in some way responsible for that abuse and is contrary to the SALRC’s stated value of upholding “the dignity of others”.<sup>74</sup> It is imperative that we all be aware of commonly-held stigmatising ideas about sex workers, which often serve to ‘disqualify’ them from the moral consideration that would normally be accorded to others. It is easy to implicitly think of sex workers as ‘lawbreakers’ who ‘deserve’ abuse or mistreatment and some of this attitude appears to be present in the Report’s quick dismissal of complaints about police brutality.

This generally indulgent attitude towards state coercion is also found in the discussion of ‘diversion’ programmes for sex workers, which are understood specifically in this context to be coercive interventions – i.e. a person can be forced to enter into a diversion programme under the threat of criminal sanctions. The authors of this response fully support the creation of well-designed programmes that provide meaningful economic opportunities and skills training to sex workers. However, if the diversion programmes proposed are in fact likely to provide meaningful economic opportunities, the natural question to ask is why it would be necessary to force anyone to enter them? Surely it would be sufficient simply to offer them to sex workers on a voluntary basis, who would then complete the programmes and embark on new careers voluntarily?

That the authors of the Report advocate compulsory diversion programmes suggests, firstly, that there is little genuine faith that these programmes are likely to offer participants job prospects that match their earnings from sex work. The primary thrust of the Report is to advocate for the retention of the existing (failed) strategy of discouraging sex work through coercive police action, which raises the concern that these diversion programmes are intended merely as support for this strategy. It is also clear that the supporters of such diversion programmes do not see sex workers as true adults with the capacity to make decisions in their own interests. They are instead to be treated as children, who must be forced into participating in various activities ‘for their own good’. This is why we see, in paragraph 2.501, the rather strange claim that “criminalisation provides a legal mechanism for a prostitute to be removed from the coercive circumstances she finds herself in...” That is to say, the best way to help someone who is being coerced by economic circumstances and low-level dangers is for the state also to exert coercion on them. This is both illogical and condescending. The aim of policy in a progressive democracy should be to reduce the coercion imposed on its citizens so that they can make their own decisions, not to force decisions upon them.

72. Mark S. Micale. (1989). Hysteria and Its Historiography: A Review Of Past And Present Writings (I). *History of Science*, 27, pp. 319-351.

73. Donna Evans and Rebecca Walker. (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 Advocacy TaskForce. Available at: <http://genderjustice.org.za/publication/the-policing-of-sex-work-in-south-africa/> [Accessed 5 April 2018].

74. South African Law Reform Commission. “Vision, Mission and Value Statement”. Available: <http://www.justice.gov.za/salrc/vision.html>

## 10

## USE OF POOR EMPIRICAL DATA REGARDING TRAFFICKING AND THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN

## There are no reliable quantitative data on the extent of sex trafficking or other coercive practices

Under South African and international law, a child is defined as anyone under the age of 18 years and commercial sexual transactions involving people younger than this are officially defined as the sexual exploitation of children.<sup>75, 76</sup> Thus, although the general age of consent for sex is 16 in South Africa, only those over 18 are considered adult sex workers. Under the Sexual Offences Amendment Act of 2007, it is an offence in South Africa to purchase sexual services from a child or to facilitate another person doing so, regardless of whether the child consents or not.<sup>77</sup>

The United Nations defines human trafficking as:

*“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”<sup>78</sup>.*

In simple terms, for a person to count as being trafficked they must have been, firstly, transported across international borders or within a country; secondly, coerced or deceived; and thirdly, “exploited” in some fashion.<sup>79</sup> Voluntary adult sex work is distinct from trafficking, even where it involves migration or travel, since there is no element of coercion or deceit.

In responding to the claims about trafficking and the commercial sexual exploitation of children made in the Report, the authors wish to make it very clear that both practices are abhorrent and need to be tackled as a matter of urgency. However, it is their view that the Report overstates both the extent of these practices and the degree to which they are connected to voluntary adult sex work. The view of the authors of this response is that, while almost all sex workers face difficult choices due to their economic conditions, outright coercive practices affect only a relatively small proportion of them. The best policy approach would involve targeted, evidence-based programmes to assist this group specifically rather than any broader crackdown.<sup>80</sup>

Many claims are made in the Report about the alleged relationship between human trafficking and the legal status of sex work. Paragraphs 2.68 - 2.79 outline “the theory that legalised prostitution causes an increase in human trafficking”, a theory which is endorsed, for instance, at paragraphs 38 and 2.461. Similar concerns are raised about the sexual exploitation of children at paragraphs 2.317 - 2.329, and at 2.458 it is stated that:

*“The Commission shares the concern that a shift away from criminalisation would cause an increase in child prostitution... The Commission agrees that child and adult prostitution cannot be compartmentalised separately, since many adult prostitutes start out selling sexual services as children...”.*

It is worth examining in detail the evidence discussed in these sections.

The argument in paragraphs 2.68 - 2.79 relies heavily on a paper by Cho et al. (2012),<sup>81</sup> which uses data from the United Nations Office on Drugs and Crime (UNODC) on reported human trafficking figures in particular countries to argue that there is a positive correlation between the legalisation or decriminalisation of sex work and trafficking. However, as pointed out by Weitzer (2014), this paper has significant weaknesses and should not be viewed as reliable.<sup>82</sup> The UNODC report from which it obtains its data specifically states that it “does not provide information regarding actual numbers of victims, nor does it provide statistics directly reflecting the severity of human trafficking around the globe”.<sup>83</sup> The report is intended only to describe

**Voluntary adult sex work is distinct from trafficking, even where it involves migration or travel, since there is no element of coercion or deceit.**

75. Children’s Act 38 of 2005.
76. *United Nations Convention on the Rights of the Child*, General Assembly Resolution 44/25 (20 November 1989). Available at: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>
77. Sexual Offences Amendment Act 32 of 2007, section 17.
78. *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*. General Assembly Resolution 55/25 (15 November 2000). Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>
79. See the extended definition of “trafficking in persons” in the Prevention and Combatting of Trafficking in Persons Act 7 of 2013.
80. Richard Steen, et al. (2015). Trafficking, sex work, and HIV: efforts to resolve conflicts. *The Lancet*, 385(9963), pp. 94-96.
81. Seo-Young Cho, Axel Dreher and Eric Neumayer. (2012). Does Legalized Prostitution Increase Human Trafficking? *World Development*, 41, pp. 67-82.
82. Ronald Weitzer. (2014). New directions in research on human trafficking. *Annals of the American Academy of Political and Social Science*, 653, pp. 6-24.
83. UNODC (2006) ‘Trafficking in Persons: Global Patterns’. Available at: [http://www.unodc.org/pdf/traffickinginpersons\\_report\\_2006ver2.pdf](http://www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf)



84. Anton van Wijk, et al (2013) 'Summary: Vulnerable Profession: A study of the prostitution business in Amsterdam'. Arnhem: Bureau Beke. Available at: [http://www.beke.nl/doc/2010/Summary\\_Vulnerable%20Profession.pdf](http://www.beke.nl/doc/2010/Summary_Vulnerable%20Profession.pdf)
85. Alet Rademeyer & Philip de Bruin. (2009) '10 000 child prostitutes in JHB'. *News24*, 3 June 2009. Available at: <http://www.news24.com/SouthAfrica/News/10-000-child-prostitutes-in-Jhb-20090603>
86. Julian Rademeyer (2013) 'Are 30,000 children really "trafficked" in South Africa every year? The claim exaggerates the problem'. *Africa Check*, 18 October 2013. Available at: <https://africacheck.org/reports/are-30000-kids-trafficked-into-south-africas-sex-trade-every-year-the-claim-exaggerates-the-problem/#comments>
87. Konstant, et al. (2015), supra note 49.
88. L Johnston. (2011). 'The Myths of Bedford v. Canada: Why decriminalizing prostitution won't help'. *The F Word*, 7 August 2011. Available at: <http://www.feminisms.org/3265/the-myths-of-bedford-v-canada-why-decriminalizing-prostitution-won%E2%80%99t-help/>
89. Richard Estes & Neil Weiner. (2001). 'The Commercial Sexual Exploitation of Children in the U. S., Canada and Mexico'. Available at: [https://web.archive.org/web/20131115060108/http://www.sp2.upenn.edu/restes/CSEC\\_Files/Complete\\_CSEC\\_020220.pdf](https://web.archive.org/web/20131115060108/http://www.sp2.upenn.edu/restes/CSEC_Files/Complete_CSEC_020220.pdf)
90. Chris Hall. (2014) 'Is One of the Most-Cited Statistics About Sex Work Wrong?' *The Atlantic*, 5 September 2014. Available at: <http://www.theatlantic.com/business/archive/2014/09/is-one-of-the-most-cited-statistics-about-sex-work-wrong/379662/>
91. Gould & Fick (2008), supra note 39.
92. Marlise Richter, 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

how frequently trafficking is reported by various agencies in different countries, and it specifically cautions that "a high level of reporting can be interpreted as a positive indicator". That is, countries interpreted by Cho et al. as having high "human trafficking inflows" may simply be places where there are coherent policies on tackling trafficking and so better reporting. Moreover, as also pointed out in the UNODC report, many of the sources interviewed confuse trafficking with voluntary "migrant-smuggling" and even with "irregular migration". Finally, it should be noted that the UNODC report states figures for *all* kinds of labour trafficking, not only that involving sexual exploitation.

For all its flaws, the paper by Cho et al. is one of the few authorities cited in the Report that even attempts to provide rigorous quantitative information about trafficking. On the few other occasions where evidence is presented, it tends to be anecdotal. For instance, at paragraph 2.188, the Report states that there is "evidence of continued (and according to some, increased) trafficking and the persistence of violence and coercion" in the legalised sex industry in the Netherlands. But the only authority cited for this is "Ina van den Heever, a South African outreach worker in the Red Light District in Amsterdam". There is no attempt to provide quantitative data, testimony from actual sex workers or victims of trafficking, or to compare the occurrence of coercive practices under differing legal regimes.

The discussion on the commercial sexual exploitation of children in paragraphs 2.317 - 2.329 also relies heavily on anecdotes and opinions presented by respondents. Little of this evidence is substantiated by references to published research or a description of the methodology behind it, making its reliability more difficult to assess. However, it is worth making a few remarks on the plausibility of some of this evidence. At paragraph 2.320, the FPI is quoted asserting that in Amsterdam there are "more than 15 000 children, primarily girls, being prostituted". This figure is repeated by another respondent at paragraph 2.323. But a recent rigorous attempt to estimate the number of sex workers in Amsterdam, counting both the licensed and unlicensed sector and all genders, has concluded that there are probably between 5150 and 7660 working in any given year<sup>84</sup>. These researchers did not find any under-age workers. So, if it was true that 15 000 children were being forced into selling sex, it would mean that there were about double as many *children* selling sex in the city than the researchers were able to find sex workers of any age. Similarly, at paragraph 2.329, a newspaper article is cited as claiming that there are "10 000 child prostitutes in Johannesburg"<sup>85</sup>. This has been disputed by various studies, as set out by Africa Check.<sup>86</sup> Moreover, the claim is extremely unlikely when placed alongside a recent systematic survey which concluded that there are approximately 150 000 sex workers in South Africa as a whole and only around 11 000 in Johannesburg.<sup>87</sup>

At paragraph 4.198, while it is acknowledged that all the sex workers contacted during the research for the Report were adults, it also states that "internationally, the average age of entry into prostitution is reportedly 14 or 15." The authority cited for this estimate is an article written by Laura Johnston, who works for The Women's Coalition for the Abolition of Prostitution in Canada.<sup>88</sup> Johnston does not support this estimate by reference to any empirical research, making it difficult to verify. However, similar estimates are cited frequently by opponents of sex work decriminalisation and seem to have arisen originally from a misinterpretation of a report published by American researchers in 2001.<sup>89, 90</sup>

This report studied a population of children who were already identified as selling sex and found that they had first started doing so between the ages of 11 and 14. However, it is meaningless to draw conclusions from this result, which is taken from a small and very specific population - i.e. children who were *already known* to be selling sex - and compare it to the population of sex workers generally. Moreover, large surveys of sex workers in South Africa have consistently found that their average age is around 29 and that most of them began sex work in their early 20s.<sup>91, 92</sup> Even assuming that there is some population of children selling sex who are not recorded in such studies, it is unlikely on purely mathematical grounds that 14 or 15 is the *average* age at which people start selling sex. This would mean that, for all the people who begin selling sex in their early 20s, there must be a large number of people who start when they are much *younger* than 14.

The simple fact is that there is actually very little reliable data on the occurrence of human trafficking or on the numbers of children in commercial sexual exploitation

in any country. The individuals and organisations who mention very large numbers are often morally opposed to the existence of sex work, and appear to be willing to use dubious methods which generate large numbers, if this is thought to help their cause.<sup>93</sup> This generalised opposition to sex work often means that many organisations – including governments – fail to make the important distinction between voluntary and coerced migration or between voluntary and forced sex work.<sup>94,95</sup>

## High estimates of the extent of coercive practices are driven by speculation, ideology and the conflation of voluntary and involuntary sex work

Paradoxically, as pointed out by the UNODC, this ideological opposition to sex work is one of the major reasons that it is difficult to obtain reliable statistics on human trafficking. Many of the people recorded as ‘trafficked’ in any given locality may be voluntary migrants who have paid smugglers to move them across borders.<sup>96</sup> Even people who have migrated without the assistance of third parties may be counted as ‘trafficked’, particularly if they are apprehended by state authorities while selling sex. To give a local example of this confusion, the Prevention and Combating of Trafficking in Persons Act (no. 7 of 2013) in South Africa states that a person counts as ‘trafficked’ if they have been moved across borders by means of “the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage... aimed at either the person or an immediate family member of that person or any other person in close relationship to that person”. So, under this legislation, someone would count as a trafficker if they simply offered to give someone money or another reward to do voluntary sex work. This makes little intuitive sense, given that we typically do not say that someone is coerced or deceived simply by the offer of payment.

Another reason for the difficulty in obtaining accurate numbers of trafficking victims is that media organisations and NGOs often misrepresent the results of academic research or treat admittedly speculative and/or tentative research as if it is solid and precise. The way they reach the estimates they give is not shared, only the final numbers (often using the upper limit of a very large range estimated range).<sup>97,98</sup> A recent local example is the Salvation Army’s claim that “30 000 children are being prostituted in South Africa”,<sup>99</sup> a figure which is not supported by any systematic quantitative research.<sup>100</sup>

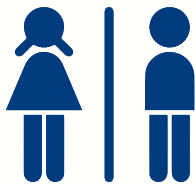
Research based on identifying particular children or adults who have been trafficked or coerced into selling sex typically identify far fewer victims than the headlines would suggest. To put some of these numbers in perspective, a survey of 164 sex workers in Cape Town found that only two had ever been the victims of trafficking under the UN definition and these had generally happened in the past, with the sex workers in question having escaped those circumstances by their own agency.<sup>101</sup> The researchers in this study were also only able to identify five children selling sex. All of these children worked on the street, and none of them were being forced to sell sex by a third party. Research commissioned by the National Prosecuting Authority in 2010 identified only 12 children who had been trafficked, five of whom had been made to sell sex, with the others being forced to perform other forms of labour.<sup>102</sup> The International Organisation for Migration reports having assisted 57 child victims of trafficking in South Africa between 2004 and 2010, not all of whom were made to sell sex.<sup>103</sup>

Of course, there are doubtless many more victims who are not identified by these surveys or the methods they use. It does seem very unlikely, however, that the true number of victims is *thousands* of times larger than the number who have been identified. This would also imply that the vast majority of the sex industry is practically invisible, even to researchers who surveyed a large proportion of the adult sex workers in several different cities. This is not only unlikely on its own terms, but immediately poses the question of how such a large ‘hidden’ industry would even be profitable, since people intent on sexually exploiting children would presumably have at least as much difficulty in locating it as expert researchers would.

To summarise, the very large estimates for the number of adults or children coerced into selling sex quoted in the media and repeated in the Report are not substantiated by solid research and are very likely extremely inflated. Careful research in fact suggests that the majority of commercial sexual transactions in South Africa and

**Research based on identifying particular children or adults who have been trafficked or coerced into selling sex typically identify far fewer victims than the headlines would suggest.**

93. Ronald Weitzer. (2007). The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade. *Politics and Society*, 35(3), pp. 447–475.
94. NSWP (2011) ‘Sex Work is Not Trafficking’. Available at: <http://www.nswp.org/sites/nswp.org/files/SW%20is%20Not%20Trafficking.pdf>
95. Kate Butcher. (2003). Confusion between prostitution and sex trafficking. *The Lancet*, 361(9373), pp. 1983.
96. Africa Check (2014) ‘Factsheet: Understanding human trafficking’. Available at: <https://africacheck.org/factsheets/factsheet-understanding-human-trafficking/>
97. Nick Pinto. (2011) ‘Women’s Funding Network Sex Trafficking Study Is Junk Science’. *The Village Voice*, 23 March 2011. Available at: <http://www.villagevoice.com/news/womens-funding-network-sex-trafficking-study-is-junk-science-6434306>
98. Nick Davies. (2009) ‘Prostitution and trafficking - the anatomy of a moral panic’. *The Guardian*, 20 October 2009. Available at: <http://www.theguardian.com/uk/2009/oct/20/trafficking-numbers-women-exaggerated>
99. Salvation Army. “Anti-Human Trafficking”. Available at: <http://www.salvationarmy.org.za/index.php/our-work/community-care-development/anti-human-trafficking>
100. Rademeyer (2013), supra note 86.
101. Gould & Fick (2008), supra note 39.
102. Carol Allais, et al (2010) ‘Tsireledzani: understanding the dimensions of human trafficking in Southern Africa’. National Prosecuting Authority. Available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_142882.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_142882.pdf)
103. Liv Torres & Denise du Toit. (2010). ‘Southern Africa Counter- Trafficking Programme (SACTP) Review’. Norad. Available at: <https://www.norad.no/globalassets/import-2162015-80434-am/www.norad.no-ny/filarkiv/vedlegg-til-publikasjoner/southern-africa-counter--trafficking-programme-sactp-review.pdf> [Accessed 2 February 2018].



**Moreover, despite the warnings of ‘proliferating’ sexual exploitation of children, a survey of sex workers in New Zealand revealed that only 41 out of 772 had entered the sex industry as children after the passage of the Act and expert opinion generally holds that there has not been any increase in the number of under-age workers.**

around the world are entered into voluntarily between adults. Ultimately the choice to include an entire section in the Report on the link between decriminalisation and increased human trafficking is risky, considering the difficulty in providing accurate data on such a relationship. The very existence of the section creates a confusion of sex work and trafficking in the mind of the reader.

Why does rigorous research on sexual exploitation tend to be ignored in favour of inflated or simply speculative estimates of its occurrence? A major factor, the authors believe, is the assumption pointed out above, namely that selling sex is seen as automatically undignified or undesirable work. Given this assumption, it follows that very few people would be doing the work voluntarily and therefore the majority of people selling sex must in fact be coerced. As pointed out above, the starting assumption of this argument is unfounded and tends to be made because some people impose their own feelings about selling sex on other people who may have very different moral or religious beliefs and attitudes to work and life circumstances. Finally, it is worth discussing the evidence regarding the impact of decriminalisation on the prevalence of children selling sex in New Zealand. At paragraph 2.325, the FPI is quoted as stating that “New Zealand Police have complained that the new policy of non-criminalisation ‘tied their hands’ when it comes to the proliferation of under-age prostitution.” This assertion is not supported by any evidence from research. In fact, there have been several successful prosecutions of brothel owners for employing children to sell sex under the provisions of the 2003 Act.<sup>104</sup> Moreover, despite the warnings of ‘proliferating’ sexual exploitation of children, a survey of sex workers in New Zealand revealed that only 41 out of 772 had entered the sex industry as children after the passage of the Act<sup>105</sup> and expert opinion generally holds that there has not been any increase in the number of under-age workers.<sup>106</sup>

104. 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>

105. Abel, et al. (2007), supra note 38.

106. New Zealand Ministry of Justice (2008), supra note 104.

## 11 OTHER FACTUAL INACCURACIES AND MISREPRESENTATIONS

It is worth outlining additional factual errors contained within the Report, as these represent further evidence of the overall poor quality of the research contained in the Report. More disturbingly, there is a clear pattern of bias, wherein statements that are taken to support continued criminalisation are simply presented as fact when they could have been disproved by further investigation.

At paragraph 2.145 it is stated that Petra Ostergren's work, which criticises the Swedish model, "has largely been invalidated, because the report that she based her findings on has been removed from the home page of Swedish National Health and Welfare and declared 'not valid anymore'." This is completely untrue.<sup>107</sup> Moreover, the 2010 Swedish Ministry of Justice report mentioned with approval in the Report in paragraphs 2.140 - 2.142 claims only that there is "nothing to indicate" an overall increase in sex work since the law was passed in 1999, which does not inspire confidence that it is on track to end it altogether.<sup>108</sup> Even this very weak claim is directly contradicted by statistics compiled by the Swedish police which indicate, for instance, a large *increase* in the number of Thai massage parlours (brothels) operating in the country between 2009 and 2012.<sup>109</sup>

The first sentence of paragraph 2.310 in the Report reads as follows: "The Family Policy Institute (FPI) notes that in 2002 prostitution was decriminalised in Germany and that consequently the promotion of prostitution, pimping and brothels became legal." Although the term "notes" implies that what follows is true, it is incorrect to say that sex work is decriminalised in Germany. As noted elsewhere in the Report, Germany has adopted a model of legalisation/regulation, under which the buying and selling of sex are only permitted under certain circumstances. Moreover, this model has been criticised by sex worker rights advocates specifically because it hands power to brothel owners and other employers who have the funds to comply with regulations, rather than to sex workers themselves.<sup>110</sup>

At paragraph 2.312, the FPI is quoted as summarising the report of the New Zealand Prostitution Law Reform Committee, while arguing that the Prostitution Reform Act (PRA) has failed to achieve its purposes. However, the quotations used by the FPI are selective and often highly misleading. For instance, it is stated that "35% [of sex workers] reported in 2007 that they had been coerced to prostitute with a given john in the past 12 months." It is true that the report quotes a figure of 35.3% for the number of workers who "felt they had to accept a client when they didn't want to in the last 12 months"; yet what is not stated is that the same survey reveals that a substantial majority - 64.8% - agree that they are "more able to refuse to do a client since law change". The FPI also quotes an "Auckland lawyer" who "declared non-criminalization a 'disaster' which had resulted in an 'explosion' of children in prostitution in Auckland and Christchurch...". This lawyer is not, as implied by the context, quoted in the report of the Law Reform Committee and no alternative reference is given. It is therefore impossible to assess the reliability of this source. In any case, as pointed out in the previous section, there is no evidence of an increase in the commercial sexual exploitation of children in New Zealand following 2003.

In the same paragraph, the FPI is quoted as asserting that a "Trafficking in Persons Report of the US State Department" states that "women from Asia, the Czech Republic and Brazil [are] 'working illegally' as prostitutes" in New Zealand. Since no reference is given, it is difficult to identify the report in question with certainty. However, it most likely refers to a 2006 Country Report on Human Rights Practices (not a Trafficking in Persons Report), which states that "there was evidence that some women from Asia, and more recently the Czech Republic and Brazil, were working illegally in the country as prostitutes."<sup>111</sup> Note here that "working illegally" is not necessarily another term for trafficking; only legal residents of New Zealand are permitted to sell sex under the PRA, so foreign nationals who voluntarily sell sex are automatically doing so illegally. The same report explicitly states that "No new confirmed cases of internationally trafficked persons have been brought to the attention of the authorities since 2001".

At paragraph 2.491, several appeals to international case law are made in order to defend a continued ban on soliciting. It is stated that "In Canada, the Ontario Court of Appeal recently found that the ban on communicating in public for the purpose



**It is worth outlining additional factual errors contained within the Report, as these represent further evidence of the overall poor quality of the research contained in the Report.**

107. The referenced report can be found at [http://www.socialstyrelsen.se/lists/artikelkatalog/attachments/8806/2008-126-65\\_200812665.pdf](http://www.socialstyrelsen.se/lists/artikelkatalog/attachments/8806/2008-126-65_200812665.pdf).
108. A Skarhed U and Kullman. (2010) "Evaluation of the prohibition of the purchase of sexual services". Government Offices of Sweden. Available at: <http://www.government.se/articles/2011/03/evaluation-of-the-prohibition-of-the-purchase-of-sexual-services/>
109. K Wahlberg. (2012) 'Trafficking in human beings for sexual and other purposes'. Available at: [https://www.polisen.se/Global/www%20och%20Intrapolis/Informationsmaterial/01%20Polisen%20nationellt/Engelskt%20Informationsmaterial/Trafficking\\_1998\\_/Trafficking\\_report\\_13\\_20130530.pdf](https://www.polisen.se/Global/www%20och%20Intrapolis/Informationsmaterial/01%20Polisen%20nationellt/Engelskt%20Informationsmaterial/Trafficking_1998_/Trafficking_report_13_20130530.pdf)
110. Frankie Mullin. (2015) 'The difference between decriminalisation and legalisation of sex work'. *New Statesman*, 19 October 2015. Available at: <http://www.newstatesman.com/politics/feminism/2015/10/difference-between-decriminalisation-and-legalisation-sex-work>
111. US Department of State, Bureau of Democracy, Human Rights, and Labor (2007). '2006 Country Report on Human Rights Practices: New Zealand'. Available at: <http://www.state.gov/j/drl/rls/hrrpt/2006/78785.htm>

of prostitution is constitutional.” While this is narrowly correct, the Supreme Court of Canada subsequently overturned that decision, by a vote of 9-0, ruling that the ban on soliciting was unconstitutional.<sup>112</sup> This decision was released on 20 December 2013, and so represented established law at the time the Report was being drafted. Later, it is stated that “New Zealand has also retained its Summary Offences Act, which classifies soliciting as offensive behaviour...” This is also very misleading, as section 26 of the Summary Offences Act, which banned soliciting, was repealed under section 48 of the PRA.<sup>113</sup>

The section of the Report entitled ‘The theory on selling sexual services as a result of addiction’ (paragraphs 2.81 - 2.83) is particularly misleading. It outlines the occurrence of drug use among sex workers, yet it fails to mention whether legal reform would have an impact on this. Therefore, it appears that this section is merely there to bring sex workers into disrepute as users of drugs, without any debate around whether different types of law reform could positively affect behaviour change in this regard.

In paragraph 2.463, it is stated that “In contrast to New Zealand, South Africa has porous borders and is already home to approximately five million illegal immigrants.” The first problem is that the reference given for this statement is an online news site from 1995, which is extremely out of date. Moreover, no logical connection is drawn between this statistic and the conclusion that “based on the current indicators, the legislative options of partial- and non-criminalisation across the board hold a strong possibility of stimulating an increase in legal and illegal migration...”. A related problem is that the figure given is directly contradicted by more reliable figures. According to Stats SA, in 2011 there were 2.2 million non-South Africans living in South Africa, many of whom will have migrated legally<sup>114</sup>.

Finally, at paragraph 4.179 it is stated that “The overwhelming failure of non-criminalisation or legalisation of prostitution as a social policy is increasingly being acknowledged and these models are being abandoned in favour of targeting buyer demand coupled with exit programmes”. The reference given for this statement is a 2009 article from the Cape Argus newspaper. Not only is this an outdated article, but it is merely a secondary source. Such a statement of fact needs to be supported with evidence in order to have validity. The statement is even more puzzling considering the wealth of recent evidence pointing to decriminalisation as the best public health option, both in terms of HIV transmission and care management.

112. *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101. Available at: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do>

113. Summary Offences Act 1981 of New Zealand. Available at: <http://www.legislation.govt.nz/act/public/1981/0113/latest/DLM53348.html>

114. Available at: [http://www.statssa.gov.za/census/census\\_2011/census\\_products/Census\\_2011\\_Census\\_in\\_brief.pdf](http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf)

## 12 FAILURE TO REFERENCE RESEARCH ON HIV/AIDS

The selective use of evidence in the Report has resulted in very important research not being discussed. There is now a great deal of systematic research on sex work readily available in the public domain, particularly in the fields of public health and medicine. So it is very disappointing to see that on several occasions important conclusions on matters of fact have been drawn on the basis of a single referenced article, or even on the strength of a respondent's stated opinion.

The Report discusses the problem of HIV/AIDS at some length, in paragraphs 2.84 - 2.114 and respondents' remarks are summarised from 2.364 to 2.389. Its conclusions regarding HIV/AIDS are summarised at paragraph 2.464:

*"One of the most vocal lobby arguments in favour of non-criminalising adult prostitution stems from the need to curtail the spread of HIV and other STIs and to provide access to adequate health care. The argument is that non-criminalising prostitution would enhance the health and safety of women who sell sex by enhancing their access to health care and increasing their practice of safe sex. However, there is scant evidence to suggest that these ideals are achievable in reality."*

The reasoning here is an example of that criticised in section 6, namely that decriminalisation would only be considered worthwhile if it seemed likely to "achieve" an "ideal". It is significant that the only authority cited in paragraph 2.464 is Kelly et al, which was also criticised for using exactly this form of reasoning.

The reliance on a single source and the claim that "there is scant evidence" is particularly disturbing with reference to HIV/AIDS, since there is now essentially a consensus among public health professionals that the criminalisation of sex work is a significant barrier to the prevention and treatment of sex workers and their clients. International and South African agencies that have a mandate over public and/or reproductive health - including the WHO, UNAIDS, the UNFPA and SANAC - have all repeatedly supported this position.



**The reliance on a single source and the claim that "there is scant evidence" is particularly disturbing with reference to HIV/AIDS, since there is now essentially a consensus among public health professionals that the criminalisation of sex work is a significant barrier to the prevention and treatment of sex workers and their clients.**

**2018 marks 21 years since the South Africa began to consider sex work legislation. Since then there has been a growing local and international call to**

# DECRIMINALISE SEX WORK!

	<p>"...recommends for the government to decriminalise sex work in South Africa"</p>
	<p>"...recommend that countries work towards decriminalization of sex work and urge countries to improve sex workers' access health services"</p>
	<p>"We believe that decriminalisation of sex work is the next step towards protecting sex workers and their clients from HIV and other public health concerns"</p>
	<p>"The decriminalization or legalization of sex work with appropriate regulation forms a necessary part of a right-to-health approach to sex work, and can lead to improved health outcomes for sex workers"</p>
	<p>"To campaign for the decriminalisation of sex work through the repealing of the Sexual Offences Act, as part of a broader campaign of ensuring their enjoyment of labour, human, health &amp; safety and socio economic rights"</p>
	<p>"Secure commitment for decriminalisation of sex work which enables access to services"</p>
	<p>"We have chosen to advocate for the decriminalization of all aspects of consensual adult sex - sex work that does not involve coercion, exploitation or abuse"</p>
	<p>"Countries should work toward decriminalization of sex work and elimination of the unjust application of non-criminal laws and regulations against sex workers"</p>
	<p>"...our push for decriminalizing voluntary sex work by adults"</p>
	

At paragraph 1.104, the Report states that South Africa's 2010 Country Progress Report, submitted by the then-Minister of Health to the UN, "boldly, but without deliberation or explanation, identifies the continued criminalisation of 'sex work' as a barrier to HIV prevention and treatment". In fact, the report in question cites scholarly research on HIV/AIDS and goes into some detail about sex work, arguing that South Africa's current laws "promote stigmatisation and discrimination" against sex workers.<sup>115</sup> The SALRC Report does not, however, explore this reasoning or mention the research used in the Country Progress Report.

In Asijiki's companion research report, some small fraction of the extensive literature on this topic and the research conducted by these agencies is summarised. In contrast, these authorities have barely been mentioned in the Report. UNAIDS, for instance, appears only once in the bibliography, and there is no detailed discussion of this reference in the main body of the text. Similarly, there is no mention or reference to the special Lancet series "HIV and Sex Workers", which was published in 2014 and found that decriminalisation could lead to a substantial decrease in HIV amongst sex workers and their clients.<sup>116</sup>

In the Report's discussion of decriminalisation in New Zealand, it acknowledges that "prostitutes in New Zealand appear to practise safe sex, and as a group their HIV/AIDS incidence rate is low". However, it provides a footnote stating that this is "reportedly" as a result of campaigns held in the 1980s - thereby omitting the impact of decriminalisation.

Given the compelling public health argument in favour of sex work decriminalisation, there is a heavy burden on supporters of continued criminalisation either to disprove this body of evidence or to show that other factors are more relevant. It is unacceptable that the Report simply failed to engage with this argument at all. To all intents and purposes, expert medical opinion on the intersection of sex work and HIV/AIDS has not even been addressed.

**...there is no mention or reference to the special Lancet series "HIV and Sex Workers", which was published in 2014 and found that decriminalisation could lead to a substantial decrease in HIV amongst sex workers and their clients.**

115. UNAIDS (2010), supra note 18.

116. *The Lancet*, HIV and Sex Workers series, published July 2014. Available at: <http://www.thelancet.com/series/HIV-and-sex-workers>

## 13 UNJUSTIFIED CONCERNS ABOUT 'SEX TOURISM'

At several points in the Report, the concern is registered that the decriminalisation of sex work would result in “rebranding South Africa as a sex tourism destination” (paragraph 2.500), which it is argued would have undesirable effects. At paragraph 2.40, there is the following rather emotive appeal:

*“The legislative stance taken is one of the clearest statements of who we are as a nation. An equally important question is: What employment and tourist market segment does South Africa wish to attract?”*

These statements presumably reflect the view of Marthinus van Schalkwyk, who was Minister of Tourism between 2004 and 2009 and made a submission to the Commission. He is quoted at paragraph 3.41: “The Minister of Tourism’s aim – and that of government – is to portray and market South Africa as a family friendly destination and not a destination for sex-tourist buyers”. He is quoted again at 3.97:

*“He states that non-criminalised prostitution would chase away this valuable category of environmentally conscious tourists, would create problems for South Africa as a host country (including health and crime problems), would affect the reputation of the country and would accelerate moral degeneration.”*

In reference to the experience of Madagascar, it is also asserted (at paragraph 2.39) that “whereas tourism initially attracted women selling sexual services, tourism is now declining because of the widescale prostitution.”<sup>117</sup>

It is worth responding to these various concerns in detail. Firstly, it should be stated that no supporters of sex work decriminalisation have advocated that South Africa should be “rebranded” as a sex tourism destination. The primary intention is to protect the health and human rights of sex workers where reform would focus on changes to criminal law, labour law, the provision of health services, business regulation and so forth. None of this would require mentioning the availability of legal commercial sex on official South African Tourism marketing materials or in private sector advertising. If it is a concern that private actors might take their own initiative in marketing commercial sex in ways that are unflattering to South Africa, there is the option of restricting the advertisement of these services, as the New Zealand PRA does.

The claim that “the legislative stance taken is one of the clearest statements of who we are as a nation” has the implication that legislation should be assessed by what ‘message’ it sends. But this seems to mistake the basic functions of the legislature. If lawmakers wish to express their feelings on any given matter, there is provision within the rules of Parliament for them to pass motions expressing whatever sentiment they please. Legislation, however, should be assessed according to rigorous evidence about the concrete effects it is likely to achieve.

Property law, for instance, provides a precise framework that judges and lawyers can use to clearly resolve disputes concerning who has rights to land and this law is ineffective to the extent it fails in that task. Sex work criminalisation, in the same way, allows agents of the state to arrest, try and convict sex workers. The value of this legislation should be assessed by whether this effect is desirable, not by whether it supports disapproval of sex work. It should also be noted that the distinction between decriminalisation and moral activity can be expressly stated within the relevant legislation itself. For instance, the stated purpose of the PRA is “to decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use)”, while also protecting human rights and preventing exploitation.

Even supposing that decriminalisation did result in South Africa becoming known as a destination for sex tourism, the assertion that this would “chase away” other sorts of tourists is not supported by the evidence presented in the Report. The only evidence given for the claim that sex tourism has harmed the tourism industry in Madagascar is the opinion of an administrator for a single island, who is quoted in an article cited in the Report.<sup>118</sup> The claim that “tourism is declining” is also contradicted by official statistics. The amount of money spent by tourists in Madagascar increased consistently from 2004 to 2014, except in 2009, which was the year of a serious political crisis.<sup>119</sup> In New Zealand, the number of international visitors has increased from 2,061,610 in 2003, the year that the PRA was enacted, to 2,817,426 in 2014.<sup>120</sup> There is not even evidence



**Even supposing that decriminalisation did result in South Africa becoming known as a destination for sex tourism, the assertion that this would “chase away” other sorts of tourists is not supported by the evidence presented in the Report.**

117. ‘Fighting a rising tide of sex tourism’ (2010) *IRIN News*, 26 November 2010. Available at: <http://www.irinnews.org/report/91197/madagascar-fighting-a-rising-tide-of-sex-tourism>
118. *Ibid.*
119. World Travel and Tourism Council (2014). ‘Travel & Tourism Economic Impact 2014: Madagascar’. Available at: <http://www.wttc.org/-/media/files/reports/economic%20impact%20research/country%20reports/madagascar2014.pdf>
120. Statistics New Zealand. (2015). ‘International Visitor Arrivals to New Zealand’. Available at: [http://www.stats.govt.nz/browse\\_for\\_stats/population/Migration/iva.aspx](http://www.stats.govt.nz/browse_for_stats/population/Migration/iva.aspx)

of declining visitor numbers in countries that are very well-known as sex tourism destinations and do, to an extent, promote themselves as such. Thailand and the Netherlands, for instance, continue to attract increasing numbers of visitors.<sup>121</sup>

Even if we accept the assumption that some potential visitors might disapprove of sex work and so be less likely to visit a place where commercial sex is visibly taking place, it is not obvious that criminalising sex work has the effect of making it less visible. Aggressive policing often has the effect of displacing street sex workers from their preferred locations, meaning that they will be working over a wider area. When sex workers are not criminalised, on the other hand, the sale of sex tends to become concentrated in particular areas where sex workers feel safer and they know that clients can find them easily.<sup>122</sup> This means that tourists who wish to can visit these areas and those who are not interested can simply avoid them.

It is worth comparing this situation to the promotion of Cape Town as a tourism destination to LGBTIQ communities abroad. This promotion has, to a very significant extent, been a matter of official policy, with city tourism officials working on some marketing campaigns.<sup>123</sup> It is considered a point of pride that Cape Town, and South Africa generally, is able to promote itself as a tolerant and welcoming destination. And yet it is clear that many people around the world are homophobic and that the appeal of a holiday in Cape Town would probably be considerably *decreased* in their minds if they came to think of it as a 'gay destination'.

Two points are relevant here. The first is that Cape Town is not marketed in the same way in every possible venue. It would probably be a mistake, for instance, to highlight the city's LGBTIQ venues and cultural life in a magazine targeting a conservative Christian audience. Similarly, even supposing that the decriminalisation of sex work in South Africa also made it legal to advertise the sale of sexual services (which, as pointed out above, should not be taken for granted), it is highly unlikely that advertisers would target potential tourists who are likely to be put off by this information

The second point is that, if it was decided on business grounds that it was worth downplaying South Africa's progressive laws on LGBTIQ rights in order to attract conservative tourists, it would surely not be worth actually compromising the rights of LGBTIQ people. The human rights of South Africa's residents must be a higher priority than attracting tourists. The same goes for sex workers. As argued extensively in this document, there is now overwhelming evidence that decriminalisation is the best way to protect the safety, health and human rights of sex workers. To continue compromising these rights on the speculative grounds that protecting them might deter tourism is contrary to the Constitution of this country and our deepest values as a nation.

**Even if we accept the assumption that some potential visitors might disapprove of sex work and so be less likely to visit a place where commercial sex is visibly taking place, it is not obvious that criminalising sex work has the effect of making it less visible.**

121. World Tourism Organisation. (2015). 'UNWTO World Tourism Highlights, 2015 Edition'. Available at: <http://www.e-unwto.org/doi/pdf/10.18111/9789284416899>

122. Phil Hubbard & Mary Whowell. (2008). Revisiting the red light district: still neglected, immoral and marginal? *Geoforum*, 39(5):1743-1755.

123. Gustav Visser. (2003). Gay men, tourism and urban space: Reflections on Africa's "gay capital". *Tourism Geographies*, 5(2), pp. 168-189.

## 14 CONCLUSION

In summary, the SALRC Report recommends continued criminalisation of sex work in South Africa, despite the following findings in the Report itself:

- Under decriminalisation in New Zealand, people involved in the sex industry are “better off” now than under the previous legal dispensation; many of the social evils predicted by those opposed to decriminalisation have not been experienced (paragraph 2.176).
- Under a criminalised model, sex workers must work in secrecy, far from protection services, to allow buyers complete anonymity; this further endangers the sex worker and adds to the vulnerability of selling sexual services on the street (paragraph 2.481).
- “A change in the law away from criminalisation *would provide recourse* after the fact...” (paragraph 3.20).

Decriminalisation is expressly endorsed by official entities, such as the Commission for Gender Equality and the Department of Health. For example, at paragraph 4.105, Dr Mhlanga of the Department of Health submits that “non-criminalisation would protect human rights, provide access to health care, and prevent prostitutes from being abused by buyers, law enforcement [officers] and ‘middle men’.”

Most of the pro-criminalisation respondents speak from a moralistic point of view, with little to no reliance on rigorous evidence. For example, in response to the possibility of decriminalisation, paragraph 4.164 states that “a strong call for moral regeneration is made by numerous respondents, with a call for government to take a strong stand against prostitution”. Furthermore, their arguments are largely against decriminalisation, without providing reasons why continued criminalisation would solve issues such as police brutality and poor access to health care services – they simply state that these types of issues exist regardless of law reform. Essentially their entire argument rests on the idea that continued criminalisation will lead to a reduction and ultimately the removal of sex work. This result has not been achieved over the last sixty years of criminalisation in this country and no reason is given for thinking the future will be different. Operating on the reasonable assumption that sex work is likely to continue, it is surely prudent to suggest law reform that will promote the health and safety of all those involved.

On the whole, the Report seems to rely on selected evidence and does not adequately represent the voices of sex workers themselves. The aims of the Report – to reduce, deter or prevent sex work – shows a bias from the outset and sets the tone for the rest of the Report. The drafters seem to be trapped into a logical error of thinking that either sex work is ‘good’ and so must be decriminalised or is ‘bad’ and so must remain criminalised. By this way of thinking, arguing for decriminalisation is tantamount to denying the harm related to sex work. In fact, our position is rooted in both an acknowledgement that such abuses exist and a recognition that decriminalisation offers the most protection and recourse to sex workers who are abused.

We urge the Department of Justice to recognise these flaws of the Report when it makes its decision with regards to the adoption of the Report and any resulting law reform.

**Furthermore, their arguments are largely against decriminalisation, without providing reasons why continued criminalisation would solve issues such as police brutality and poor access to health care services – they simply state that these types of issues exist regardless of law reform.**

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# FACTS

ABOUT

# SEX WORKERS

AND THE MYTHS THAT HELP SPREAD HIV

THE LANCET series on HIV and sex workers

## Misconceptions about sex workers hinder effective HIV prevention programmes

THE MYTH IS...

BUT THE TRUTH IS...

THE IMPACT BEING...



All sex workers are women  
**FALSE**



Sex workers may be male, female, transgender or non-transgender and from diverse backgrounds<sup>7</sup>



Heterogeneity of epidemics across various groups<sup>7</sup>



Male sex workers are all gay  
**FALSE**



Often male sex workers with male clients don't identify as gay or bisexual and have female intimate partners<sup>5</sup>



Heterosexual identity in male sex workers represents increased risk among their non-paying female partners<sup>5</sup>



Transgender female sex workers face the same risk of HIV as male sex workers  
**FALSE**



Transgender women have distinct biological HIV risks from male sex workers or non-transgender women<sup>6</sup>



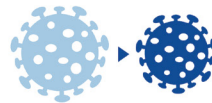
Transgender female sex workers demonstrate about **1.5 times** the risk of HIV compared to male sex workers<sup>6</sup>



Sex work is not a real job  
**FALSE**



Sex work is officially recognised as an occupation in Brazil, entitling sex workers to labour rights<sup>3</sup>



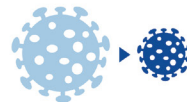
Community empowerment among sex workers reduced the odds of HIV by **32%**<sup>2</sup>



Sex workers won't use condoms  
**FALSE**



Greater success in condom uptake has been reported in sex workers than any other affected population<sup>2</sup>



Condom promotion in South Africa has reduced HIV in sex workers by more than **70%**<sup>2</sup>



Criminalising sex work prevents HIV spread  
**FALSE**



Police harassment forces hurried transactions which jeopardise condom negotiation<sup>1,4</sup>



**One third** of sex workers don't carry condoms as they are used as evidence of illegal sex work<sup>1,4</sup>

After close to twenty years of inquiry, the South African Law Reform Commission (SALRC) submitted its report on 'Adult Prostitution' (Project 107: Sexual Offences: Adult Prostitution) in June 2015 to the Department of Justice. This report appeared in the public domain only in May 2017, when the Commission released its findings in conjunction with the Department of Justice.

In its 530-page report, the SALRC ultimately supports continued criminalisation of sex work in South Africa, with minor modifications.

The Asijiki Coalition subsequently commissioned a rigorous analysis of the SALRC report. It is presented here entitled "What happened to the evidence?" and contains a detailed examination of the SALRC's stated evidence and argument. Through vigorous testing and drawing on current peer-reviewed, academic research, this analysis ultimately finds that the SALRC defended its conclusion of on-going criminalisation by a limited presentation of the evidence, problematic theoretical assumptions and logically unsound arguments.

This analysis concludes by urging the Department of Justice to recognise these flaws of the SALRC Report when it makes the ultimate decision on the legal model that should govern sex work in South Africa.

