

Joint Submission Regarding The South African Law Reform Commission (SALRC) Report 107 on Adult Prostitution

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Submission

This Joint Submission represents the position of our own organisations particularly, but more generally the worldwide movement of people that recognise prostitution as sexual exploitation and contrary to the rights of women to psychological and physical dignity. The recognition of the dignity of all people endorsed in the South African Law Reform Commission Report (SALRC Report) is an unparalleled opportunity to push back against the commodification of persons¹ endemic in the world today. As the SALRC Report notes on page xxii,

(The) Commission believes that legalising prostitution would increase the demand, locally and internationally, for more prostituted persons, and would foster a culture that normalises prostitution and sexual coercion. The Commission believes that due to the systemic inequality between men and women in South Africa, any form of legalisation will not magically address the power imbalance between the buyer and the prostitute, or the demand by buyers for unsafe or high-risk sex (SALRC Report, para:18).

We believe the efforts of those being funded to promote the sale of bodies for sex acts have contributed to the fact that South Africa currently has no national strategy to assist sex workers to choose decent livelihoods outside of prostitution. It must be underlined that even while organisations receive funding to advocate for the sale of sex acts as decent, normal everyday work, there is substantive case study material that shows the vast majority of women in the 'industry' don't see it that way and would exit if other livelihood choices were made available to them. That is to say, the 'departure from the occupation' as the Sex Workers Education & Advocacy Taskforce (SWEAT) submission calls it on Page 189 of the SALRC Report, is not the same as "exiting" in the context of everyday speech. The sense in which we are using the words "exiting program" is informed by the constitutional understanding of human dignity outlined in our submission below. We agree with the SALRC

¹ We recognise on p xii-xiii SALRC Report, '...the Commission has attempted to keep gender identification neutral in this Report, in several instances we have used feminine pronouns to refer to people who provide sexual services for payment and masculine pronouns for buyers of sexual services. Available evidence and research has shown that most prostitutes are women and most buyers are men. However, we recognise that a number of men and transgendered or transsexual people provide sexual services for reward and that a minority of female buyers exist.

report in its affirmation that prostitution does not fit comfortably into the international definition of decent work. Hence, the mandate for state assistance and intervention is grounded on the understanding that prostitution diminishes the inherent dignity of the human body. The contrary argument, that prostitution is a valid occupation, simply endorses the commodification and exploitation of women in particular, thereby supporting the dominant neo-liberal capitalist economic trend towards exploitation of the vulnerable. In our submission, we argue *inter alia* in support of the following findings by SALRC Report.

- A national strategy is needed to deal with prostitution focused on exiting strategies for those trapped in prostitution².
- Government should retain the constitutionally permissible criminalisation of prostitution (we endorse total criminalisation with a strong victim-centred justice approach)³.
- To accelerate prevention to reduce new HIV infections. It stands to reason that an unambiguous and resolutely constitutional stance regarding commodification of people must come from government.

We believe our position is in harmony with the South African Constitution, Chapter Two of the Bill of Rights, that recognizes the rights of all people in our country. We understand from the SALRC Report, that in *S v Jordan* – the Constitutional Court found that criminalizing prostitution is a constitutional option. Criminalisation of the perpetration of prostitution, while protecting the vulnerable who are exploited within this industry, ought to be recognised as a valid option. Accordingly, a proposed change of legal regime would require substantial legal and social evidence to justify any such change. Significantly, it would need to justify both its constitutionality and its impact on the interests of the marginalised and all South Africans.

The SALRC Report duly noted Robyn Fudge's (former public prosecutor and Senior State Advocate) observation and noting,

'...the proposal that prostitution must be non-criminalised to realise various constitutional rights is —specious. She argues that the question of the constitutionality of legislative measures to control adult prostitution has already been adjudicated by the Constitutional Court in the Jordan matter; any suggestion that the current legislative measures should be changed to be brought in line with the Constitution is simply incorrect. The Christian Lawyers

² SALRC Report, p5. 'the Commission has found that despite isolated cases of private and state run and funded programmes there is no national strategy to deal with prostitution. The Commission recommends that irrespective of the policy option chosen, a national strategy should be implemented to deal with prostitution. It further recommends that this national strategy should do the following: seek to implement the proposed legislation or policy; offer viable alternatives to prostitution; assist a person to exit prostitution should he or she express a willingness to do so; support reskilling, health and education initiatives for prostitutes; promote economic independence; and promote sexual health and safer sexual practices'

³ SALRC Report, p29. The Commission endorses the finding of the Constitutional Court per Justices O'Regan and Sachs where they held that where the existing Sexual Offences Act opts for prohibition, it is a constitutionally permissible legislative choice.

of South Africa agree that the criminalisation of prostitution does not deny prostitutes their basic human rights.’ (p 135 ibid).

The SALRC Report also shed light on misunderstanding regarding the *Kylie v Commission for Conciliation, Mediation and Arbitration and Others*⁴. *‘The Labour Appeal Court made a clear distinction between illegal — work and illegal contracts.’* It also makes it clear that, *‘This affords all people the right to fair labour practices and the right to organise, strike and to claim for constructive dismissal.’* (p 94 ibid)

African National Congress Resolution to decriminalise Adult Prostitution

We note with grave concern the African National Congress ANC National Elective Conference December 2017, resolution to decriminalise adult prostitution. The adoption of this resolution by the ANC translates to a dramatic departure from the current South African legal position that all prostitution-related activities are criminal offences. The ANC public endorsement of prostitution as akin to normal ‘work’ seems disconnected from the global and local discourse that recognizes prostitution and trafficking as forms of exploitation of the vulnerable. Joyce Outshoorn points out that even in the Netherlands selling sex is regarded as a form of work no woman would choose freely (Outshoorn, 2004), and Jan Jordan (2005) observes that New Zealand policy treats prostitution as a matter between consenting adults, rather than a form of employment⁵. It is therefore in the interest of the ANC to accept the decision of the Constitutional Court particularly because this decision is supported by the large majority of South Africans. South Africa has a civil society that is morally, ethically and spiritually grounded, a society that, if it were put to the vote, would not condone physical exploitation of vulnerable woman nationally (and globally) as a decent labour practice. Nor would South African civil society endorse a policy decision that would have both regional, continental and global repercussions, especially in terms of the trafficking of human bodies. Parliament has a mandate from the public and is answerable to the public for the way its mandate is exercised. It would be a mistake to assume parliamentary sovereignty, this is contrary to the new legal order established by the 1993 Constitution.

⁴ ‘...the Labour Appeal Court endorsed the Constitutional Court’s comments in *S v Jordan* that the illegality of prostitution should not strip prostitutes of their right to be treated with dignity by clients, and concluded that this should apply to employers as well. Although the court found that *Kylie* was an employee of the massage parlour, the employment contract was illegal, invalid and unenforceable. The result is that a person need not be engaged in legal —work || to fall under the protection of section 23 of the Constitution. Section 23 of the Constitution extends fair labour practice rights to all people and not just employees. This affords all people the right to fair labour practices and the right to organise, strike and to claim for constructive dismissal. The court did not, however, allow for an order of re-employment because in the current legislative environment this would have been seen to encourage participation in criminal activity. The Labour Appeal Court made a clear distinction between illegal — work and illegal contracts. *Kylie* merely performed an illegal job, which did not negatively impact on her employment status. The matter was referred back to the Commission for Conciliation, Mediation and Arbitration (CCMA) but a settlement was reached at this point, leaving the matter unresolved in the CCMA.’ p 94 ibid

⁵ *Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries* Liz Kelly, Maddy Coy and Rebecca Davenport Child & Woman Abuse Studies Unit (CWASU), London Metropolitan University.

The SALRC Report notes the Islamic Unity Convention submission in this regard,

‘...state-controlled prostitution effectively means that the state has acknowledged its failure to provide ALTERNATIVE EMPLOYMENT. It submits that should the state legalise prostitution, this would fly in the face of the aforesaid entrenched socio-economic fundamental rights. This would effectively mean that the constitutional socio-economic fundamental rights are in effect worthless and that the state has systematically decided that those constitutionally protected rights are no longer worthy of being respected, protected, pursued and enhanced. In short, the government would have failed the nation’. p 132 ibid.

The Gender Commission has Unfairly Discriminated against Faith Based Groups opposed to the legalization of prostitution

We are thankful to the Constitutional Court for correcting the Gender Commission’s argument that fallaciously dismissed the viewpoints of all faith based groups on three points summarized below:

- Moral and ethical claims should not be considered in court.
- Existing law is sufficient to address human trafficking and organized crime concerns. Therefore, prostitution should be considered in isolation of such considerations of trafficking and organized crime.

These logical fallacies, corrected by the Constitutional Court, are discussed below.

Are Moral Claims Necessarily Inadmissible?

The Constitutional Court Judgment noted,

‘To posit a pluralist constitutional democracy that is tolerant of different forms of conduct is not, however, to presuppose one without morality or without a point of view. A pluralist constitutional democracy does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but it is not neutral in its value system. Our Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep civic morality. As this Court held in Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC):’ p 69 ibid

For the record, we affirm both the value of the ‘legal choice’ that we are defending, as framed by the values of the South African Constitution, as well as the right to challenge even the South African Constitution (for example as with ANC land reform challenge). We are thankful that the SALRC Report (in harmony with the Constitutional Court) did not dismiss faith based submissions simply as a result of the secular biases of the Gender Commission. Rather, they evaluated the claims and concerns of faith based groups in terms of the Constitutional Values of South Africa and the merit of the arguments themselves. We trust that this honorable Multi-Party Women’s Caucus will likewise give us a fair hearing.

Is Existing Law is Sufficient to Disconnect Prostitution from Human Trafficking?

Regarding the 'existing law is sufficient' argument. The Gender Commission argued that existing South African law is sufficient to address human trafficking and organized crime concerns. It then concluded that prostitution should therefore be considered in isolation of such considerations. Failure to do so would inevitably expose a moral bias. Likewise, in the SALRC Report, the Sex Workers Education & Advocacy Taskforce (SWEAT) claimed, that - *'existing laws to deal with crimes associated with prostitution and prostitution related activities; these include money laundering, drug dealing, sexual violence, assault, extortion and blackmail...'* SALRC Report responds to this 'naïve' claim as follows;

'...it would be naïve to think that prostitution could be neatly excised from the above activities through non-criminalisation. Prostitution would continue to be shaped by the same socio-economic factors that concentrate crime in areas plagued by poverty, inequality and unemployment. Country reports from Australia and the Netherlands confirm this pattern. Violence perpetrated by buyers and other role players apparently continue unabated in non-criminalised settings (p 15 ibid).

In the *S v Jordan* Judgment, the court argued that the 'demand side' of prostitution can be dealt with via existing laws in answer to the legal representative of the Gender Commission who insisted that a change in legal regime was necessary to address demand inequality (contradicting themselves - the law is sufficient but not sufficient). It follows we believe that the arguments in question cannot be said to imply bias necessarily. However, as was pointed out, it does not follow that prostitution can be disconnected from the 'demand side' any more than it can be disconnected from a trafficking context. The 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, (Palermo Protocol) includes a requirement to address the issue of demand⁶. The demand for trafficked persons, we argue is easier to conceal in a legalised regime. Prostitution, pimping and maintaining brothels— *'fuel the growth of modern-day slavery by providing a facade behind which traffickers for sexual exploitation operate.'*⁷ Deputy Minister, Ms Fatima Chohan put it this way, argued against the legalisation of prostitution:

"Here again the onslaught in the name of human rights takes the form of calls for the legalisation of prostitution as if this is a benign practice which holds all promise for the attainment of the total emancipation of women. Nothing in these debates record the

⁶ The US Department of State 'The Link Between Prostitution and Sex Trafficking'. 2004 notes. "Where prostitution is legalized or tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and children trafficked into commercial sex slavery... The 'State' attempts to regulate prostitution by introducing medical check-ups or licenses but doesn't address the core problem: the routine abuse and violence that form the prostitution experience and brutally victimize those caught in its netherworld. Prostitution leaves women and children physically, mentally, emotionally, and spiritually devastated. Recovery takes years, even decades—often, the damage can never be undone."

⁷ The US Department of State 'The Link Between Prostitution and Sex Trafficking'. 2004

*indignity, degradation and disgrace suffered by women and children who are trafficked in the so-called 'trade'.*⁸

To reiterate, the abuse of vulnerable ought not to be reduced to economic criteria alone. It is therefore disingenuously academic to disconnect considerations of trafficking from prostitution more generally. Many labour and sex trafficking victims don't even know they are victims of a crime⁹.

Misinformation is further fueled by the fact that significant aspects of this domain of exploitation, including deceit, fraud, grooming, manipulation and trauma bonding often go unreported to the relevant authorities. Hence, we affirm the SALRC Report and the Constitutional Court judgment in their assessment of the Gender Commission's argument as fallacious and ultimately contra to women's right to a decent working occupation.

It is important to emphasise that the rule of law should not be undermined by narrowly focused policy decisions. It is in the public domain that government has conceded that law enforcement in the context of prostitution has shown instances of unethical behavior. Thus, the State may unintentionally place all the responsibility of upholding constitutional rights on those who are most vulnerable. In endorsing legalization of prostitution, labour rights will then instantiate when law enforcement is ostensibly no longer necessary (the state thereby abdicating responsibility for claiming rights to the individual). However, this does not necessarily follow, as the claiming of rights will still depend on law enforcement.

It is important to note that human trafficking (vulnerability) is not connected to poverty alone. Meghan Hampsey points out, inequality and the exploitation thereof transcends narrow framings. . In Human Traffickers Only Target "Poor and Uneducated" Individuals, she notes,

In the 2010 case U.S. v. Askarkhodjaev, recruiters lured college students from Mexico, the Philippines, and the Dominican Republic into forced labour by lying to them about the work, wages, hours, and living conditions they would receive in the United States. By charging recruitment fees that left the victims indebted, and threatening deportation if they went to authorities, traffickers were able to control and manipulate the victims into working in various businesses throughout the country.

⁸ www.Africacheck.org

<https://africacheck.org/reports/are-30000-kids-trafficked-into-south-africas-sex-trade-every-year-the-claim-exaggerates-the-problem/>

⁹ SALRC Report p 161 Nation Building Submission, cautions that the close connections between prostitution and organised criminal activity cannot be denied or minimised. The submission quotes Jeffreys (2006) in —Prostitution and Trafficking in Australia: 20 years of liberalization || , as follows: In the Australian state of Victoria, where large parts of the sex trade have been legal since 1984, one of the strongest arguments put forward for the legalisation of prostitution was that it would inhibit criminal involvement and reduce opportunities for police corruption. Neither of these have, however, materialised. Members of crime families still own and run brothels, often as a front for the actual owner; many managers and associates have an inexplicably high death and injury rate; investigations have been undertaken into corrupt police officials suspected of laundering money through legal brothels; illegal brothels have spread; and numbers of women trafficked for sexual exploitation — primarily from Thailand but increasingly from China and Korea — have increased to the point where police estimate that approximately AU\$1 million is earned from trafficked women each week.

Going after organized crime is not a straightforward matter. That is why tax evasion was the only thing available to prosecute Al Capone (a famous example). Often crimes of Sex Trafficking are complicated by the trauma and grooming which victims have endured. Likewise, South Africa has been plagued by corruption and crime. Dealing with the exploitation inherent in prostitution requires some policy creativity. This will be made more complicated if government chooses to convert brothels, sex clubs, massage parlors and other sites of prostitution activities into legitimate venues where commercial sexual acts are allowed to flourish legally with few restraints.

*'We find that countries with legalized prostitution have a statistically significantly larger reported incidence of human trafficking inflows. This holds true regardless of the model we used to estimate the equations and the variables we control for in the analysis. Also, the main finding is not dominated by trafficking to a particular region of the world.'*¹⁰

We applaud the work of the Hawks (DPCI) in targeting trafficking situations in South Africa. With this in mind we endorse the finding of the SALRC Report with particular reference to the need for specialised policing units. This we believe will go a long way to reform law enforcement and uphold the rule of law in South Africa.

Narrow Labour Paradigm

Prostitution cannot be viewed exclusively via a narrow labour paradigm any more than the de-humanising frame of non-personhood can be separated from slavery. Gender based violence, sexual addiction, and amoral dysfunction cannot be disconnected from notions of sexual commodification of persons¹¹. The South African Constitutional court does not view prostitution as merely a private matter between consenting adults either. In the S v Jordan Judgment the court observed,

'...because of the commercial character of the activity involved, the right to privacy of the prostitutes is attenuated. What is also clear is that there is a strong public interest in the regulation of prostitution in a manner which will foster the achievement of equality between men and women.' p 63 S v Jordan Judgments

Furthermore, SALRC Report points out on page thirteen of the SALRC Report that neither the International Labour Office (ILO) Decent Work Agenda and the Decent Work Programme for South Africa view prostitution as a solution to poverty and inequality. The South African Constitutional court judgment noted;

'We were not told of any society in which prostitution is regarded as a normal business activity just like any other, or a legitimate form of self-expression just like any other. Neither has any example been brought to our attention of international law or domestic constitutional

¹⁰ Seo-young Cho, Axel Dreher, Eric Neumayer, Does Legalized Prostitution Increase Human Trafficking?, Published in World Development, p 6.

¹¹ Donald L. Hilton, Jr and Clark Watts. Pornography addiction: A neuroscience perspective. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3050060/>

law which has been used in any country successfully to challenge laws penalising prostitution on the grounds that such laws violated rights of autonomy or rights to pursue a Livelihood.’ p 64 ibid

In the case of both New Zealand and Australia, it has been argued that prostitution was introduced via colonialism. Historically, transactional sex is not common to indigenous African culture either. This evidence embarrasses the efforts of those who argue that prostitution is a necessary evil which is part of worldwide culture going back centuries¹². The SALRC Report notes,

‘Some people may (even if subconsciously) consider prostitution a fair choice for a particular sector or class of women. In this light, prostitution might be considered somehow acceptable for poor women, vulnerable women, and women of colour instead of being seen as sexual exploitation and a human rights violation. If this notion is supported then our society is effectively tolerating the creation of a separate, expendable, throwaway class of women. Research discussed in this Report and submissions (written and oral) made to the Commission have shown that intrinsic to prostitution are numerous violations of human rights: sexual harassment, economic servitude, educational deprivation, job discrimination, partner and family violence, racism, classism, vulnerability to frequent physical and sexual assault, and being subjected to body invasions that are equivalent to torture. By legalising prostitution, society would fail to acknowledge that prostitution preys particularly on women who are vulnerable and choose prostitution as a last resort. The Commission is not convinced that changing the legal framework to one of non-criminalisation would address the violations or vulnerability experienced by prostitutes’ (p 1, ibid)

This evidence is strengthened as survivors find courage to speak out against the oppression of prostitution. The following is a statement made by survivors (see Survivors Manifesto, Joint CATW- EWL Press Conference, 2005):

‘We, the survivors of prostitution and trafficking gathered at this press conference today, declare that prostitution is violence against women. Women in prostitution do not wake up one day and ‘choose’ to be prostitutes. It is chosen for us by poverty, past sexual abuse, the pimps who take advantage of our vulnerabilities, and the men who buy us for the sex of prostitution.’

According to the Islamic Unity Convention submission the in the SALRC Report:

‘The right to freedom of trade, occupation and profession does not include nor can it be extended to prostitution, as that would be nothing but the denial of the right to dignity and the legalisation and legitimisation of the enslavement of people. To do so would be to maintain and further such enslavement. The fact that other countries (e.g. western countries) have done so is no criteria for a young African country trying to heal after more than 300 years of oppression of the indigenous population, especially its women.’ (p 131).

¹² Jordan, J. (2005) The Sex Industry in New Zealand: A Literature Review. Wellington: Ministry of Justice. Note: As with Australia, there is no history of prostitution in New Zealand predating colonisation.

Exploitative Environments

We believe the SALRC Reports efforts to draw a sharp distinction between the word ‘consent’ in terms of an imagined entry into a ‘profession’ vs consent at the so called, ‘point of sale’ is problematic. This because some may attempt to hide the exploitative environments which informs the decision behind the equivocal use of the word ‘consent’. We will look at this in more detail later in this submission (with reference to youth). What is clear from the Prevention and Combating of Trafficking in Persons Act (PCTP Act) — consent cannot be isolated to exclusively ‘point of sale’ styled definitions. The context of persons described by the PCTP Act as, ‘the exploitation of vulnerability’ plays a significant role in identifying the offence of trafficking.

The Understanding the Intersections of Economic Exchange, Sex, Crime and Violence in South Africa Study¹³ profiled the ‘demand’ side of prostitution saying,

‘The study has also shown that most men who have had sex with women in prostitution are not ‘normal’ men. They are all more likely to have engaged in a range of illegal practices. Further the largest group of these men, those who had also had sex or relationships predicated on their occupying a provider role, displayed a self-focused, instrumental masculinity. They had the most pronounced gender inequitable attitudes and psychological attributes indicating ruthlessness in interpersonal relations. They were also much more likely to have engaged in a range of acts of gender-based violence. As such they pose a considerable threat to women in prostitution.’

The Gender Commission seems confused in this regard. From the S v Jordan Judgment we hear that the Gender Commission’s representative argued to the affect that ‘male patrons’ abuse human rights (*use their economic means to obtain sexual gratification*). The Gender Commission then argues for the normalisation of this behaviour via total decriminalisation as if the legal regime change would remedy this form of abuse. We argue that it is more consistent to argue for the application of current law in targeting ‘male patrons’ (as was argued in S v Jordan Judgment). Margareta Winberg Former Deputy Prime Minister of Sweden Speech in Stockholm Nov. 5-6, 2002 said,

‘I believe that we will never succeed in combating trafficking in women if we do not simultaneously work to abolish prostitution and the sexual exploitation of women and children. Particularly in light of the fact that many women in prostitution in countries that have legalised prostitution are originally victims of trafficking in women.’

These ethical insights should not be lost in the political battlefield as to how best to serve the rights of women. Clearly, internationally it is recognized that the legalization of prostitution does not support women’s right to a non-exploitative livelihood.

¹³ Rachel Jewkes, Robert Morrell, Yandisa Sikweyiya, Kristin Dunkle, Loveday Penn-Kekana, Men, Prostitution and the Provider Role: Understanding the Intersections of Economic Exchange, Sex, Crime and Violence in South Africa, Published: July 20, 2012
<https://doi.org/10.1371/journal.pone.0040821>

Legalisation is Not an Enlightened Panacea

The SALRC Report is alive to the challenges of access to health, the prevention of the transmission of HIV, and addressing arbitrary arrest and exploitation of women at risk. The SALRC Report notes that the people that buy sex acts can and do transmit diseases to women. The critical point is that condom policies aimed at reducing the spread of disease and pregnancy seem ineffective or unenforceable because buyers of sex mostly resist condom use. Decriminalisation of prostitution will still focus all the responsibility on the most vulnerable in the name of public health. As the SALRC Report underlines,

—women only health checks do not make sense for public health because monitoring prostituted women would not protect them from HIV/AIDS or STIs. This is because male clients can and do originally transmit such diseases to the women (p 17 ibid)

We share the concern of all stakeholders regarding the HIV prevalence. We note with concern, the lack of verifiable data in regard to the number of prostituted people and the prevalence of HIV/AIDS and STIs¹⁴. To accelerate prevention to reduce new HIV it stands to reason that an unambiguous and resolutely constitutional stance must come from government. As noted in the SALRC Report,

‘SANAC National Strategic Plan for HIV, STIs and TB 2012 -2016 (NSP) objectives would significantly improve use of health services. These objectives can be implemented independently of the legislative framework governing prostitution.’

The Commission found that prostitution in South Africa is ‘...driven by a complex intersection of social and economic factors in which poverty, unemployment and inequality are key drivers and has thus been mindful that our Constitution requires that the law be a means to achieve social justice’. It is significant as the SALRC Report goes on to say, internationally “liberalised” settings are abandoning flawed assumptions as they are persuaded by the evidence of harm and exploitation of prostitution and hence are implementing ‘Claw back’ measures to move away from legalising¹⁵. As other countries in the world, with strong economies, watertight borders and an operative rule of law, claw back from failed attempts at prostitution legalisation, the South African Government is really not in a position to experiment with the lives of the vulnerable in South Africa.

With this said, the option is to maintain the criminalisation of all prostitution related offences, focusing on prosecuting the perpetrators, while protecting the rights of sex workers, seems the logical way forward for South Africa. This option coupled with state affiliated diversion programs which facilitating the restoration and reintegration of prostitution survivors, will uphold the rule of law and protects the vulnerable from both organised crime and the overwhelming tide of gender based violence in South Africa. The warrant for state

¹⁴ The SANAC one month rapid evaluation of the national prostitution population estimated approximately 153 000 people in prostitution in South Africa (research led by SWEAT). We are concerned that this research has not been collaborated by other reliable data points. We agree with the SALRC Report that

¹⁵ Prostitution is totally criminalised across Africa (not Senegal), USA (not Nevada), and India

assistance and intervention should really be grounded on the understanding that prostitution is demeaning of persons (not just business as usual as SWEAT is suggesting). Furthermore, groups like SWEAT are effectively blocking the momentum for government to look into helping those trapped in prostitution. After decriminalisation, as evidenced by the Netherlands, Germany and New Zealand, prostitution is framed as an uncomfortable necessity, the impetus to provide any existing service disappears. That is to say, the 'departure from the occupation', as the SWEAT submission calls it on page 189 of the SALRC Report, does not warrant additional state involvement which would otherwise would be justified under a criminal justice response (as is the case in parts of the USA)

Anomalies in Law

SALRC Report notes

*It is necessary to point out that the Sexual Offences Amendment Act contains a potential anomaly. Although a child is legally allowed to consent to a sexual act (which includes touching or penetration) from the age of 16, a consensual sexual act with a child is criminalised as exploitation of the child where such an act is **accompanied by a reward or payment**. The aim seems clearly to protect this category of children from sexual exploitation. This Report in no way derogates from the criminalisation of under-aged prostitution (younger than 18 years). The Commission endorses section 17 of the Sexual Offences Amendment Act and the use of 18 years as a defining line between child and adult prostitution. The added protection is justified due to the vulnerability of children. Anyone paying a consenting child between 16 and 18 for sexual services could be charged with committing the offence of sexual exploitation of a child (child prostitution).*

With this 'reward' in mind we are concerned about the term 'transactional relationships' being used as the mainstay of sex work ideology. We maintain that sex work does not comply with the concept of decent work, from the point of view of the vulnerable women who are often driven to this form of labour out of desperation. The right to choose a decent occupation is at issue here, and from a gender perspective, the legalization of prostitution will not prevent exploitation.

*The Commission maintains that true transactional relationships should not be confused with adult prostitution. Although transactional relationships do not form part of this investigation, preliminary research has uncovered troubling trends that require attention. The Commission therefore recommends that relationships of this nature, as a growing social phenomenon, be further investigated from a social and gender-based violence intervention perspective (in contrast with the need for legal intervention or law reform) (p 9-10 *ibid*)*

We observe the social and structural driver leading a significant number of young women towards having sexual relationships – many of which are transactional in nature – with men who are five to 10 years older than they are as being directly connected to the abuse of vulnerability defined in the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

Young women (aged between 15 and 24 years) have the highest HIV incidence of any age or sex cohort, at 2.01% in 2015.] Young women in their early 20s have a four-fold burden compared to their male peers, with approximately 2 000 new HIV infections occurring weekly, or 100 000 of the 270 000 new infections a year, [3] and one third of teenage girls become pregnant before the age of 20. Responding to the social and structural drivers of this vulnerability (which leads young women towards having sexual relationships – many of which are transactional in nature – with men who are five to 10 years older than they are) is key to controlling the epidemic. - p 7 South Africa's National Strategic Plan for HIV, TB and STIs 2017-2022

The euphemistic *'transactional in nature'* seems to be vulnerable to being misused. If sex work is just like any other work then this very broad definition may well conceal juvenile entry into prostitution. It seems intuitive, we suggest, that young people may incorrectly assume if sex acts for sale are acceptable for some, then it should be acceptable for all. Using the word 'Work' creates the expectation of automatic labour rights. Keep in mind that children from the age of fifteen may enter the labour market. Advocates of sex work advocates have relentlessly attempted to disconnect children from the 'sex work'. It is however uncontroversially the case that many, if not most, sex workers 'started out' under age. The findings of the *South Africa's National Strategic Plan for HIV, TB and STIs 2017-2022* indicate that this message of sexualised commodification cannot be disconnected from its influence as a social grooming tool which will increase the vulnerability of youth to exploitation. A UNESCO 2007 report estimated 30,000 child prostitutes in South Africa. *'Once involved in the criminal environment children can be emotionally intimidated, physically moved and trapped into trafficking'*, the report claimed¹⁶.

We agree with the argument The Islamic Forum Azaadville in the SALRC Report that, *'...the differentiation between child prostitution and adult prostitution is both legal and academic. The Forum submits that adult prostitution feeds off child prostitution. The Forum cautions against non-criminalisation, saying that insufficient police manpower and resources would ensure that adult prostitution would continue to operate under the façade that child prostitution is absent, whereas in reality children in prostitution will be paraded as adults. The Forum believes that non-criminalisation will cause the phenomenon of child prostitution to grow unhindered, in time growing the adult population of prostitutes.'*

Professor Rassie Malherbe (University of Johannesburg, Faculty of Law, Professor of Public Law, Faculty of Law, and former Head of the Department of Public Law) put it this way, in regard to the South African constitution.

'Inherently and by definition, the practice of prostitution demeans those who are involved and constitutes the most direct and blatant denial of human dignity. In Jordan v S the Constitutional Court explained that by its very nature prostitution diminishes and devalues the dignity of human beings: Our Constitution values human dignity which inheres in various

¹⁶ UNESCO, Human Trafficking in South Africa: Root Causes and Recommendations In South Africa, No 14.5 (E).

aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected ... To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body ... The dignity of prostitutes is diminished ... by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body" from the Coalition To End Sexual Exploitation South African (CESESA) Correspondence.

Creating an Environment to Help Prostitutes Exit Prostitution

We endorse approaching the rights issues inherent in prostitution with a strong gendered, social justice centered approach. The approach we recommend would avoid the trap of a dualistic legal regime. The soliciting and exploitation of sex workers should remain a crime. The sex worker should have a range of choices both to avoid being criminalized but also to exit the industry, the main focus being on creating alternatives for the most vulnerable. The latter is the most important part of a more compassionate and comprehensive strategy to address this from both a labour and a gender rights point of view. Unless both the demand and the supply side are tackled in tandem, South Africa will not succeed in preventing, deterring or reducing prostitution and the exploitation and health citizenship issues that accompany it. To the contrary, the legalization of prostitution would legally justify this form of exploitation, and given the high rates of youth unemployment in South Africa, would in all likelihood see a sharp and shocking rise in the number of sex workers, including those under-age, with a concomitant rise in levels of exploitation and outright physical abuse. South Africa has already a huge problem with violence, especially sexual violence towards women. It also has a problem with migration and trafficking. We argue that prostitution and trafficking cannot be delinked. These national problems will be significantly added to by the legalisation of prostitution in South Africa, with profoundly negative regional, continental and global consequences.

We thank the Multi-Party Women's Caucus for your careful consideration of our submission.

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