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Our Reference: Prostitution
Date: 26 February 2018

Multi-Party Women's Caucus, Parliament
For Attention: Honourable RMS Morutoa, MP
By Email: bmantyi@parliament.gov.za

Honourable Madam Chairperson,

RE: SUBMISSIONS ON THE SALRC REPORT ON PROJECT 107 ON ADULT PROSTITUTION

A. INTRODUCTION

- 1 We refer to the abovementioned matter, specifically the Parliamentary press statement on 8 February 2018, alerting stakeholders to submit inputs and responses to the South African Law Reform Commission's (SALRC's) Report 107 on Adult Prostitution (SALRC Report) for the purposes of the Multi-Party Women's Caucus' (MPWC) Summit to be held on 5 March 2018.
- 2 Cause for Justice ("CFJ/We") hereby want to thank the MPWC for the opportunity to present you with these written submissions, as may be amplified by oral representations at the Summit or at a later stage, and in so doing to be able to participate in the policy-making process.
- 3 We focus our submissions on matters affecting rights, values and interests protected and/or promoted in the Bill of Rights and related matters affecting the public interest in the context of adult prostitution and prostitution-related activities.

B. BACKGROUND TO CAUSE FOR JUSTICE

- 4 CFJ is a non-profit human rights and public interest organisation founded in 2013 to advance constitutional justice in South Africa, primarily through participation in the legislative process and governmental decision-making structures, litigation and through creating public awareness. Four of CFJ's core values give it a particular interest in the law applicable to adult prostitution, namely (1) the responsible exercise of freedom, (2) protection of the family unit, (3) protection and promotion of human dignity/worth, and (4) protection of the vulnerable in society (social justice).

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Interest and background in matters pertaining to “sexual exploitation”

- 5 During 2013, 2014 and up to March 2015, CFJ was involved as one of three applicants in the “ICASA // StarSat (formerly TopTV)” judicial review case to overturn ICASA’s legally flawed decision to approve three dedicated pornographic channels as part of TopTV’s suite of channels in South Africa. The matter was disposed of in CFJ and its co-applicants’ favour in the Supreme Court of Appeal after a second failed ‘leave-to-appeal’ application by TopTV.
- 6 In addition, CFJ also made submissions to the Films and Publications Board later in 2015 as part of the public participation process on the Draft Online Content Regulation Policy and is a participant in the SALRC’s Project 107 - Sexual Offences: Pornography and Children (still on-going).
- 7 Furthermore, CFJ has been a stakeholder and active participant in the Parliamentary process on the Films and Publications Amendment Bill, 2015, which proposes (amongst other interventions) the legalising of online pornography in South Africa. The public participation process in the Portfolio Committee on Communications took place from April to October 2016 and the National Assembly is now preparing to debate and vote on the Bill at its Second Reading on 6 March 2018.
- 8 At present, CFJ has the backing of an intensive five-year track record in the law (and law reform) pertaining to sexual exploitation.

C. STRUCTURE OF SUBMISSIONS

- 9 Our submissions are structured as follows:

- 10 **E.1 The current state of the law in South Africa**

- What is prostitution?
- History of the law on prostitution in South Africa and the rest of the world
- The constitutional basis of current South African law and S v Jordan
- International law
- Foreign law

- E.2 Is there a need for law reform?**

- **E.2.1 Concerns regarding prostitution**

- The SALRC Report
- Other research on the harms of prostitution
- Lobby groups’ representation of prostitution

- **E.2.2 Conclusion: Causes of the harms of prostitution**

- **E.2.3 Impact on constitutional rights**

- **E.2.4 Conclusion: The extent to which law reform is required?**

E.3 Law reform proposals

E.3.1 Full criminalisation (with diversion)

E.3.2 Partial criminalisation (prostitute not criminalised)

E.3.3 Socio-economic interventions and exit programs

E.3.4 Conclusion regarding proposals for law reform

E.4 Conclusion

D. INTRODUCTION

- 11 As introduction to our submissions, CFJ would like to state categorically that persons involved in the practice prostitution are not treated truly as human beings with intrinsic value in and of themselves. When prostituted, a person is solely or mainly used as an object for the sexual stimulation and gratification of another. The prostitute's sexuality is not protected or promoted in the context of human individuality, dignity and personhood. We submit that prostitution, by its very nature, involves a violation of human dignity and that the limitation of freedom to engage in prostitution and prostitution-related activities would on these grounds alone, be both reasonable and justifiable.
- 12 South Africa currently follows a regime of total criminalisation. Internationally a trend to address the demand side of prostitution by partial criminalisation (wherein the prostitute's actions are not criminalised) is gaining support. While this approach recognises that prostitution is inherently sexual exploitative, we have reservations whether this model would be successful in South Africa. An extremely well-researched and considered report of the SALRC shares these reservations on well-founded grounds and expresses a preference for full criminalisation, with effective exit/diversion programmes to empower women economically and socially.
- 13 Prostitution originates in desperate socio-economic circumstances which leave predominantly women with very few survival options. Furthermore, the practice of prostitution is inherently harmful, carries heightened risks of violence and is associated with trafficking and other criminal activities. We therefore favour the retention of the total criminalisation of prostitution with strong diversion programmes to assist vulnerable individuals to exit prostitution.

E. SUBMISSIONS

E1. Current state of the law in South Africa

- 14 South Africa currently follows a regime of total criminalisation. Prostitution and prostitution-related activities (the keeping of brothels, the procurement of persons as prostitutes, soliciting by prostitutes, and living off the earnings of prostitution) are criminalised in terms of the Sexual

Offences Act¹ and the Sexual Offences Amendment Act.² The conduct of all persons involved in prostitution (the prostitute, users of prostituted services and third parties such as brothel owners and pimps) are criminalised.³

Definition of prostitution

- 15 The Oxford English Dictionary defines prostitution as “the practice or occupation of engaging in sexual activity with someone for payment”.⁴ Prostitute is defined as “a person, in particular a woman, who engages in sexual activity for payment” and “A person who misuses their talents or behaves unworthily for personal or financial gain”.⁵
- 16 The SALRC Report describes prostitution as “referring to the buying and selling of sexual acts and related activities”⁶ and a prostitute as “an adult person (older than 18 years) who voluntarily offers or provides sexual services for financial or other reward, favour or compensation, irrespective of whether the sexual act occurs or not”.⁷ The SALRC Report definition of prostitute does not include any underage and/or coerced prostitute, or a person who has been trafficked for purposes of prostitution.
- 17 Prostitution and prostitution-related activities are criminalised in terms of the Sexual Offences Act⁸ and the Criminal Law (Sexual Offences and Related Matters) Amendment Act.⁹
- 18 The Sexual Offences Act criminalises (1) any person who keeps a brothel,¹⁰ (2) any person who procures or attempts to procure a female for the purposes of prostitution, for the purposes of becoming an inmate of a brothel, or drugs a female for the purposes of prostitution,¹¹ (3) any person who assists another in engaging in prostitution,¹² (4) any person who permits prostitution to be committed on a premises owned or controlled by that person,¹³ (5) any person

¹ Sexual Offences Act 23 of 1957.

² Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

³ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 87.

⁴ Oxford English Dictionary Online *Definition of “Prostitution”* <https://en.oxforddictionaries.com/definition/prostitution>.

⁵ Oxford English Dictionary Online *Definition of “Prostitute”* <https://en.oxforddictionaries.com/definition/prostitute>.

⁶ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 45.

⁷ *Ibid.*

⁸ Sexual Offences Act 23 of 1957.

⁹ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Amendment Act”).

¹⁰ Section 2 of the Sexual Offences Act 23 of 1957.

¹¹ Section 10 of the Sexual Offences Act 23 of 1957.

¹² Section 12A of the Sexual Offences Act 23 of 1957.

¹³ Section 17 of the Sexual Offences Act 23 of 1957.

enticing and/or soliciting another to commit or committing immoral acts in public,¹⁴ and (6) any person living of the earnings of prostitution.¹⁵

19 Neither the Sexual Offences Act nor the Amendment Act however specifically defines prostitute or prostitution.

20 Section 20(1A) of the Sexual Offences Act criminalises prostitution – the acts of the prostitute. Section 20(1A) reads:

Any person 18 years or older who –

- (a) has unlawful carnal intercourse,¹⁶ or commits an act of indecency, with any other person for reward, or
 - (b) in public commits any act of indecency with another person,
- shall be guilty of an offence.

21 Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act reads:

A person ('A') who unlawfully and intentionally engages the services of a person 18 years or older ('B'), for financial or other reward, favour or compensation to B or to a third person ('C') –

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
 - (b) by committing a sexual act with B,
- is guilty of the offence of engaging the sexual services of a person 18 years or older.

22 The demand side of prostitution, accordingly is criminalised in terms of Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

23 We submit that any legal definition of prostitution cannot be divorced from the socio-economic circumstances from which prostitution originates or the harms it causes. Any description of prostitution should also be cognisant of its impersonal, promiscuous, commodifying and commercial nature. Prostitution can therefore conveniently be described as –

“the commodification of human sexuality for purposes of the commercial exploitation of the bodily expression of human sexuality through sexual acts.”

¹⁴ Section 18 of the Sexual Offences Act 23 of 1957.

¹⁵ Section 20 of the Sexual Offences Act 23 of 1957.

¹⁶ “unlawful carnal intercourse” is defined in section 1 of the same Act as ‘carnal intercourse otherwise than between husband and wife’.

- 24 Since most prostituted persons are women and most users of prostituted services are men, for the sake of convenience and practically, these submissions will refer to prostitutes in female terms, and to users of prostituted services, in male terms.

History of the law on prostitution in South Africa and the rest of the world

- 25 The recorded history of European prostitution begins in the ancient Greco-Roman world. In ancient Greece there were four classes of prostitutes. While the highest class of prostitutes enjoyed considerable political influence, the lowest class of prostitutes were socially isolated and forfeited any rights that originated in citizenship. Even the children of these women were penalised by not being allowed to inherit property. Extensive legislation regulated the brothels which were state-owned and staffed by slaves. In ancient Rome, prostitutes were required to register at a magistrate's office in order to obtain a licence. Unlicensed prostitutes were arrested, punished and evicted from the city.¹⁷
- 26 Prostitution was not outlawed in medieval Europe. It was seen as immoral, but also as a necessary evil that should be allowed in order for men to have access to women's bodies for the purposes of men's sexual gratification. Legal mechanisms did not seek to eradicate prostitution, but rather to control and contain it. Prostitution was tolerated, but stigmatised.¹⁸
- 27 Only during the Reformation did social policies change from tolerating prostitution to completely prohibiting prostitution by criminal sanction.¹⁹
- 28 In South Africa, prostitution was criminalised in 1988 when Parliament amended the Immorality Act and renamed it the Sexual Offences Act.²⁰
- 29 Prior to 1998, "while it was considered necessary to prohibit certain aspects and manifestations of prostitution in the public interest it was deemed neither necessary nor appropriate to prohibit the occupation of the prostitute. Accordingly, engaging in sexual intercourse in order to receive a material or pecuniary reward was not prohibited by penal sanction."²¹ While prostitution narrowly defined, was not criminalised under either the common or statutory law, various activities associated with prostitution were criminalised, including soliciting, living off the earnings of prostitution and keeping a brothel.²²

¹⁷ SALRC Discussion Paper *Project 107 Sexual Offences Adult Prostitution* (2009) at 110 and 111.

¹⁸ SALRC Discussion Paper *Project 107 Sexual Offences Adult Prostitution* (2009) at 110 and 111.

¹⁹ *Ibid.*

²⁰ Sexual Offences Act 23 of 1957.

²¹ J Burchel and J Milton *Principles of Criminal Law* 2 ed (1997) 629 and 630.

²² S Pudifin and S Bosch "Demographic and Social Factors influencing Public Opinion on Prostitution: an Exploratory Study in Kwazulu-Natal Province South Africa" (2012) *PER* 6.

The constitutional basis of current South African law and S v Jordan

- 30 In *S v Jordan*,²³ the Constitutional Court confirmed the constitutional validity of section 20(1)(aA) of the Sexual Offences Act.²⁴ The constitutional validity of the section was challenged on the bases of the right to human dignity (gender discrimination), the right to privacy, the right to freedom and security of the person, and the right to economic activity.
- 31 With regard to the right to human dignity (alleged gender discrimination), the Court held that section 20(1A)(a) does not discriminate either directly women or indirectly against prostitutes by only criminalising the conduct of prostitutes, as the term prostitute is gender neutral and the purpose of the section is to criminalise commercial sex and not to protect the users of prostituted services.
- 32 The Court held that section 20(1A)(a) is a constitutionally reasonable and justifiable limitation of the right to privacy, the right to freedom and security of the person, and the right to economic activity.
- 33 The Court found in respect of the right to privacy that a person cannot appeal to the protection of the right to privacy in order to commit a crime in private and avoid criminal punishment for that crime. Furthermore, prostitutes solicit users of their services to engage in the crime of prostitution in private. Crimes committed in private are not less criminal in nature or less serious than crimes committed in public.
- 34 In respect of freedom and security of the person, the Court found that the prostitute makes herself liable for arrest and imprisonment by engaging in prostitution and is therefore able to avoid arrest and imprisonment by not engaging in prostitution. If the criminalisation of voluntary adult prostitution is constitutionally valid, being arrested and imprisoned for engaging in the crime of prostitution is a reasonable and justifiable limitation of a prostitute's right to freedom and security of the person.
- 35 Forced prostitution and/or trafficking are not criminal offences. A person will not be prosecuted as a criminal if they have been *forced* to engage in prostitution and/or have been trafficked. The law regards such a person as a victim of a sexual crime and not a perpetrator of a sexual crime.
- 36 The state argued that the purpose of the Sexual Offences Act is to promote the protection or the improvement of the quality of life and human development. This purpose is sanctioned by section 26 of the interim Constitution. Prostitution is known to be associated with violence,

²³ *S v Jordan* 2002 (6) SA 642 (CC).

²⁴ Section 20(1)(aA) has since been deleted but has been replaced by an identical provision contained in section 20(1A)(a).

substance abuse, trafficking and other criminal activities and accordingly, its legal prohibition is reasonable and justifiable.

- 37 The Constitutional Court's judgment in *S v Jordan* is strong confirmation that the criminalisation of prostitution and prostitution-related activities is constitutionally valid under South African law. We return to the discuss the reasoning of the Court later herein when considering the need for law reform.

International law

- 38 South Africa has ratified two significant United Nations conventions which relate to prostitution. When a country ratifies a convention, it engages in an international act whereby it indicates its consent to be legally bound by that convention.
- 38.1 South Africa is a signatory to the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others²⁵. South Africa ratified the convention on 10 October 1951. In its preamble, the convention stipulates that ***“prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community”***.
- 39 South Africa is also a signatory of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁶ South Africa ratified the convention on 15 December 1995. In Article 6 thereof, the convention stipulates that ***state parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.***
- 40 South Africa is a state party to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime²⁷ (the Palermo Protocol), which declares in its preamble that state parties thereto agree to ensure that “effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights”.

²⁵ UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949).

²⁶ UN Convention on the Elimination of All Forms of Discrimination against Women (1979).

²⁷ UN United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (2000).

- 41 Article 3(a) of the Palermo Protocol defines trafficking in persons 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.²⁸
- 42 According to Waltman²⁹, “most people who are in prostitution are subject to the treatment contained in the Palermo Protocol” since the definition of trafficking in the Protocol “in reality describes pimping as commonly conducted”. Therefore, prostitution generally is considered a form of trafficking by the United Nations as recognised by the United Nations Special Rapporteur on Trafficking.³⁰
- 43 Waltman states that “for the most part, prostitution as actually practised in the world usually does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution and/or a person's experiences within prostitution do not involve, at the very least, an abuse of power and/or an abuse of vulnerability. Power and vulnerability in this context must be understood to include power disparities based on gender, race, ethnicity and poverty. Put simply, the road to prostitution [...] is rarely one marked by empowerment or adequate options.”³¹
- 44 As is clear from the abovementioned, South Africa is bound by international law to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women and South Africa has also legally acknowledged that it considers prostitution incompatible with the dignity and worth of the human person and that it endangers the welfare of the individual, the family and the community. The significance and importance hereof is profound.

Foreign law

- 45 Below we briefly summarise the legislative and policy approaches to prostitution in a selection of foreign jurisdictions. Approaches to prostitution range from legalisation with or without regulation, to partial criminalisation (where the buyers of prostituted services and third parties

²⁸ Article 3(a) of the UN *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (2000).

²⁹ M Waltman “Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law” (2011) *Michigan Journal of International Law* 134.

³⁰ Ibid.

³¹ Ibid.

involved in the selling of prostituted services are criminalised, but not the prostitutes themselves), to full criminalisation.

- 46 In general, there has been a trend towards viewing prostitutes as the victims of sexual exploitation.

United States of America

- 46.1 The United States of America (USA) has a federal system of government, which means that states may adopt different policies and laws about certain matters, like prostitution. Generally, in the United States of America (USA) follows the criminalisation model³² and consequently the offering and/or purchasing of prostituted services and related activities are illegal and subject to criminal sanction. The state of Nevada is a notable exception, as brothels may be legally operated in designated areas.³³
- 46.2 The USA is increasingly adopting a strategy of suppressing the demand for prostituted services. Prostitutes are treated as victims rather than criminals and the degree to which they can be prosecuted is limited. Instead, law enforcement targets the purchasers of prostituted services.³⁴

Canada

- 47 Canada follows a regime of partial criminalisation.³⁵ Recently the constitutionality of three provisions of the Canadian Criminal Code was successfully challenged in the Supreme Court of Canada.³⁶ The three provisions prohibited the operation of common bawdy-houses³⁷, living on the income of prostitution, and communicating for the purpose of prostitution in public. The Court held that it did not make a ruling on whether prostitution should be legal or not, only on whether the challenged provisions were constitutionally sound. The Court further held that the Canadian legislature was not precluded from imposing limits on where and how prostitution may be conducted as long as the rights of prostitutes were not infringed.
- 48 Prostitution is seen as a form of exploitation and prostitutes as victims rather than criminals.³⁸ In response to the Supreme Court decision, the Canadian legislature amended the Canadian

³² SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 95.

³³ A Chauhan "How do Prostitution Laws differ around the World?" (10/11/2017) <<http://www.advocatemail.com/legal-articles/3190-how-do-prostitution-laws-differ-around-the-world.html>>

³⁴ R Garfinkel. "A New Twist on World's Oldest Profession: Nab the Johns, not the Prostitutes" (13/03/2017) <<https://www.washingtontimes.com/news/2017/mar/13/working-women-prostitution-law/>>

³⁵ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 104.

³⁶ *Canada (Attorney General) v Bedford* 2013 SCC 72.

³⁷ Brothels, including a prostitute's own home.

³⁸ A Maclvor "How Changes to Prostitution Laws shifted the Way Police tackle the Issue" (16/0/2017) <<http://www.cbc.ca/news/canada/nova-scotia/nova-scotia-prostitution-law-human-trafficking-police-1.4162524>>

Criminal Code by enacting the Protection of Communities and Exploited Persons Act. The Act effectively criminalises the demand side and commercial exploitation of prostitution by inter alia prohibiting the purchasing of sex, operating brothels and pimping, and advertising sexual services.³⁹

United Kingdom

- 49 In England and Wales, the offering and purchasing of prostituted services are legal, but many prostitution-related activities are illegal and criminalised. Illegal activities relate to the exploitation of a prostitute which include controlling prostitution, managing a brothel, and activities that can be public nuisance, like soliciting sex in public.⁴⁰ While purchasing sex is not illegal per se, the Sexual Offences Act of 2003 (as amended by the Policing and Crime Act of 2009) prohibits the soliciting a person in a street or public place for the purpose of obtaining sexual services from a prostitute.⁴¹ The approach in the United Kingdom is therefore to address and limit the demand for prostitution.
- 50 Northern Ireland follows a regime of partial criminalisation. It is legal to sell sex and to solicit in public. It is illegal to purchase sex, to keep a brothel or control prostitution for profit.⁴² The prohibiting on the purchase of sex is currently being challenged in Court.⁴³
- 51 In Scotland selling sexual services is not illegal, but activities associated with prostitution is illegal, such as soliciting, kerb-crawling, and brothel keeping.⁴⁴

Australia

- 52 Australia is a federal system and each state may decide its own prostitution regime. In Queensland, New South Wales, the Australian Capital Territory, and Victoria, prostitution is legal and regulated. In Western Australia, the Northern Territory, Southern Australia and Tasmania, independent prostitution is legal and unregulated, but brothels are illegal.
- 53 For example, in the state of Victoria, prostitution is regulated by the Prostitution Control Act 102 of 1994, which legalises indoor prostitution while street prostitution and commercial sex (in massage parlours and flats) remain illegal. The purpose of the Act is to regulate prostitution in

³⁹ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 108.

⁴⁰ House of Commons Home Affairs Committee Report *Prostitution* Third Report of Session 2016-17 (July 2016)

⁴¹ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 100.

⁴² Government of North Ireland "Paying or Sexual Services" (undated) <<https://www.nidirect.gov.uk/articles/paying-sexual-services>>

⁴³ Z Tabary "Sex worker to challenge Northern Ireland prostitution law" (05/02/2017) <<https://www.smh.com.au/world/sex-worker-to-challenge-northern-ireland-prostitution-law-20170205-gu5r44.html>>

⁴⁴ SCOT-PEP "The Law – Outdoors" (undated) <<http://www.scot-pep.org.uk/sex-workers-toolkit/law/law-outdoors>>

Victoria. The Act imposes substantial penalties for illegal activities and provides onerous regulations for legal operations. While the Act sought to regulate prostitution and improve the health and safety of prostitute's, it has instead caused the emergence of a two-tier system of a legal operations and illegal operations with circumstances in the illegal sector remaining dire.⁴⁵ In Queensland, where a similar trend has emerged, an estimated 90% of brothels are illegal.⁴⁶

New Zealand

- 54 Prostitution was decriminalised in New Zealand in 2003 under the Prostitution Reform Act.⁴⁷ It is legal to sell sexual services, keep a brothel, live of the proceeds of someone else's prostitution, and soliciting on the street.⁴⁸ Prostitution is further regulated by generic employment, and health and safety laws as well as prostitution specific laws that prohibit the exploitation of prostitutes.⁴⁹ For example, prostitutes have the right to refuse to have sex with a client even if the client has paid, and cannot be fined for refusing the client, while purchasers may refer contested contracts to a dispute tribunal.⁵⁰

The Netherlands

- 55 The Netherlands follow a non-criminalised regulated model.⁵¹ Prostitution, including brothel-keeping, is legal and regulated by the imposition of municipal regulations on the location, organisation and the practice of prostitution. Once all regulatory requirements have been fulfilled, a licence to sell sex may be obtained from the municipal office.⁵²
- 56 While the Netherlands, particularly Amsterdam, is well known for its sex tourism industry, recently the Dutch government has begun considering reintroducing stricter prostitution-related laws due to the link between prostitution and criminal activity.⁵³ After the legalising of prostitution in the Netherlands, organised crime spiralled out of control and women in prostitution were no safer than when prostitution was illegal.⁵⁴ The Dutch legislature also recognised and emphasised that prostitution is not work like any other, since a prostitute cannot

⁴⁵ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 111.

⁴⁶ *Ibid.*

⁴⁷ Kelly L at al *Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries* (2009) at 26 and 27.

⁴⁸ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 108.

⁴⁹ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 109.

⁵⁰ *Ibid* at 109.

⁵¹ *Ibid* at 114.

⁵² *Ibid* at 115.

⁵³ *Ibid* at 116.

⁵⁴ M Farley "Very inconvenient Truths: Sex Buyers, Sexual Coercion, and Prostitution-Harm-Denial" (2017)

<<http://logosjournal.com/2016/farley-2/>>

be held to an employment contract which forces the prostitute to engage in sexual services without violating the most fundamental human rights like safety and security of the person.⁵⁵

Germany

57 In Germany, prostitution is legal, but regulated.⁵⁶ The Prostitutionsgesetz (Prostitution Act) of 2001 imposes zoning restrictions and requires the registration of brothels, while the advertising of sexual services remains prohibited in terms of administrative laws.⁵⁷ Prostitution is regarded by law as any other form of labour. Prostitutes enjoy labour rights and are required to pay taxes. But treating prostitution as any other normal profession has led to some absurd results.⁵⁸

58 A German woman, who is trained as an IT professional, was seeking employment and registered at an employment agency. In her application, she indicated her willingness to attend interviews for positions falling outside of the IT sector. She received an invitation for an interview at a bar, but realised that it was a position that required her selling her body for sex. She declined the interview. Because prostitution is seen as a normal profession under German law, she was seen as turning down an offer of employment. Under German law, if a job seeker turns down a legal offer of employment, that job seeker may lose their unemployment benefits. Therefore, under German law women can be forced to choose between working as a prostitute or losing their unemployment benefits. This is both an absurd and shocking situation, and one to take heed of as “you *may* be a prostitute” can easily digress to “you *shall* be a prostitute”.

Sweden

59 Sweden has partially decriminalised prostitution.⁵⁹ The users of prostituted services, pimps and brothels remain criminalised, but not the prostitutes themselves. This is known as the Nordic Model and it has gained considerable support worldwide.⁶⁰ This model has enjoyed

⁵⁵ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 116.

⁵⁶ A Chauhan “How do Prostitution Laws differ around the World?” (10/11/2017) <<http://www.advocatemail.com/legal-articles/3190-how-do-prostitution-laws-differ-around-the-world.html>>

⁵⁷ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 113.

⁵⁸ C Chapman “If you don't take a job as a prostitute, we can stop your benefits” (30/01/2005) <<http://www.telegraph.co.uk/news/worldnews/europe/germany/1482371/If-you-dont-take-a-job-as-a-prostitute-we-can-stop-your-benefits.html>>

⁵⁹ Swedish Government Report *SOU 2010:49 The Ban against the Purchase of Sexual Services. An evaluation 1999-2008* (2010)

⁶⁰ M Goldberg “Swedish prostitution law is spreading worldwide – here's how to improve it” (08/08/2014) <<https://www.theguardian.com/commentisfree/2014/aug/08/criminalise-buying-not-selling-sex>>

considerable success and has resulted in significant reductions in street prostitution and sex trafficking.⁶¹

60 The Nordic Model considers the selling of a person's body for the sexual gratification of another to be inherently exploitative and not compatible with human dignity. It sees prostitutes as victims of exploitation and therefore seeks to eradicate prostitution by addressing the demand for prostituted services.⁶²

E.2 Is there a need for law reform?

61 The fundamental question that needs to be answered, is whether law reform is at all necessary. In order to answer this question, we need to critically assess both the nature and effect of prostitution, prostitution-related activities and how current South African prostitution laws fits within the matrix of constitutional rights, values, obligations and the interests that undergird them. In this regard, the most important constitutional rights are the right to (1) equality, (2) human dignity, (3) freedom and security of the person, (4) privacy, (5) freedom of trade, occupation or profession, and (6) health care, food, water and social security, and the right (7) not to be subjected to slavery, servitude and forced labour.

61.1 We will examine the impact that prostitution, prostitution-related activities and current South African prostitution laws have on these fundamental rights to formulate a reasoned and authoritative opinion on whether legislative reform is at all necessary. Furthermore, we will consider whether prostitution and prostitution-related activities respect, protect, promote and fulfil any of these fundamental rights or are prejudicial to the proper use and enjoyment of these rights.

61.2 A related consideration is whether prostitution is a desirable practice at all. If, for argument's sake, the inherent nature of prostitution is that it is harmful, to the individuals engaged therein and/or to society generally, for the good and benefit of all prostitution should then not be protected but rather discouraged through all available means. In such circumstances, the appropriate legislative response would be to recognise its harms by prohibiting the practice thereof.

61.3 A further significant consideration is whether the harms of prostitution will best be addressed and solved by a legislative response, a socio-economic response or a combination of both. We will argue that the practice of prostitution is primarily socio-economic in origin and that any

⁶¹ Z Aleem "16 Years Since Decriminalizing Prostitution, Here's What's Happening in Sweden" (13/03/2015) <<https://mic.com/articles/112814/here-s-what-s-happened-in-sweden-16-years-since-decriminalizing-prostitution#.5ZvXZU1cw>>

⁶² Swedish Government Report *SOU 2010:49 The Ban against the Purchase of Sexual Services. An evaluation 1999-2008* (2010)

legislative response to prostitution is at best reactionary. Prostitution will only be eradicated if the socio-economic circumstances that give rise thereto are addressed and solved.

62 In this regard, the position of the SALRC offers significant guidance. The Commission conducted a thorough and laborious research project into the subject of prostitution, recognising that the origin of prostitution is found in desperately disadvantaged socio-economic circumstances.

E.2.1 Concerns regarding prostitution

The SALRC Report - Introduction

63 The SALRC found that prostitution is inherently exploitative in nature and characterised by dominance and violence.⁶³ The Report finds that prostitution is not work in any conventional sense of the word; it is a survival strategy.⁶⁴

64 Indeed, the Report recognises the inherently exploitative nature of prostitution and recommends that “prostitution should not be recognised as a reasonable means to secure a person’s living in South Africa, and from a formal labour perspective should not be considered to be work or decent work.”⁶⁵ This is a significant conclusion since the legal acceptance of ‘prostitution as work’ is a major objective of those who contend for the legalising of prostitution and argue that the decriminalisation of prostitution will address and remove the harms associated with the practice thereof.

65 . The Report states that the objective should be to create opportunities for decent and productive work that will contribute to the reduction of inequality and poverty.⁶⁶ The developmental challenges of inequality and poverty are known causes of prostitution. Legalising prostitution cannot be promoted as a solution to poverty since prostitution is not “an employment option for poor or marginalised people”.⁶⁷

66 It is therefore crucially important to recognise that ultimately legalising prostitution will not benefit either prostitutes or society, but instead ignore the socio-economic and physiological origins of prostitution and exacerbate its harms.

⁶³ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 204, 218 and 225.

⁶⁴ *Ibid* at 200.

⁶⁵ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at xviii.

⁶⁶ *Ibid*.

⁶⁷ *Ibid*.

67 The SALRC as well as other researchers⁶⁸ and organisations⁶⁹ that focus on prostitution specifically and the sexual exploitation of women generally, have concluded that the legalising of prostitution will not address the harms of prostitution since the harms of prostitution are inherently rooted in the activity of prostitution itself. This is a view we support based on the soundness of the basis thereof – research findings and first-person accounts of lived experiences of prostitutes.

68 In summary, these harms include (1) prostitution carries an extremely high risk of prostitutes experiencing physical violence and psychological trauma, (2) racism, sexism and class prejudice are intrinsic in prostitution, (3) prostitution involves indirect sexual coercion for economically marginalised prostitutes and is closely associated with sex trafficking, and (4) prostitution is associated with substance abuse and other criminal activities.⁷⁰

The SALRC Report – Discussion

69 The SALRC has found that prostitution is inherently exploitative.⁷¹ The SALRC came to this conclusion after a thorough process of investigation, public participation, consideration of research and law on a global scale and proper application of all its observations to the South African context. Findings based on such extensive work by a specialist body designed and mandated to make recommendations to government should only be departed from in the most exceptional of circumstances, for example if it could conclusively be proved that to follow the recommendations would result in grave injustice.

70 In this regard, the Constitutional Court’s pronouncements on the nature and effect of prostitution is instructive, as it is the final arbiter on all matters of constitutional import.

71 In *S v Jordan*, the court held that the

“Our Constitution values human dignity which inheres in various 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. We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the

⁶⁸ Melissa Farley.

⁶⁹ National Center on the Sexual Exploitation.

⁷⁰ National Center on the Sexual Exploitation *Amicus Brief (Erotic Service Provider Legal Education and Research Project v. Gascon, 16-15927)* (2018).

M Farley “Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly” (2006) *Yale Journal of Law & Feminism*.

⁷¹ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 204, 218 and 225.

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. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but 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.⁷²

- 72 From the perspective of exploitation, women are essentially coerced into a life of prostitution due to economic marginalisation, educational deprivation, job shortages and gender discrimination.⁷³ These socio-economic conditions make women particularly vulnerable for recruitment into a life of prostitution.
- 73 The Report states that economic marginalisation can be seen as a form of subtle or indirect coercion. This means that even where a woman seems to voluntarily choose to enter prostitution, since she is making a choice between prostitution as a form of income over a life of absolute poverty, her choice is not really a voluntary choice. Her desperate circumstances, limited choices and vulnerability essentially force her into prostitution.⁷⁴
- 74 From this perspective, decriminalising prostitution will only add insult to injury. Already the desperate socio-economic circumstances that give rise to prostitution are not being adequately addressed. From the above we conclude that prostitution is a symptom of an underlying cause: a severe lack of choices.⁷⁵ No young girl walks around with the dream in her heart to one day be a prostitute. It is ultimately the lot of those without choices.
- 75 Similarly, desperate socio-economic circumstances cause other criminal activities. It would be absurd to suggest for example, that petty thievery and drug dealing should be legalised. At least a drug dealer has the option of not using the drugs that he sells and not experiencing the physiological harms thereof in his body. A prostitute does not even have this option as she experiences the physiological and psychological harms of prostitution in and through her body.
- 76 The Report states that an empirical study of 150 countries found that countries in which prostitution is legalised, has significantly higher instances of human trafficking compared with countries in which prostitution is not legalised.⁷⁶ The Report notes that similar to other illegal markets like drugs, illegality does not eradicate the illegal market. In fact, it has been found that

⁷² S v Jordan 2002 (6) SA 642 (CC). at 74.

⁷³ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 201.

⁷⁴ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 63.

⁷⁵ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at xvi.

⁷⁶ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 70.

when prostitution is legalised and the practice becomes less socially condemned, the purchasers of sexual services and third parties like brothels and pimps, typically become more brazen in violent behaviour.⁷⁷ It seems that the social stigma attached to the purchasers of sexual services, keeps the already violent behaviour of the purchasers in check to some degree. When prostitution is legalised, the social check (conscience of exploitation) is removed.

77 The Report states that prostitution can also involves gender-based violence.⁷⁸ Most prostitutes are women and most purchasers of sexual services are men. Historically, men have held more traditional positions of social and economic power than women. The prevalence of gender-based violence against women in South Africa is well documented. South Africa has recognised the special need to empower women socio-economically and protect them from gender-based violence, given past and current social realities. Legalising prostitution will frustrate this very laudable objective as it will entrench gender imbalances and its consequences (e.g. gender-based violence against women) and make it even more socially acceptable.

78 From this perspective (social acceptability), prostitution is not a private act, but a social statement about the status and worth of women in society. If it is socially acceptable and legally condoned that a human being can be reduced to a mere organ or orifice for used for the sexual gratification of another, society has a very low view of women.⁷⁹ Prostitution is degrading, humiliating and causes physical and psychological harm to nearly all women. Prostitution necessarily exposes women to violence (not *all* women, but the vast majority of them). Most prostitutes have been or will be physically abused and raped.⁸⁰

79 Due to the overwhelming evidence of the harms of prostitution, the SALRC Report does not favour the decriminalisation of prostitution.

Other research on the harms of prostitution

80 The National Center on Sexual Exploitation (NCOSE)⁸¹ and Dr Melissa Farley⁸², represent an organisation and an individual researcher who have conducted thorough research on the harms of prostitution. We will briefly discuss the findings of their research findings.

⁷⁷ M Farley "The Real Harms of Prostitution" (19/10/2010)

https://www.mercatornet.com/articles/view/the_real_harms_of_prostitution/8143

⁷⁸ Ibid at 73.

⁷⁹ M Farley "Very inconvenient Truths: Sex Buyers, Sexual Coercion, and Prostitution-Harm-Denial" (2017)

<<http://logosjournal.com/2016/farley-2/>>

⁸⁰ National Center on the Sexual Exploitation *Amicus Brief (Erotic Service Provider Legal Education and Research Project v. Gascon, 16-15927)* (2018) at 25.

⁸¹ National Center on the Sexual Exploitation *Amicus Brief (Erotic Service Provider Legal Education and Research Project v. Gascon, 16-15927)* (2018).

- 81 The harms of prostitution also include (1) prostitution carries an extremely high risk of prostitutes experiencing physical violence and psychological trauma, (2) racism, sexism and class prejudice are intrinsic in prostitution, (3) prostitution involves indirect sexual coercion for economically marginalised prostitutes and is closely associated with sex trafficking, and (4) prostitution is associated with substance abuse and other criminal activities.
- 82 It is well documented that most if not all prostitutes will experience physical or sexual violence.
- 83 Most prostitutes are women and prostitution seems most prevalent under socio-economically marginalised women. Women forced into prostitution due to lack of socio-economic choices are seen as and become a separate class of women who are perceived as less worthy women.
- 84 Since most women in prostitution entered the practice as a survival strategy due to desperate socio-economic circumstances, whether these women truly consent to prostitution is highly questionable at best and objectively speaking, highly improbable. In this sense, prostitution is sexual coercion, albeit subtle and indirect. When someone has nothing left to make a living with – the produce of their hands or intellect (whether labour or goods) – they are forced to consider and proceed to sell their last resort, their bodies or organs. At such point, choice and consent no longer play a role, as actions flow from circumstances that were void of options to begin with.
- 85 The link between prostitution and sex trafficking has also been well documented. Where there is a decrease in the demand for prostitution, there is a decrease in sex trafficking.
- 86 Even countries that have legalised prostitution, such as the Netherlands, have recognised the correlation between prostitution and other criminal activities and are considering stricter prostitution laws as a result.

Lobby groups' representation of prostitution

- 87 Some lobby groups and organisations argue that the decriminalising of prostitution will “reduce harm, abuse and exploitation by bringing prostitution practices into the mainstream”.⁸³ These groups further argue that decriminalising prostitution will allow prostitutes to have access to rights, including labour-related rights, and enable them to have their rights enforced against the police, community and “employers”. According to this perspective, prostitution should be legal, regulated and monitored. As long as prostitution is criminalised, these groups argue, prostitutes are denied basic rights and suffer harm.

⁸² M Farley “Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly” (2006) *Yale Journal of Law & Feminism*.

⁸³ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 118.

- 88 Yet, as shown above, it is the act of prostitution itself that carries the risk of harm to the prostitute and the SALRC found that prostitution cannot be seen as work.
- 89 Sex Workers Education and Advocacy Taskforce (SWEAT) argues that when prostitution is legalised, the relationship between prostitutes and the police, the state and society will improve and prostitutes will be granted the same rights as other ordinary citizens.⁸⁴ This argument does not address the basic factual reality which is that prostitution is inherently harmful and exploitative. Legalising prostitution will not eradicate the harms of prostitution, it will only legalise the very source of the harm. As shown above, the Constitutional Court held that criminalising prostitution does not unreasonably or unjustly limit any constitutional rights.
- 90 People Opposed to Women Abuse (POWA) argues that criminalising prostitution makes women vulnerable to violence, discriminates against women and facilitates the conditions under which women prostitutes continue to be harassed and physically or sexually abused by pimps, brothel owners, purchasers and clients and the police.⁸⁵ However, the violence and abuse associated with prostitution is not created by legislation, but originates in the act of prostitution itself. The only way to end sexual abuse and violence against women in prostitution is to eradicate prostitution. Legalising prostitution does not reduce sexual abuse and violence, in fact it seems to embolden it.
- 91 Furthermore, the necessary laws to protect women against sexual abuse and violence are already in place. Such acts are criminalised under South African Law, which means that the status of the law is not the problem. The problem lies elsewhere, potentially in that these laws that are already in place, are not properly enforced. *Criminalising* prostitution does not make women vulnerable to violence, *prostitution* makes women vulnerable to violence.
- 92 Sonke Gender Justice argues that decriminalising prostitution will make prostitution and prostitutes safe, reduce gender-based violence and improve public health.⁸⁶ Current South African prostitution laws do not prevent prostitutes from obtaining health care. If health care workers discriminate against prostitutes, education programs to sensitise health care workers are necessary.
- 93 Prostitution laws do not cause gender-based violence or make prostitutes and prostitution unsafe. These harms associated with prostitution are inherent to prostitution and will exist wherever prostitution is practiced, irrespective of whether the prostitution regime in place. Legalising prostitution turns a blind eye to the inherently exploitative nature of prostitution.

⁸⁴ Ibid at 118.

⁸⁵ Ibid at 119.

⁸⁶ Sonke Gender Justice "Decriminalisation of Sex Work" (undated) <<http://genderjustice.org.za/project/policy-development-advocacy/decriminalisation-sex-work/>>

94 Similarly, to SWEAT, POWA and Sonke Gender Justice, the Asijiki Coalition argues that the criminalisation of prostitution violates the human rights of prostitutes. As we will show hereinbelow, prostitution itself is the human rights violation and criminalising prostitution recognises this fact. In the same way that for example assault is a human rights violation, legalising assault will not change the inherent nature or harmful consequences thereof. Even if assault were legalised, it will remain the violation of another's body, usually associated with psychological consequences for the victim, even if the law ceases to attach any consequences to the act or its damaging effects.

E.2.2 Conclusion: Causes of the harms of prostitution

95 As stated above, the harms of prostitution are linked to the act of prostitution itself. When a woman sells her body, a part of her body or a body orifice, she sacrifices her personhood because she is used as an object or thing. She is reduced to her utility to address another's need for sexual gratification. South African law does not allow persons to be sold as objects (whether by others or by themselves) as that would be slavery and/or be contrary to the right to human dignity.

96 Being treated as an object, psychologically harms a person very severely, as that person disassociates from their personhood and regard themselves as an object in that moment. They are stripped of their power and agency.

97 The violence associated with prostitution also originates in the objectification of prostituted women.⁸⁷ Psychologically, when person purchases an object, that person is free to do with and treat that object as he wishes. The object may not protest and it has no feelings or rights. This is undoubtedly one of the reasons men who purchase prostituted services from women use to justify their violent treatment of these women.

98 Therefore, the only way to cure the harms of prostitution is to deal with the cause of the harm. The cause of the harm is the devaluing of human beings which is inherent in prostitution - the commodification and exploitation of women's bodies as objects for sexual gratification. Seen from this perspective, prostitution itself is the problem and the only way to address the harm is to eradicate prostitution.

E.2.3 Impact on constitutional rights

⁸⁷ M Farley. Comparing Sex Buyers with Men Who Don't Buy Sex. 2000.

- 99 Prostitution violates fundamental constitutional rights, most pertinently the right to human dignity.⁸⁸ Since most prostitutes are women, the practice also reflects entrenched discrepancies between the power of men and the power of women, and superficially the practice indicates that it is acceptable for women to be objectified and used by men, even if women are severely injured in the process.
- 100 Due to many women entering prostitution due to a lack of income alternatives, the consent of such women to their sexual exploitation is of a questionable quality. It is a desperate choice and may be a form of indirect coercion. It may be argued that prostitution violates the right not to be subjected to slavery, servitude or forced labour.
- 101 Criminalising prostitution is a reasonable and justifiable limitation of the right to privacy, freedom and security of the person (in fact, prostitution is arguably a violation of this right), and the right to freedom of trade, occupation or profession. As shown above, prostitution cannot be regarded as work.
- 102 As shown above, prostitution originates mainly in desperate socio-economic circumstances and the severely injures women, both physically and psychologically.

E.2.4 Conclusion: The extent to which law reform is required?

- 103 We submit that the harms of prostitution are inherent in the activity of prostitution itself. On the 'prevention of harm' and 'improvement of quality of life' policy considerations, law reform will only be required if two factors were present:
- 103.1 If the harms and the social/economic marginalisation of prostitution flow either solely or mainly from the fact that prostitution is fully criminalised (current status of our law), as opposed to from the act of prostitution itself and/or its underlying causes; and
- 103.2 If the decriminalisation of prostitution, whether fully or partially, would result in the reduction or negating of the harms of prostitution and improvement of the quality of life for prostitutes.
- 104 As discussed hereinabove, the conclusion is inescapable - the fact that prostitution is a criminal offense is not the sole or main cause of the harms, health risks, gender discrimination and social/economic inequalities of prostitution.

⁸⁸ See in this regard the Constitutional Court's findings at paragraph [74] of its judgment in *S v Jordan*, quoted at 71 above.

105 As such, it would therefore be inconceivable that the decriminalisation of prostitution will address the harms and improve the social circumstances for women.

E.3 *Law reform proposals*

E.3.1 *Full criminalisation (with diversion)*

106 The SALRC Report lists the option of full criminalisation with diversion as its first alternative. In this option, all aspects of prostitution and prostitution-related activities remain criminalised. This option includes the important imperative of diversionary programmes to help women exit prostitution.

107 We support this option because it legally recognises that prostitution is undesirable since it is a human rights violation and inherently violent and exploitative. It recognised that, as is the case with drugs, society through the legislature has a duty to protect its people from harmful practices.

108 We are also encouraged by the recognition of this option that women need help to exit prostitution. It recognises that the majority of these women are victims of their circumstances to a significant degree. We would suggest that the criminal record of women who successfully exit prostitution, as far as their record relates to prostitution and prostitution-related activities, be expunged.

E.3.2 *Partial decriminalisation (prostitute not criminalised)*

109 The SALRC Report lists the option of partial decriminalisation as its second alternative.

110 We support the focus of this option to address the demand side of prostitution. This option, which is known as the Nordic-model, is garnering significant support in an increasing number of jurisdictions.

111 This option also recognises that prostitution is harmful and needs to be eradicated and that prostitutes are victims of sexual exploitation. For this option to be practically effective, law enforcement has to actively address the demand side of prostitution. Otherwise, prostitution and prostitution-related activities will continue or even increase. The demand side of prostitution is already not deterred by the criminalisation of prostitution. Therefore, if the demand side is not actively policed, this option will not be effective to eradicate prostitution.

112 It is generally known that the South African police force faces challenges relating to management, resources and staff. Unless a specialised prostitution unit can be establish and

maintained, we cannot support this option, because if this option is not effectively implemented, it will likely do more harm than good.

- 113 Furthermore, we also have reservations about decriminalising inherently self-harming behaviour that constitutes a basic human rights violation. Again, to use the example of harmful drugs, society has a duty through the legislature to prohibit such activities.

E.3.3 Socio-economic interventions and exit programs

- 114 Since the origin of prostitution is socio-economic circumstances coupled with commodification/devaluation of women, the only way to effectively eradicate the harms of prostitution is to address the socio-economic circumstances that give rise thereto. The challenge to eradicate prostitution is therefore a developmental challenge. This is admittedly an enormous challenge and we appeal to the MPWC to focus their attention on the development of social and economic development strategies that will focus on the socio-economic upliftment of women and ultimately enable women caught in prostitution to exit from it.

- 115 We also propose that civil society be encouraged, incentivised and enabled to establish strong and sustainable diversion programmes to help women to permanently and successfully exit prostitution. These programs will have to focus on economic and social re-integration, psychological counselling and education with a focus on skills training that will enable women to join the formal labour force. We suggest that the MPWC can play an important role in initiating a participatory process that will start to build the infrastructure for such programmes.

E.3.4 Conclusion regarding proposals for law reform

- 116 In light of the foregoing, we propose the retention of the total criminalisation of prostitution coupled with strong diversion programs. A human rights-based society cannot condone and tolerate human rights violations that originate from the vulnerability of a group of persons which renders that group relatively powerless and easily exploitable due to their desperate socio-economic circumstances.

- 117 If prostitution is legalised, as one survivor put it, “to be prostituted is humiliating enough; to legalize prostitution is to condone that humiliation, and to absolve those who inflict it. It is an agonizing insult.”⁸⁹

⁸⁹ Lauren Hersh (Equality Now) “[Legalized prostitution has not reduced stigma or exploitation.](https://womennewsnetwork.net/2013/09/23/legalized-prostitution-stigma/)” (23/09/2013)
<<https://womennewsnetwork.net/2013/09/23/legalized-prostitution-stigma/>>

- 118 If prostitution is legalised, we will fail the socio-economically marginalised women of South Africa. The harms of prostitution are inherent therein and severe. The only way to protect women and society from these severe harms, is to eradicate it by all available means, including - to focus on eradicating demand for prostitution, to actively establish viable opportunities for women to exit prostitution and/or not enter prostitution in the first place and through legal/criminal prohibition.
- 119 We therefore support the SALRC's first option, being the total criminalisation of prostitution (with diversion).

F. CONCLUSION

- 120 In light of the above, we want to reiterate that prostitution is inherently exploitative in nature and rightly seen as a human rights violation. Prostitution is caused by desperate socio-economic circumstances, gender and economic inequality and often psychological trauma in the form of sexual abuse. Engaging in prostitution exposes already vulnerable and exploited women to even more harm.
- 121 We conclude with a word of caution by re-affirming what we have stated above: The SALRC came to its conclusions after a thorough process of investigation, public participation, consideration of research and law on a global scale and proper application of all its observations to the South African context. Findings based on such extensive work by a specialist body designed and mandated to make recommendations to government should only be departed from in the most exceptional of circumstances, for example if it could conclusively be proved that to follow the recommendations would result in grave injustice.
- 122 In this regard, the Constitutional Court's pronouncements on the nature and effect of prostitution is instructive, as it is the final arbiter on all matters of constitutional import.
- 123 In *S v Jordan*, the court held that the

“Our Constitution values human dignity which inheres in various 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. We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. 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. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of

prostitutes is diminished not by section 20(1)(aA) but 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.⁹⁰

124 We trust that the above submissions are of assistance to the MPWC and look forward to your response thereto (if any) in due course. CFJ remains at the MPWC's disposal to assist in the further development of policy on adult prostitution and prostitution-related activities.

125 We hereby respectfully request the MPWC to –

125.1 Allow us an opportunity to augment the current brief written submissions with more detailed comprehensive submissions at a later stage; and/or

125.2 Give us an opportunity to make oral submissions (representations) to the MPWC at the Summit scheduled for 5 March 2018 to augment these brief written submissions.

Yours faithfully,

Liesl Stander (Preparer)
Legal Advisor: Law and Policy

and

Ryan Smit (Reviewer)
Director: Law and Policy

⁹⁰ S v Jordan 2002 (6) SA 642 (CC). at 74.