

# **AMNESTY INTERNATIONAL SOUTH AFRICA**

**SUBMISSION TO THE MULTI-PARTY  
WOMEN'S CAUCUS ON THE SOUTH  
AFRICAN LAW REFORM  
COMMISSION REPORT ON  
"PROJECT 107 SEXUAL OFFENCES  
ADULT PROSTITUTION"**

**AFR 53/7950/2018**

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# 1. INTRODUCTION

Amnesty International South Africa welcomes the opportunity to make this submission to the Multi-Party Women's Caucus, in response to the South African Law Reform Commission's (SALRC's) report and recommendations on "Project 107 Sexual Offences Adult Prostitution" (the SALRC Report).<sup>1</sup> The submission has been prepared ahead of the Multi-Party Women's Caucus Summit to discuss the SALRC report, scheduled for 5 March 2018. Amnesty International South Africa welcome the opportunity to make an oral submission at summit, or at any other time as appropriate.

## AMNESTY INTERNATIONAL

Amnesty International South Africa is registered as a Public Benefit Organization (PBO) in South Africa, our offices are based in Johannesburg. Amnesty International South Africa is a national Section, and our members are part of Amnesty International's global movement of more than seven million people who campaign for a world where human rights are enjoyed by all. We are independent of any government, political ideology, economic interest or religion.

As a global human rights organization, Amnesty International investigates human rights violations and regularly makes recommendations on how abuses can be prevented. Our recommendations are based on our independent research and aligned with international human rights laws and standards.

Our research, globally and within South Africa, has found that that all forms of criminalization of sex work results in disproportionate harm to sex workers. Amnesty International has consistently documented that sex workers are at particularly high risk of human rights violations, including: rape, violence, extortion, arbitrary arrest and detention, forced eviction from their homes, harassment, discrimination, exclusion from health services, and lack of legal redress.<sup>2</sup> We have also found that state responses to sex work that seek to criminalize or penalize involvement in sex work actively disempower sex workers, entrench stigma, discrimination and social inequalities, and support a culture of impunity for human rights abuses against them.

This submission draws on the research findings developed in the lead up to Amnesty International's 2016 adoption of an institutional *Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers*.<sup>3</sup> The policy is based on Amnesty International's research into the lived experiences of sex workers in different socio-economic and legal contexts (including Buenos Aires, Argentina, Hong Kong, Norway and Papua New Guinea) and engagement with more than 200 sex workers from around the world, including South Africa. We also spent more than two years consulting with wide array of individuals and groups, including but not limited to: sex workers, survivor and "abolitionist" groups, HIV agencies, women's and LGBTI rights activists, Indigenous women's groups, anti-trafficking groups and leading academics. This submission also refers to international human rights laws and standards and to evidence-based research and recommendations from human rights and public health experts.

Amnesty International recommends the full decriminalization of consensual adult sex work; the exchange of sexual services between consenting adults for some form of remuneration, with the terms agreed between the seller and the buyer, that does not involve coercion, exploitation or abuse. We want states to ensure no one is coerced to sell sex, has to rely on it for survival, or is unable to stop if they choose to. Our research shows that laws should be redirected towards making sex workers' lives safer by ensuring everyone's access to human rights. States should combat all forms of discrimination and gender inequality and, investigate and prosecute all instances of human trafficking and ensure remedy to victims.

**A copy of Amnesty International's 2016 *Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers* and the related Explanatory Note<sup>4</sup> is attached to this submission.**

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<sup>1</sup> South African Law Reform Commission Report Project 107, Sexual Offences Adult Prostitution DATE: June 2015 ISBN: 978-0-621-42727-1

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<sup>2</sup> See Amnesty International A Research Summary on Human Rights Abuses Against Sex Workers Index: POL 40/4061/2016 [www.amnesty.org/en/documents/pol40/4061/2016/en/](http://www.amnesty.org/en/documents/pol40/4061/2016/en/); Harmfully isolated: Criminalizing sex work in Hong Kong (Index: ASA 17/4032/2016), [www.amnesty.org/en/documents/asa17/4032/2016/en/](http://www.amnesty.org/en/documents/asa17/4032/2016/en/); Outlawed and abused: Criminalizing sex work in Papua New Guinea (Index: ASA 34/4030/2016), [www.amnesty.org/en/documents/asa34/4030/2016/en/](http://www.amnesty.org/en/documents/asa34/4030/2016/en/); "What I'm doing is not a crime": The human cost of criminalizing sex work in the City of Buenos Aires, Argentina (Index: AMR 13/4042/2016), [www.amnesty.org/en/documents/amr13/4042/2016/en/](http://www.amnesty.org/en/documents/amr13/4042/2016/en/); "I Can't Afford Justice": Violence against Women in Uganda Continues Unchecked and Unpunished, [www.amnesty.org/en/documents/AFR59/001/2010/en/](http://www.amnesty.org/en/documents/AFR59/001/2010/en/); Amnesty International public statement (2012) calling on Greece to "stop the criminalization and stigmatization of alleged sex workers found to be HIV positive", [www.amnesty.org/en/documents/EUR25/004/2012/en/](http://www.amnesty.org/en/documents/EUR25/004/2012/en/); "Welcome to Hell Fire": Torture and Other Ill-Treatment in Nigeria, [www.amnesty.org/en/documents/AFR44/011/2014/en/](http://www.amnesty.org/en/documents/AFR44/011/2014/en/); Amnesty International Urgent Action on the targeting and killings of sex workers in Honduras: "Sex Workers targeted and Killed in Honduras", 10 January 2014, [www.amnesty.org/en/documents/amr37/001/2014/en/](http://www.amnesty.org/en/documents/amr37/001/2014/en/); Amnesty International Urgent Action on the eviction and abuse of sex workers by police in Brazil: "Sex Workers Evicted and Abused by Police", 3 July 2014, [www.amnesty.org/en/documents/amr19/006/2014/en/](http://www.amnesty.org/en/documents/amr19/006/2014/en/); Assaulted and Accused: Sexual and Gender-Based Violence in Tunisia, [www.amnesty.org/en/documents/mde30/2814/2015/en/](http://www.amnesty.org/en/documents/mde30/2814/2015/en/); "Police Seize Sex Workers and Men Believed to be Gay in Tajikistan's New 'Morality' Campaign", 13 June 2014, [www.amnesty.ca/news/news-releases/police-seize-sex-workers-and-men-believed-to-be-gay-in-tajikistan%E2%80%99s-new-%E2%80%98morality](http://www.amnesty.ca/news/news-releases/police-seize-sex-workers-and-men-believed-to-be-gay-in-tajikistan%E2%80%99s-new-%E2%80%98morality); Stonewalled: Police Abuse and Misconduct against Lesbian, Gay, Bisexual and Transgender People in the United States, [www.amnesty.org/en/documents/AMR51/122/2005/en/](http://www.amnesty.org/en/documents/AMR51/122/2005/en/)

<sup>3</sup> Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers POL 30/4062/2016 26 May 2016, [www.amnesty.org/en/documents/pol30/4062/2016/en/](http://www.amnesty.org/en/documents/pol30/4062/2016/en/) (Hereafter Amnesty International Policy on the Human rights of Sex Workers 2016).

<sup>4</sup> Amnesty International, Explanatory Note on Amnesty International's Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers Index: POL 30/4063/2016

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## **TERMINOLOGY<sup>5</sup>**

Whereas the SALRC Report uses the term “Adult Prostitution” to refer to “un-coerced...selling and buying of sexual acts and related activities”,<sup>6</sup> this submission uses the term “sex work”.

Amnesty International refers to “sex work” to mean the exchange of sexual services between consenting adults for some form of remuneration, with the terms agreed between the seller and the buyer that does not involve coercion, exploitation or abuse.<sup>7</sup>

Similarly, this submission uses “sex worker” to mean adults (aged 18 and older) of all genders who receive some form of remuneration in exchange for the consensual provision of sexual services, either regularly or occasionally.<sup>8</sup>

Amnesty International considers children<sup>9</sup> involved in commercial sex acts are victims of sexual exploitation, recognized by the International Labour Organization as one of the worst forms of child labour<sup>10</sup> and a grave human rights abuse. Amnesty International agrees with the SALRC’s position that “endorses section 17 of the Sexual Offences Amendment Act and the cut off of 18 years as a defining line between child and adult prostitution.”<sup>11</sup>

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<sup>5</sup> Elaborated definitions are available within Amnesty International’s 2016 Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers and the related Explanatory Note, attached to this submission.

<sup>6</sup> SALRC Report para 17.

<sup>7</sup> Amnesty International Policy on the Human rights of Sex Workers 2016.

<sup>8</sup> Amnesty International recognizes that terms referring to sex work and sex workers vary across continents and by individual preference, and not all who sell sexual services identify themselves as “sex workers”.

<sup>9</sup> A “child” is any person under the age of 18, as defined by the UN Convention on the Rights of the Child, and the Constitution of the Republic of South Africa, Section 28 (2).

<sup>10</sup> ILO Convention No. 182 (Worst Forms of Child Labour), 1999, Arts. 3(b) and 6(1).

<sup>11</sup> SALRC Report para 1.26

“Criminalization” refers to the process of prohibiting consensual adult sex work and attaching punishments in law. It includes measures directly criminalizing sex work through sanctions such as criminal prosecution, detention and fines. It further includes indirect criminalization of sex work through laws that – in prohibiting activities associated with sex work, such as buying sexual services or general organization of sex work – penalize sex workers or negatively affect their ability to organize and to exercise their rights. It further includes discriminatory enforcement of other laws – such as on loitering or vagrancy – to prohibit sex work.<sup>12</sup>

## 2. SUMMARY

Amnesty International recognize the important role of Members of Parliament in deciding how best South Africa can respond to the numerous challenges linked to sex work.<sup>13</sup> We note the effort made by the Multi-Party Women’s Caucus to achieve an inclusive and transparent process ahead of the planned summit to discuss the SALRC report, scheduled for 5 March 2018.

It is vital that the development of policy and legislative responses to sex work takes a human rights-based approach which is informed by the best available evidence and includes the participation of sex workers in the process.

This submission sets out Amnesty International’s key concerns in response to the SALRC report on “Project 107 Sexual offences Adult Prostitution”, published in May 2017.

### I) BACKGROUND INFORMATION

Under Project 107, the SALRC was tasked to “review the fragmented legislative framework that currently regulates adult prostitution within the larger framework of all statutory and common law sexual offences” including the statutory provisions contained in the Sexual Offences Act 23 of 1957 (the Sexual Offences Act).<sup>14</sup> The secondary aim of the SALRC review was to “consider the need for law reform in relation to adult prostitution and to identify alternative policy and legislative responses that might regulate, prevent, deter or reduce prostitution.”<sup>15</sup> The SALRC review took over 15 years.

In concluding the review, the SALRC recommend the continued criminalization of sex work in South Africa, and specifically: “*the repeal of the Sexual Offences Act and the amendment of the Sexual Offences Amendment Act by the inclusion of offences which criminalize prostitution and prostitution related activities, coupled with an option for people in prostitution to divert out of the criminal justice system*” as the Commission’s preferred option.<sup>16</sup> The SALRC has also offered alternative suggestions for legislating for ‘partial criminalization’, whereby only the buyers of sex would face criminal sanctions’.<sup>17</sup>

The SALRC report accepts that sex workers are at high risk of human rights violations.<sup>18</sup> However, the Commission suggest that these can be addressed without changes to the legislative framework, and recommend strengthening redress mechanisms through the Equality Courts and improved public sector service delivery in policing and health care.<sup>19</sup>

### II) AMNESTY INTERNATIONAL DISAGREES WITH THE SALRC’S RECOMMENDATIONS

Amnesty International is concerned that the SALRC’s position diminishes the agency of sex workers and justifies the continued risks to sex workers’ human rights, in part, due to the repeated conflation of trafficking and sex work within the report. Amnesty International’s longstanding position is that human trafficking is an abhorrent human rights abuse requiring concerted action, which states must criminalize.<sup>20</sup> Amnesty International is concerned that the SALRC report fails to reflect evidence from contexts

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<sup>12</sup> See the Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers for an elaborated definition.

<sup>13</sup> Noting the judgment of the Constitutional Court, that the legislature of South Africa is best placed to address the question of “whether the interests of society would be better served by legalising prostitution than by prohibiting it” *Jordan v the State* 2002 (6) SA 642 (CC) Ngcobo J at para 30, and specifically the judgment of O’Regan J ad Sachs J that the question “is peculiarly one for the Legislature, given the wide range of potential legislative responses to the social problems related to prostitution There are many reasons why the Legislature may choose not to criminalise prostitution at all including the following: criminalisation of prostitution may be seen not adequately to deter prostitution; that criminalisation of prostitution may render the prostitute more a victim than a criminal; that there is a need to regulate prostitution to limit its social harm rather than prohibit it.” At para 45.

<sup>14</sup> SALRC Report para 2.

<sup>15</sup> SALRC Report para 2.

<sup>16</sup> SALRC Report para 2.515.

<sup>17</sup> SALRC Report para 2.513.

<sup>18</sup> As including “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.” SALRC Report para 44.

<sup>19</sup> SALRC Report paras 11, 34.

<sup>20</sup> See further Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers.

where sex work has been decriminalized which indicates that decriminalization of sex work does not increase trafficking, and may in fact help victims of trafficking and lead to more effective anti-trafficking efforts.<sup>21</sup> Amnesty International is concerned that the approach taken by the SALRC may not only undermine efforts to prohibit and punish trafficking, but also risks violations of sex worker's human rights.

Amnesty International is further concerned that the SALRC's recommendations excessively prioritize public nuisance concerns and untested assertions regarding economic and development fears,<sup>22</sup> over the government's duty to protect sex workers' human rights.<sup>23</sup> This trade-off shapes the SALRC report.

Our research, globally and within South Africa, has found that that all forms of criminalization of sex work results in disproportionate harm to sex workers. Amnesty International has consistently documented that sex workers are at particularly high risk of human rights violations, including rape, violence, extortion, arbitrary arrest and detention, forced eviction from their homes, harassment, discrimination, exclusion from health services, and lack of legal redress.<sup>24</sup>

We have also found that state responses to sex work that seek to criminalize or penalize involvement in sex work actively disempower sex workers, entrench stigma, discrimination and social inequalities, and support a culture of impunity for human rights abuses against them.

### 3. THE FAILURE OF THE SALRC TO CITE RECENT EVIDENCE AND RECOMMENDATIONS

Amnesty International is not alone in recommending the full decriminalisation of sex work. Although the SALRC report states it has reflected "recent developments in the debate on adult prostitution," and claims to present a report "that is based on an analysis of local and international legal principle, precedent and experience," Amnesty International is concerned that the report does not reference any substantive public health or human rights research published after 2013.

This is a major gap. There have been a number of expert and evidence-based reports published in recent years which highlight the negative legal, social and health impact of criminalisation of sex work. These include – but are not limited to:

- Recommendation from the scientific medical journal the Lancet

In 2014, the Lancet published a ground breaking series of research papers on HIV and sex workers.<sup>25</sup> The findings of multiple studies highlight the negative impact of "social, legal, and economic injustices" experienced by sex workers which, "contribute to their high risk of acquiring HIV."<sup>26</sup> One key finding "showed that decriminalisation of sex work would have the greatest effect on the course of HIV epidemics across all settings, averting 33–46% of HIV infections in the next decade."<sup>27</sup> The Lancet also calls for decriminalization of sex work to "reduce mistreatment of sex workers and increase their access to human rights, including health care."<sup>28</sup>

- Recommendation from the World Health Organization (WHO)

The World Health Organization similarly cites studies which indicate that decriminalising sex work could lead to a 46% reduction in new HIV infections in sex workers over 10 years."<sup>29</sup> Most recently, the expert body has highlighted the need for countries to "revise laws, policies and practices" and work towards the decriminalization of sex work.<sup>30</sup>

- Recommendation from the Global Commission on HIV and the Law 2012

It is also notable that the SALRC report does not make reference to the Global Commission on HIV and the Law's report on Risks, Rights and Health, published in 2012.<sup>31</sup> The Global Commission on HIV and the Law is a UN established, independent body of 14 distinguished individuals, chaired by Fernando Henrique Cardoso, former president of Brazil, and supported by public health and legal experts. Their report is based on "18 months of extensive research,

<sup>21</sup> See below at page 16, and for example, the study by Anti-Slavery International in Submission to the Committee on Justice on the proposal of Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill, Northern Ireland Assembly, 2014, para. 4.12; and Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers.

<sup>22</sup> See for example, the SALRC's concern that decriminalization of sex work would "erode [South Africa's] brand value, by positioning the country as a sex tourist destination" SALRC Report paras 52 & 2.500.

<sup>23</sup> SALRC Report paras 65 and 4.280.

<sup>24</sup> Amnesty International, A Research Summary on Human Rights Abuses Against Sex Workers Index: POL 40/4061/2016, and report cited at footnote 2 above.

<sup>25</sup> <http://www.thelancet.com/series/HIV-and-sex-workers>

<sup>26</sup> <http://www.thelancet.com/series/hiv-and-sex-workers>

<sup>27</sup> K. Shannon et al. Global epidemiology of HIV among female sex workers: influence of structural determinants, *The Lancet* Volume 385, No. 9962, p55–71, 3 January 2015

<sup>28</sup> [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(15\)61460-X/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(15)61460-X/fulltext)

<sup>29</sup> [http://www.who.int/hiv/topics/sex\\_work/en/](http://www.who.int/hiv/topics/sex_work/en/)

<sup>30</sup> Policy Brief: Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations, 2016 update. Geneva: World Health Organization; 2017 (WHO/HIV/2017.05). Licence: CC BY-NC-SA 3.0 IGO, <http://apps.who.int/iris/bitstream/10665/258967/1/WHO-HIV-2017.05-eng.pdf?ua=1>

<sup>31</sup> The Global Commission on HIV and the Law, Risks, Rights and Health, 2012, published by UNDP available :

consultation, analysis and deliberation... [including of] testimony from over 700 people most affected by HIV-related legal environments from 140 countries".<sup>32</sup> The report includes the key recommendation that states "Decriminalise private and consensual adult sexual behaviours, including...voluntary sex work."<sup>33</sup>

- Recommendations from UNAIDS

Including in the Gap Report (2014), in which UNAIDS emphasized, the "legal status of sex work is a critical factor defining the extent and patterns of human rights violations, including violence against sex workers. Where sex work is criminalized, violence against sex workers is often not reported or monitored, and legal protection is seldom offered to victims of such violence."<sup>34</sup> The Report recommends "Sex work [be] decriminalized and punitive laws that make it a crime to carry condoms ended."<sup>35</sup>

- Recommendations WHO, UNFPA, UNAIDS, Global Network of Sex Work Projects (NSWP) 2012

In the joint report, *Prevention and Treatment of HIV and other sexually transmitted infections for sex workers in low- and middle-income countries: Recommendations for a public health approach*, WHO, UNFPA, UNAIDS, and NSWP call for all countries to "work toward decriminalization of sex work and elimination of the unjust application of non-criminal laws and regulations against sex workers."<sup>36</sup>

Notably, a range of international NGOs have called for decriminalization of sex work, including Human Rights Watch,<sup>37</sup> Open Society Foundations<sup>38</sup> and Global Alliance Against the Traffic in Women (GAATW),<sup>39</sup> among other groups. Most significantly, a large number of sex worker organizations and networks, including the Global Network of Sex Work Projects, support the decriminalization of sex work as a means to realize sex workers' human rights.<sup>40</sup>

**Further details of these reports and other important studies are referenced within Amnesty International's 2016 Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers and the related Explanatory Note, attached to this submission.**

## 4. CRIMINALISATION OF SEX WORK RISKS VIOLATING A NUMBER OF HUMAN RIGHTS

The SALRC report recognizes the government's obligation under the South African Constitution and its international human rights commitments to "promote human dignity, the achievement of equality and the advancement of human rights."<sup>41</sup> The SALRC report also acknowledges the high rate of serious human rights abuses faced by sex workers in South Africa.<sup>42</sup> Nevertheless, the Commission has focused on "non-legislative recommendations" as the preferred means of addressing these urgent challenges.<sup>43</sup>

Amnesty International disagrees with this finding. Laws and policies play a hugely influential role in shaping the values of society.<sup>44</sup> Amnesty International's research has clearly found that laws which criminalize sex work have a pervasive impact on the violence, stigma and discrimination suffered by sex workers.<sup>45</sup> Human rights experts, including the UN Special Rapporteur

<sup>32</sup> The Global Commission on HIV and the Law, Risks, Rights and Health, 2012, page 7.

<sup>33</sup> The Global Commission on HIV and the Law, Risks, Rights and Health, 2012, page 10.

<sup>34</sup> UNAIDS The Gap Report, section on Sex Workers, page 6, available [www.unaids.org/sites/default/files/media\\_asset/06\\_Sexworkers.pdf](http://www.unaids.org/sites/default/files/media_asset/06_Sexworkers.pdf)

<sup>35</sup> UNAIDS The Gap Report, section on Sex Workers, page 11.

<sup>36</sup> WHO, UNFPA, UNAIDS, NSWP, *Prevention and Treatment of HIV and other sexually transmitted infections for sex workers in low- and middle-income countries: Recommendations for a public health approach*, 2012, available at: [apps.who.int/iris/bitstream/10665/77745/1/9789241504744\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf); at page 8.

<sup>37</sup> J. Amon, *Canada's prostitution bill as step in the wrong direction*, Human Rights Watch (media release), 2014, available at: [www.hrw.org/news/2014/06/18/canadas-prostitution-bill-step-wrong-direction](http://www.hrw.org/news/2014/06/18/canadas-prostitution-bill-step-wrong-direction)

<sup>38</sup> Open Society Foundations, *Ten reasons to decriminalize sex work*, 2012.

<sup>39</sup> See Global Alliance Against the Traffic of Women (GAATW), *Statement to the Human Rights Council*, 2012, available at [www.gaatw.org/statements/GAATWStatement\\_05.2013.pdf](http://www.gaatw.org/statements/GAATWStatement_05.2013.pdf)

<sup>40</sup> For example, "more than 160 sex worker organisations in over 60 countries across the globe" supported the Global Network of Sex Work Projects, *Consensus Statement on Sex Work, Human Rights, and the Law: A Summary*, which is guided by "opposition to all forms of criminalisation and all other legal oppression of sex work (including sex workers, clients, third parties\*, families, partners and friends)" (p.1) and is available at [www.nswp.org/sites/nswp.org/files/ConStat%20PDF%20EngSum.pdf](http://www.nswp.org/sites/nswp.org/files/ConStat%20PDF%20EngSum.pdf); see also the English Collective of Prostitutes' campaign for decriminalization at: [www.pledgedecrim.com](http://www.pledgedecrim.com).

<sup>41</sup> SALRC Report para 1.128.

<sup>42</sup> As including "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." SALRC Report para 44.

<sup>43</sup> SALRC Report paras 11, 34.

<sup>44</sup> See for example, O'Regan J and Sachs J in the minority judgment *Jordan v the State* 2002 (6) SA 642 (CC) who note "It is no answer then to a constitutional complaint to say that the constitutional problem lies not in the law but in social values, when the law serves to foster those values" at para 72.

<sup>45</sup> See for example, *Outlawed and abused: Criminalizing sex work in Papua New Guinea* (Index: ASA 34/4030/2016), [www.amnesty.org/en/documents/asa34/4030/2016/en/](http://www.amnesty.org/en/documents/asa34/4030/2016/en/); "What I'm doing is not a crime": The human cost of criminalizing sex work in the City of Buenos Aires, Argentina (Index: AMR 13/4042/2016), [www.amnesty.org/en/documents/amr13/4042/2016/en/](http://www.amnesty.org/en/documents/amr13/4042/2016/en/)

2012 public statement calling on Greece to "stop the criminalization and stigmatization of alleged sex workers found to be HIV positive", [www.amnesty.org/en/documents/EUR25/004/2012/en/](http://www.amnesty.org/en/documents/EUR25/004/2012/en/)

for the human right to safe drinking water and sanitation and the UN Special Rapporteur on extreme poverty and human rights have linked issues of criminalization and stigma as barriers to the effective realization of the human rights of sex workers.<sup>46</sup>

As the following sections highlight, the recommendation of continued criminalization of sex work risks violating a number of human rights. Set forth below is an overview of some of the human rights implicated and violated by criminalization of sex work and the international human rights standards that support full decriminalization of sex work.

## I) SOCIAL AND ECONOMIC RIGHTS

Under international law, South Africa has an obligation to fulfil all people's economic, social and cultural rights, in particular guaranteeing access for all to education and employment options and social security to prevent any person from having to rely on selling sex as a means of survival due to poverty or discrimination.<sup>47</sup>

The SALRC report highlights the challenges South Africa faces in terms of poverty, high rates of unemployment and inequality as drivers of "prostitution".<sup>48</sup> The report also acknowledges the disproportionate impact of poverty on women, as compounded by gender and racial inequality and barriers to employment opportunities.<sup>49</sup> The SALRC report cites with agreement the findings of the Australian Institute of Criminology, that "the need for women to enter prostitution can only be significantly reduced through long-term economic and social measures."<sup>50</sup>

However, in focusing on criminalizing sex work, the SALRC has failed to sufficiently recognize South Africa's obligations to address underlying socio-economic reasons behind sex work, such as the need for alternative employment options or improved rates of pay, and creates another barrier to sex workers realizing their rights. Amnesty International is concerned that the narrow focus on criminalization, as recommended by the SALRC report, only compounds the marginalization of people in sex work, forcing them to sell sex in clandestine and dangerous conditions while limiting their access to justice and stigmatizing and punishing them for their decisions.<sup>51</sup>

### **Groups most affected by discrimination and inequality are frequently over-represented in sex work.**

Sex work is generally a highly stigmatized activity and sex workers routinely face prejudice and discrimination at the hands of state and non-state actors.<sup>52</sup> Groups most affected by discrimination and inequality are frequently over-represented in sex work.

Women make up the majority of sex workers globally.<sup>53</sup> Women face entrenched gender discrimination and structural inequalities in most societies. Globally, and in South Africa, women bear a disproportionate burden of poverty.<sup>54</sup> Women facing multiple and intersecting forms of discrimination, such as on the basis of sexual orientation, gender identity, race, caste, status as a migrant, ethnicity and Indigenous identity, experience compounded inequalities which present multiple barriers to the full enjoyment of their human rights.

<sup>46</sup> See for example, the Human Rights Council, Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque: Stigma and the realization of the human rights to water and sanitation, UN Doc. A/HRC/21/42, 2012; The Special Rapporteur on extreme poverty and human rights has also identified the linked issues of criminalization and stigma as barriers to the effective realization of the human rights of sex workers, calling it a failure "to provide all persons equal and effective protection of the law and take measures to prevent and combat indirect systemic discrimination on the form of legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups in the enjoyment of their rights Human Rights Council, Report of the Special Rapporteur on extreme poverty and human rights, Ms. Magdalena Sepúlveda Carmona, Addendum: Mission to Namibia (1 to 8 October 2012), UN Doc. A/HRC/23/36/Add.1, 17 May 2013, para.53

<sup>47</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) outlines states' responsibilities to realize the right of everyone to an adequate standard of living for themselves and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions International Covenant on Economic, Social and Cultural Rights, Article 11.

<sup>48</sup> Throughout the SALRC report, including paras 7,36, 55, 1.1, 1.96, 2.33, 2.48, 2.259, 2.445, 3.119, 3.132, 4.199, at para 2.33 citing the official rate of unemployment at 24.3%.

<sup>49</sup> SALRC Report para 2.36, 2.445, 2.105.

<sup>50</sup> SALRC report para 69.

<sup>51</sup> See further Amnesty International, Explanatory Note on Amnesty International's Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers Index: POL 30/4063/2016

<sup>52</sup> See Amnesty International reports, "What I'm doing is not a crime": The human cost of criminalizing sex work in the City of Buenos Aires, Argentina (AMR 13/4042/2016); The human cost of 'crushing' the market: Criminalization of sex work in Norway, (EUR/36/4034/2016); Harmfully Isolated: Criminalizing sex work in Hong Kong (ASA 17/4032/2016); Outlawed and abused: Criminalizing sex work in Papua New Guinea (ASA 34/4030/2016).

<sup>53</sup> J. Vandepitte, R. Lyerla, G. Dallabetta, F. Crabbé, M. Alary, A. Buvé, 'Estimates of the number of female sex workers in different regions of the world', Journal of Sexually Transmitted Infections, 82, 2006; HIV and STI Control Board, National Centre for AIDS and STD Control, Mapping and size estimation of most at risk populations in Nepal, Vol 3: Female Sex Workers, UN Office on Drugs and Crime, 2011; B. Vuylsteke, H. Vandenhoude, L. Langat, G. Semde, J. Menten, F. Odongo, A. Anapapa, L. Sika, A. Buve M. Laga, 'Capture-recapture for estimating the size of the female sex worker population in three cities in Côte d'Ivoire and in Kisumu, western Kenya', Journal of Tropical Medicine and International Health, 2010; REDLACTRANS, International HIV/AIDS Alliance, What's Preventing Prevention, 'The night is another country: Impunity and violence against transgender women human rights defenders in Latin America', 2012, p. 9, available at: [redlactrans.org.ar/site/wp-content/uploads/2013/05/Violencia-e-impunidad-English.pdf](http://redlactrans.org.ar/site/wp-content/uploads/2013/05/Violencia-e-impunidad-English.pdf); Best Practices Policy Project, National Center for Transgender Equality, The Red Umbrella Project, 'Meaningful work: Transgender experiences in the sex trade', 2015, available at: [www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report\\_FINAL\\_3.pdf](http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf); S. Baral, C. Beyrer, T. Poteat, 'Human rights, the law, and HIV among transgender people', Working Paper prepared for the Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law, 2011; T. Poteat, A.L. Wirtz, A. Radix, A. Borquez, A. Silva-Santisteban, 'HIV risk and preventive interventions in transgender women sex workers', Lancet, 2014, pgs. 274–286; WHO, 'Transgender people and HIV: Policy brief, 2015, p. 8, available at: [apps.who.int/iris/bitstream/10665/179517/1/WHO\\_HIV\\_2015.17\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/179517/1/WHO_HIV_2015.17_eng.pdf). – as cited in Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers POL 30/4062/2016

<sup>54</sup> Statistics South Africa, 2017, South Africa Demographic and Health Survey 2016: Key Indicator Report, Statistics South Africa pages 26-28.



Sex workers who are lesbian, gay, bisexual, transgender and/or intersex (LGBTI), or who are otherwise seen as transgressing gender or sexuality norms, face intersectional discrimination and marginalization. Transgender people are overly represented among sex workers<sup>55</sup> this is indicative of the often marginalized status of LGBTI people, and the deeply-embedded prejudiced attitudes and barriers to accessing education, social protections, housing and justice.

The SALRC report highlights that “the practice of selling sexual services is often the result of a choice made in severely limiting socio-economic circumstances, and in a context of social inequality.”<sup>56</sup>

Amnesty International submits that rather than taking a punitive approach which marginalizes sex workers, the majority of whom are women, the focus should be on fulfilling economic, social and cultural rights, in particular guaranteeing access for all to education and employment options and social security to prevent any person from having to rely on selling sex as a means of survival due to poverty or discrimination.

Amnesty International has found that rather than supporting individuals to overcome challenges in their lives and escape poverty, criminalization of sex work may further limit their options and make them a target for abusive criminal justice responses. This not only exacerbates the poverty and marginalization many sex workers face, but also compromises their protection from violence and abuse by law enforcement, clients and community members.

## II) RIGHT TO PARTICIPATION

The right to directly and indirectly participate in political and public life is essential in empowering individuals and groups, and a core component of human rights-based approaches working to eliminate marginalization and discrimination. Participation rights are inextricably linked to other human rights such as the rights to peaceful assembly and association, freedom of expression and opinion and the rights to education and to information.<sup>57</sup> The human rights principle of participation calls for ensuring that people can participate in how decisions are made regarding protection of their rights. This includes, but is not limited to, having input on government decisions about rights.

Globally, Amnesty International has found the voices of sex workers are frequently obscured or silenced as a result of the marginalization they experience and those who oppose the sale and purchase of sex, despite the fact that sex workers are best placed to help define the most appropriate mechanisms to maximize their own welfare and safety. It is unfortunate that the SALRC report is yet another such example.<sup>58</sup>

A central premise of the SALRC report and recommendations is the view taken by the Commission that sex work is inherently exploitative.<sup>59</sup> They conclude that the “exploitation of a person’s lack of alternatives does not amount to a considered exercise of that person’s own choice”<sup>60</sup> and that “the illusion that prostitution is a choice is manipulative and deceptive.”<sup>61</sup>

Amnesty international is concerned that by taking this restrictive view the SALRC has failed to ensure the meaningful participation of a diverse range of sex workers over the 15 year process of review, and has not represented their views or agency within the report. The position taken by the SALRC effectively denies agency and decision-making to an entire group of people (most of whom are women) and place the power to make decisions about their lives in the hands of the state.

Sex worker advocates caution against polemics of choice and agency, and warn that such a “circular argument is baffling and infuriating for sex workers, as they are rendered unable to speak for themselves, and their opinions are invalidated by people

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<sup>55</sup> Significant numbers of transgender people and cisgender men engage in sex work worldwide. A growing number of studies, mainly within the HIV epidemiological field, have identified significant populations of transgender persons and cisgender men sex workers. One study estimated that 43% of the transgender population have been estimated to have had experiences in sex work; See V. L. Hounsfield, et al., ‘Transgender people attending Sydney sexual health services over a 16 year period’, *Sex Health*, 4, 2007; Another national study in the United States estimated that transgender people engage in sex work at a rate of 10 times that of cisgender women. See J. Grant, L. Mottet, J. Tanis, J. Harrison, J. Herman and M. Keisling, *Injustice at every turn: A report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, as cited in Amnesty International Policy on the Human rights of Sex Workers 2016 page 6, footnote 15.

<sup>56</sup> SALRC Report para 28.

<sup>57</sup> ICCPR, Art. 25; UDHR, Art. 21; ICESCR, Art. 8; ICERD, Art. 5 (c); CEDAW, Arts. 7 and 8; CRC, Art. 15; CRPD, Arts. 4 (3), 29, and 33 (3); CMW, Arts. 41 and 42; UN Declaration on the Rights of Indigenous Peoples, Arts. 5 and 18; the Durban Declaration and Programme of Action, Art. 22; the Declaration on the Rights to Development, Arts 1.1, 2 and 8.2; and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Art. 8; the African Charter on Human and Peoples’ Rights, Art. 13.

<sup>58</sup> Amnesty International is concerned by the excessive reliance throughout the SALRC report on the submissions from a narrow range of organizations which directly oppose the sale and purchase of sex and recognition of sex worker’s agency, including Ruhama, the Family Policy Institute, South Africa Christian lawyers Association, and Doctors for Life International, see SALRC Report at footnote 38.

<sup>59</sup> SALRC Report para 8, 34, 43, 44.

<sup>60</sup> SALRC Report para 43.

<sup>61</sup> SALRC Report paras 69, 2.263 and 4.289.

who claim to have their best interests in mind.”<sup>62</sup> Even in cases where choices may be limited by structural inequalities, it is important to recognise that sex workers have capacity to make decisions.”<sup>63</sup>

Amnesty International urges the Multi-Party Women’s Caucus to recognize the importance of respecting the agency and life decisions of individuals, particularly those who have limited economic opportunities. Amnesty International’s research findings highlight that sex workers are a diverse group and there are many personal, social, political and macro-economic drivers of sex work. While some people engage in sex work as a preferred means to earn a living, others may sell sex because they have limited options and are dealing with issues of poverty, marginalization and/or drug use.<sup>64</sup>

The SALRC cite the Convention on the Elimination of Discrimination Against Women (CEDAW), and specifically the obligation on State Parties to “suppress... [the] exploitation of prostitution of women” under Article 6, in support of their view that sex work is inherently exploitative.<sup>65</sup> However, such reliance is misplaced. Rather, the language used in CEDAW Article 6 indicates that the drafters acknowledged that not all instances of sex work are inherently exploitative or constitute a violation of women’s human rights. Indeed, when the text of CEDAW was being drafted, a proposal for the amendment of Article 6 to call for the abolition of “prostitution” in all its forms was rejected.<sup>66</sup>

Similarly, human rights bodies, experts and instruments increasingly recognize that individuals have the capacity to consent to selling sex.<sup>67</sup> For example, the United Nations (UN) Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in her report to the UN Commission on Human Rights on trafficking in women, women’s migration and violence against women, recognized that some individuals do consent to selling sex and thus should not be classified as trafficking victims.<sup>68</sup> Similarly, the Office of the High Commission on Human Rights in the Recommended principles and guidelines on human rights and human trafficking, specifically recognize consent as a defence for trafficking of adults.<sup>69</sup> Human rights bodies and experts have similarly critiqued criminalization of sex work as a matter of human rights.<sup>70</sup> Including the CEDAW Committee, in its Concluding Observations to at least four States Parties.<sup>71</sup>

The exercise of agency – that is, people determining for themselves what they want to do and when – is central to the SALRC’s framing of the Project 107 review of “adult prostitution”. Indeed, the very definition of “prostitution” recommended by the SALRC, and used within the SALRC report, of 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 as a prostitute,”<sup>72</sup> implies consent of sex workers and their capacity to exercise that consent voluntarily.

The SALRC’s failure to respect the agency of sex workers inevitably limits the Commission’s human rights analysis within the SALRC report.

### III) RIGHT TO EQUALITY AND NON-DISCRIMINATION

Under international human rights law, states have an obligation to combat gender and other forms of direct and indirect discrimination, and to ensure that the human rights of all individuals, including women and girls, and those at risk of

<sup>62</sup> Sex Workers Organising for Change: Self-representation, community mobilisation, and working conditions, 2018 Global Alliance Against Traffic in Women (GAATW), page 21.

<sup>63</sup> The Global Alliance Against Traffic in Women (GAATW) cite the helpful critique of choice verses agency, given by sex work activist Ava Caradonna, “She writes, ‘the former insinuates a fictional context in which we all have “equal” options in life and unlimited access to resources. The latter recognises our capability to make plans, to have strategies, and to act within a limiting structure” Sex Workers Organising for Change: Self-representation, community mobilisation, and working conditions, 2018 at page 21.

<sup>64</sup> Amnesty International, Explanatory Note on Amnesty International’s Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers Index: POL 30/4063/2016.

<sup>65</sup> SALRC Report para 1.84, noting “Article 6 of CEDAW states that States Parties must take all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women.”

<sup>66</sup> J. Doezeema, “Forced to Choose: Beyond Voluntary v. Forced Prostitution Dichotomy”, Global Sex Workers: Rights, Resistance and Redefinition, 1998, p. 39.

<sup>67</sup> See, UNAIDS, Guidance note on HIV and sex work, 2012, p. 16; UNDP, Global Commission on HIV and the Law, Risks, rights & health, 2012, p. 39; UN Fourth World Conference on Women International, Beijing Platform for Action, 1995, para. 96; ILO, L.L. Lim, ‘The economic and social bases of prostitution in Southeast Asia’, in The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia, 1998, pp. 1, 213. After conducting research on the sex sector in Southeast Asia conducted in 1998, the ILO concluded that while coercion often accompanied sex work, it could be freely chosen.

<sup>68</sup> UN Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women’s migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44, UN Doc. E/CN.4/2000/68, 2000, para. 36.

<sup>69</sup> OHCHR, Recommended principles and guidelines on human rights and human trafficking: Report of the United Nations High Commissioner for Human Rights (Addendum), UN Doc. E/2002/68/Add.1, 2002, Guideline 8.1 (Similar to the Trafficking Protocol, these Guidelines recognize consent as a defence for trafficking of adults.

<sup>70</sup> See WHO, UNFPA, UNAIDS, NSWP, Prevention and Treatment of HIV and other sexually transmitted infections for sex workers in low- and middle-income countries: Recommendations for a public health approach, 2012, p.8, available at: [apps.who.int/iris/bitstream/10665/77745/1/9789241504744\\_eng.pdf](https://apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf) (Calling for all countries to “work toward decriminalization of sex work and elimination of the unjust application of non-criminal laws and regulations against sex workers.”); UNDP, Global Commission on HIV and the Law, Risks, rights & health, 2012, pp. 36-43 (Global research documenting that criminalising the sale of sex can negatively impact sex workers’ human rights in several ways, including by directly violating their rights to life, health, physical and mental integrity, equality and non-discrimination and autonomy, by rendering sex workers and those who work with them more vulnerable to violence, abuse and extortion by police, clients and third parties, infringing upon their privacy and bodily autonomy, and through shaping negative attitudes that lead to their diminished human rights protection.

<sup>71</sup> CEDAW Committee, Concluding Observations: Fiji, UN Doc. A/57/38, 2002, paras. 64-65; Kenya, UN Doc. CEDAW/C/KEN/CO/6, 2007, paras 29-30; Republic of Korea, UN Doc. CEDAW/C/KOR/CO/6, 2007, paras. 19-20; France, UN Doc. CEDAW/FRA/CO/6, 2008, paras. 30-31; Albania, UN Doc. CEDAW/C/ALB/CO/3, 2010, para. 29.

<sup>72</sup> SALRC Report para 17.

discrimination because of their sexual orientation or gender identity, race, caste, ethnicity, Indigenous identity, migrant or other status, are equally respected, protected and fulfilled.<sup>73</sup> South Africa's Constitution also enshrines the right to equality.<sup>74</sup>

Many of the SALRC's findings and recommendations within the report are based on the premise that decriminalizing sex work would result in increased rates of gender inequality and gender based violence.<sup>75</sup> The SALRC report highlights pervasive gender inequality within South Africa, and the "devastatingly high levels of violence, and specifically sexual violence, against women".<sup>76</sup> However, the SALRC suggests that decriminalizing sex work would result in increased rates of sexual violence against women.<sup>77</sup> They further argue that "non-criminalisation will not foster the achievement of equality between men and women."<sup>78</sup>

Amnesty International disagrees with this reasoning. Our research has found that criminalizing sex work compounds and perpetuates gender inequality.<sup>79</sup> Women who sell sex are frequently subjected to harmful gender stereotypes and abuse on account of being perceived to transgress traditional notions of what is acceptable sexual behavior for women.<sup>80</sup> Arguably, the SALRC's view that diminishes sex worker's agency is an example of such stereotypes.

Amnesty International is also concerned that the SALRC report appears to negate human rights arguments supporting decriminalization of sex work on the basis that it will not be an effective method for overcoming systemic challenges of gender inequality.<sup>81</sup> This reasoning is misleading as it fails to acknowledge the significant guidance that decriminalization is a vital step towards protecting sex workers from discrimination and marginalization. For example, the CEDAW Committee have expressed concern about how "[w]omen are also disproportionately criminalized due to their situation or status, for instance women in prostitution."<sup>82</sup> Similarly, the South African Commission for Gender Equality (CGE), who have a "constitutional mandate to protect, develop, promote respect for and attain gender equality,"<sup>83</sup> have found that "Criminalization of sex work discriminates against women because laws against sex work disproportionately affect women and stigma against sex workers fuels societal discrimination." The CGE have recommended decriminalization of sex work as a means of fulfilling South Africa's Human Rights obligations.<sup>84</sup>

Amnesty International is also concerned that despite citing the CEDAW Committee's General Recommendation 19, that "Prostitutes are especially vulnerable to violence because of their status, which may be unlawful, tends to marginalise them. They need the equal protection of laws against rape and other forms of violence,"<sup>85</sup> the SALRC has failed to sufficiently acknowledge the negative impact of criminalization on access to justice for survivors of sexual violence.

Amnesty International's research has also found that criminalization of sex work acts as a major barrier to police protection and access to justice for sex workers who experience sexual violence.<sup>86</sup> A 2010 study of 593 sex workers in Papua New Guinea's capital Port Moresby found that in a six-month period, 50 per cent had been raped by clients or by police.<sup>87</sup> Studies from South Africa, indicate similar abuses and barriers to justice. For example, the Women's Legal Centre's 2016 report *Police abuse of sex workers* reviewed cases of human rights violations by the police, reported by sex workers, including: "being forced to pay a bribe or perform sexual favours to be released from custody, violence and discrimination, unlawful fines and arrests, and violations

<sup>73</sup> The International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of all forms of Racial Discrimination (CERD); the Convention on the Elimination of all forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD); and the International Convention on the Rights of all Migrant Workers and Members of their Families (CMW), between them comprehensively prohibit discrimination on all grounds, including age, race, caste, ethnicity, disability, sexual orientation, gender identity, marital status, and migrant status. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires governments to address specifically discrimination against women and guarantee substantive gender equality in all areas.

<sup>74</sup> Constitution of the Republic of South Africa, Sec. 9.

<sup>75</sup> See for example paras 8, 43, 56, 2.496, 2.515.

<sup>76</sup> SALRC Report para 3.35.

<sup>77</sup> SALRC Report para 43.

<sup>78</sup> SALRC Report para 66.

<sup>79</sup> See for example, Amnesty International's 2015 report on Tunisia which detailed how sex workers are vulnerable to sexual exploitation, blackmail and extortion primarily by police: *Assaulted and Accused: Sexual and Gender-Based Violence in Tunisia*, [www.amnesty.org/en/documents/mde30/2814/2015/en/](http://www.amnesty.org/en/documents/mde30/2814/2015/en/); and Amnesty International's report on Violence Against Women in Uganda where we highlighted the cases of women who were told that because they were selling sex they were "asking for it", that "a prostitute can't be raped": "I Can't Afford Justice": Violence against Women in Uganda Continues Unchecked and Unpunished, [www.amnesty.org/en/documents/AFR59/001/2010/en/](http://www.amnesty.org/en/documents/AFR59/001/2010/en/)

<sup>80</sup> O'Regan J and Sachs J in the minority judgement *Jordan v the State* 2002 (6) SA 642 (CC) para 65.

<sup>81</sup> SALRC Report para 3.133.

<sup>82</sup> CEDAW Committee, General Recommendation 33 (Women's access to justice), UN Doc. CEDAW/C/GC/33, 23 July 2015, para. 49.

<sup>83</sup> O'Regan J and Sachs J in the minority judgement *Jordan v the State* 2002 (6) SA 642 (CC) para 70, citing section 187 of the South African Constitution.

<sup>84</sup> OFFICIAL POSITION OF THE COMMISSION FOR GENDER EQUALITY, DECRIMINALISING SEX WORK IN SOUTH AFRICA: 2013 <http://www.cge.org.za/wp-content/uploads/2014/05/CEG-Decr.pdf>

<sup>85</sup> SALRC Report para 1.2.

<sup>86</sup> Amnesty International has found that the unlawful status of sex work, as well as associated stigma and discrimination, make sex workers more vulnerable to violence from other individuals, including clients, see further *Sex Workers at Risk, A Research Summary on Human Rights Abuses Against Sex Workers* 2016, Index: POL 40/4061/2016; *Outlawed and abused: Criminalizing sex work in Papua New Guinea* (Index: ASA 34/4030/2016), <https://www.amnesty.org/en/documents/asa34/4030/2016/en/>; "What I'm doing is not a crime": The human cost of criminalizing sex work in the City of Buenos Aires, Argentina (Index: AMR 13/4042/2016), <https://www.amnesty.org/en/documents/amr13/4042/2016/en/>; Our 2010 report on Violence Against Women in Uganda where we highlighted the cases of women who were told that because they were selling sex they were "asking for it", that "a prostitute can't be raped": "I Can't Afford Justice": Violence against Women in Uganda Continues Unchecked and Unpunished, [www.amnesty.org/en/documents/AFR59/001/2010/en/](http://www.amnesty.org/en/documents/AFR59/001/2010/en/)

<sup>87</sup> See further Amnesty International A Research Summary on Human Rights Abuses Against Sex Workers Index: POL 40/4061/2016 page 11.

of procedures and standing orders and being denied access to justice.<sup>88</sup> The report also cites a 2013 study where “over 50% of sex workers in a survey of 1129 sex workers [reported] having experienced violence by police and/or clients”<sup>89</sup> and another from 2015, where “of 410 sex workers in Port Elizabeth, 62% had been physically abused and 38% had been raped.”<sup>90</sup>

The fact that various aspects of sex work are treated as criminal conduct means that sex workers cannot rely on support or protection from the police. For many sex workers, reporting crimes experienced during the course of their work means putting themselves at risk of criminalization and/or penalization on the basis of their involvement in sex work, seizure of their earnings, potential loss of their livelihood through related sanctions and/or monitoring by the police to detect their clients.<sup>91</sup> As a result, sex workers are frequently unable to seek redress for crimes committed against them, thereby offering impunity to perpetrators.<sup>92</sup> This also impacts on sex worker’s right to liberty and security of person, discussed in further detail below.<sup>93</sup>

Amnesty International submits that rather than taking a punitive approach which marginalizes sex workers, the focus should rather be focused on addressing the underlying harmful gender and other stereotypes, discrimination and structural inequalities that drive marginalization and exclusion and lead to individuals from marginalized groups selling sex in disproportionate numbers, and to discrimination against sex workers.

#### **IV) RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK**

International human rights law stipulates that everyone is entitled to just and favourable conditions of work, including safe and healthy working conditions<sup>94</sup> including those who are self-employed or who make their living in informal settings. This is affirmed in General Comment 23 issued by the UN Committee on Economic, Social and Cultural Rights, which states that “laws and policies should explicitly extend to workers in the informal economy”.<sup>95</sup> The Committee also stressed the importance of involving workers (including informal workers) and their representative organizations in formulating, implementing, reviewing and monitoring laws and policies relating to the right to work.<sup>96</sup> The ILO agreed in 2010 that its recommendation on HIV and the World of Work (200/2010) should apply to all workers, both formal and informal, and that this should include sex workers.<sup>97</sup>

Along these lines, states have an obligation to ensure that all persons, including sex workers, have access to just and favourable conditions of work (which includes matters of safety)<sup>98</sup> and are protected against exploitation, including those who are self-employed or who make their living in informal settings.<sup>99</sup>

As noted above, the SALRC’s refusal to recognize the agency of sex workers has implications on how they have assessed sex worker’s barriers to other human rights – including the right to just and favourable conditions of work. The SALRC recommends that sex work “should not be considered to be work or decent work.”<sup>100</sup> In support, the Commission refer to the fact that neither South Africa’s National Development plan nor International Labor Organization (ILO) have “promoted legalizing prostitution as a solution to poverty”.<sup>101</sup>

<sup>88</sup> Rangasami, J; Konstant, T; Manoek, S; Police Abuse of Sex Workers: Data from cases reported to the Women’s Legal Centre between 2011 and 2015; Women’s Legal Centre, 2016. Page 13.

<sup>89</sup> Ibid., page 12 citing SANAC, SWEAT and Impact Consulting. (2013a). Estimating the size of the sex worker population in South Africa.

<sup>90</sup> Ibid., page 12 citing Mac AIDS (2015) Prevention of Mother to Child Transmission Needs of Female Sex Workers Study. Mac AIDS Fund Research Brief, June 2015.

<sup>91</sup> See for example: Amnesty International reports, “What I’m doing is not a crime”: The human cost of criminalizing sex work in the City of Buenos Aires, Argentina (AMR 13/4042/2016); The human cost of ‘crushing’ the market: Criminalization of sex work in Norway (EUR/36/4034/2016); Harmfully Isolated: Criminalizing sex work in Hong Kong (ASA 17/4032/2016); Outlawed and abused: Criminalizing sex work in Papua New Guinea (ASA 34/4030/2016).

<sup>92</sup> I. Pauw and L. Brener, “You are just whores—You can’t be raped”: Barriers to safer sex practices among women street sex workers in Cape Town’, Culture, Health and Sexuality, 2003, pp. 465-81.

<sup>93</sup> SALRC Report at page 15.

<sup>94</sup> Article 7 (b) of the International Covenant on Economic, Social and Cultural Rights, which states: “he States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular;... (b) Safe and healthy working conditions”.

<sup>95</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the Right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, 8 March 2016, para.47(iv). See also ILO Recommendation 200, Recommendation Concerning HIV and AIDS and the World of Work, adopted by the Conference at its Ninety-Ninth Session, Geneva, 17 June 2010 defines a “workplace” as “any place in which workers perform their activity”; and a “worker” as referring to “any persons working under any form or arrangement.” p. 6.

<sup>96</sup> CESCR, General Comment No. 23, para. 56.

<sup>97</sup> ILO Report of the Committee on HIV/AIDS ‘HIV Aids and the World of Work Provisional Record 13 (Rev.) 99th session 2010 paras. 192-210.

<sup>98</sup> See CESCR, General Comment 23 (right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), 2016, UN Doc. E/C.12/GC/23, 2016, paras. 25-30.

<sup>99</sup> Universal Declaration of Human Rights, Article 23; CESCR, General Comment 23 (right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), 2016, UN Doc. E/C.12/GC/23, 2016, para. 5 (The right to just and favourable work conditions applies to everyone, including self-employed people and those in the informal sector. Additionally, “[w]hile the overall objective should be to formalize work, laws and policies should explicitly extend to workers in the informal economy and States parties should take steps to gather relevant disaggregated data so as to include this category of workers in the progressive realization of the right. For that purpose the informal economy should be included in the mandate of a respective monitoring and enforcement mechanism” para. 47 (iv).

<sup>100</sup> SALRC Report para 2.452.

<sup>101</sup> SALRC Report para 2.452.

While Amnesty International does not take a position on whether states should formally recognize sex work as a form of work that requires specifically designed regulation,<sup>102</sup> the SALRC's reasoning is problematic. First, it appears to conflate decriminalization with legal recognition of work for purposes of regulation.<sup>103</sup> Second, it fails to recognize the contribution that decriminalization can make towards better enabling sex workers to exercise their rights to just and favourable work conditions and to freedom of association. In turn, such rights can enable sex workers to take action when their rights are denied and seek redress and accountability for crime and violence that they face.

There has been some movement at all levels – international,<sup>104</sup> regional<sup>105</sup> and national<sup>106</sup> – to recognize that sex workers must be protected with relevant labour and employment guarantees even in the absence of explicit recognition by the state of sex work as an occupation and where sex work has not been decriminalized. In South Africa, the Labour Appeal Court, in the case of *Kylie v Commission for Conciliation, Mediation and Arbitration and others*,<sup>107</sup> emphasized that “the right to fair labour practices is a more direct expression of the right to dignity in the workplace.”<sup>108</sup> The judgment held that the right to “fair labour practices”<sup>109</sup> under section 23 of the Constitution, and by extension, protection for employees under the Labour Relations Act, extends to sex workers.<sup>110</sup>

As noted earlier, the ILO has confirmed that their Recommendation on HIV and AIDS (No. 200) includes sex workers.<sup>111</sup> These labour standards, adopted by the ILO in 2010, include non-discriminatory access to health services and occupational safety for sex workers, including empowerment to insist on safe and protected paid sex in their workplaces.<sup>112</sup>

The Global Commission on HIV and the Law has underscored that “[d]ecriminalisation is the first step toward better working conditions.” They highlight the positive impact of decriminalization under New Zealand’s Prostitution Reform Act (2003) on workplace health and safety standards for sex workers in New Zealand.<sup>113</sup> The Global Commission has recommended that “Countries must reform their approach towards sex work. Rather than punishing consenting adults involved in sex work, countries must ensure safe working conditions and offer sex workers and their clients (sic) access to effective HIV and health services and commodities.”<sup>114</sup>

The SALRC’s reason against decriminalizing sex work as a solution to systemic challenges of poverty or inequality. However, decriminalization of sex work is not suggested as a single solution to such serious problems. Rather, Amnesty International submit that decriminalization will better enable sex workers to exercise their right to just and favourable conditions of work, and take action when those rights are denied.<sup>115</sup>

## V) RIGHT TO HEALTH

Human rights bodies and experts are increasingly focusing on the impact of punitive regulation on sex workers’ right to health, and specifically their sexual and reproductive health. The right to health contains both freedoms and entitlements, including the “right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference,”

<sup>102</sup> See further Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers POL 30/4062/2016

<sup>103</sup> SALRC Report para 2.452.

<sup>104</sup> For example, despite initial opposition from some member states, the ILO agreed in 2010 that its recommendation on HIV and the World of Work (200/2010) should apply to all workers, both formal and informal and this should include sex workers. See ILO Report of the Committee on HIV/AIDS ‘HIV Aids and the World of Work, Provisional Record 13 (Rev.) 99th session, 2010, paras. 192-210.

<sup>105</sup> In 2001, the European Court of Justice ruled that a group of Polish and Czech women had the right to engage in sex work in the Netherlands under treaties between the European Union and its applicant countries. The judges said that “prostitutes” could work in any European Union country where selling sex was tolerated as long as they were genuinely self-employed, had the means to set up their business and had a reasonable chance of success. (Jany and Others C-268/99).

<sup>106</sup> See *Kylie v Commission for Conciliation, Mediation and Arbitration & Ors* [2008] ZALC 86; [2008] 9 BLLR 870 (LC); (2008) 29 ILJ 1918 (LC) (31 July 2008) in which the South African Labour Appeals Court ruled that a sex worker was entitled to protection against unfair dismissal even though sex work remained criminalized. See also the minority judgment of Sachs and O Regan JJ in *S v Jordan and others* 2002 (6) SA 642 (CC), para 74.

<sup>107</sup> *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA10/08) [2010] (10) BCLR 1029 (LAC) available: <http://www.saflii.org/za/cases/ZALAC/2010/8.html>

<sup>108</sup> *Kylie v Commission for Conciliation, Mediation and Arbitration & Ors* [2008] 9 BLLR 870 (LC) para 59.

<sup>109</sup> Constitution of the republic of South Africa, “Labour relations 23. (1) Everyone has the right to fair labour practices.”

<sup>110</sup> <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng-02.pdf>

<sup>111</sup> Judge Dennis Davis, *Kylie v Commission for Conciliation Mediation and Arbitration and Others* noting: “as sex workers cannot be stripped of the right to be treated with dignity by their clients, it must follow that, in their other relationship namely with their employers, the same protection should hold. Once it is recognised that they must be treated with dignity not only by their customers but by their employers, section 23 of the Constitution, which, at its core, protects the dignity of those in an employment relationship, should also be of application.” At para 26.

<sup>112</sup> [http://www.ilo.org/wcmsp5/groups/public/@ed\\_protect/@protrav/@ilo\\_aids/documents/genericdocument/wcms\\_185717.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@ilo_aids/documents/genericdocument/wcms_185717.pdf)

<sup>113</sup> ILO Recommendation concerning HIV and AIDS and the World of Work, 2010 (No. 200).

<sup>114</sup> The Global Commission on HIV and the Law, Risks, Rights and Health, 2012, page 40, noting for example that “The New Zealand Prostitutes’ Collective, brothel operators and the Labour Inspectorate have collaborated to develop Sex workers can bring employment discrimination complaints to the Human Rights Commission, and the Mediation Service on Employment adjudicates disputes.”

<sup>115</sup> The Global Commission on HIV and the Law, Risks, Rights and Health, 2012, page 43

<sup>116</sup> See further International Committee on the Rights of Sex Workers in Europe (ICRSE), Exploitation: Unfair labour arrangements and precarious working conditions in the sex industry, 2016, available at: [www.sexworkereurope.org/fr/news/general-news/may-day-icrse-launches-community-report-exploitation-sex-industry](http://www.sexworkereurope.org/fr/news/general-news/may-day-icrse-launches-community-report-exploitation-sex-industry); Empower Foundation, Moving toward decent sex work, Empower University Press, 2016, available at: <http://www.nswp.org/sites/nswp.org/files/Moving%20Toward%20Decent%20Work%2C%20EMPOWER%20-%20April%202016.pdf>.

as well as “equality of opportunity for people to enjoy the highest attainable level of health.”<sup>116</sup> The right to sexual and reproductive health is an integral part of the right to health.<sup>117</sup> Sexual and reproductive health services include “maternal health, contraceptives, family planning, sexually transmitted infections and HIV prevention, safe abortion and post abortion care, infertility and fertility options, and reproductive cancers.”<sup>118</sup>

Amnesty International has found that stigma and discrimination that stems from criminalization of sex work can lead abuse of sex workers during the provision of health services, as well as non-medically indicated treatment. Sex workers in criminalized contexts may also avoid health services entirely and/or to self-medicate.<sup>119</sup>

Barriers to the right to health for sex workers in South Africa are highlighted within the SALRC report. And the SALRC acknowledge the impact of criminalization and related discrimination on access to health services, including sexual and reproductive health services and HIV testing and treatment.<sup>120</sup> Nevertheless, the SALRC recommendations propose that violations of the right to health can be addressed independently of the legislative framework governing sex work;<sup>121</sup> through improved training of health care workers and accountability processes within the public health system and redress via the equality courts when rights are violated.<sup>122</sup>

Amnesty International disagrees with this finding. Rather, our evidence indicates that criminalization interferes with and undermines sex workers’ right to access health services and information, in particular the prevention, testing and treatment of sexually transmitted infections (STIs) and HIV.<sup>123</sup> Furthermore, Amnesty International has found that sex workers are stigmatized by many police officers, health care providers and the media as being “spreaders” of HIV – discouraging them from seeking sexual and reproductive health information and services.<sup>124</sup> For example, police in many countries, including South Africa, are reported to frequently confiscate and cite the use of condoms as evidence of sex work offences, creating a disincentive to their use and further jeopardizing the right to the highest attainable standard of health.<sup>125</sup>

Criminalization of sex work has specifically been shown to directly undermine global HIV prevention efforts.<sup>126</sup> The importance of recognizing and promoting sex workers’ human rights is a basic building block of sound HIV prevention as reflected in the policy positions of the Global Fund to Fight AIDS, Tuberculosis and Malaria, and the Joint UN Programme on HIV/AIDS (UNAIDS).<sup>127</sup> In 2014 the scientific medical journal, the Lancet published a ground breaking series of research papers on HIV and sex workers.<sup>128</sup> A key finding showed that decriminalization of sex work would have the greatest effect on the course of HIV epidemics across all settings, averting 33–46% of HIV infections in the next decade.<sup>129</sup> Such a move would also reduce mistreatment of sex workers and increase their access to human rights, including health care.<sup>130</sup> As noted above, in 2012, the Global Commission on HIV and the Law strongly recommended the decriminalization of sex work and called for laws and policies to ensure safe working conditions to sex workers.<sup>131</sup> UNAIDS found that “The criminalization of sex work impedes evidence-informed HIV responses for sex workers... Punitive laws are not an effective response to the public health challenge of HIV.”<sup>132</sup>

The SALRC report also fails to reflect the best practice reflected in the South African National Sex Worker HIV Plan 2016-2019. The Plan has been heralded as an innovative and holistic intervention to improve access health services for sex workers in South

<sup>116</sup> CESCR, General Comment 14 (The right to the highest attainable standard of health (article 12 of the ICESCR)), UN Doc. E/C.12/2000/4, 2000, para. 8.

<sup>117</sup> CESCR, General Comment 22 (UN Doc. E/C.12/GC/22), 2016, para.1.

<sup>118</sup> CESCR, General Comment 22 (UN Doc. E/C.12/GC/22), 2016, para. 18.

<sup>119</sup> “What I’m doing is not a crime”: The human cost of criminalizing sex work in the City of Buenos Aires, Argentina (Index: AMR 13/4042/2016), [www.amnesty.org/en/documents/amr13/4042/2016/en/](http://www.amnesty.org/en/documents/amr13/4042/2016/en/)

<sup>120</sup> See for example SALRC Report paras 68, 1.122, 2.94-98.

<sup>121</sup> SALRC para 2.114.

<sup>122</sup> SALRC paras 40 and 2.468.

<sup>123</sup> “What I’m doing is not a crime”: The human cost of criminalizing sex work in the City of Buenos Aires, Argentina (Index: AMR 13/4042/2016), [www.amnesty.org/en/documents/amr13/4042/2016/en/](http://www.amnesty.org/en/documents/amr13/4042/2016/en/)

<sup>124</sup> See for example Amnesty International’s public statement calling on Greece to “stop the criminalization and stigmatization of alleged sex workers found to be HIV positive”, [www.amnesty.org/en/documents/EUR25/004/2012/en/](http://www.amnesty.org/en/documents/EUR25/004/2012/en/)

<sup>125</sup> See Amnesty International reports, The human cost of ‘crushing’ the market: Criminalization of sex work in Norway (EUR/36/4034/2016); Harmfully Isolated: Criminalizing sex work in Hong Kong (ASA 17/4032/2016); Outlawed and abused: Criminalizing sex work in Papua New Guinea (ASA 34/4030/2016). See also Open Society Foundations, Criminalizing Condoms, How policing practices put sex workers and HIV services at risk in Kenya, Namibia, Russia, South Africa, the United States and Zimbabwe, 2012; Human Rights Watch, Sex Workers at Risk: Condoms as Evidence of Prostitution in Four U.S. Cities, 2012; M.H. Wurth et al., ‘Condoms as Evidence of Prostitution in the United States and the Criminalization of Sex Work’, Journal of the International AIDS Society, 2013.

<sup>126</sup> See generally Global Commission on HIV and the Law, Risks, Rights and Health, 2012; UNAIDS Guidance Note on HIV and Sex Work, Annex 3; UNAIDS, UNFPA, UNDP, Sex Work and the Law in Asia and the Pacific, 2012; UNDP, UNFPA, APNSW, SANGRAM, The Right(s) Evidence: Sex, Violence and HIV in Asia – A Multi-country Qualitative Study, 2015

<sup>127</sup> See, for example, UNAIDS Strategy 2011-2015, “Getting to Zero”, 2010, p. 7. UNAIDS issued an updated Guidance Note on HIV and Sex Work in 2009 and some additional Annexes to the Guidance Note in 2012. See also UNAIDS, On the fast-track to end AIDS: UNAIDS 2016–2021 Strategy, p. 64, available at:

[www.unaids.org/sites/default/files/media\\_asset/20151027\\_UNAIDS\\_PCB37\\_15\\_18\\_EN\\_rev1.pdf](http://www.unaids.org/sites/default/files/media_asset/20151027_UNAIDS_PCB37_15_18_EN_rev1.pdf) (“Evidence-informed analyses also indicate that decriminalization of sex work could prevent people from acquiring HIV through combined effects on violence, police harassment, safer work environments and HIV transmission pathways.”).

<sup>128</sup> [www.thelancet.com/series/HIV-and-sex-workers](http://www.thelancet.com/series/HIV-and-sex-workers)

<sup>129</sup> K. Shannon et al. Global epidemiology of HIV among female sex workers: influence of structural determinants, *The Lancet* Volume 385, No. 9962, p55–71, 3 January 2015.

<sup>130</sup> [www.thelancet.com/journals/lancet/article/PIIS0140-6736\(15\)61460-X/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(15)61460-X/fulltext) Keeping sex workers safe, *The Lancet*, 8 August 2015.

<sup>131</sup> UNDP, Global Commission on HIV and the Law, Risks, rights & health, 2012, p. 99.

<sup>132</sup> UNAIDS, The Gap Report, 2014 Section on Sex Workers page 7, available [www.unaids.org/sites/default/files/media\\_asset/06\\_Sexworkers.pdf](http://www.unaids.org/sites/default/files/media_asset/06_Sexworkers.pdf) See the subheading on the failure to cite expert recommendations in the SALRC report at page 8 above.

Africa.<sup>133</sup> However, the Plan also recognizes the challenges for implementing a human rights-based approach to health in the context where sex work is criminalized and supports decriminalization of sex work.<sup>134</sup>

The UN Committee on Economic Social and Cultural Rights has confirmed that states must specifically ensure that sex workers have access to the full range of sexual and reproductive health care services.<sup>135</sup> In its recent General Comment, the Committee recognized that criminalizing consensual adult sexual activities violates states' obligation to respect the right to sexual and reproductive health as it amounts to a legal barrier that impedes access to sexual and reproductive health services.<sup>136</sup> The Committee has advised that states have an immediate obligation to "repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine [an] individual's or particular group's access to sexual and reproductive health facilities, services, goods and information".<sup>137</sup>

The UN Special Rapporteur on the right to health has explicitly called for the decriminalization of sex work and for existing domestic labour laws, occupational health and safety laws, social insurance schemes and other protections to be extended to sex workers, including irregular migrant workers.<sup>138</sup> Similarly, in its General Recommendation 24 on Women and health, the CEDAW Committee has recommended that special attention should be given to the health rights of women belonging to marginalized groups, which include "women in prostitution."<sup>139</sup>

## VI) RIGHT TO LIBERTY AND SECURITY OF PERSON

Criminalizing the buying or selling of adult consensual sex, or elements of these transactions, also threatens the right to liberty where sex workers are arbitrarily detained – in the international legal sense of the term,<sup>140</sup> and/or in a manner not in accordance with domestic law. The Human Rights Committee has determined that legally authorized detention must be reasonable, necessary and proportionate taking into account the specific circumstances of a case.<sup>141</sup> Detention can amount to arbitrary detention, even if it is authorized by law, if it includes "elements of inappropriateness, injustice, lack of predictability and due process of law".<sup>142</sup>

Instances of harassment, extortion, corruption, violence, and rape of sex workers are well documented in South Africa.<sup>143</sup> In 2016, the Women's Legal Centre published a review of cases of police abuse reported between 2011 and 2015, which records the role of the police in perpetuating "stigma and discrimination and verbal, psychological, physical, economic and sexual violence against sex workers".<sup>144</sup> Amnesty International South Africa has received direct complaints from sex workers and from civil society partners of horrific cases of abuse of sex workers.<sup>145</sup> The situation in South Africa fits within the findings of Amnesty International's global research, that the stigmatized and criminalized status that sex workers experience gives law enforcement officials the scope to harass, extort and perpetrate physical and sexual violence against them, also with impunity.<sup>146</sup>

The SALRC report acknowledges the high rates of human rights abuses perpetrated against sex workers by law enforcement officials.<sup>147</sup> However, the Commission suggest that non-legislative improvements in the standard of policing as a whole will be

<sup>133</sup> See Press Statement of UNAIDS, UNAIDS welcomes South Africa's groundbreaking National Sex Worker HIV Plan, 11 March 2016.

<sup>134</sup> South African National Sex Worker HIV Plan 2016-2019.

<sup>135</sup> CESCR, General Comment 22 (UN Doc. E/C.12/GC/22), 2016, para. 32.

<sup>136</sup> See CESCR, General Comment 22 (right to sexual and reproductive health (Article 12)), (UN Doc. E/C.12/GC/22), 2016, para. 57.

<sup>137</sup> CESCR, General Comment 22 (UN Doc. E/C.12/GC/22), 2016, para. 49(a).

<sup>138</sup> Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UN Doc. A/HRC/14/20, 2010, paras. 46-50; Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UN Doc. A/HRC/23/41, para. 76(j).

<sup>139</sup> CEDAW, General Recommendation 24 (Article 12: Women and health), UN Doc. A/54/38/Rev.1, chap. I, 1999.

<sup>140</sup> See ICCPR, Art. 9(1); Human Rights Committee, General comment 35 (Article 9: Liberty and security of person), UN Doc.

CCPR/C/GC/R.35/Rev.3, 2014, paras. 10-23; Methods of work of the Working Group on Arbitrary Detention, UN Doc. A/HRC/30/69, 2015, para. 8.

<sup>141</sup> See Human Rights Committee, *Van Alphen v The Netherlands*, UN Doc. CCPR/C/39/D/305/1988, 1990, para. 5.8; Human Rights Committee, *Comm. No. 560/1993, A v Australia*, UN Doc. CCPR/C/59/D/560/1993, 1997, para. 9.2.

<sup>142</sup> Human Rights Committee, *A. W. Mukong v Cameroon*, UN Doc. GAOR, A/49/40 (vol. II), 1991, para. 9.8.

<sup>143</sup> Gould C. and Fick N. (2008) *Selling sex in Cape Town: Sex work and human trafficking in a South African city*, Pretoria/ Tswane, Institute for Security Studies, found that 12% of sex workers in Western Cape have reported being raped by police; Fick, N. (2006) *Sex workers speak out: Policing and the sex industry*. SA Crime Quarterly: 15 (March 2006); Manoeke S. (2012). *A report on human rights violations by police against sex workers in South Africa*. Women's Legal Centre, Sisonke and SWEAT all as cited in Rangasami, J; Konstant, T; Manoeke, S; *Police Abuse of Sex Workers: Data from cases reported to the Women's Legal Centre between 2011 and 2015*; Women's Legal Centre, 2016 and Open Society Foundations, *Criminalizing Condoms, How policing practices put sex workers and HIV services at risk in Kenya, Namibia, Russia, South Africa, the United States and Zimbabwe*, 2012.

<sup>144</sup> Rangasami, J; Konstant, T; Manoeke, S; *Police Abuse of Sex Workers: Data from cases reported to the Women's Legal Centre between 2011 and 2015*; Women's Legal Centre, 2016.

<sup>145</sup> Amnesty International interviews with sex workers in Cape Town in May 2016; Complaints on file from Sex Workers in Mpumalanga 2016; Project reports relating to sexual and reproductive health and rights 2015-2017.

<sup>146</sup> See Amnesty International reports, "What I'm doing is not a crime": The human cost of criminalizing sex work in the City of Buenos Aires, Argentina (AMR 13/4042/2016); The human cost of 'crushing' the market: Criminalization of sex work in Norway (EUR/36/4034/2016); Harmfully Isolated: Criminalizing sex work in Hong Kong (ASA 17/4032/2016); Outlawed and abused: Criminalizing sex work in Papua New Guinea (ASA 34/4030/2016); Assaulted and accused: Sexual and gender based violence in Tunisia (MDE 30/2814/2015); Amnesty International, "Welcome to hell fire": Torture and other ill-treatment in Nigeria (AFR 44/011/2014); Rights, Risks & Health p. 37; Human Rights Watch, *Off the Streets: Arbitrary Detention and other Abuses Against Sex Workers in Cambodia*, 2010; WHO, *Violence Against Women and HIV/AIDS: Critical Intersections, Violence against Sex Workers and HIV Prevention*, Information Bulletin Series, No. 3, 2005.

<sup>147</sup> SALRC Report paras 1.122, 2.56-9.

sufficient to increase protection for sex workers. Their recommendations include improving complaints mechanisms, implementing guidelines for police officers (including prohibiting police from confiscating condoms) and developing specialist policing units in relation to the Sexual Offences Act and “prostitution”, with redress mechanisms available through the equality courts.<sup>148</sup>

Amnesty International disagrees with this recommendation. The position taken by the SALRC fails to recognise the disproportionate rate of violence and extortion that sex workers experience. It is not – as the SALRC suggest – merely reflective of a general failing in policing within the country, but is specifically linked to the stigma and discrimination of criminalization.

The Global Commission on HIV and the Law has emphasized the role that criminalization of sex work plays in police abuse. That Commission found that: “The criminalisation of sex work, drug use and harm reduction measures create climates in which civilian and police violence is rife and legal redress for victims impossible.”<sup>149</sup> The Commission has further observed that:

*“In many cases, the police commit violent and discriminatory acts because the law and social attitudes at least tacitly authorise them to do so, in the name of public safety, order, or morality. When the law punishes drug use, sex work, and certain sexual behaviours and identities, key populations can neither count on the police for protection from violence nor seek legal redress when they are its victims, especially when the perpetrators are police officers. After all, under the law, the...sex worker is the ‘criminal’.”*<sup>150</sup>

## 5. CRIMINALIZATION OF SEX WORK CAN HINDER THE FIGHT AGAINST TRAFFICKING

Human trafficking amounts to a grave human rights abuse and states have an obligation under international human rights and international criminal law to ensure that it is recognized as a criminal offence. Amnesty International calls for the criminalization of human trafficking, including in the sex sector, which is one component of protecting the human rights of all people who engage in sex work. It further reaffirms that anti-trafficking laws must comply with international human rights standards.<sup>151</sup>

At the outset of the SALRC report, the terms of reference clearly differentiated between consensual adult “prostitution” and trafficking. However, Amnesty International is concerned that the SALRC’s analysis within the report conflates human trafficking and sex work. In part, this is related to the failure of the SALRC to respect the agency of sex workers.<sup>152</sup> However, trafficking, including into the sex sector, is not the same as sex work. Sex work refers to a contractual arrangement where sexual services are negotiated between consenting adults with the terms of engagement agreed upon between the seller and the buyer.<sup>153</sup> Trafficking is expressly non-consensual.<sup>154</sup>

The SALRC report further suggests that decriminalizing sex work will result in increased cases of trafficking and child sexual exploitation.<sup>155</sup> However, the available evidence indicates that criminalization of sex work does not increase trafficking. This is noted by The Lancet and other credible research institutions.<sup>156</sup> Indeed, the EUROPOL unit that deals with trafficking confirmed in 2012 that there is no evidence in Europe to show any significant impact on the issue of trafficking by any laws on prostitution (regulation or prohibition) and that the two are separate issues.<sup>157</sup> In Germany, where sex work is legalized (as opposed to

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<sup>148</sup> SALRC Report para 2.468 and 4.276.

<sup>149</sup> The Global Commission on HIV and the Law, Risks, Rights and Health, 2012, page 8.

<sup>150</sup> The Global Commission on HIV and the Law, Risks, Rights and Health, 2012, page 27.

<sup>151</sup> See further Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human rights of Sex Workers POL 30/4062/2016

<sup>152</sup> See above under the section on the right to participation, page 9.

<sup>153</sup> See UNDP, Global Commission on HIV and the Law, Risks, rights & health, 2012, p. 41.

<sup>154</sup> The UN Office on Drugs and Crime (UNODC) has clarified: “It is important to note that the [Trafficking in Persons] Protocol does not equate prostitution with trafficking. For prostitution involving adults to fall within the definition of trafficking all three definitional elements (action, means and purpose). The relevant ‘purpose’ is ‘exploitation of prostitution’. This term refers not to prostitution per se but rather, to deriving some benefit from the prostitution of another person.” UNODC, Issue paper: The concept of ‘exploitation’ in the Trafficking in Persons Protocol, 2015, p.7. See also A.T. Gallagher, The International Law of Human Trafficking, 2010, p. 39 (“There was clear consensus within the drafting group that the Trafficking Protocol definition was not to extend to prostitution or pornography per se.”) This is affirmed by the Council of Europe, working from the Council of Europe Convention, which clarifies a distinction between the prostitution and trafficking in persons: “It must be clear that the forms of exploitation covered by the Convention are not limited to sexual exploitation. Moreover, trafficking in human beings differs from “prostitution” in that it is a new form of slavery which can include sexual exploitation, but not necessarily. Prostitution can only be qualified as “trafficking in human beings” if one of the actions e.g. “recruitment” and means, “threat or use of force referred to under at. 4 of the Convention have been used.” Statement by the Head of the Minorities, Media and Equality Department, Directorate General of Human Rights, Council of Europe as published in Proceedings from the regional seminar in Riga, 2006. Directorate General of Human Rights, Council of Europe, Strasbourg, 2007.

<sup>155</sup> SALRC Report para 2.458.

<sup>156</sup> Anti-Slavery International, Submission by Anti-Slavery International to the Committee on Justice on the proposal of Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill, Northern Ireland Assembly, 2014 (citing Europol); “Keeping sex workers safe”, The Lancet, 2015, available at: [www.thelancet.com/journals/lancet/article/PIIS140-6736\(15\)61460-X/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS140-6736(15)61460-X/fulltext).

<sup>157</sup> This was reported by Anti-Slavery International in Submission by Anti-Slavery International to the Committee on Justice on the proposal of Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill, Northern Ireland Assembly, 2014, para. 4.12.



decriminalized), the Federal Crime Office has reported that: "The number of identified cases of human trafficking for sexual exploitation in Germany has been decreasing in the past years and in 2013 it has reached the lowest point since 2006."<sup>158</sup>

Amnesty International is concerned that the approach taken by the SALRC may not only undermine efforts to prohibit and punish trafficking, but also risks violations of sex worker's human rights. There is growing evidence to suggest that indiscriminate approaches - that fail to distinguish between sex workers and victims of trafficking into the sex sector - undermine valuable links and intelligence to detect trafficking and support victims.

Amnesty International research conducted in the city of Buenos Aires, Argentina, documented how sex workers are frequently subjected to ill-treatment by law enforcement officials during anti-trafficking raids on apartments where commercial sex is suspected. Frequently, sex workers are detained for long periods of time and subjected to coercive and intimidating questioning where the authorities attempt to persuade them that they are victims of violence and human trafficking.<sup>159</sup> A recent report from Global Alliance Against Traffic in Women (GAATW) found sex workers were "extensively harassed, arrested and incarcerated, including in 'rehabilitation centres', in the name of combatting trafficking."<sup>160</sup>

Sex workers can be uniquely positioned to identify, witness and inform police of instances of forced or coerced sex and trafficking. However, they are unlikely to report such crimes if they are at risk of being criminalized or "rehabilitated" themselves. When not threatened with criminalization, sex worker organizations have collaborated with law enforcement to identify women and children who have been trafficked, and to refer them to the necessary services.<sup>161</sup> GAATW have emphasized the potential role sex workers can play in preventing and prosecuting trafficking, advising that "Anti-trafficking stakeholders need to recognise sex workers as partners, not adversaries, in anti-trafficking work."<sup>162</sup> Their study's findings echo that of the UNAIDS Guidance Note on HIV and Sex Work; that sex worker organizations are often best positioned to refer women and children who are victims of trafficking to appropriate services.<sup>163</sup>

The UN Special Rapporteur on violence against women has noted the need to ensure that "measures to address trafficking in persons do not overshadow the need for effective measures to protect the human rights of sex workers."<sup>164</sup> The Special Rapporteur on the right to health has also spoken out against the conflation of consensual sex work and human trafficking which can lead to "at best, the implementation of inappropriate responses that fail to assist either of these groups in realizing their rights, and, at worst, to violence and oppression", and called for human rights protection of trafficked persons and of sex workers.<sup>165</sup>

## **6. SOLELY CRIMINALIZING THE PURCHASE OF SEX CAN ACTUALLY PLACE SEX WORKERS AT GREATER RISK OF HARASSMENT, VIOLENCE AND EXTORTION**

The SALRC recommends the continued total criminalization of sex work in South Africa,<sup>166</sup> and has suggested draft legislative amendments for offences relating to selling sex, buying sex and associated activities, including: soliciting to commit a sexual

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<sup>158</sup> Federal Criminal Police Office (BKA), 'Lagebilder menschenhandel', available at:

[www.bka.de/nn\\_231620/DE/ThemenABisZ/Deliktsbereiche/Menschenhandel/Lagebilder/lagebilder\\_\\_node.html?\\_\\_nnn=true](http://www.bka.de/nn_231620/DE/ThemenABisZ/Deliktsbereiche/Menschenhandel/Lagebilder/lagebilder__node.html?__nnn=true). While some claim human trafficking has increased since a 2002 reform of Germany's law (which decriminalized "solicitation" and recognized contracts between sex workers and clients and enabled sex workers to sue clients for refusing to pay), sex work was actually legalized in 1927.

<sup>159</sup> Amnesty International, "What I'm doing is not a crime": The human cost of criminalizing sex work in the City of Buenos Aires, Argentina (Index: AMR 13/4042/2016).

<sup>160</sup> Sex Workers Organising for Change: Self-representation, community mobilisation, and working conditions, 2018 Global Alliance Against Traffic in Women (GAATW) page 37; see also NSWPF Briefing paper 3 'Sex work is not trafficking' - <http://www.nswp.org/sites/nswp.org/files/SW%20is%20Not%20Trafficking.pdf>

<sup>161</sup> Sex Workers Organising for Change: Self-representation, community mobilisation, and working conditions, 2018 Global Alliance Against Traffic in Women (GAATW; see also for example, Durbar Mahila Samanwaya Committee, Innovative approaches to combat trafficking of women in sex trade by Durbar Mahila Samanwaya Committee (Kolkata), available at: [www.sexworkurope.org/sites/default/files/resource-pdfs/dmsc\\_innovative\\_approaches\\_trafficking.pdf](http://www.sexworkurope.org/sites/default/files/resource-pdfs/dmsc_innovative_approaches_trafficking.pdf); Open Society Foundations, 10 reasons to decriminalize sex work: A reference brief, p. 6, available at: [www.opensocietyfoundations.org/sites/default/files/decriminalize-sex-work-20120713.pdf](http://www.opensocietyfoundations.org/sites/default/files/decriminalize-sex-work-20120713.pdf); UNAIDS, Guidance note on HIV and sex work, 2012.

<sup>162</sup> Sex Workers Organising for Change: Self-representation, community mobilisation, and working conditions, 2018 Global Alliance Against Traffic in Women (GAATW) page 40.

<sup>163</sup> UNAIDS, Guidance Note on HIV and Sex Work, 2009, p 12.

<sup>164</sup> Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, Mission to India, Rashida Manjoo, UN Doc. A/HRC/26/38/Add.1, 2014, para. 78 (e).

<sup>165</sup> See Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, U.N. Doc. A/HRC/14/20, 2010, for example at para.33.

<sup>166</sup> The preferred and recommended option of the SALRC report – as set out in draft legislation at page 434. See also para 2.497.

act,<sup>167</sup> the commission of sexual acts in a public place,<sup>168</sup> the making available of sexual services by persons 18 years or older;<sup>169</sup> buying sex,<sup>170</sup> engaging sexual services of persons 18 years or older,<sup>171</sup> paying for sexual services of a person subjected to force;<sup>172</sup> keeping a brothel,<sup>173</sup> knowingly living off the earnings of “prostitution,”<sup>174</sup> enticing to commission of immoral acts,<sup>175</sup> advertising the sexual services of persons 18 years or older;<sup>176</sup> procuration [of any person to engage in prostitution with any person other than the procurer],<sup>177</sup> detention of a person for purposes of prostitution;<sup>178</sup> assistance for purposes of unlawful carnal intercourse;<sup>179</sup> and owner or occupier permitting on his premises any prostitution-related offence.<sup>180</sup>

The SALRC is clear that it does not support the option of partial criminalization.<sup>181</sup> Nevertheless, they offer an alternative drafting option of partial criminalization – specifically, criminalizing the purchase of sexual services.<sup>182</sup> This alternative purportedly follows the path of a small number of countries which have attempted to shift criminal responsibility away from sex workers by directing sanctions toward individuals who buy or attempt to buy sex. The criminalization of sex workers’ clients, as opposed to sex workers themselves, is sometimes referred to as the “Swedish Model” as it was adopted by Sweden in 1999. It has subsequently been adopted by governments in Finland, Iceland, Israel, South Korea, Nepal and Norway. Such laws are generally based on the notions that sex workers are “victims” who cannot consent to sex work and that all commercial sex is coerced and is a form gender-based violence.<sup>183</sup>

However, this distinction is misleading, as it fails to specifically call for decriminalization of the sale of sex and other provisions that can be used to punish sex workers. Amnesty International’s research has found that laws criminalizing the ‘purchase’ of sex are most often enforced in a manner that criminalizes and punishes sex workers.<sup>184</sup>

In this regard, the SALRC also cite the reservations of the South Africa Commission on Gender Equality, that “prostitutes subject to a partially criminalised legal framework continue to suffer harassment from police and seldom report incidents of violence and coercion; that violence has increased; and that there is greater competition, declining prices and harsher conditions.”<sup>185</sup>

Amnesty International has also raised serious concerns regarding partial criminalization models.<sup>186</sup> Whatever their intention, laws that criminalize the purchase of sex can actually place sex workers at greater risk of harassment, violence and extortion. For example, in both Sweden and Norway, researchers have found evidence of increased risk-taking among sex workers in relation to their safety since the passage of the purchasing ban. Research in 2012 by Pro Sentret, Norway’s national centre of expertise on sex work policy, indicated that since the introduction of the prohibition on purchasing sex, some sex workers have reported seeing a decrease in “good” clients and that the remaining “bad” clients now make up a greater proportion of available options. The report indicates that sex workers are taking greater risks in their interactions with clients, such as agreeing to visit their homes, concluding negotiations with clients more quickly or in secluded spaces that are safer for the client, and agreeing to engage with more dangerous clients.<sup>187</sup>

Amnesty International’s research also indicates that this increase in risk is felt most acutely by resource-poor, street-based sex workers who cannot relocate indoors and now face increased competition for “bad” clients, more pressure to conclude negotiations quickly and covertly, and reduced bargaining power.<sup>188</sup> In Norway, service providers, as well as many of the sex workers interviewed by Amnesty International, expressed concern that attitudes towards people who sell sex have hardened in

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<sup>167</sup> SALRC Report page 232.

<sup>168</sup> SALRC Report page 233.

<sup>169</sup> SALRC Report para 2.497 and page 233.

<sup>170</sup> SALRC Report para 3.132

<sup>171</sup> SALRC Report para 3.134.

<sup>172</sup> SALRC Report para 3.137.

<sup>173</sup> SALRC Report para 4.239, note that the SALRC “recommend the retention of criminal sanctions for brothels and all third party offences.”

<sup>174</sup> SALRC Report para 62 and 4.273.

<sup>175</sup> SALRC Report para 3.134.

<sup>176</sup> SALRC Report para 3.138.

<sup>177</sup> SALRC Report para 4.239,

<sup>178</sup> SALRC Report para 4.239

<sup>179</sup> SALRC Report para 4.239

<sup>180</sup> SALRC Report para 4.239

<sup>181</sup> SALRC Report para 3.117, the SALRC noting: “Non-criminalising the buyers of prostitution would therefore infringe on a prostitute’s rights of dignity, privacy and safety and security”

<sup>182</sup> SALRC Report para 2.

<sup>183</sup> See for example the SALRC reference to the submission of Ruhama, in support of the view that the SALRC “agrees that the illusion that prostitution is a choice is manipulative and deceptive.” The Ruhama submission is noted to have been endorsed by the Family Policy Institute, South Africa Christian lawyers Association, and Doctors for Life International, see SALRC Report at footnote 38.

<sup>184</sup> Amnesty International, The human cost of ‘crushing’ the market: Criminalization of sex work in Norway (Index: EUR/36/4034/2016), <https://www.amnesty.org/en/documents/eur36/4034/2016/en/>

<sup>185</sup> SALRC Report para 39, 44.

<sup>186</sup> Amnesty International, The human cost of ‘crushing’ the market: Criminalization of sex work in Norway (Index: EUR/36/4034/2016), <https://www.amnesty.org/en/documents/eur36/4034/2016/en/>

<sup>187</sup> J. Levy and P. Jakobsson, ‘Sweden’s abolitionist discourse and law: Effects on the dynamics of Swedish sex work and on the lives of Sweden’s sex workers’, *Criminology and Criminal Justice*, British Society of Criminology, 2014; S. Dodillet and P. Östergren, The Swedish sex purchase act: Claimed success and documented effects.

<sup>188</sup> For more information on the situation in Norway - See Amnesty International, The Human Cost of ‘Crushing’ the Market: Criminalization of Sex Work in Norway, 2016 (Index: EUR/36/4034/2016)

recent years and cited media reports, research and the experiences of other sex workers as evidence that negative attitudes towards sex workers have become more common in the last decade.<sup>189</sup>

Similarly, the Global Commission on HIV and the Law, considered submissions and research evidence related to the “Swedish Model” which “criminalises the client and not the worker” concluding “This approach has been applied in other countries and has actually resulted in grave consequences for the [sex] workers.”<sup>190</sup> Another study highlighted that the criminalization of the purchase of sex has also impacted HIV prevention and harm reduction; with condom distribution among clients has been publicly criticized for “encouraging sex work” and running contrary to the law, and has been scaled back in one area of Sweden since the passage of the law.<sup>191</sup>

Amnesty International considers that in order to protect the rights of sex workers, it is necessary not only to repeal laws which criminalize the sale of sex, but also to repeal those which make the buying of sex from consenting adults or the organization of sex work (such as prohibitions on renting premises for sex work) a criminal offence. Such laws force sex workers to operate covertly in ways that compromise their safety, prohibit actions that sex workers take to maximize their safety, and serve to deny sex workers support or protection from government officials. They therefore undermine a range of sex workers’ human rights, including their rights to security of person, housing and health.

## 7. DIVERSION

The SALRC report includes a recommendation that sex workers be provided with an “option to divert out of the criminal justice system.”<sup>192</sup> At this section of the SALRC report, the Commission appears to recognise the enormous harm that the criminal justice system can impose on sex workers. The report notes:

*“The Commission believes that a focus outside of the formal criminal justice system will allow South Africa to meet its obligations under the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to take all legal and other measures necessary to provide women with effective protection against gender-based violence and to protect women against all kinds of violence”*<sup>193</sup>

However, the SALRC’s proposals would allow for the subsequent rescinding of a related criminal record, only “if and when” sex workers “comply with” diversion orders.<sup>194</sup> The suggested drafting of a diversion order includes the discretion for “[c]ompulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose, which may include a period or periods of temporary residence;”<sup>195</sup> There is also a recommendation that decisions regarding the welfare of minors (who are in the care of sex workers) could be linked to the diversion process.<sup>196</sup>

Amnesty International disagrees with these recommendations. We submit that it is vital to ensure that there are effective frameworks and services that allow people to leave sex work if and when they choose. Amnesty International have found that state responses to sex work that rely principally on enforcement of criminal laws against sex work to discourage and/or penalize involvement in sex work have a detrimental impact on the human rights of sex workers and do not offer support, alternatives or choices to people who do not want to engage in sex work. Additionally, retaining criminalization and solely permitting some option for diversion fails to address the stigma and discrimination that attends criminalization. It further enables presumptions of criminality to be imposed on sex workers, where they are always deemed suspect under the law.

The CEDAW Committee is also very clear in its expectations that states parties provide proper opportunities for women and girls to leave sex work when they want to, and has criticized the “absence of specific shelters and crisis centres adapted for their needs and the lack of exit and reintegration programmes for women who wish to leave prostitution.”<sup>197</sup>

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<sup>189</sup> Amnesty International, The human cost of ‘crushing’ the market: Criminalization of sex work in Norway (Index: EUR/36/4034/2016), <https://www.amnesty.org/en/documents/EUR/36/4034/2016/>

<sup>190</sup> The Global Commission on HIV and the Law, Risks, Rights and Health, 2012, page 36 and at page 38 noting the negative impact of partial criminalisation includes an increase in “underground trade, more violence...[and] [f]ew prosecutions and convictions”.

<sup>191</sup> Levy and P. Jakobsson, ‘Sweden’s abolitionist discourse and law: Effects on the dynamics of Swedish sex work and on the lives of Sweden’s sex workers’, *Criminology and Criminal Justice*, British Society of Criminology, 2014

<sup>192</sup> SALRC Report para 46.

<sup>193</sup> SALRC Report para 2.501.

<sup>194</sup> See for example, the SALRC recommends that all recorded criminal activity associated with a woman’s life in prostitution must be rescinded if and when she agrees to exit, and complies with the assistance offered by state funded exit programs”, SALRC Report para 2.507.

<sup>195</sup> SALRC Report page 228.

<sup>196</sup> SALRC Report para 228.

<sup>197</sup> See CEDAW, Concluding Observations: Hungary, UN Doc. CEDAW/C/HUN/CO7-8, 2013, para. 22; CEDAW, Concluding Observations: China (including mainland China, Hong Kong and Macau), UN Doc. CEDAW/C/CHN/CO/6, 2006, para. 19

Amnesty International is concerned that detention in the context of diversion as proposed may threaten the right to liberty and security of persons, for example, where sex workers or their clients are arbitrarily detained, or held in shelters or “re-education centres” from where they cannot leave voluntarily.<sup>198</sup> Any person held on grounds that are not in accordance with the law is arbitrarily detained and therefore unlawfully. Detention can also amount to arbitrary detention, even if it is authorized by law, if it includes “elements of inappropriateness, injustice, lack of predictability and due process of law.”<sup>199</sup> The UN Human Rights Committee has determined that legally authorized detention must be reasonable, necessary and proportionate, taking into account the specific circumstances of a case.<sup>200</sup>

The Global Commission on HIV and the Law recommends that countries must move away from compulsory detention or rehabilitation and “[i]nstead, provide sex workers with evidence-based, voluntary, community empowerment services.”<sup>201</sup>

The UN Special Rapporteur on torture has expressed concern about the compulsory detention of sex workers in so-called rehabilitation centres and observed: “[b]reaches of privacy and confidentiality are a further indignity experienced by sex workers in health settings.”<sup>202</sup> The UN Special Rapporteur on violence against women has also expressed concern about the use of forcible detention and rehabilitation against sex workers.<sup>203</sup>

In light of these concerns, and in line with South Africa’s international human rights obligations, Amnesty International recommends that the government should rather ensure protection of social and economic rights that allow voluntary exit from sex work.

## 8. CONCLUSION

This submission has set out some of Amnesty International’s key concerns with the SALRC Report and recommendations in relation to their review of “Project 107 Sexual Offences Adult Prostitution.”

The submission has highlighted findings from research conducted by Amnesty International in various countries with different legal contexts and approaches to sex work, which demonstrates that criminalization and other penalization of sex work have a foreseeably negative impact on a range of sex workers’ human rights.

Amnesty International recommends that the South African government fully decriminalize sex work as the starting point of preventing and redressing human rights violations against sex workers.

### **Amnesty International also recommend that the government of South Africa should:**

- Ensure the meaningful participation of sex workers in the development of law and policies that directly affect their lives and safety;
- Address underlying harmful gender and other stereotypes, discrimination and structural inequalities that drive marginalization and exclusion and lead to individuals from marginalized groups selling sex in disproportionate numbers, and to discrimination against sex workers;
- Comply with their obligations with respect to all people’s economic, social and cultural rights, in particular guaranteeing access for all to education and employment options and social security to prevent any person from having to rely on selling sex as a means of survival due to poverty or discrimination;
- Combat gender and other forms of direct and indirect discrimination and ensure that the human rights of all individuals, including women and girls, and those at risk of discrimination and abuse because of their sexual orientation or gender identity and expression, race, caste, ethnicity, Indigenous identity, migrant status or other characteristics of their identity, are equally respected, protected and fulfilled;
- Repeal existing laws and refrain from introducing new laws that criminalize or penalize directly or in practice the consensual exchange of sexual services between adults for remuneration;

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<sup>198</sup> See Human Rights Watch, *Off the streets: Arbitrary detention and other abuses against sex workers in Cambodia*, 2010.

<sup>199</sup> See Human Rights Committee, Comm. 458/1991, *A. W. Mukong v Cameroon*, UN Doc. CCPR/C/51/D/458/1991, 1994, para. 9.8.

<sup>200</sup> Human Rights Committee, Comm. 305/1988, *Van Alphen v The Netherlands*, UN Doc. CCPR/C/39/D/305/1988, 1990, para. 5.8; Human Rights Committee, Comm. No. 560/1993, *A. v Australia*, UN Doc. CCPR/C/59/D/560/1993, 1997, para. 9.2.

<sup>201</sup> The Global Commission on HIV and the Law, *Risks, Rights and Health*, 2012.

<sup>202</sup> Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN Doc. A/HRC/22/53, 2013, paras. 40, 75.

<sup>203</sup> Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to India, Rashida Manjoo, UN Doc. A/HRC/26/38/Add.1, 2014, para. 78 (e).

- Refrain from the discriminatory enforcement of other laws, such as those on vagrancy, loitering, and immigration requirements, against sex workers;
- Refocus laws away from catch-all offences that criminalize most or all aspects of sex work and towards laws and policies that protect sex workers' health and safety and that oppose all acts of exploitation and trafficking in commercial sex (including any involvement of children);
- Ensure that there are effective frameworks and services that allow people to leave sex work if and when they choose; and
- Ensure that sex workers have equal access to justice, health care, and other public services, and to equal protection under the law.

Amnesty International South Africa would welcome the opportunity to provide the Multi-Party Women's Caucus with more information regarding the human rights abuses associated with the criminalization of sex work. We are available to provide an oral submission at the Multi-Party Women's Caucus Summit on 5 March 2018.

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SUBMISSION TO THE MULTI-PARTY WOMEN'S CAUCUS ON THE  
SOUTH AFRICAN LAW REFORM COMMISSION REPORT ON  
"PROJECT 107 SEXUAL OFFENCES ADULT PROSTITUTION

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