

A “Fair Choice” for South Africa’s Sex Workers

Case Study on Struggles for Sex Workers’ Rights in South Africa

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Introduction

Globally the commercial sex industry has become the focus of intense and emotive debate. Human rights concerns form foundational elements of the arguments both for and against decriminalization whilst political, ethical, and cultural factors continue to obscure the reality faced by those on the ground. Even the oft referred to dichotomy between criminalization and legalization is misleading in its simplification of a complex intersectional discussion. However, regardless of moral or legislative allegiance, there is a universal consensus that prostitution, or sex work as the practice will be referred to in this paper, and the surrounding socio-economic framework in which it is situated facilitates suffering on an egregious scale. The relegation of society’s most vulnerable to a life of violence, exploitation, and persecution has come to the fore as one the great failings of humanity and activists, academics, and politicians alike have sought to respond.

The profound nature of the pain prostitution proliferates has seen deep ideological divides emerge where legislature is concerned. Whilst formal alterations to laws will not provide an instantaneous or all-encompassing remedy the legislative framework in which the commercial sex industry operates defines and shapes any and all efforts toward a resolution as well as the value status of sex workers. Several nations have decriminalized or sought to regulate prostitution, notably the Netherlands, Germany, and New Zealand, whilst a host of Scandinavian countries, including Sweden and Finland, have opted for policies of partial-decriminalization. However, sex work is currently criminalized across the vast majority of Africa which sees the worst of the ills associated with the enterprise continue to develop at an alarming rate. This paper concerns the South African case and seeks to establish the context of the commercial sex therein, provide an analysis of both the theory and practical consequences of legislative change, and provide informed recommendations as to which legislative response would best facilitate the protection and enhancement of the rights and freedoms of Africa’s prostituted peoples.

This project characterizes the discussion of sex work in South Africa within the context of the U.N. Human Rights mandate and the differing stances of key political actors in the country. I will then present the four broad categories of legislative alternatives for regulating the sex industry namely: full-criminalisation, regulation, partial-decriminalisation (the decriminalization of the sale of sex only), and full-decriminalisation. The current state of the commercial sex industry in South Africa leaves little room to argue that the status quo (full-criminalization) is an effective or even adequate model of regulation and whilst studies regarding the consequences of regulation will be considered in this project regulation will be shown to be an inviable option. This discussion of regulative alternatives for the South African sex industry will thus be narrowed to a consideration of partial and full decriminalisation. To this end the findings of the South African Law Reform Commission’s (“SALRC”) 2015 report, independent studies, and academic theory, will supplement a contrast of the objectives and arguments advanced by Embrace Dignity, a non-

governmental organization and leading advocate of partial-decriminalisation in South Africa, and the Sex Worker Education and Action Task Force (“SWEAT”), the longest-standing NGO lobbying group on this issue committed to a full-decriminalisation agenda. In May of 2003 New Zealand, by a single-vote majority in parliament, decriminalized the sex industry and, whilst vastly removed from South Africa culturally and socio-economically, the New Zealand case is referenced by SWEAT in their campaign for decriminalization and so will be considered here.¹

Debate regarding legislation concerning the commercial sex industry in South Africa is currently dominated by the agendas of Embrace Dignity, SWEAT, religious institutions, politicians, and academics. Whilst numerous studies have sought to quantify the consequences of criminalization and expose the reality of life as a sex worker the opinions of those on the ground are still too often overlooked, spoken for by advocacy groups or experts, and only acknowledged in the rare cases where sex workers manage to exit the industry and themselves become prominent public advocates of a specific legislative agenda; but otherwise given little weight in the discussion. The basis for this project is survey study of 67 sex workers from Cape Town and the surrounding rural areas. Twenty-six of the survey participants were black South Africa women who work in Cape Town, twenty-two black South African women from farms and the rural areas surround Cape Town (Genadendal, Haarlem, Kranshoek and Reitpoort), and nineteen black foreign sex workers working in Cape Town. The overwhelming majority of South African sex workers are women and so this sample group consisted of women only --not to neglect or dismiss the plight of male or trans sex workers -- but to maintain consistency across the sample group and limit the scope of this project.² This study endeavoured to provide insight into the experiences and opinions of South African sex workers and bring their concerns to bare in the discussion of legislative change. In doing so five overarching issues of contention were considered: Financial necessity, stigma and its relation to law, sex worker client relations, health concerns and condom use, and sex worker-law enforcement relations. To a lesser extent, sex worker-third party relations were also a topic of inquiry. While a similar number of questions were devoted to this issue as to others this project does not want to inadvertently downplay the widespread, well-documented, and serious consequences of third party involvement in the sex industry based on the results of this survey alone.

Ultimately the findings of this study and others, in conjunction with theoretical arguments and analysis, conclude in favour of the full-decriminalisation of the commercial sex industry in South Africa. Rather than protect those who are most exploited and abused in sex industry the current law in South Africa sees sex workers vilified and further harmed by police. Whilst partial-decriminalisation does extend formal legal protections to sex workers it does not ally them with law enforcement. Rather than initiating a meaningful and mutual change in sex worker-law enforcement relations such a policy leads to police officers treating sex workers as means to arrest their clients. Further still the ultimate goal of partial-decriminalisation itself, that of abolishing the sex industry through targeting demand, is problematic. Labelling sex workers as victims rather than equal citizens does not work to reduce stigma or enhance their dignity as Embrace Dignity claims it to do. Analogous to the effect of partial-decriminalisation on sex worker-law enforcement

¹ Rachel Moran and Melissa Farley, “Consent, Coercion, and Culpability: Is Prostitution Stigmatized Work or an Exploitive and Violent Practice Rooted in Sex, Race, and Class Inequality?,” *Archives of Sexual Behavior* 48 (February 5, 2019), <https://doi.org/10.1007/s10508-018-1371-8>.

² “Sex Work and Feminism,” *Sonke Gender Justice* (blog), accessed April 29, 2020, <https://genderjustice.org.za/publication/sex-work-feminism/>.

relations so too would such a policy fail to address stigma in healthcare and broader society. As will be considered in the survey results, abolishing the sex industry removes valuable source of income for many household South African women who have no other options. Whilst full decriminalization is not a silver bullet, and does pose potential risks, such a legal alteration in conjunction with exit programs and non-legal departmental policies regarding training and education for law enforcement and healthcare workers, would effectively protect sex workers whilst not limiting their agency or ability to support their families, and meaningfully and unequivocally acknowledge their status as equal citizens.

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Definitions

Sex Worker:

Aside from quotation, paraphrasing or references to written law, his project utilizes the term 'sex worker' to refer to the sellers of sex in the commercial sex industry. This phrasing, as opposed to 'prostitute' or 'prostituted person', definitively and deliberately characterizes sex work as a legitimate occupation and respects the personhood of those to whom it applies. Conversely advocates of partial-decriminalisation who characterize sex work as inherently violent and exploitive, Embrace Dignity being the key example here, use the term 'prostituted person'.

Third Party Actors:

Encompasses pimps, brothel owners and managers, human traffickers who supply the commercial sex market, people who coerce or lead others into prostitution, and those who facilitate prostitution financially or logistically (e.g. connecting buyers to sellers).

Buyers and Clients:

Refers to the purchasers of commercial sex.

Contextualizing the Discussion: The U.N. Human Rights Mandate and the Evolution of the Debate in South Africa

The discussion of different legislative regulatory models for the sex industry evolved within the context of the United Nations (UN) human rights mandate established in the mid-twentieth century.³ The 1949 U.N. Convention on the Suppression of the Traffic in Persons and Exploitation of Others shifted global focus toward human trafficking.⁴ Whilst the commercial industry was identified as a contributor toward human trafficking it wasn't until the 1979 Convention on the Elimination of Discrimination Against Women ("CEDAW"), which called on signatories to suppress all forms of traffic in women and the exploitation of prostitution, that sex work was explicitly included in the global discussion of human trafficking.⁵ CEDAW placed binding obligations on signatory states to seek to abolish the sex industry and characterized sex work as indecent.⁶ South Africa signed CEDAW in January of 1993 and ratified it on the 15th of December 1995 without reservations.⁷ Advocates of legalization, campaigning for the recognition of sex work as a legitimate form of employment, objected to this characterization of prostitution and sought further discussion over the complex nature of consent in the context of sex work. Negotiating these divergent positions resulted in the drafting of the 2000 U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children dubbed the Palermo Protocol.⁸ This international convention again highlighted the responsibility of states to respond to, and combat, human trafficking for sex and address demand for commercial sex but left the specific regulatory model adopted by each nation open to the possibility of defining sex work as legitimate.⁹

Congress Of South African Trade Unions

Whilst the South African Parliament reaffirmed its commitment to criminalization of the commercial sex industry through the codification of statutory crimes detailed in the Sexual Offences Act of 2007 several influential interest groups have since entered the discussion.¹⁰ The Congress Of South African Trade Unions ("COSATU") tabled a sex work discussion document at its 2012 Gender Conference.¹¹ Whilst the document was not ratified as representing COSATU's official position it was intended to resuscitate the discussion regarding decriminalization of sex work initiated at the federation's 10th Congress in 2009.¹² COSATU's involvement in the discussion regarding sex work is motivated by the disproportionate effect the sex industry has on working class and poor people in South Africa; predominately black women.

³ "Decriminalisation of Adult Sex Work; SALRC Project 107" (South African Law Reform Commission), accessed April 29, 2020, <https://www.justice.gov.za/salrc/reports/r-pr107-SXO-AdultProstitution-2017-Sum.pdf>.

⁴ "Decriminalisation of Adult Sex Work; SALRC Project 107."

⁵ "Decriminalisation of Adult Sex Work; SALRC Project 107."

⁶ "Decriminalisation of Adult Sex Work; SALRC Project 107."

⁷ "Decriminalisation of Adult Sex Work; SALRC Project 107."

⁸ "Decriminalisation of Adult Sex Work; SALRC Project 107."

⁹ "Decriminalisation of Adult Sex Work; SALRC Project 107."

¹⁰ "Decriminalisation of Adult Sex Work; SALRC Project 107."

¹¹ "Decriminalisation of Adult Sex Work; SALRC Project 107."

¹² "Decriminalisation of Adult Sex Work; SALRC Project 107."

High levels of unemployment, limited access to education, the burden of child rearing, and persisting gender inequality have contributed to the feminization of poverty in South Africa. The discussion document aligned itself with the non-governmental organization the Sex Worker Education and Action Taskforce (SWEAT) in calling for the full decriminalization of sex work on the following grounds:

- “Prostitution is a source of income for women and has a long history of existence;
- The laws criminalising prostitution are out-dated and patriarchal, reflecting repressive ideas on sexuality, relationships, who owns women’s bodies, and the position of women in society;
- Current laws violate prostitutes’ rights;
- Violence against women can only be addressed in a fully decriminalised system where prostitution is recognized as viable work;
- Current laws increase women’s vulnerability to HIV/AIDS. The law reduces women’s power to negotiate safer sex; limits their access to HIV education, condoms and treatment; and increases their risk for violence and rape.” *

The criminalization of sex work is thus identified as a primary contributor to instances of violence against sex workers at the hands of clients and police. Working outside of the law exposes sex workers to unsafe working conditions, perpetuates harmful societal stigma, and prevents sex workers from accessing adequate healthcare.¹³ However, some delegates raised concerns as to whether the law itself was indeed a root cause of these issues or merely an exacerbating factor.

African National Congress Gender Policy Discussion

During the COSATU Gender Conference the Honourable Angie Motshekga -- MP and ANC Women’s League (“ANCWL”) President -- stated that, “poverty in South Africa is wearing a woman’s face and that if any progress is to be made against poverty then women are the entry point.”¹⁴ Ms Nozizwe Madlala-Routledge, representing the ANCWL and the organization Embrace Dignity, presented the ANC Gender Paper titled “Prostitution and the Trafficking of Women.”¹⁵ Embrace Dignity is a non-governmental organization campaigning for the partial-decriminalisation of sex work, the decriminalisation of the sale of sex only, as a means to afford formal legal protections to the sex industry’s most vulnerable actors whilst targeting the demand for commercial sex. On this view sex work is an institution of exploitation, born of economic desperation and coercion, and buttressed by a system of patriarchy in which women are commodified.¹⁶ The ANC Gender Paper prioritized gender sensitive policies, which seek to educate and employ South Africa’s impoverished women, as a means to address the coercive socio-economic forces that push women toward sex work in the first place rather than merely mitigate the symptoms of an inherently damaging practice.¹⁷

¹³ “Decriminalisation of Adult Sex Work; SALRC Project 107.”

¹⁴ “Decriminalisation of Adult Sex Work; SALRC Project 107.”

¹⁵ “Sex Work Decriminalisation: Commission on Gender Equality, SWEAT, South African Law Reform Commission, Department of Justice, Parliamentary Legal Services | PMG,” accessed April 30, 2020, <https://pmg.org.za/committee-meeting/23084/>.

¹⁶ “Decriminalisation of Adult Sex Work; SALRC Project 107.”

¹⁷ “Sex Work Decriminalisation.”

Federation of South African Trade Unions

Advocates of partial-decriminalisation share the sentiment that the commercial sex industry is inherently exploitative with those who support the status quo of full criminalization but differ in their legislative approach thereto. In June 2011 the Federation of Unions of South Africa (FEDUSA) adopted a resolution at its 58th National Executive Committee meeting, pledging its support to the policy of total criminalization.¹⁸ FEDUSA argued that the loosening of commercial sex regulations would result in an increase in the scale of the societal ills associated with the industry. The focus of policy-makers should therefore be on effective poverty eradication.¹⁹ FEDUSA supports the International Labour Organisation's (ILO) characterization of sex work as 'indecent' because of the abusive nature of the practice, links to human and child trafficking, its role as a vector for HIV/Aids, and the institutionalized presence of organized crime syndicates*.

Legislative Models

Broadly categorized there are four legislative regulatory models which have been utilized in the context of the commercial sex industry: full-criminalisation, partial-decriminalisation, regulation, and full-decriminalisation.

Full-criminalisation, as mentioned previously, is the current model employed in South Africa under which the sale, purchase, and third-party facilitation of commercial sex is illegal. Under South African law Section 20(1A)(a) of the Sexual Offences Act 505 provides that any person who has unlawful carnal intercourse or commits an act of indecency with another person for reward, commits an offence.²⁰ A person cannot, however, be arrested simply for being known or suspected to be a sex worker; law enforcement must establish a reasonable claim that an indecent act has been or will be committed by said person at the time in question.²¹ This stipulation has translated into police officers searching suspected sex workers for condoms, which they confiscate as evidence of intent to sell sex, and the harassment of sex workers. Full-criminalisation characterizes the sex industry as inherently exploitative and detrimental to society at large. It thus seeks to eliminate the commercial sale of sex entirely. Such a policy is characterized by an adversarial relationship between sex workers and law enforcement, the disproportionate arrest and prosecution of the sellers of sex, widespread stigmatization of sex workers, the underground and unregulated operation of sex workers and coercive third party influences, and sex workers having limited access to healthcare and other social services as a result of their criminal status.

¹⁸ "Decriminalisation of Adult Sex Work; SALRC Project 107."

¹⁹ "Decriminalisation of Adult Sex Work; SALRC Project 107."

²⁰ "Decriminalisation of Adult Sex Work; SALRC Project 107."

²¹ "Decriminalisation of Adult Sex Work; SALRC Project 107."

This project limits the discussion of the partial-decriminalisation model to that of decriminalizing the sale of sex only, as is the current legal position in Sweden, and is often referred as either the Swedish or Nordic model. Since 1999, under the Swedish Penal Code, sex work is not criminalised but the buyers of sex and other third parties may face criminal consequences.²² Norway, Iceland, Finland, Israel, Korea and the United Kingdom have since adopted similar legislative models. Similarly to a system of full-criminalisation ‘prostitution’ is regarded as inherently exploitative and a form of violence against women symptomatic of gender inequality.²³ The intent here is to afford formal legal protections to those victimized by the sex industry whilst deliberately targeting the demand for paid sex. Such a model is abolitionist in that it seeks eliminate the sex industry rather than to regulate it or mitigate harm.

Government regulation of the sex industry within a non-criminalized framework has been implemented in the Netherlands and Germany. Sex work is decriminalised in the Netherlands but subject to municipal regulations on location and practice.²⁴ Provided the proper licenses have been attained from the relevant municipality it is legal to own and operate a brothel as well as sell sex directly.²⁵ A deliberate focus on combatting criminal elements and eradicating involuntary prostitution whilst pursuing the integration of sex work into the formal economy is facilitated by administrative and labour laws.²⁶ Regionalized regulatory responsibility sees local governments enforce licensing and health and safety requirements.²⁷ Licensing stipulations detail permitted substance consumption by sex workers, safe sex practices, and the right to refuse clients or specific sex acts.²⁸ Roughly half of Dutch municipalities require sex workers who operate from their homes or to possess licenses to work from home. The Aliens Employment Act of 1944 prohibits the issuing of a work permit for the sex industry to undocumented foreigners and requires that people operating in such a capacity be deported as an illegal alien.²⁹

The discussion of the efficacy of government regulation as a legislative model for the sex industry is contentious, nuanced, and still ongoing in Netherlands.³⁰ Whilst this paper draws on information and experiences gleaned from studies pertaining to the Dutch model it does not take regulation to be a viable option in the South African context. Any potential legislative framework for the South African sex industry should prioritize the concerns of low-income women, who make up the majority of South Africa’s sex worker population.³¹ Licensing and locational regulations would be both unenforceable and detrimental in the South African case. Sex workers, who currently face stigma from society at large and abuse at the hands of law enforcement would be unwilling to register with municipal authorities.³² This buy-in problem is evident in Senegal, the only African state to implement the regulatory legal model for its sex industry, which currently sees an estimated 8% to 25% of its sex worker population registered

²² “Sex Work Decriminalisation.”

²³ “Sex Work Decriminalisation.”

²⁴ “Decriminalisation of Adult Sex Work; SALRC Project 107.”

²⁵ “Decriminalisation of Adult Sex Work; SALRC Project 107.”

²⁶ “Decriminalisation of Adult Sex Work; SALRC Project 107.”

²⁷ “Decriminalisation of Adult Sex Work; SALRC Project 107.”

²⁸ “Decriminalisation of Adult Sex Work; SALRC Project 107.”

²⁹ “Decriminalisation of Adult Sex Work; SALRC Project 107.”

³⁰ “Decriminalisation of Adult Sex Work; SALRC Project 107.”

³¹ “Sexuality, Poverty and Law,” accessed April 30, 2020, <http://spl.ids.ac.uk/sexworklaw>.

³² “Sexuality, Poverty and Law.”

for the appropriate licenses.³³ Formal registration is perceived as labelling oneself for exploitation and numerous NGOs confirm this concern reporting that police routinely harass sex workers demanding bribes or sex.³⁴ In the case of South Africa's rural sex worker population licensing and locational restrictions are likely to be treated as obstacles to be overcome rather than as efforts to protect the interests of sex workers. Currently the criminal status of sex workers in South Africa isolates vulnerable women preventing them from accessing formal social services and the protection of law enforcement or exiting the industry once convicted. Rather than mitigate these issues partially enforceable regulations with low participation rates would merely perpetuate the exclusion of the majority of sex workers in a different form. Regulation does not do enough to alter the dynamics between sex workers and law enforcement or society at large. Rather, the ineffective implementation thereof, because of pre-existing stigma and limited public funds, would instead increase the vulnerability of sex workers.

The Prostitution Reform Act 28 of 2003 saw sex work entirely decriminalised in New Zealand with respect to people selling their bodies for sexual services, brothel keeping, living off the proceeds of someone else's prostitution, and street solicitation.³⁵ New Zealand's decriminalisation of sex work is an oft cited event in the arguments proposed by SWEAT, the leading proponent of decriminalisation in South Africa.

The Sex Worker Education and Action Taskforce

Founded by Shan Petzer, a male sex worker, and Ilse Pauw, a Clinical Psychologist, in the early 1990s the Sex Worker Education and Action Taskforce has become one of South Africa's leading advocates for the total decriminalization of sex work.³⁶ Originally focused on safer sex education programs for sex workers in 1999 SWEAT expanded its mandate to include crisis counselling, legal advice, and skills training. In 2000, SWEAT officially established its advocacy program for the decriminalization of adult sex work in South Africa and began reaching out to sex workers across the country in an effort to engage them on the topics of healthcare and legal reforms.³⁷ SWEAT makes deliberate use of the term 'sex worker' as a part of this advocacy campaign. Working alongside the Women's Legal Centre SWEAT offered pro-bono legal advice to sex workers whilst pursuing the case for decriminalization in the nation's courts. By 2003, SWEAT initiated a research program aimed at gathering credible information on the commercial sex industry and the experiences of sex workers to further legitimize the decriminalization movement. SWEAT's legislative stance maintains that the criminalization of sex is the primary cause for many of the problems sex workers in South Africa are currently faced with. By labelling sex workers as criminals, the state indirectly endorses a harmful stigma which sees sex workers denied equal treatment by healthcare workers, routinely abused and

³³ "Sexuality, Poverty and Law."

³⁴ Maya Lau, "Sex Tourism In Senegal," HuffPost, September 8, 2011, https://www.huffpost.com/entry/senegalese-sex-tourism_b_952640.

³⁵ "Sex Work Decriminalisation."

³⁶ "Sex Work Decriminalisation."

³⁷ "Who We Are," Sweat (blog), accessed April 30, 2020, <http://www.sweat.org.za/who-we-are/>.

harassed by police, and ostracized by society at large.³⁸ This paper presents the following analysis of SWEAT's research into the South African commercial sex industry, and their case for full decriminalisation, through the lens of the criteria established by the Asijiki survey.

Financial Necessity:

On the metric of financial necessity SWEAT characterizes the South African commercial sex industry as comprising of an estimated 130,000 to 180,000 sex workers, 90% of which are female and the remaining 10% male or transgender.³⁹ Poverty in South Africa is highly feminized with women shouldering the responsibility for the vast majority of unpaid domestic work. 27.1% of women compared to 15.6% of men occupy the poorest fifth of households in the country.⁴⁰ The limited number of employment opportunities for low income women, many of whom are uneducated as a result of domestic responsibilities, sees the widespread occurrence of transactional sex for items such as groceries and school fees occur daily.⁴¹ This informal 'sex for survival' offers only short-term financial relief. Contrastingly, sex workers who engage in transactions of a similar nature with their clients were found by a 2010 study in Cape Town to earn between 1.5 and 5.4 times more than they had in previous employment depending on their education levels.⁴² Although most female sex workers in South Africa have not completed matric (high school) the same study found that they earned on average more than double the mean income of employed South Africans and 76% of participants in the study reported that their primary reasons for selling were financial.⁴³ Sex work allows women with familial or other dependents to set their own working hours and effectively meet domestic obligations through earning a more lucrative hourly income.⁴⁴

Many opposed to the decriminalisation of sex work argue that the unequal power dynamic between wealthy clients and financially desperate sex workers limits their ability to 'freely consent'. Regardless of whether sex work pays better than alternative employment options, if financial necessity is a motivating factor for one's decision to sell sex, then said 'choice' was made under coercive conditions.⁴⁵ Further still, rather than choose sex work because of its higher earning potential the vast majority of low income, uneducated, South African women who sell sex do so because it is their only employment option. Survival sex of this kind is does not meet the standard for voluntary consent we intuitively associate with sex in any other context and so should not be permitted simply because a certain socio-economic class of women have no other means to support themselves and their households.⁴⁶

³⁸ "Who We Are."

³⁹ "Sex-Workers-Size-Estimation-Study-2013.Pdf," accessed April 30, 2020, <http://www.sweat.org.za/wp-content/uploads/2019/09/Sex-Workers-Size-Estimation-Study-2013.pdf>.

⁴⁰ "Sex Work and Feminism."

⁴¹ Ibid

⁴² "Sex Work and Feminism."

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ "Sex Work Decriminalisation."

⁴⁶ "Sex Work and Feminism."

SWEAT responds to arguments of this kind by emphasising that in South Africa low-come workers face difficult and limiting economic conditions regardless of their industry of employment.⁴⁷ All but the most privileged in society are ‘forced’ by financial necessity to work, many in unpleasant conditions for little pay, yet one’s consent to do so is not seen as illegitimate or coerced.⁴⁸ The claim that consent in the context of sex entails a more rigorous standard for ‘free choice’ than agreeing to risk one’s life labouring in a mine shaft is problematic when it is made on behalf of sex workers.⁴⁹ If the goal here is to ensure that women are freely able to exercise agency in deciding with who, and for what reasons, they have sex then blanket statements labelling ‘financial necessity’ as a normatively insufficient basis for consent do not further this aim. Instead such reasoning implies that poor women are not able to respond as effectively as poor men to difficult economic situations and undermines their status as equal and active decision makers in society.⁵⁰

Stigma and its Relation to Law:

SWEAT maintains that sex work’s criminal status provides the genesis and framework through which the associated societal ills of the industry are proliferated. Sex work is not inherently bound to crime, human trafficking, and exploitation. Rather, the current illegality of the practice in South Africa drives sex workers underground and away from social services, facilitates the emergence and operation of organized crime and trafficking syndicates, increases societal stigma toward sex works, and labels vulnerable women as criminals to be targeted and arrested rather than protected.⁵¹ Arguments against decriminalization which focus the high rates of violence and crime prevalent in the commercial sex sector ignore the role the current law plays in perpetuating this pernicious elements. 15% of female sex workers surveyed in Johannesburg in 2011 reported negative interactions with police just in the month prior being interviewed.⁵² Police abuse, harassment, and rape of sex workers is widely documented in South Africa.⁵³ Law enforcement officers see their actions as justified because sex workers are criminals, responsible for the degradation of societal morality. Sex workers, persecuted by those who are supposed to protect them, rarely report incidents of abuse, trafficking, or rape to the authorities for fear of being arrested themselves.⁵⁴ This antagonistic relationship, and cycle of exploitation, can only be broken by the effective and mutual alliance of sex workers and law enforcement. Similarly, stigma resulting from their criminal status sees sex workers encounter obstacles in accessing healthcare, including condoms and HIV treatment.⁵⁵ Disease risk does not automatically go along with sex work. Indeed, women who sell sex under better working conditions report STI rates similar to those of the general population.⁵⁶ Whilst criminalisation purports to combat the growth and persistence of the sex industry, through marking sex workers

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ “Sex Work and Feminism.”

⁵¹ “Sex Work Decriminalisation.”

⁵² Ibid

⁵³ “Sex Work and Feminism.”

⁵⁴ “Decriminalisation of Adult Sex Work; SALRC Project 107.”

⁵⁵ “Sex Work and Feminism.”

⁵⁶ “Sex Work and Feminism.”

with a criminal record, such a system prevents them from attaining alternate employment and exiting the industry.⁵⁷ Sex workers are thus trapped by a law which claims to free them.

Criminalisation's role in fostering stigma against sex workers is further illustrated by their dual status as protected-but-excluded from South Africa's formal legal system. Stigma and discrimination prevent sex workers from accessing the protection health, labour, and safety laws afford to all South African citizens.⁵⁸ Sex workers cannot unionise or engage in collective bargaining, their working conditions and hours are not subject to regulation, nor is the capacity of their employers to withhold large amounts of their pay on threat of dismissal or require them to see specific clients against their will.⁵⁹ In *Kylie versus CCMA 2010*, the Labour Appeals Court ruled that sex workers are protected by South African labour law despite the present illegality of their work.⁶⁰ However, owing to the stigma and discrimination associated with sex work it is unlikely that any real benefits will flow from this ruling. Sex workers are technically entitled to equal protection under South African law yet substantially unable to exercise this right.⁶¹

Sex Worker - Client Relations

According to SWEAT, the legal framework in which the commercial sex industry operates is the primary determinant of the dynamic between sex workers and clients.⁶² Criminalisation isolates sex workers from both legal and police protections rendering them vulnerable to abuse and exploitation at the hands of their clients. A predatory relationship between the sellers and buyers of sex is not however, preordained. The New Zealand Prostitution Reform Act of 2003, which decriminalized the commercial sex industry, has seen sex workers from small independently run brothels.⁶³ In a study conducted by Mossman and Mayhew in 2007 sex workers in New Zealand reported that the Act had helped increase the reporting of violence to the police which has resulted in an increase in the number of buyers arrested as opposed to their victims.⁶⁴ Such a system effectively brings sex work into the domain of the formal legal system. Rather than promoting the belief that men are entitled to women's bodies it empowers sex workers to exercise their right to bodily autonomy and dictate the terms of transactions as the provider of a regulated service.⁶⁵ In New Zealand sex workers are aware that they have the right to refuse clients for any or no reason.⁶⁶ Prior to decriminalisation only 37% of sex workers felt that they could refuse clients compared to 62% of interviewed respondents four years after

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ "Sex Work and Feminism."

⁶⁰ Ibid

⁶¹ "Decriminalisation of Adult Sex Work; SALRC Project 107."

⁶² "Sex Work Decriminalisation."

⁶³ Kathleen Preble, Regina Praetorius, and Andrea Cimino, "Supportive Exits: A Best Practices Report for a Sex Worker Intervention," *Journal of Human Behavior in the Social Environment*, September 4, 2015, 1–17, <https://doi.org/10.1080/10911359.2015.1082852>.

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Gillian M. Abel, Lisa J. Fitzgerald, and Cheryl Brunton, "The Impact of Decriminalisation on the Number of Sex Workers in New Zealand," *Journal of Social Policy* 38, no. 3 (July 2009): 515–31, <https://doi.org/10.1017/S0047279409003080>.

decriminalisation.⁶⁷ Clients in turn are more likely to report incidents of third-party maleficence or the exploitation of children to law enforcement since they are no longer committing a criminal offense themselves.⁶⁸

Sex Worker - Law Enforcement Relations:

The legal framework in which sex workers and law enforcement officers operate casts these two groups in specific roles and fundamentally determines the dynamics between them. The criminalization of sex work positions sex workers as the subject of police persecution rather than protection and facilitates an inherently antagonistic dynamic between police officers and sex workers. Police are obligated by both the law and their reinforced unconscious biases to arrest and target sex workers as criminals while sex workers are driven toward riskier practices to their attentions.⁶⁹ Many police officers believe that because sex workers operate outside of law they deserve the consequences of their criminal actions. Sex workers reporting cases of abuse and rape are thus often turned away, mocked, or exploited even further by police themselves.⁷⁰

Pragmatically, the cycle of arresting and re-arresting sex workers does not target the perpetrators of serious violent crime in the sex industry, does not restrict the growth of the industry as sex workers labelled with criminal records are unable to seek other forms of employment, facilitates the ongoing abuse of sex workers by both their clients and police, and wastes scarce public resources.⁷¹ In South Africa between April 2014 and March 2015 there were 6340 arrests for detected ‘sexual offenses’, which does not include sex workers who were arrested without any crime being officially recorded.⁷² In 2011 it is estimated that R14 million was spent on arresting, detaining, and bringing sex workers to court.⁷³ A report published by SWEAT and Sonke Gender Justice in 2017 found that 63% of surveyed sex workers had been arrested at least once and that averaging out the total number of arrests across the 50 participants resulted in a mean of four arrests per sex worker.⁷⁴ Arresting sex workers does not effectively restrict the growth of the commercial sex industry.

The antagonistic dynamic between sex workers and law enforcement is clearly illustrated in the report’s analysis of how sex workers perceive police. Only 8% of participants indicated that they trust the police ‘all’ or ‘most of the time’ while the 37% of respondents selected the most negative possible option; ‘not at all.’⁷⁵ Of the sex workers surveyed 74% answered yes to the question ‘Is local policing behaviour a problem and do you avoid police?’⁷⁶ This distrust manifests the majority of sex workers being reluctant or unwilling to report crimes to the police and one participant was quoted as saying, “I am very scared of the police. I am scared the police

⁶⁷ Abel, Fitzgerald, and Brunton.

⁶⁸ Ibid

⁶⁹ “Research Brief: The Policing Of Sex Work In South Africa,” *Sonke Gender Justice* (blog), accessed April 30, 2020, <https://genderjustice.org.za/publication/research-brief-the-policing-of-sex-work-in-south-africa/>.

⁷⁰ Ibid

⁷¹ “Sex Work Decriminalisation.”

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ “Research Brief.”

⁷⁶ Ibid

might shoot me again. I am worried that if I follow up my complaint this Metro Police Officer might himself, or send another person, to arrest me or hurt me again.”⁷⁷

Incidents of police violating the human rights of sex workers or engaging in criminally abusive behaviour are well documented in South Africa as the table below from the SWEAT and Sonke Gender Justice Study illustrates:

Criminal policing behaviour experienced



Figure 17: Criminal policing behaviour experienced by survey participants– survey summary table (n=57)

POLICING BEHAVIOUR	YES	NO
Harassed by police (n = 54)	31 (57%)	23 (43%)
Intimidated by police (n= 51)	27 (53%)	24 (47%)
Threatened with harm (n= 51)	21 (41%)	30 (59%)
Dropped off somewhere else (n=50)	22 (44%)	28 (56%)
Kidnapped by police (n=50)	7 (14%)	43 (86%)
Pepper sprayed by police (n=52)	13 (25%)	39 (75%)
Physically assaulted (n=51)	12 (24%)	39 (76%)
Sexually assaulted (raped) (n=49)	16 (33%)	33 (67%)
Asked to pay a bribe (n=50)	27 (54%)	23 (46%)
Paid a bribe (n=50)	26 (52%)	24 (48%)

As a consequence of their heightened vulnerability police officers are able to shame, humiliate, threaten, and intimidate sex workers into complying with their requests and not pursuing criminal charges against them. One sex worker explained that, “The police there refused to take a complaint from me. They called me names, told me to stop being a prostitute, there was nothing I could do about it”.⁷⁸ This power imbalance allows, and subliminally justifies, police harassing sex workers. Sex workers are often arrested without cause and humiliated for their criminal work, the latter abusive act serving as grounds for the first. One sex worker who was arrested while at home described the police as forcing her and several other sex workers to walk up to a taxi rank in various states of undress where, ““The police made us stand at the taxi rank and told all the public that we were prostitutes. Members of the public were laughing at us and calling us names.”⁷⁹

An unnervingly high number of police officers utilize this form of double think to justify the rape and sexual assault of sex workers. This occurs in two ways: firstly, reports of sexual violence and rape by clients are dismissed or not taken seriously and case go unopened and, secondly, police officers themselves rape and exploit sex workers directly.⁸⁰ Sex worker testimonials describe harrowing encounters with police:

“When I get into the police car, the police start touching my genitals. They say they want sex. If I refuse to give free sex, they tell me they will pay later, after they have had sex on

⁷⁷Ibid

⁷⁸ “Research Brief.”

⁷⁹ Ibid

⁸⁰ Ibid

demand. But sometimes after they finish having sex, they tell me they don't have any money to pay me".⁸¹ "Even though the man raped me and stole my cell phone, I am more frightened of the police than I am of that man".⁸²

Corruption committed by police officers is recognised as one of the most common forms of abuse of power in policing in general in South Africa. Sex workers are especially vulnerable to being exploited by police in this manner. Almost all of the 63 participants in the aforementioned SWEAT and Sonke Gender Justice report described situations in which police officers solicited bribes, either monetary or in the form of sexual acts, as means to avoid arrest or on the threat of violence.⁸³ Police also demand bribes from the clients of sex workers rather than arrest them. Not only does this practice contribute to the one-sided enforcement of the law which sees a disparate number of sex workers arrested relative to the buyers of sex but it also motivates clients to seek out clandestine locations, away from law enforcement, which increases the risks taken by sex workers.⁸⁴

Health Concerns and Condom Use

The predatory power imbalance between sex workers and their clients, the antagonistic relationship between sex workers and police, as well as the pervasive stigmatisation of sex workers by healthcare practitioners, all of which are fostered by criminalisation have dangerous public health consequences. Southern Africa is in the grips of a worsening HIV and AIDS epidemic. A 2010 study found that almost 70% of sex workers in Namibia were infected with the virus, one in every four adults is HIV positive in Botswana, and the prevalence of HIV among adults in South Africa is 20.4%.⁸⁵ An unregulated sex industry with no safe sex standards or formal measures to protect and empower sex workers thus poses an imminent threat to both South African sex workers and society at large. Without the structural support of law enforcement or the formal legal system sex workers are at a disadvantage in negotiations with clients over condom use.⁸⁶ Despite the protests of sex workers, and the risk to their own health, many buyers of sex in South Africa insist on sex without a condom or agree to use a condom and remove it during sex.

Numerous studies have documented incidents of South African police officers searching sex workers for, and confiscating, condoms as evidence of intent to prostitute.⁸⁷ The South African situation stands in stark contrast to New Zealand where, following the decriminalisation of sex work, police formally investigate complaints about clients who remove condoms during

⁸¹ Ibid

⁸² Ibid

⁸³ "Research Brief."

⁸⁴ Ibid

⁸⁵ Ayesha B.M. Kharsany and Quarraisha A. Karim, "HIV Infection and AIDS in Sub-Saharan Africa: Current Status, Challenges and Opportunities," *The Open AIDS Journal* 10 (April 8, 2016): 34–48, <https://doi.org/10.2174/1874613601610010034>.

⁸⁶ "Sex Work Decriminalisation."

⁸⁷ "Sex Work Decriminalisation."

sex and have made arrests on said grounds.⁸⁸ As mentioned previously, the stigmatisation of sex workers by healthcare practitioners poses yet another obstacle to ensuring safe sex practices in the commercial sex industry. Sex workers are often unwilling to go to clinics for fear of being insulted and ostracised by both nurses and doctors and when they do seek medical help they are often denied STD tests, condoms, and abortions as they are seen to be criminals who should bare the responsibility for their lifestyle choices.

Sex Worker - Third Party Relations

The threat of expanded criminal elements and organisation in South Africa's commercial sex industry is used to buttress arguments against decriminalization. Decriminalizing sex work would encourage extortionist third parties to coerce women into sex work, increase human trafficking as mean to cater to growing demand, and see South Africa become a sex tourism hot spot.⁸⁹ Third parties with criminal links currently use drugs, threats of violence, and the financial desperation of poverty stricken women to coerce and control sex workers; a situation which would be worsened by the removal of legal restrictions and the rapid growth of the industry.⁹⁰ Analogous to the law's role in characterizing the relationship between the police and sex workers SWEAT maintains that criminalization is responsible for, and facilitates the growth of, criminal activity in the commercial sex industry.⁹¹ The sale of sex between consenting adults does not inherently entail malicious exploitation or criminal involvement. Rather it is the current illegality of sex work in South Africa which affords criminals the opportunity to exploit vulnerable women who fall outside of the law's protection.⁹²

SWEAT's primary focus in addressing the subject of sex worker – third party relations is establishing the distinction between, and real harm in conflating, consensual sex work with human trafficking. SWEAT contends that many organisations including South Africa's legislature use expanded definitions of trafficking which often don't require the presence of coercion.⁹³ The Prevention and Combating of Trafficking in Persons Act (2013), adds to the list of characterizes, "the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage... aimed at either the person or an immediate family member of that person or any other person in close relationship to that person", as a 'coercive tactic' which constitutes human trafficking.⁹⁴ Under this definition consensual sex work would be classed as a form of trafficking in persons. Speculatively high estimates of the prevalence of human trafficking in South Africa are often reported by NGOs and mainstream media with little

⁸⁸ Ibid

⁸⁹ "Sex Work Decriminalisation."

⁹⁰ Ibid

⁹¹ "Decriminalisation of Adult Sex Work; SALRC Project 107."

⁹² Skye Wheeler and Liesl Gerntoltz, *Why Sex Work Should Be Decriminalised in South Africa* (New York, N.Y.: Human Rights Watch, 2019).

⁹³ Ibid

⁹⁴ Ibid

substantiating research.⁹⁵ A large study of sex workers in Cape Town found that only 2 out of the 164 participants had been victims of trafficking under the U.N. definition.⁹⁶

Decriminalizing consensual, adult, sex work in South Africa would provide much needed clarity on this issue. Criminalization and the conflation of human trafficking with sex work has resulted in a confused response to a serious human rights issue on the part of South Africa's law enforcement. Sex workers, who are supposedly being exploited by criminal third parties, are presently the targets of police investigations. Rather than encouraging sex workers to report incidents of trafficking or seek help from law enforcement they are actively discouraged from doing so. This heightened vulnerability allows trafficking syndicates to operate more freely without the threat of their victims being taken seriously or protected by law enforcement.⁹⁷ Decriminalizing sex work would ally sex workers with police in pursuit of the mutual goal of combating harmful, criminal, activities in the commercial sex industry.⁹⁸ This increase in transparency would allow law enforcement to effectively protect the victims of exploitation, partner with sex workers, and focus their efforts and resources on prosecuting the perpetrators of harmful criminal acts. Decriminalisation would thus better protect the victims of trafficking and more effectively target traffickers than the status quo.

Argument for Decriminalisation

The dangers faced by sex workers and the associated societal ills of the commercial sex industry are predominantly a product of the risky and abusive environment created by criminalisation.⁹⁹ Decriminalisation entails the removal of all laws which outlaw sex work its incorporation into the formal economy.¹⁰⁰ The commercial sex industry would fall under the jurisdiction of labour laws and extend occupational protections, such as health and Safety regulations, to sex workers. Sex workers are able to work as independent contractors and unionize strengthening their independence and autonomy.¹⁰¹ Decriminalizing sex work does not necessitate an endorsement thereof.¹⁰² Rather it recognizes the ineffective and dangerous consequences of criminalisation and serves as a public acknowledgement of the equal humanity of sex workers.¹⁰³ Rather than attempting to remove sex work as an option decriminalisation enshrines and reinforces the sexual and reproductive health rights of sex workers.¹⁰⁴ It is not the prerogative of the government to dictate under what circumstances consenting adults engage in sexual activities especially when attempting to so perpetuate the very harms such laws are meant to guard against.¹⁰⁵ Sex workers interviewed in New Zealand reiterate that decriminalisation has

⁹⁵ "Sex Work, Human Trafficking & the Harm of Conflating the Two" (SWEAT), accessed April 30, 2020, https://asijiki.org.za/new/wp-content/uploads/Sex-work-and-Human-trafficking_Asijiki-Fact-Sheet_Web.pdf.

⁹⁶ Ibid

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ "Sex Work Decriminalisation."

¹⁰⁰ "Sex Work and Feminism."

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ "Decriminalisation of Adult Sex Work; SALRC Project 107."

¹⁰⁵ Ibid

enhanced their autonomy with regard to client selection and refusal.¹⁰⁶ Safe sex standards have lowered the risk of STIs and the police regularly investigate reports of abuse or criminal activities.¹⁰⁷ Philosopher and advocate for decriminalisation Laurie Shrage crystalized the difference in perspectives between criminalisation and decriminalisation through answering the blunt question, “But would you want you daughter to be a sex worker?”

“I suppose the only way to answer this question/objection is to take it personally – I happen to have a daughter who is now eight. The argument is meant to expose the hypocrisy of anyone who has made the assertions [on decriminalisation] I have made. For, not surprisingly, my answer is “No, I wouldn’t want my daughter to be a prostitute.” So how can I accept this occupation for others? Well, first of all, this isn’t all of my answer. The more nuanced answer is that, although I would prefer my daughter to be a mathematician, pianist, or labour organizer, were she to seek employment in the sex trade, I would still want the best for her. Her choice would be less heart-breaking to me if the work were legal, safe, reasonably well paid and moderately respectable.”¹⁰⁸

Embrace Dignity and Partial Decriminalisation

Embrace Dignity is a South African feminist and abolitionist human right advocacy NGO established in 2010.¹⁰⁹ Embrace Dignity characterises sex work as an inherently exploitative form of gender-based violence and works to provide support for women attempting to exit the commercial sex industry, examine men’s demand for commercial sex, and advocate for legal reform.¹¹⁰ On this view sex workers are referred to as prostituted peoples to emphasise the existence of male oppression and differentiate commercial sex from other economic transactions.¹¹¹ Sex work is degrading not only for sex workers but for women in general as the practice thereof submits to the will of men who would seek to own women’s bodies.¹¹² Mickey Meji, the advocacy manager at Embrace Dignity, said at a 2019 conference in Germany, “prostitution is neither sex nor work, nor is it a free choice.”¹¹³ She is a vocal critic of decriminalisation and argues that in order for the law to respect the dignity and equal value of women in society it should seek to abolish sex work, not condone it.¹¹⁴ Embrace Dignity acknowledges the deeply harmful effects of the criminalized commercial sex industry on sex

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Laurie Shrage, “Should Feminists Oppose Prostitution,” *Ethics* 99, no. 2 (1989): 347–361, <https://doi.org/10.1086/293069>.

¹⁰⁹ “Embrace Dignity - Join Us in the Fight against Sexual Exploitation in SA,” accessed April 30, 2020, <http://embracedignity.org.za/>.

¹¹⁰ Ibid

¹¹¹ “Sex Work Decriminalisation.”

¹¹² Ibid

¹¹³ “Don’t Decriminalise Sex Work, Former Cape Town Prostitute Tells World Congress,” TimesLIVE, accessed April 30, 2020, <https://www.timeslive.co.za/news/south-africa/2019-04-04-dont-decriminalise-sex-work-former-cape-town-prostitute-tells-world-congress/>.

¹¹⁴ Ibid

workers but maintains that decriminalisation would exacerbate rather than address these ills.¹¹⁵ The organization thus aligns itself with the ‘Swedish Model’ for legislating the commercial sex industry.¹¹⁶

Swedish Model

In Sweden sex work is regarded as an aspect of male violence against women and children and as a symptom of the inequality between the sexes.¹¹⁷ In order to protect the vulnerable actors in the commercial sex sector Swedish law does not criminalise the sellers of sex but targets the buyers of sex and third parties.¹¹⁸ Since 1999 it has been illegal under the Swedish Penal Code⁵⁴⁶ to buy sexual services.¹¹⁹ The maximum penalty for soliciting a sex worker was revised upwards in 2011 to one year in prison to reflect the Swedish government’s prioritisation of this issue. This legislative model is ‘abolitionist’ in that its ultimate aim is to eradicate the commercial sex sector entirely through targeting the demand for paid sex.¹²⁰ The financial need of sex workers does not justify their submission to this violent form of exploitation; a stance indicative of Sweden’s strong social welfare system and low poverty prevalence.¹²¹ Following an inquiry by the Chancellor of Justice to evaluate the effects of the law 10 years after its implementation the Swedish government published a report in 2010.¹²² It noted that sex work had not increased in Sweden over the previous 10 years and that ‘street prostitution’ had been cut in half.¹²³ There was no evidence that former street sex workers had migrated indoors or were now conducting their business over the internet.¹²⁴ The Swedish government, law enforcement agencies, and NGOs have all reported that there has been far less trafficking and involvement of foreign nationals since the prohibition compared to that of neighbouring countries.

Partial Decriminalisation in the South African Context

Grizelda Grootboom, the author of ‘Exit’ a book about her experiences as a prostitute in South Africa and her eventual escape from the violent world she became trapped in, is a vocal opponent of decriminalisation.¹²⁵ In response to a question about whether sex work is a job like any other she replied:

“I often ask them what they mean by “sex worker”: the 16 year old sold on the street? The stripper who was gang-raped as a child? The privileged White woman who

¹¹⁵ “Sex Work Decriminalisation.”

¹¹⁶ Ibid

¹¹⁷ Ibid

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ “Sex Work Decriminalisation.”

¹²¹ Ibid

¹²² Ibid

¹²³ Ibid

¹²⁴ Ibid

¹²⁵ Taina Bien-Aime, Contributor Executive Director, and Coalition Against Trafficking in Women, “Blessing The Sex Trade In South Africa: A Sex Trafficking And Prostitution Survivor Testifies,” HuffPost, 15:14 400AD, https://www.huffpost.com/entry/post_12702_b_11220970.

dabbles in escorting? In South Africa so-called “sex workers” aren’t just any women - they’re Black women. In prostitution, we are stripped of our dignity and often left to die. How can that be a job?”¹²⁶

On the subject of access to healthcare she maintained that sex workers do not have the ability to negotiate with their clients regarding condom use and that decriminalisation would not change this dynamic.¹²⁷ Grizelda was trafficked from province to province around South Africa. Her captives utilised drugs and violence to control their victims and in that time none of her clients showed any concern for her well-being.¹²⁸ After managing to escape from this world of hurt and abuse she testified in parliament in front of some of her former clients. Regarding this experience she said, “If the government legalizes prostitution or decriminalizes the sex trade, it will mean that women are officially property. South Africa needs to hold sex buyers and pimps accountable under the law.”¹²⁹

The South African Law Reform Commission echoed some of these sentiments in its 2015 report on ‘Adult Prostitution’. In justifying its conclusion that decriminalisation is not a viable option for South Africa the report stated, “Some people may (even if subconsciously) consider prostitution a fair choice for a particular sector or class of women. In this light, prostitution might be considered somehow acceptable for poor women, vulnerable women, and women of colour, instead of being seen as sexual exploitation and a human rights violation. If this notion is supported then our society is effectively tolerating the creation of a separate, expendable, throwaway class of women... By legalising prostitution, society would fail to acknowledge that prostitution preys particularly on women who are vulnerable and choose prostitution as a last resort.”¹³⁰ The report presented two legislative recommendations for South Africa lawmakers: pursue an agenda of partial decriminalisation in the mould of the Swedish Model or, and this is the report’s preferred policy option, retain the full criminalisation status quo and implement non-legal training and educational reforms for relevant healthcare workers and police officers.¹³¹

The decriminalisation of the sale of sex only in South Africa would see the country adopt the view that, “their (sex workers) desperate economic plight should not be manipulated against them by institutionalising businesses that specialise in facilitating the sale of sex as a legitimate business.”¹³² Sex workers are characterised as victims in need of protection, even from themselves, in the same manner that government prohibits one from selling oneself into slavery.¹³³ Regardless of the conditions under which one’s decision to engage in sex work was made this ‘choice’ is characterised as either coerced or degrading to oneself and therefore not a legitimate exercise individual autonomy.

¹²⁶ Ibid

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ Ibid

¹³⁰ “Sex Work Decriminalisation.”

¹³¹ Ibid

¹³² Ibid

¹³³ Hyunsoo Chung, “Sex Work and the Law in South Africa, Sweden and New Zealand: An Evidence Based Argument for Decriminalization,” *The Journal of Global Health*, 2015, [//www.ghjournal.org/sex-work-and-the-law-in-south-africa-sweden-and-new-zealand-an-evidence-based-argument-for-decriminalization/](http://www.ghjournal.org/sex-work-and-the-law-in-south-africa-sweden-and-new-zealand-an-evidence-based-argument-for-decriminalization/).

Partial decriminalisation purports to respect the dignity of women who fall victim to an abusive and exploitative practice. It does so through affording them formal legal and police protections which serve to lessen the power imbalance between sex workers and their clients who are now the only party operating outside of the law. This dynamic better positions sex workers to negotiate condom use and access healthcare services.¹³⁴ The unique vulnerability of sex workers is thus accounted for by a legal framework which simultaneously does not condone or permit the proliferation of sex work. However partial decriminalisation has unintended consequences as well. While the law no longer explicitly labels sex workers as criminals it does facilitate their continued stigmatisation. The commercial exchange of sex is still a crime and sex workers are still associated with illegal activities and societal degradation.¹³⁵ Law enforcement officers no longer take sex workers to be the primary subjects of their attention but treat them as leads to arresting their clients.¹³⁶ In order to avoid arrest the buyers of sex will demand to conduct business in more secluded locations which increases the risks taken by sex workers.¹³⁷ As sex workers are driven further underground they have less access to health services and are less able to exchange information about risky clients.¹³⁸

A Note on Trafficking

While there is an important distinction to be made between consensual sex work and sex trafficking this paper does not wish to down play or omit the clear and deeply harmful consequences of the interplay between these practices. There is evidence that the decriminalisation of sex work in the Netherlands has not led to a reduction in the presence of coercive third parties and a 2007 Dutch government report found that pimps were still a “common phenomenon... the fact that the number of prostitutes with pimps has not decreased is a cause for concern.”¹³⁹ In Germany, Paulus (2014) observed that 95% of the women in the legal prostitution were under the control of others.¹⁴⁰ Because of the limits of what a survey study can reasonably be expected to reveal, this paper does not take its findings, that there is a low prevalence of coercive third party influences amongst participants, to tell the whole story. However, this paper does find arguments in favour of decriminalisation which emphasize the increased transparency of legal sex work and ability to partner with law enforcement would do more to combat organised crime in the commercial sex industry in South Africa than criminalisation currently does.

¹³⁴ “Sex Work Decriminalisation.”

¹³⁵ Ibid

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Ibid

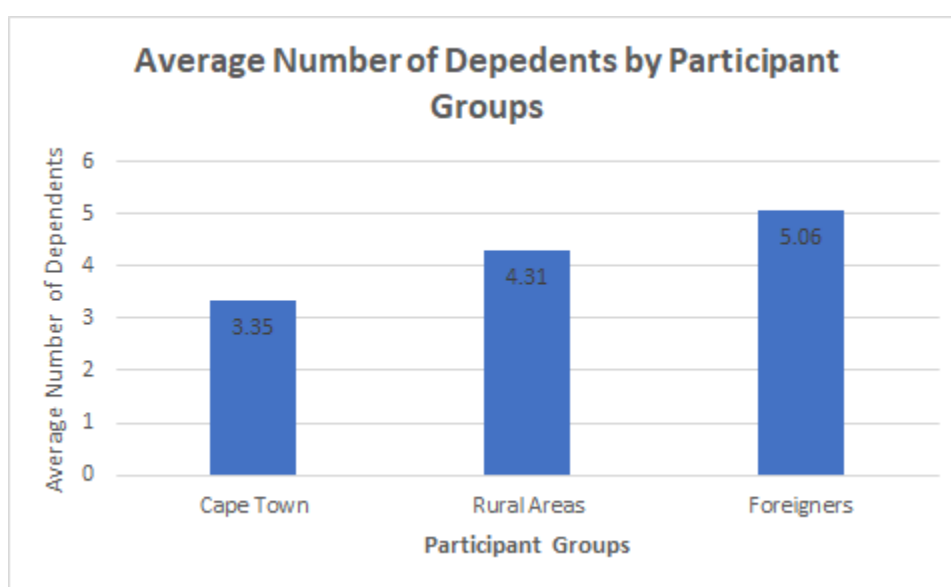
¹³⁹ Moran and Farley, “Consent, Coercion, and Culpability.”

¹⁴⁰ Ibid

Survey Results

Financial Necessity

Out of the 67 survey participants only one respondent, from the Cape Town group, indicated that she did not support any dependents with her income as a sex worker. From the Cape Town group two respondents stated that they supported 8 and 12 dependents respectively, from the rural areas group 6 respondents indicated that they supported 6 or more dependents with the highest response being 11, and from the foreigners groups 4 respondents replied that they supported 9 or more dependents with a highest response of 14.



The majority of participants had not completed high school, some had a matric qualification, and a few exceptions per group had higher educational attainment levels. Of the 26 Cape Town respondents 19 did not complete high school, 6 matriculated, and one pursued a Business Science degree at university before dropping out in second year. Respondents from the rural group indicated similar educational attainment levels with 12 of 19 not graduating high school, 4 completing matric, and 3 qualifying for technical diplomas. The group of foreign sex workers had higher and more diverse educational qualifications on average with 5 participants completing matrics, 4 attaining university degrees, 1 a nursing diploma, and another qualifying as a teacher. This divergence from the other two groups corresponds with the qualitative descriptions of the often tragic circumstances under which these participants were forced to leave their home countries. The high numbers of reported dependents and generally low levels of educational attainment speak to both the important financial support sex work provides families as illustrating what can be argued to be coercive financial circumstances.

Responses to the question: *If you were not a sex worker would you likely be unemployed or struggle to find job?*

Answer Options	Cape Town	Rural Areas	Foreigners	Total
Yes	17	21	18	56
No	8	1	1	10

Follow-up questions pertaining to alternative forms of employment revealed that remuneration levels were the primary concern for sex workers who would not be able to support their families sufficiently by working as a cleaner or cashier. A majority of respondents in this category did not see finding another job as a problem but preferred their earnings as sex workers. Second, sex workers were concerned that criminal records might prevent them from acquiring work, and that any work available for people with criminal backgrounds might pay poorly. These concerns were echoed in answers to the question “*Do you think that sex workers are able to freely exit the industry when they want to?*” of the 20 respondents from the Cape Town group who answered this question 17 replied *yes* and 3 answered *sometimes*. Their qualitative responses were almost unanimous in highlighting that they would only want to quit sex work if they were able to find a job which paid a similar level and that this was not the case. For the rural areas group 5 selected *yes*, 2 *sometimes*, and 14 *no*. This reversal in answers was primarily due to respondents with criminal records not perceiving alternative employment as a possibility. Foreign sex workers were equally split between *yes* and *no* citing the same reasoning. Rather than combat the commercial sex industry and deter sex workers from becoming repeat offenders through criminal sanctions, criminalisation traps them therein.

Stigma and its Relation to Law

Responses to: *Do you think that sex workers in South Africa face harmful stigma/judgement from other parts of society?*

Answer Options	Cape Town	Rural Areas	Foreigners	Total
a. Yes; it is widespread and harmful.	23	21	18	62
b. There is a stigma but its impact is not that great.	3	1	1	5
c. No; sex workers are treated fairly by society at large.	0	0	0	0

An overwhelming majority of respondents across all participant groups indicated that the stigmatisation of sex workers in South Africa is widespread and harmful. Questions probing the primary sources of this perceived stigma and how it manifests itself revealed important

differences amongst the participant groups. At a personal level in community and daily life stigma is encountered less by sex workers in the Cape Town group. While a majority of 15 to 11 indicated that *yes* they had been personally stigmatised this response set was far removed from the rural areas group, 22 answered *yes* and 0 *no*, and the foreigners group, 14 *yes* and 5 *no*. Respondents from rural shared particularly emotive stories about their children being ostracised at schools, churches no longer welcoming them on the premises, public verbal harassment, and rejection from their families. While a majority of the Cape Town and foreigners groups indicated that they had not experienced discrimination at the hands of healthcare workers 20 of the 22 rural areas participants answered that they had. Follow-up qualitative questions revealed sex workers in these areas were often verbally abused by doctors and nurses and denied condoms, STI tests, and abortions on account of their work. The effects of stigma on sex workers appear to be more severe in low income communities and remote clinics where it is more difficult to enforce standards of patient care. Decriminalisation removes the criminal label from sex workers and empowers them to report incidents like these to the police. Conversely, partial decriminalisation maintains the association between sex workers and undesirable criminal actors.

While there is variation among participant group responses as to whether conservative religious beliefs and non-religious African cultural beliefs are fundamental sources of the stigmatization of sex workers, the answers were consistent across the groups for the question *Do you think that the South African law which criminalises sex is a primary cause of stigma?*

Answer Options	Cape Town	Rural Areas	Foreigners	Total
Yes	19	20	16	55
It contributes but not as much as other factors	5	2	3	10
No	0	0	0	0

In qualitative responses participants also identified race, gender, class, and nationality as important contributors to the stigmatisation of sex workers. All of these elements function within and intersect a legal framework which currently labels already vulnerable South African women as criminals. When asked “*Do you think decriminalisation would help reduce stigma?*” participants responded in the affirmative:

Answer Option	Cape Town	Rural Areas	Foreigners	Total
Yes	15	21	16	52
No	2	0	0	2
Unsure	5	1	3	9

Sex Worker - Client Relations

SWEAT and Embrace Dignity both characterize full criminalisation as perpetuating a harmful power imbalance between sex workers and their clients. Embrace Dignity however advocates that this status quo is preferable to acknowledging sex work as a legitimate profession. Doing so would seek to mitigate the harm done by an inherently damaging practice. Conversely, SWEAT maintains that consensual sexual transactions between adults are not fundamentally exploitative but that it is the law which currently heightens the vulnerability of sex workers relative to their clients facilitating a predatory dynamic. This project that found that while sex workers currently perceive their clients to be highly unlikely to report instances of abuse to the police this situation can be improved by legislative change:

In your experience are clients likely to report incidents of abuse or crimes committed against sex workers?

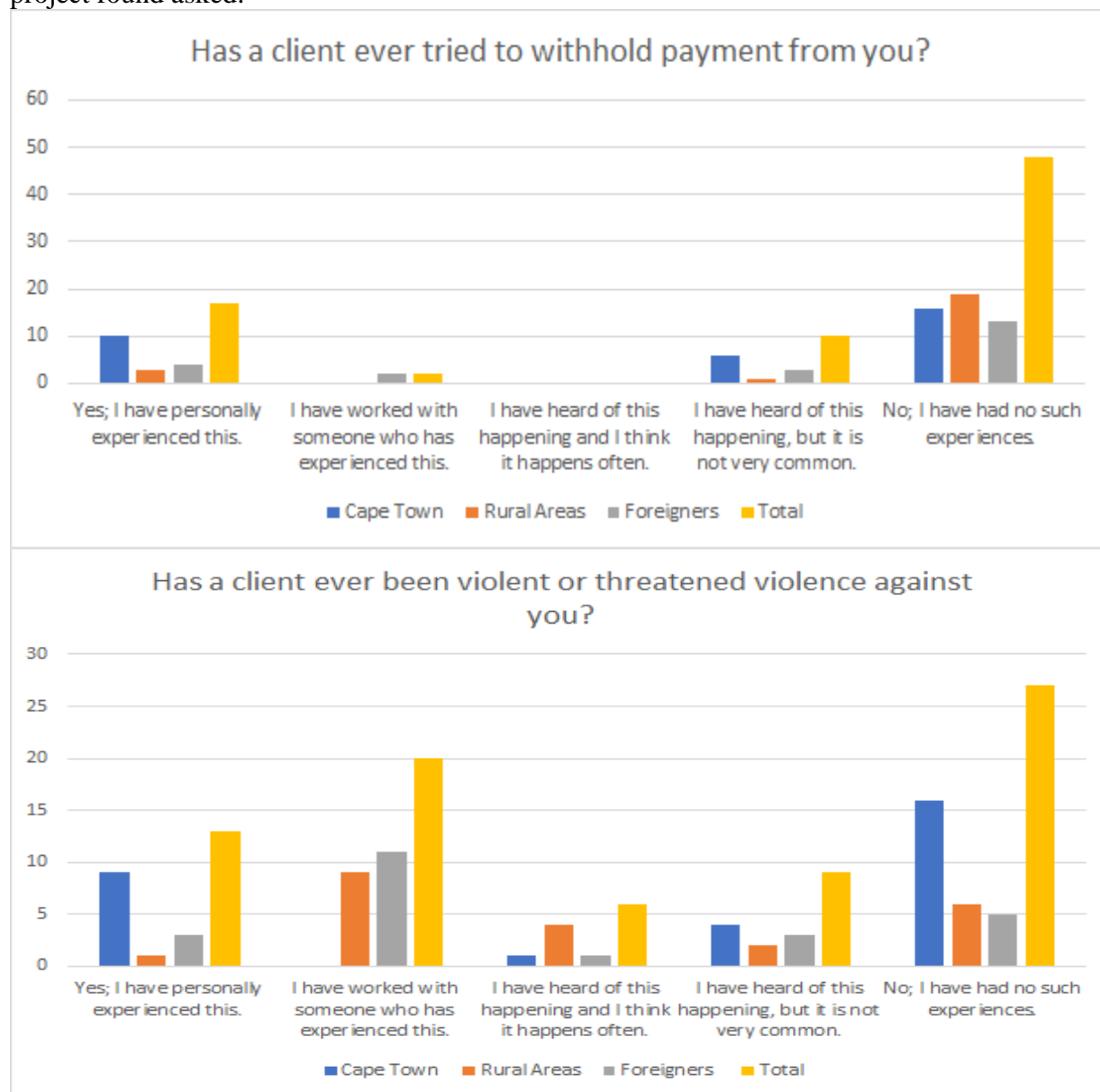
<i>Answer Options</i>	<i>Cape Town</i>	<i>Rural Areas</i>	<i>Foreigners</i>	<i>Total</i>
<i>Yes</i>	2	1	0	3
<i>Most of the Time</i>	0	0	0	0
<i>Sometimes but Unlikely</i>	5	1	2	8
<i>No</i>	18	20	17	55

a. Do you think clients would be more likely to report such incidents if sex work was decriminalised?

Yes	9	18	10	37
No	2	1	1	4
Not Sure	15	2	8	25

Decriminalisation would bring both sex workers and their clients into the folds of South African law and labour regulations. In a commercial sex industry subject to health and safety standards and the enforcement of laws by police sex workers and their clients are allied in the common pursuit of legally sanctioned and mutually beneficial transactions. The power imbalance between sex workers and their clients is addressed through increased access to police and the judicial system. Both sex workers and their clients are no longer deterred by the prospect of self-incrimination from reporting incidents of abuse and criminal activity. Rather than ally sex workers with their clients partial decriminalisation facilitates mistrust. Advocates of partial decriminalisation maintain that the buyers of sex either do not care about the well-being of sex

workers or are the perpetrators of abuse and so whether they are more likely to report incidents to the police or not is irrelevant. In trying to determine the prevalence of direct client abuse this project found asked:



In terms of clients withholding payment from sex workers the responses across the groups indicated that this was not a common occurrence. The more serious concern of clients directly perpetuating or threatening violence against sex workers yielded mixed responses. While a majority of participants had not directly experienced violence at the hands of their clients a high number of sex workers from the rural areas and foreign groups had worked with someone who did. Characterising clients as either purely malicious or magnanimous is unhelpful for investigating the effects of legal reform on their relationship to sex workers. What is clear is that criminalisation disproportionately disempowers sex workers and deters both sex workers and their clients who would report incidents of abuse from doing so.

Advocates of partial decriminalisation argue that the Swedish Model empowers sex workers through enabling them to report their clients, who are committing felonies, to the police. The abolitionist intent of this policy also aims to decrease the demand for transactional sex. When asked to describe the likely effects of partial decriminalisation on their clients the survey participants responded:

Answer Options	Cape Town	Rural Areas	Foreigners	Total
This would not affect how your clients behave.	0	3	0	3
Your clients would be more worried about the police and want to meet in more secluded (hidden) places.	11	16	17	44
This would give sex workers more power when interacting with clients since they can now report client abuse to the police.	15	7	8	30
This would decrease the number of clients (the demand for sex) in South Africa.	17	6	10	33

While partial decriminalisation would provide sex workers with increased access to police protection the targeted criminalisation of their clients would likely result in them engaging in transactions in deliberately isolated places away from these resources. It is therefore unlikely that sex workers will actually be empowered to report abusive clients to the police. In qualitative responses participants indicated that the decrease in demand for commercial sex caused by partial decriminalisation would diminish their ability to negotiate with their clients over prices and condom use. Sex workers competing for a diminishing number of buyers would necessarily need to cater to their demands in order to stay in business. There is no reason to suspect that partial decriminalisation would succeed in completely abolishing the sex industry rather the gains such a policy would make in restricting demand would be outweighed by the increased hardships it would cause for sex workers. The persistence of the sex industry despite the persecution sex workers currently face shows that attempting to make the practice more inhospitable is not an effective deterrent but rather a form of punishment for those who one intends to protect. The same question regarding full decriminalisation saw 58 respondents indicate that they would feel empowered in their interactions with clients and 31 predict that this would increase the demand for commercial sex in South Africa. Qualitative responses highlighted that while there may be a modest increase in the number of sex workers most of this uptake would be from new buyers. Sex workers would thus be better positioned to negotiate with their clients. The expansion of the sex industry in conjunction with increased transparency, access to police, and an improvement in sex worker client relations would effectively empower sex workers on their own terms.

Health Concerns and Condom use

The disparate discrimination experienced by sex workers in rural areas from healthcare practitioners highlights the importance of full decriminalisation's role in addressing stigma. It is imperative that sex workers are able to access contraceptives, STI tests, abortions, and other healthcare resources without being disparaged or turned away by clinic workers. Qualitative response from the rural areas group revealed that a significant portion of healthcare practitioners perceive giving condoms and STI tests to sex workers as wasteful since they continually engage in risky sexual activities. However, even without the assistance of legal safety standards sex workers themselves are not as reckless as this stereotype suggests.

How often do you use condoms?

<i>Answer Options</i>	<i>Cape Town</i>	<i>Rural Areas</i>	<i>Foreigners</i>	<i>Total</i>
<i>Very rarely</i>	0	0	0	0
<i>Sometimes</i>	4	1	3	8
<i>Often</i>	1	2	1	4
<i>Almost all of the time</i>	16	18	15	49

How often do clients insist on sex without a condom?

<i>Answer Options</i>	<i>Cape Town</i>	<i>Rural Areas</i>	<i>Foreigners</i>	<i>Total</i>
<i>Very rarely</i>	1	1	0	2
<i>Sometimes</i>	15	6	7	28
<i>Often</i>	0	11	9	20
<i>Almost all of the time</i>	6	3	3	12

When clients insist on not using a condom are you able to negotiate with them?

Answer Options	Cape Town	Rural Areas	Foreigners	Total

I can negotiate with them and they agree to use a condom.	11	8	12	31
I negotiate with them and they often offer more money in exchange for not using a condom and I agree to this.	11	2	5	18
They refuse and I lose their business.	10	12	6	28
If other please describe briefly:...	2	3	1	6

The overwhelming majority of participants reported using condoms almost all of the time. While the widespread preference of clients for unprotected sex is concerning, the ability and intent of sex workers to insist on condoms and negotiate thereover is positive. Despite the unequal power dynamic between sex workers and their clients the majority of participants reported that they had a hard-line ‘no condom no business’ policy and that ultimately most clients agree to use a condom. A significant number of participants indicated that in situations when a client cannot be persuaded to use a condom they refuse his business. The qualitative responses revealed that this awareness of the dangers of unprotected sex and individual hard-line policies of insisting on condom use are product of the educational campaigns of SWEAT and its affiliate organisations. While neither full nor partial decriminalisation would address instances where clients offer more money to sex workers in exchange for unprotected sex these policies would buttress their ability to negotiate in other contexts. The important distinction between these policy options in terms of health outcomes is their disparate impact on access to treatment and the dynamic between sex workers and the police.

Do you think full decriminalisation would improve your ability to insist on safer sex practices?

Answer Options	Cape Town	Rural Areas	Foreigners	Total
Yes	5	16	10	31
No	3	1	1	5
Maybe	12	4	8	24

Follow-up qualitative questions provided context for the predominantly positive responses in the table above. Participants who answered *yes* and *maybe* emphasised issues such as being able to visit hospitals without fear of being mocked or shamed by medical staff, being denied access to condoms, STI tests, and abortions, being able to work in safer legally sanctioned establishments, and protection from police abuse and harassment, as factors which they hoped

legal change would address. All of these aspects are best served by decriminalization relative to partial decriminalisation especially the subject of police harassment.

Have police ever searched you for condoms or confiscated condoms from you?

Answer Options	Cape Town	Rural Areas	Foreigners	Total
Yes	6	6	5	17
No	8	7	4	19
I'd rather not answer	12	9	10	31

Police confiscating condoms as evidence of intent to sell sex is a serious health concern. Several participants identified being able to carry protection freely as a reason why they felt that decriminalisation would improve their ability to insist on safer sex practices. A large portion of the survey participants elected not to answer this question directly but in their qualitative responses, and answers to a later question regarding negative interactions with police, it became apparent that most of these non-answers would most likely have been 'yes's. Only full decriminalisation effectively allies sex workers with police such that they are the subject of their protection and not criminals or a lead thereto.

Sex Worker - Police relations

Further investigation of the dynamic between survey participants and law enforcement found that 75% of respondents had experienced at least one negative interaction with the police in their time as a sex worker; many of whom declined to answer the question pertaining to the confiscation of condoms. Of the 60 participants who answered the question "*With the law as it is in South African do you feel comfortable reporting cases to the police and testifying in court if necessary?*" 90% (54) indicated that they did not. Relative to the status quo 52% of respondents felt that partial decriminalisation would not improve the relationship between sex workers and the police, 44% answered that it might have a positive effect but that they were unsure, and only 4%, 2 participants, responded in the affirmative. This response set is aptly explained by the near unanimous perception among participants that partial decriminalisation would result in police following and harassing sex workers in order to arrest their clients.

Do you think partial decriminalization would lead to police following and harassing sex workers in order to arrest their clients?

Answer Options	Cape Town	Rural Areas	Foreigners	Total
Yes	13	20	18	51

No	1	0	0	1
Maybe	7	1	1	9

Conversely, across all three respondent groups full decriminalisation is perceived by a majority (55%) as having a positive effect impact on the relationship between sex workers and law enforcement officials. A significant portion, 73%, of participants indicated that they would be more comfortable reporting cases to the police and testifying in court if sex work were to be decriminalised. Of the remainder, 25% answered that decriminalisation might improve upon the status quo and only 2% felt that it would not.

Sex Worker - Third Party Relations

The section of the survey study which addressed the dynamics between sex workers and third parties investigated whether participants had personal or indirect experiences with trafficking for sex work, drugs and violence as means of third party coercive control of sex workers, and the confiscation or withholding of the earnings of sex workers by controlling third parties. Across these questions a fraction of participants, 2%-3%, indicated that they had directly experienced the behaviour in question. Indirect experiences, as a result of having worked with someone or having heard of someone, who experienced these behaviours were reported by 25%-35% of respondents. A majority of participants in this study answered that they had no such experiences of any kind. While this may appear to support the case for full decriminalisation this project does not claim these limited findings to be generalizable in the same way as questions which were answered within context and with further qualitative explanation.

Conclusion

Do you think that decriminalisation would give sex workers the rights and protections needed to address the abuse and exploitation that some sex workers face in South Africa?

- ***No - 1 respondent***
- ***Yes - 53 respondents***

The criminalisation of sex work in South Africa has failed. It has failed to target the perpetrators of violent crimes and those who would exploit vulnerable women for their own gain. It has failed to protect sex workers providing for their families. It has failed to acknowledge them

as equal citizens, as women with agency despite difficult financial realities, as people deserving of legal justice and the respect of this nation's police and healthcare workers. Partial decriminalisation in the vein of the Swedish Model offers a prima facie persuasive case for a legislative alternative. By acknowledging the violence perpetuated against sex workers partial decriminalisation does provide formal legal protections and address the imbalance between sex workers and their clients. However, rather than empower women partial decriminalisation labels them as victims who need to be saved regardless of whether they want to be. Or as complicit but not culpable in the criminal activity from which they earn a livelihood; leads to the next arrest. Unsuccessfully attempting to abolishing the sex industry through punishing those therein, limiting their clients and ability to negotiate, does not enhance the dignity of sex workers. But decriminalisation does. While full decriminalization is not a silver bullet, and does pose potential risks, such a legal alteration in conjunction with exit programs and non-legal departmental policies regarding training and education for law enforcement and healthcare workers, would effectively protect sex workers whilst not limiting their agency or ability to support their families, and meaningfully and unequivocally acknowledge their status as equal citizens.

Do you think sex work should be completely decriminalised in South Africa?

- *No - 1 respondents*
 - *Yes - 58 respondents*
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