



## Prostitution/Sex Work: Is it Work and is it a Choice?

*"Everyone is equal before the law and has the right to equal protection and benefit of the law...Everyone has inherent dignity and the right to have their dignity respected and protected."*

*The Bill of Rights*

### 1. Introduction

In May 2017 the Minister of Justice and Correctional Services, Michael Masutha, released the South African Law Reform Commission's *Report on Project 107 - Adult Prostitution*. Subsequently, during March 2018, Parliament's Multi-Party Women's Caucus<sup>1</sup> held public hearings on the report, which advocates the complete criminalization of prostitution.<sup>2</sup> The report was first presented by the Commission in 2009 during several events countrywide which set out various legislative options that could serve as the basis for new legislation relating to adult prostitution. Submissions were invited, and the report presently under discussion drew together the substance of some 1 761 responses.<sup>3</sup> The considerable length of the interim period is indicative of the difficulty in addressing this complex issue in such a way that it protects the rights of the vulnerable; recognizes the inherent dignity of each person; and promotes social mores in such a way that the corporal integrity of all is asserted.

It was clear at the public hearings that the debate on prostitution is highly polarised, with some calling for the complete decriminalization of prostitution, while others believe that it should remain a crime.<sup>4</sup> Another alternative is partial criminalization with diversion and greater regulation. But while total criminalization has failed to regulate prostitution in the context of high unemployment and economic and gender inequality, would decriminalization provide women with the protection they need?

### 2. Background

At present the major focus of law enforcement is on the criminalization of the prostitute, while those benefitting from the practice in various forms – from the man who seeks transactional sex to the pimp and others benefitting from the proceeds of prostitution – usually escape sanction. From the perspective of the SALRC "the important consideration from a law reform perspective is whether the current legislative scheme exacerbates the social problems associated with prostitution or serves the purpose of countering them."<sup>5</sup> Such social problems associated with prostitution include: vulnerability to rape and other forms of physical violence; substance abuse; disrespect and humiliation; human trafficking; vulnerability to HIV/AIDS and other sexually transmitted diseases; difficulty in accessing public health facilities; difficulties in laying charges with the police; vulnerability to verbal and physical harassment as well as theft; and economic insecurity. It is a vulnerable life with little social protection, as the organization Embrace Dignity has noted: "Although prostitution may seem to provide superficially attractive short-term financial benefits, it has not been shown to lift women out of a lifetime of poverty and economic inequality. The reason for this may lie in the very personal and private nature of the service provided, which heightens a prostitute's vulnerability to exploitation".<sup>6</sup>

A prostitute is defined in most dictionaries as a person, in particular a woman, who engages in sexual activity for payment.<sup>7</sup> Others define a prostitute as 'a promiscuous woman.' The value judgement is implicit in the definition. One seldom

hears of a man of loose moral character, who purchases sex, described in this way. Prostitutes, however, are the most marginal of the marginalized and inhabit a space on the very fringes of our society. They are 'objects' of derision and abuse, and the most profane and vulgar epithets are used to describe 'them' or are directed at 'them'. They are the public face of societal impropriety; since they remind us of the prevalence of promiscuity they are scapegoated and the other part of who they are become blurred. And this blurring in the trading of sex engenders extreme vulnerability and affords those selling sex little protection.

Underpinning laws that legalise prostitution is the belief that, since the phenomenon is inevitable, the mainstreaming thereof is pragmatic and will provide for its regulation. However, this approach arguably gives the practice a veneer of respectability and creates the impression that transactional sex takes place between equals. It obscures the reality that in the business of prostitution, sexual harassment, sexual exploitation, and rape cannot be avoided.<sup>8</sup>

However, there are women engaged in the sex trade who claim their own agency and who assert that they are 'sex workers' who provide a service. They claim that they are thus entitled to the same benefits and protections accorded the purchaser, who remains largely anonymous and who escapes social censure and the stigma associated with being a prostitute. Such women assert that there are instances where selling sex should be seen as work and as a choice. Decriminalization would dispense with pimps and brothel owners who presently benefit most from the sale of sex, and would allow sex workers to operate independently. (It must be emphasized that those advocating this position insist that it pertains *only* to adult prostitution and not to the prostitution of children or victims of human trafficking.<sup>9</sup>)

### **3. What Are the Options?**

The SALRC report sets out four legislative and regulatory options:

#### **3.1. Full criminalization**

This option means that both parties to the transaction, as well as any pimp or brothel-owner involved, are guilty of a crime. However, there would be diversion processes in place to assist

those wishing to exit the industry. This is the preferred option of the SALRC. However, the strict implementation of such an approach would be costly and unlikely to achieve the eradication of the practice of prostitution.

"The prohibitionist approach sees prostitution as a social illness and sees all activities in the prostitution system as wrong, so prohibits it in law. It does not recognise the vulnerability of those bought and sold and in fact perpetuates the stigma and marginalisation and further criminalises them, making it even more difficult for them to exit, and find legal means of making a living. This has not proved to be an effective strategy in ending the exploitation of the prostitution system".<sup>10</sup>

Furthermore, there is a contradiction between the enforcement of the law on the one hand, and prosecuting offences committed against prostitutes including rape, assault and theft, on the other. This model perpetuates the status quo.

#### **3.2. Partial criminalization**

This option advocates the criminalization of the purchase of sex, and diversion for the seller. This would turn the status quo on its head with the principle focus on the buyer and a far gentler approach to the seller. Prostitution exists because of the demand for it, and proponents of this view argue that the time has come to focus on criminalising this demand.<sup>11</sup> The underlying assumption is that without demand, there is no need for supply. This is frequently referred to as the Nordic Option, as this approach is practiced in countries such as Sweden, Norway, Finland and Denmark. For example, in 2009 Norway introduced punitive legislation making the purchase of sex illegal, and Norwegian citizens caught paying for prostitutes at home or abroad face a hefty fine or a six-month prison sentence; this sentence can be extended to three years in cases of child prostitution.

Iceland, Northern Ireland, Canada, France and Ireland have adopted a similar approach. As part of the diversion process, prostitutes are offered access to free education and to health treatment for those with alcohol and/or drug problems. Those exiting the industry who may have incurred criminal records can apply to have them expunged.

This approach resonates with comments made US police officer Donna Gavin that,

“we need to attack this harmful sex industry from all sides by targeting the pimps and the traffickers, providing services and exit strategies for those being prostituted, and educating and dissuading would be buyers. We need to dissuade buyers from fuelling this industry and hold them accountable when they do.”<sup>12</sup>

Former US President Jimmy Carter has written that

“Some assert that this 'profession' can be empowering and that legalizing and regulating all aspects of prostitution will mitigate the harm that accompanies it. But I cannot accept a policy prescription that codifies such a pernicious form of violence against women. If paying for sex is normalized, then every young boy will learn that women and girls are commodities to be bought and sold...”<sup>13</sup>

### **3.3. Partial criminalization with state regulation**

This approach would involve greater state control of the industry – particular areas would be set aside for prostitution-related activities, and in these ‘red light’ districts the authorities would provide a regulatory framework to protect the rights of those selling sex and to allow them easier access to health and social services. These areas would be policed to protect public order and to ensure that the business taking place is between consenting adults and in the designated areas. This approach has been adopted in the Netherlands.

"Brothels... were illegal until 1 October 2000, when... the ban on brothels and pimping was lifted. It is now legal to run a business where men or women over the age of consent are voluntarily employed as prostitutes. The person running the business must satisfy certain conditions and obtain a licence from the local authorities.”<sup>14</sup>

In 2010 a Canadian Court found that the ban on brothels and soliciting for the purposes of prostitution was unconstitutional. Subsequently, in 2014 the Protection of Communities and Exploited Persons Act, or Bill C-36, criminalized

the purchase (but not the sale) of sexual services, and restricted the advertisement of sexual services and communication in public for the purpose of prostitution. The bill replaced legislation, overturned in 2013 by Canada's Supreme Court, which criminalized acts associated with selling sexual services. It is often argued that legalizing prostitution can allow the government to regulate it and reduce harm to those involved in it. Thus, in 2016 the French parliament approved changes to the country's prostitution laws which now ban the purchase, but not the sale, of sex. Customers who break the law will face fines and be made to attend awareness classes on the harms of the sex trade.

But not everyone in these countries supports these measures. Canadian MP Francoise Boivin, in summing up the impact of Bill C-36, observed, “You're permitting people to sell something that no one can buy.”<sup>15</sup> And it can be argued that this policy shift leads to greater risk-taking and may actually compromise rather than protect the safety of the women concerned.

### **3.4. Full decriminalization**

The full decriminalization of the sex industry would mean that prostitution would be acknowledged as work like any other and be conducted as any other business. Sex workers would be registered and pay taxes; they would not experience discrimination on the basis of their choice of employment, and they could form and join trade unions. Amnesty International, one of the many civil rights organizations supporting full decriminalization, argues that

“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...”<sup>16</sup>

Bioethicist Peter Singer comments that “It is time to put aside moralistic prejudices, whether based on religion or an idealistic form of feminism, and do what is in the best interests of sex workers and the public as a whole.”<sup>17</sup> Such an approach is regarded by its proponents as pragmatic and realistic – prostitution has endured throughout history, and its criminalization has done little except drive the industry further underground.

#### 4. Countries Which Have Decriminalization Policies

Proponents of legalization argue that all attempts to deal with the sex business via criminal law have failed and the only option left untried is decriminalization.<sup>18</sup> Thus, for example, New Zealand and Germany have fully decriminalized the sex industry.

The 2002 German Prostitution Reform Law declared that prostitution was no longer immoral and that pimping was legal if enforced with formal contracts, provided increased access to state health insurance and pension schemes, and allowed prostitutes to sue their clients for non-payment.<sup>19</sup> However, Judge Navi Pillay observes that in Germany only 44 out of over 400 000 people in prostitution have actually registered for welfare benefits. The German sex trade has been called a 'giant Teutonic brothel' by the Economist magazine, which 'services' over 1 million men each day.<sup>20</sup> And Thomas Kleine-Brockhoff, Senior Director at the German Marshall Fund of the United States, writes that "While prostitution is legal, forced prostitution is not. The latter occurs, and the new German law unintentionally makes it harder to hunt down human traffickers, especially from Eastern Europe and Africa. Similarly, it is harder to combat under-aged prostitution".<sup>21</sup>

Although prostitution is legal in Switzerland too, critics say the law actually offers little protection to the women involved. The city of Zurich devised a solution which it believes will provide better protection for them: soliciting on the streets will be forbidden, and instead prostitutes and their clients will be expected to use a custom-built compound on an industrial site which provides drive-in sex boxes.<sup>22</sup> The Zurich 'sex box' experiment follows their largely successful introduction in Germany, where they have been in operation in designated big city areas since 2001, and where they were used during the 2006 soccer world cup. They are reported to have led to a 'considerable drop' in violence against sex workers. However, in the German city of Dortmund a number of sex boxes installed in 2007 were closed down in 2011 after they fell under the control of eastern European gangs.

Similarly, the streets of Amsterdam's Red Light district are "filled with poverty-stricken women from Eastern European countries. They often do not speak Dutch or English. It is common knowledge that in the Netherlands and elsewhere,

as standards of living and opportunities for women have risen, the number of national [local] women in prostitution has fallen, leading to the 'import' of women from other less developed parts of the world to satisfy the demand for legalised prostitution".<sup>23</sup>

As always, vulnerability and economic necessity remain important 'push' factors.

The Netherlands and Germany are popular destinations for sex tourism for men from countries where there is no legal prostitution. In 2017 Germany passed the Prostitutes Protection Act which mandates the registration of individuals working as prostitutes, and requires them to attend annual counselling and health checks.<sup>24</sup> This would indicate that, in spite of the very liberal prostitution law, those in the business nevertheless experience vulnerability and are in need of support. Furthermore, there are public health concerns.

On June 25, 2003, by a vote of 60-59, the New Zealand Parliament passed the Prostitution Reform Act (PRA), which decriminalized prostitution and created a system of regulations for brothels.<sup>25</sup> The change in the law was welcomed by many as it gave sex workers recognition and rights and access to police protection if necessary. In terms of the PRA, operators of prostitution businesses

"must adopt and promote safer sex practices. Every person convicted of an offence is liable to a fine not exceeding \$10,000. Sex workers and clients must also adopt safer sex practices or be liable to receive a fine not exceeding \$2,000. The Act provides powers of entry to premises for the purpose of inspection for compliance with health and safety requirements".<sup>26</sup>

The effectiveness of the PRA is periodically reviewed. Concerns have been expressed regarding the prevalence of underage prostitutes found to be working in the industry. Similarly to the South African experience, there is disquiet considering the incidence of domestic rural to urban trafficking in young girls, often of Māori or Pacific Islander descent. The intersection between human trafficking and prostitution is difficult to avoid.

Prostitution has become so mainstream that New Zealand has added 'sex work' to its list of skills for

migrants. But, as one writer has put it, “When prostituted women become “employees”, and part of the “labour market”, pimps become “managers” and “business entrepreneurs”, and the punters are merely clients. Services helping people to exit are irrelevant because who needs support to get out of a regular job”?<sup>27</sup>

It was speculated at one time that Taiwan would legalize prostitution. However, legislation was introduced in 2011 to allow local governments in that country to set up ‘special zones’ where prostitution would be permitted, while outside these zones prostitution would continue to be illegal. It was reported that by 2017 no ‘special zones’ had been opened, meaning that prostitution continues to be illegal.<sup>28</sup>

Opponents of full decriminalisation argue that partial decriminalization, which prosecutes the buyer rather than the seller, is more likely to be successful in curbing human trafficking and in protecting the seller from violence. As Judge Pillay points out, “If you can’t legally sell women for prostitution in a country, you would be less likely to traffic them there for sale when you can traffic them to countries where selling women in prostitution is legal”.<sup>29</sup>

## 5. The Position of the Catholic Church

According to the Catechism of the Catholic Church, “Prostitution does injury to the dignity of the person who engages in it, reducing the person to an instrument of sexual pleasure.”<sup>30</sup> Such objectification of the human person violates fundamental of human rights. The Pontifical Council for the Pastoral Care of Migrants and Itinerant People holds that prostitution is a form of modern day slavery:

“It is important to recognize that sexual exploitation, prostitution and trafficking of human beings are all acts of violence, and as such constitute an offence to [human] dignity and are a grave violation of basic human rights. The number of women of the street has increased dramatically throughout the world for a variety of complex economic, social and cultural reasons. In some cases the women involved have experienced pathological violence or sexual abuse since childhood. Others have been driven into prostitution in order to have sufficient means of living for themselves or their families. Some search for

a father figure or a loving relationship with a man. Others are trying to pay off unreasonable debts. Some leave situations of poverty in their country of origin, believing that the job being offered overseas will change their lives. It is clear that the sexual exploitation of women that pervades the world’s social fabric is a consequence of many unjust systems.”<sup>31</sup>

“[The] Church has a pastoral responsibility to promote the human dignity of persons exploited through prostitution, and to advocate for their liberation and economic, educational and formative support. The Church must take up the defence of the legitimate rights of women. In addition to responding to the pastoral needs of the women of the street, the Church must prophetically denounce injustices and violence perpetrated against women wherever and in whatever circumstances this may occur. The Church must also invite all men and women of good will to commit themselves to sustaining human dignity by putting an end to sexual exploitation.”<sup>32</sup>

Pope Francis has denounced the commercialization of persons since he was the Archbishop of Buenos Aires from 1998 to 2013, and as Pope he has asked forgiveness for all the Catholic clients “who commit this criminal act.”<sup>33</sup>

## 6. Government’s Perspective

It was erroneously reported that the ANC at its Nasrec Conference in December 2017 had taken a policy decision to support the call to decriminalize prostitution and to recognize it as work. As it is the governing party, such a decision would have had a major impact on the development of public policy on this issue. However, at CPLO’s roundtable discussion the Deputy Minister of Justice and Constitutional Development, John Jeffery, said that the government did not see the matter as a moral issue, but rather as a practical one and had not yet adopted a position. Health care for vulnerable groups was a particular concern, especially due to the incidence of new HIV/AIDS infections. Adopting a position involving the full decriminalization would involve more policy changes, and would also have consequences in terms of policing. The executive’s primary concern was on what would work best for all concerned.<sup>34</sup>

At the report-back meeting subsequent to the public hearings held by the Multi-Party Women's Caucus, it was concluded that insufficient consultation had taken place in the rural areas and in the more remote informal settlements. It was therefore agreed the Caucus would have to undertake further public hearings in the provinces, and that approaches adopted in other countries should be considered.

## 7. Sex Work and Survival Sex

South Africa's most recent expanded unemployment figures demonstrate that 41.2% of women are without work, compared to 33.7% of men.<sup>35</sup> The most vulnerable homes are those of single women with children dependant on social grants. For many women in such a situation 'survival sex' is a way out of extreme poverty and of ensuring a minimum level of well-being for their families. As one participant at the roundtable discussion poignantly, and with great dignity, stated: "I do not live in Sweden, I live in South Africa and I make my choices from the few that are available to me and my children." She sees sex as work because she supports her family and is the breadwinner of the family. It is her occupation, and she wants it to be recognized as something of value and not to have to experience stigma and be relegated to the margins of society. In a context of limited choices and systemic poverty, she is asking for the respect due to us all in terms of our Constitution. Sex workers are asking for protection from their clients and from the harassment of the police; for easy access to health and social services; and for the right to lay charges of assault against clients and to see justice done. They reject being categorised simply and patronisingly as 'poor black women' but rather see themselves as individuals who can speak for themselves, who have their own agency, and who are able to organize as a collective. They do not

want to be seen solely as victims when there is so much more to them than that: they are dutiful daughters and caring mothers who feed and clothe their children, and pay their school fees. Their voices surely cannot be ignored.

However, given the present context, Judge Pillay questions whether 'survival sex' transactions can be represented as

"an example of free will, though technically they might be called 'consensual'. Is this what South African society wants to endorse? Ask yourself if almost all (or all) prostitution might be seen as some form of survival sex. The human right I see in this universe is not the right to prostitution but the right NOT to be prostituted as the only means of survival. What kind of choice is it if you don't have any other choice?"<sup>36</sup>

This kind of sex says a great deal more about the socio-economic injustice of our society than it does about the women engaged in the trade.

## 8. Conclusion

Prostitution is a consequence of a broad range of socio-economic and psycho-social power relationships. As we have seen, different countries have tried different approaches and none have been without difficulty. Hopefully, the further public consultation proposed in our country will point to innovative solutions. The importance of approaching the issue with a non-judgemental attitude cannot be over-emphasized. We must be forever mindful that everyone has the right to dignity and respect.

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<sup>1</sup> The Multi-Party Women's Caucus is made up of female members of Parliament from all political parties and is aimed at addressing the issue of gender equality and the challenge of under-representation of women in legislative bodies.

<sup>2</sup> The task of the Commission was to find a legal approach that would effectively curb prostitution and address high HIV prevalence in the sex trade, improve access to health and justice, and provide support services for those who are active in prostitution.

<sup>3</sup> The SACBC Parliamentary Liaison Office made a written submission in 2009.

<sup>4</sup> On Thursday, 21<sup>st</sup> June 2018 the SACBC Parliamentary Liaison Office, Embrace Dignity and the Hanns Seidel Foundation held a Roundtable Discussion on 'Prostitution/Sex Work: Is it work and is it a choice?' The Roundtable was addressed by Judge Navi Pillay, Former UN High Commissioner for Human Rights; Mr John Jeffery, Deputy Minister of

Justice; and Ms Samantha Ferrell-Schweppenstedde of Equality Now. Ms Kholi Buthelezi from Sisonke and Ms Mickey Meji from KWANELE were the respondents.

<sup>5</sup> SALRC Report Project 107, *Adult Prostitution*, 2017

<sup>6</sup> Embrace Dignity's submission to the Multi Party Women's Caucus Public Hearings, March 2018

<sup>7</sup> There are, of course, male prostitutes, and many of the same arguments and considerations apply to them as apply to female prostitutes. However, in South Africa as elsewhere, the vast majority of prostitutes are women.

<sup>8</sup> <https://www.catholiceducation.org/en/controversy/persecution/the-real-harms-of-prostitution.html>

<sup>9</sup> The SALRC Report deals only with adult prostitution. There is an assumption that this takes place between consenting adults.

<sup>10</sup> See 5 above

<sup>11</sup> Embrace Dignity's submission to the Multi Party Women's Caucus Public Hearings, March 2018

<sup>12</sup> Donna Gavin, Lieutenant in the Human Trafficking Unit at the Boston Police Department, in a Mar. 23, 2015, article for [bostonglobe.com](http://bostonglobe.com)

<sup>13</sup> Jimmy Carter, 39th President of the United States, in a May 31, 2016 article for the *Washington Post* titled "To Curb Prostitution, Punish Those Who Buy Sex Rather Than Those Who Sell It."

<sup>14</sup> <https://prostitution.procon.org/sourcefiles/netherlands.pdf>

<sup>15</sup> <https://www.sbs.com.au/guide/article/2018/02/27/how-one-law-changed-everything-about-prostitution-canada>

<sup>16</sup> "Amnesty International Policy on State Obligations to Respect, Protect, and Fulfil the Human Rights of Sex Workers," 26<sup>th</sup> May 2016

<sup>17</sup> "The Case for Legalizing Sex Work," Project Syndicate, 14<sup>th</sup> November 2016

<sup>18</sup> Thomas Kleine-Brockhoff, Senior Director at the German Marshall Fund of the United States, 29<sup>th</sup> January, 2007 article "Legalization Opens Criminal Floodgates."

<sup>19</sup> <https://prostitution.procon.org/view.timeline.php?timelineID=000028>

<sup>20</sup> Presentation at the Roundtable Discussion on 'Prostitution/Sex Work: Is it work and is it a choice?'

<sup>21</sup> Thomas Kleine-Brockhoff, Senior Director at the German Marshall Fund of the United States, 29<sup>th</sup> January, 2007 article "Legalization Opens Criminal Floodgates."

<sup>22</sup> <https://www.project-syndicate.org/commentary/case-for-legalizing-sex-work-by-peter-singer-2016-11?barrier=accesspaylog>

<sup>23</sup> Presentation at the Roundtable Discussion on 'Prostitution/Sex Work: Is it work and is it a choice?'

<sup>24</sup> Ms Samantha Ferrell-Schweppenstedde of 'Equality Now' Presentation at the CPLO/Embrace Dignity/HSF Roundtable Discussion on 'Prostitution/Sex Work: Is it Work and is it a Choice?' 21<sup>st</sup> June 2018

<sup>25</sup> <https://prostitution.procon.org/view.timeline.php?timelineID=0000288>

<sup>26</sup> <https://www.parliament.nz/mi/pb/research-papers/document/00PLSocRP12051/prostitution-law-reform-in-new-zealand/>

<sup>27</sup> <https://www.theguardian.com/commentisfree/2018/apr/30/new-zealand-sex-work-prostitution-migrants-julie-bindel>

<sup>28</sup> <https://www.quora.com/Is-prostitution-legal-in-Taiwan-2018>

<sup>29</sup> Presentation at the Roundtable Discussion on 'Prostitution/Sex Work: Is it work and is it a choice?'

<sup>30</sup> [www.catholicdoors.com/catechis/cat2331.htm](http://www.catholicdoors.com/catechis/cat2331.htm)

<sup>31</sup> Pontifical Council for the Pastoral Care of Migrants and Itinerant People, final document of the International Meeting of Pastoral Care for the Liberation of Women of the Street, Rome, 20<sup>th</sup> -21<sup>st</sup> June 2005

<sup>32</sup> See 31 above

<sup>33</sup> <https://cruxnow.com/vatican/2018/03/19/pope-says-prostitution-tortures>

<sup>34</sup> Presentation by the Deputy Minister of Justice and Constitutional Development at the CPLO/Embrace Dignity/HSF Roundtable Discussion on 'Prostitution/Sex Work: Is it Work and is it a Choice?' 21<sup>st</sup> June 2018

<sup>35</sup> <https://www.dailymaverick.co.za/opinionista/2018-08-14-women-continue>

<sup>36</sup> Presentation at the Roundtable Discussion on 'Prostitution/Sex Work: Is it work and is it a choice?'

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The Roundtable Discussion on which this paper is based was sponsored by the Hanns Seidel Foundation.