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# PROSTITUTION: THE EQUALITY LAW

## DID YOU KNOW?

After Sweden, Iceland, Norway, Canada, Northern Ireland and France, Ireland has adopted the legislation that removes the offence of soliciting and ends the impunity of the sex-buyers by criminalizing the purchase of sex act. *The Criminal Law (Sexual Offences) Act 2015* was passed on February 14, 2017 by a majority of parliamentarians.

### THE NORDIC MODEL OR SEX BUYER LAW (HEREAFTER THE EQUALITY LAW)

The Equality Law was first introduced in Sweden in 1999 and has been shown to be highly effective in reducing demand for prostitution and making the country in question a more hostile destination for traffickers.

#### In the Equality Law:

1. The buying of sex acts is criminalised
2. The selling of sex acts is decriminalised
3. Support and exiting services are provided for those exploited through prostitution

#### Underlying principle of the Law

The Equality Law recognises that the exploitation of people through prostitution and sex trafficking, most of whom are women and girls, ultimately only occurs because there is currently a demand from men wanting and willing to pay for sex. If there was no demand, there would be no 'supply'.

South Africa's Constitution is a transformative vehicle for change. It speaks to a vision of a South Africa where the inherent Dignity, Equality and Freedom of all her people will be realised. The Constitution recognises current systems of inequality, and makes provision for laws and policies specifically aimed at redress and transformation.

The Equality Law would operate within the ambit of these provisions. In its unequal operation (criminalising buyers and third parties; decriminalising sellers) the Equality law recognises the inequality and abuse of power inherent in the exchange between buyer and seller in the sex trade. Most importantly, it employs Constitutionally mandated and sanctioned strategies aimed at remedying these inequalities through legislative transformative justice.

#### Purpose of the Law

The Equality Law is designed to:

- Reduce demand for sexual exploitation – by making it a criminal offence to pay a person for sex.
- Support people exploited through the sex trade – by completely decriminalising the sale of sex acts and providing comprehensive support and exiting services.
- Transform attitudes – by challenging the belief that it is acceptable to treat women and girls as sexual objects by paying them for sex acts.

In Sweden, Finland, Iceland, Norway, and Northern Ireland, this approach has been effective in reducing the demand for paid sexual services<sup>1</sup>. And this in turn threatens the profits of those who traffic in human beings for personal gain.

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<sup>1</sup> <http://prostitutionresearch.com/wp-content/uploads/2014/06/Swedens-prohibition-of-purchase-of-sex.pdf>



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# PROSTITUTION: HIV/AIDS

## DID YOU KNOW?

Up to 20% of HIV infection is linked to prostitution\* and, in 2013 70% of 2180 people in prostitution from Cape Town, Johannesburg and Durban tested positive for HIV\*\*.

\*Department of Health

\*\*Study by the US Centre for Disease Control and Prevention in conjunction with the University of California, the Anova Health Institute and Wits University's Reproductive Health and HIV Institute

The system of prostitution places people exploited within it at high risk of HIV/AIDS infection. It is indisputable that total criminalisation – South Africa's legal model regarding prostitution – worsens the position and compromises the safety of those vulnerable to infection in a number of ways:

### How does partial decriminalisation respond to the issues resultant of current laws?

1. Criminal record makes it difficult to find employment necessary to support oneself
  - The Equality Model enacts an Exit Programme, which provides comprehensive support and exiting services.
  - Complete decriminalisation the sale of sexual acts and therefore people exploited through the sex trade – those selling sex – do not incur a criminal record.
2. The stigma and fear of arrest act as a barrier to their ability to access services such as health and justice.
  - The law decriminalises sellers or prostituted people so fear of arrest is removed.
  - Buyers are criminalised rather than seller, and so the stigma, and burden of responsibility, is shifted from sellers to buyers. Prostituted people are therefore appropriately positioned as survivors of exploitation who need access to these services.
  - Furthermore, exit an programme would provide a number services geared towards addressing addiction, mental and physical health and other services needed.
3. Forced unprotected sex with multiple partners, rape and sexual assault at the hands of abusive clients because of the exploitative nature of prostitution
  - Demand for prostitution will decrease and so women will face less abuse from clients and third parties.
4. Ineffective policing of crimes against prostituted people as well as physical and sexual abuse at the hands of police who are tasked to enforce current laws decriminalising sellers is commonplace.
  - Police are enforcers of the law, and should the law change making buying rather than selling sex illegal, so too would the reach of the police's power and ability to level out such abuse.
    - i. Reports of abuse may be welcomed as evidence of the criminals in the system (buyers and third parties)
    - ii. Need to use condoms as evidence of crime of 'selling' will no longer be practiced because sellers will no longer be the target of police scrutiny.



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## DID YOU KNOW?

Before 2007, the law stated that only the *selling* of sexual acts was illegal. However, the enactment of the Criminal Law (Sexual Offences and Related Offences) Amendment Act in 2007 saw the introduction of a new provision which criminalises the *buyer* of sexual acts as a perpetrator.

# PROSTITUTION: PROPOSED LEGAL FRAMEWORKS

Currently, South Africa's legislative framework surrounding prostitution declares prostitution illegal.

The SALRC has presented four legal models up for consideration for legal reform of South Africa's legal framework governing prostitution:

- 1) **Total criminalisation** penalises prostitution and all acts relating to prostitution. Examples of this model are rare. The laws against prostitution in the state of Idaho in the United States of America are an example. It may happen in a model of total criminalisation that the sanctions towards the prostitute and solicitor is stricter than those towards the other role players, as is the case in the state of Colorado in the United States of America. The current legal regime in South Africa is also an example of this.
- 2) **Non-criminalisation** refers to the model of removing laws that criminalise adult prostitution and related activities. Under the non-criminalisation model, the supervision of prostitutes, other role players and business establishments typically takes place through general legislation on labour, occupational, health and safety and human rights. Generally, non-criminalisation does not mean the removal of criminal sanctions against abuse, trafficking or forced or under age prostitution
- 3) **Regulation or Legalisation** refers to the removal of general criminal sanctions against prostitution in combination with measures aimed at state regulation and control of the industry. See, for example, the position in Nevada, USA, and the Netherlands. The control measures in a regulated system are based on the prevailing social norms and conditions of the particular jurisdiction. These measures will typically prescribe health checks, registration of prostitutes, licensing of brothels and sometimes the zoning of certain areas in which prostitution is allowed.
- 4) **Partial (de)criminalisation** is enforced in a number of ways. In some instances, activities related to prostitution such as soliciting, brothel-keeping and living off the earnings of prostitution are prohibited, while prostitutes themselves are free from criminal sanction. The UK is an example of this partial criminalisation model. Another version criminalises persons who solicit or facilitate the performance of sexual services of prostitutes *i.e.* the client or pimp, but not the prostituted people. Sweden is an example of this.<sup>1</sup>

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<sup>1</sup> SALRC Discussion Paper 0001/2009, Project 107: Sexual Offences/Adult Prostitution (2009)



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## DID YOU KNOW?

The sex industry is invested in the use of terms such as "sex work" and "sex worker" when referring to prostitution. Prostitution is violence, not "sex" or "work". The term "sex work" completely masks the physical, psychological and sexual violence inflicted on prostituted persons. Furthermore, referring to prostitution as "work" ignores the fact that so many people are trafficked into prostitution. In fact, the United Nations Special Rapporteur on Trafficking in Persons reports that "...for the most part, prostitution as actually practiced in the world usually does satisfy the elements of trafficking."

# PROSTITUTION: MEDIA GUIDE

Reporting on prostitution means finding not only the language but the context and sensitivity to communicate a trauma that is both deeply personal and a matter of public policy; urgent and yet rooted within centuries of stigma, violence and oppression. Reporting on prostitution requires special ethical sensitivity, interviewing skills, and knowledge about survivors, perpetrators, law and psychology.

### Key Concepts

1. Prostitution is a system that is *inherently exploitative* for those persons who enter or are within the system.
2. There is rarely choice or safety in the system for women and marginalised people in an industry riddled with a lack of power and choice on the one hand, and exploitation and an exercise of power on the other.
3. Prostitution constitutes part of an overarching system of sexual exploitation, and is inextricably linked to human trafficking and pornography.
4. Regardless of the legal framework surrounding the system, the unequal social, economic and political positions of power occupied by prostituted people and buyers/pimps/third parties means the system cannot be understood as a safe working environment.
5. The vast majority of prostituted people would choose different means of survival were there presented real options and opportunities to exit the system.
6. There is only one offence in the sex trade: the exploitation of those without power and agency by those with power through commercialised sexual violence. The burden of responsibility for the crime of sexual violence must be on those who exploit prostituted persons by buying and/or pimping them.

### The importance of language when reporting on prostitution

Prostitution is a system in which those bought and sold are subjected to sexual violence and exploitation. Language used to describe it should show the non-consensual nature of the acts within the sex trade. For instance, when a person "works" in prostitution, it implies voluntary participation and minimizes the harms. Words can conceal harms and lead to confusion about the real nature of prostitution.

Examples of words in current usage that make the harms of prostitution invisible:

"voluntary prostitution" implies that the person consented when usually, they had no other options to survive.

"forced trafficking" implies that somewhere there are people who are not forced to be trafficked into prostitution.

"sex work" re-defines prostitution as a "job" rather than an act of violence against women and marginalised people.

Terms should be used that are neither pejorative or that ignore the violence to women and marginalised people used in the sex industry. Rather than refer to someone as a "sex worker," it is preferable to use "sexually exploited person," "prostituted person" or "child used in prostitution." These terms do not pretend that a human rights abuse is 'work'. Negative terms - such as 'prostitute', 'whore' or 'hooker' - should not be used as they stigmatize victims.



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## PROSTITUTION: OUR POSITION

### DID YOU KNOW?

Embrace Dignity believes that systems of oppression work thoroughly and effectively to limit and constrain the choices available to those it oppresses.

This oppressive system leaves prostituted people socially and economically vulnerable to a commercialised system of sexual exploitation.

We advocate for partial decriminalisation – or the Equality Model – wherein the sellers are decriminalised and offered a way out of the system through comprehensive exit programs, and the buyers and third parties are criminalised.

Adopting the structural feminist view, we believe that prostitution as a system is *inherently exploitative* for those persons who enter or are within the system. We do not accept that there is any choice or safety in the system for women and marginalised people, and therefore do not accept the system as a safe working industry. We argue that it is not only the position of the vulnerable that needs to be protected, but moreover the position of power held by the exploiters in the system that needs to be challenged and penalised.

Our view is rooted not in any notions of morality, but rather in our unequivocal belief that this system is indicative of the fact that there is no safety, equality or dignity for prostituted persons in our society.

We also recognise that by advocating for laws which aim to shrink the demand for prostitution and therefore compromise the income of those supplying it, we must ensure that any legal reform must include an extensive and substantial national strategy centred around providing an exit and alternative for persons in prostitution.

This is further illustrated by the SALRC, who in their report, found that:

“despite isolated cases of private and state run and funded programmes there is no national strategy to assist people out of prostitution. The Commission notes that irrespective of the policy option chosen that a national strategy should be implemented to deal with prostitution. This national strategy should seek to offer viable alternatives to prostitution; assist a person to exit prostitution should he or she<sup>1</sup> express a willingness to do so; support re-skilling, health and education initiative for prostitutes<sup>2</sup>; promote economic independence<sup>3</sup> promote sexual health and safe sexual practices and provide for a review system and body to evaluate the effectiveness of the legislation in order to make recommendation for its improvement<sup>3</sup>

We strongly support these suggestions, and believe that they can be best achieved through partial decriminalisation on an adapted version of the Swedish Model: the Equality Law.

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<sup>1</sup> Or they

<sup>2</sup> We reject the term used here because of the stigma attached – use rather prostituted persons

<sup>3</sup> Report by Principal State Law Advisor assigned to law reform research at the SALRC, Current Status of the SALRC: Project 107 – Sexual Offences/Adult Prostitution (28 March 2012).



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# PROSTITUTION: EXIT

## DID YOU KNOW?

a nine country study found that 89% of respondents said they wanted to leave prostitution and would do so if they had other options. Given this statistic – and the numerous instance of gender based violence within the industry – the need for exit programs is indisputable.

**\*\***<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3651545/>

**Social, economic, political, cultural and legal factors place vulnerable people in a position where prostitution is the only option available for survival, therefore significantly decreasing chances of not only preventing entry, but exiting the system too.**

Many people do not have formal work in South Africa, partly due to lack of skills and high unemployment rates<sup>1</sup>. Poverty is also highly "feminised" (more common for women), with women working longer hours for less money than men. Women also often do more caring for children, the elderly and people with disabilities<sup>2</sup>, which is work that is unpaid or poorly paid<sup>3</sup>. Studies show that 80% of prostituted persons are women<sup>4</sup>.

Prostitution requires little or no training and pays quite well. One study in 2010 found that, although most of the prostituted women surveyed had not completed secondary school, they earned an average income more than double that of all employed South Africans<sup>5</sup>. A similar survey in Cape Town found that, depending on their level of education, prostituted people earned between 1.5 and 5.4 times more than they had made in their previous employment<sup>7</sup>. Unsurprisingly, 76% of prostituted people in this study reported that their main reasons for selling sex were financial. Another common motivation was that prostitution allows for flexible hours and so is well-suited to people who have other commitments such as work or child-care.

<sup>1</sup> Statistics South Africa (2014). "Employment, unemployment, skills and economic growth". StatsSA, Pretoria.

<sup>2</sup> Statistics South Africa (2013). "Gender Statistics in South Africa, 2011". StatsSA, Pretoria

<sup>3</sup> Bentley, K. (2004). "Women's Human Rights & the Feminisation of Poverty in South Africa" *Review of African Political Economy*, 31(100): 247-261.

<sup>4</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3651545/>

<sup>5</sup> Richter, M. et al. (2013). "Characteristics, sexual behaviour and risk factors of female, male and transgender sex workers in South Africa." *South African Medical Journal* 103(4): 226-251.

<sup>6</sup> Statistics South Africa (2010). Monthly earnings of South Africans, 2010. Pretoria: Statistics South Africa.

<sup>7</sup> Gould, C. & Fick, N. (2008). "Selling sex in Cape Town: Sex work and human trafficking in a South African city". Pretoria/Tshwane, Institute for Security Studies.





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# PROSTITUTION: TOTAL CRIMINALISATION HARMS

## DID YOU KNOW?

68% of South Africans within the sex industry have reported being threatened with a weapon, 66% reported being assaulted, and 56% reported being raped. Of the 56% who reported being raped, 58% reported being raped more than 5 times.

**\*\*<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3651545/>**

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### There are a number of harms faced by prostituted people given South Africa's current legislative Framework

The stigma of prostitution and the fact that sellers are regarded as criminals by the law create a series of barriers to prostitutes claiming their rights, such as the right of access to health and social services.

In South Africa criminalisation means that prostituted persons are hesitant to make use of existing health services because they fear revealing their identity and facing prejudiced behaviour by the service providers. Moreover, they are afraid that if they seek these services and disclose themselves as part of the system of prostitution, they will be arrested or subject to discrimination. In general, they try to remain hidden in order to avoid those who enforce the law.

This also means that persons who are prostituted work in dangerous places where they are at risk and inaccessible to the health service providers attempting to assist them. This is particularly problematic as the result of the stigma and barriers to accessing healthcare services compound and interlock to render prostituted persons particularly vulnerable to HIV/AIDS.

The criminal nature of prostitution means that sellers of sex in the system have no access to protection from the police. Because their behaviour is illegal, prostituted persons find themselves forced to operate outside of the protection of the law, and are therefore unable to ensure safe conditions. Their vulnerability as a group is thereby exacerbated and ultimately enhances their position as susceptible to exploitation and abuse.

The climate of criminalisation means that prostituted persons are abused financially, sexually and physically by gangsters, clients, brothel owners and pimps, often with impunity. Research shows that irrespective of the legal option followed, women and girls in prostitution have a mortality rate 40 times higher than the national average. However, as a result of their criminalised status in society and the fact that they are by and large women, they are particularly vulnerable to all crimes related to gender based violence. There is an abundance of evidence that the criminalised status of prostitution is exploited by authorities to harass and brutalise prostituted persons. Allegations of abuse by policemen range from assault to extortion and rape.<sup>1</sup>

*In light of both the enormous harms inherent in prostitution under South Africa's current laws around prostitution, as well as our belief that prostitution cannot be considered work but should rather be seen as an institutionalised form of sexual oppression, abuse and exploitation, we strongly advocate for law reform.*

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<sup>1</sup>South African Legal Reform Commission Discussion Paper 0001/2009, Project 107: Sexual Offenses/Adult Prostitution (2009)