

Proposed Legislative Framework:

Prostitution

8 October 2019¹

¹ Embrace Dignity is a South African non-profit organisation that actively advocates for legal reform of the laws regulating prostitution in South Africa. Norton Rose Fulbright South Africa are Embrace Dignity's attorneys.

Contents

- FOREWARD 3**
 - The scope 3
 - The lens 3
 - The terminology 3
- INTRODUCTION 4**
 - Legislative options 4
 - The current South African legal position 4
- THE PROPOSED LEGISLATIVE MODEL 5**
- DOMESTIC SUPPORT FOR THE MODEL 8**
 - The Constitution of the Republic of South Africa, 1996 8
 - South African Law Reform Commission 10
 - The National Council of Provinces (NCOP) 12
 - Case law 13
 - Criminal Law (Sexual Offences and Related Matters) Amendment Act 16
- REGIONAL SUPPORT FOR THE MODEL 17**
 - Support from the African Union 17
 - South African Development Community 17
 - Comparative support 19
- INTERNATIONAL SUPPORT FOR THE MODEL 22**
 - International Labour Organisation 22
 - The United Nations 23
 - Conventions 23
 - Comparative support 26
- CONCLUSION 29**

FOREWARD

The scope

- 1 This proposal advocates for a legislative model in respect of adult prostitution. Child prostitution as well as human trafficking are excluded from the scope of this discussion. These are regulated by the Prevention And Combating Of Trafficking In Persons Act 7 of 2013 and provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

The lens

- 2 The alignment towards a particular legislative framework regulating the prostitution industry is deeply rooted in one's perspective on prostitution, its effects, causes and the desirability to preserve or eliminate the trade.
- 3 The proposed bill was drafted in light of the provisions of the Bill of Rights, as found in the Constitution, as well as South Africa's obligations under international law.
- 4 This proposal bases its advocacy for particular legislative reform on a variety of premises which include:
 - 4.1 Firstly, prostitution is inherently exploitative and amounts to a degradation of a prostituted person's human dignity, right to life and freedom (non-derogable). It cannot be considered as a legitimate form or work.²
 - 4.2 *In S v Jordan* ("Sex Workers Education and Advocacy Task Force and Others as Amicus Curiae")³ (**S v Jordan**) the court held that the very nature of prostitution involves the commercialisation of sex and the commodification of an individual's body which amounts to a corrosion of the inherent dignity of a human being; Secondly, prostitution feeds off the racial, gender and economic inequalities within society. The overwhelming majority of prostituted persons do not freely chose to participate in the industry and are most often forced to do so due to their socio-economic circumstances;
 - 4.3 Thirdly, prostituted persons are a vulnerable group within society that are often the target of emotional, verbal, economic, sexual and physical abuse and require legislative protection;
 - 4.4 Fourthly, prostitution contributes to organised crime, human trafficking and the spread of sexually transmitted diseases, including HIV; and
 - 4.5 Fifthly, the South African Law Reform Commission ("**SALRC**"), in its report on adult prostitution, recognised that the prostituted persons are a vulnerable group who need compassion and opportunities to exit prostitution.⁴
 - 4.6 Lastly, the aim of any legislative framework adopted should be to abolish prostitution.⁵

The terminology

- 5 In line with the perspective described above the preferred term when referring to persons who sell sexual services for reward is "prostituted persons" in lieu of sex workers or prostitutes and the preferred term for the general societal structure which facilitates the performance of sexual acts/relations for reward is the prostitution system.

² SALRC (Project 107) *Report on Sexual Offences: Adult Prostitution* (2015) Summary p 12 para 29. P 13-14 para 31-33

³ 2002 (2) SACR 499 CC.

⁴ SALRC (Project 107) *Report on Sexual Offences: Adult Prostitution* (2015) Summary p 12 para 29.

⁵ Ibid Para 86.

INTRODUCTION

Legislative options

- 6 There is a broad array of interlinked and overlapping legislative models that address prostitution. The four common legislative models that are often referred to are:
- 6.1 *Criminalisation (Prohibition)*: which criminalises the conduct of all parties involved in prostitution including the prostituted person, the buyer as well as those benefiting from and assisting in the prostitution. This approach aims to eradicate prostitution in its entirety and punish all those connected with the trade.
- 6.2 *Partial criminalisation (Abolition)*: which involves criminalising the conduct of the buyer, as well as those benefiting from and assisting in the prostitution. The prostituted person faces no criminal sanction. The key objectives of this approach are to eradicate prostitution whilst providing maximum protection for prostituted persons. This model is also referred to as the Equality model.
- 6.3 *Legalisation / Regulation*: provides that detailed rules should be implemented in order to monitor control over how the prostitution industry operates. This approach puts forward that prostitution either should nor or simply cannot be eradicated and the best way to limit the adverse effects consequences of the trade is to therefore regulate it.
- 6.4 *Decriminalisation*: where there are no laws relating to prostitution in place and as a result no party involved in the prostitution trade faces criminal sanction. This option relies on the argument of autonomy to advocate that prostitution should be permitted and that the industry should be left to regulate itself.

The current South African legal position

- 6.5 South Africa's current legal approach in respect of prostitution is one of criminalisation, whereby both the sale and purchase of sexual relations for reward are criminalised.
- 6.6 The criminalisation of prostitution in South Africa commenced with the adoption of the Sexual Offences Act 23 of 1957 (**Sexual Offences Act**). Section 20 (1A) of the Sexual Offences Act criminalised prostituted persons and not the buyers of sexual services.⁶ Section 20 (1A) (a) provides that:

"any person, 18 years or older, who has unlawful carnal intercourse, or commits an act of indecency; with any other person for reward, is guilty of an offence".

- 7 The Sexual Offences Act currently defines "*carnal intercourse*" as intercourse other than intercourse between husband and wife.⁷ The Sexual Offences Act also criminalises prostitution related activities such as brothel-keeping and the procurement of sex workers.

- 8 Subsequent legal development led to the buyers of sexual services being criminalised as well. Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (**Amendment Act**) provides:

"a person (A) who unlawfully and intentionally engages the services of another adult (B) for financial or other reward to B or a third person (C) for the purposes of engaging in a sexual act with B, will be guilty of an offence".

⁶ However in *S v Jordan* at 60-63 it was argued that the purchaser of sex could be held liable as an accomplice under the common law or co-conspirator under the Riotous Assemblies Act 17 of 1956.

⁷ G Rhoda *The decriminalisation of prostitution in South Africa: towards a legal framework* LLM thesis, University of the Western Cape (2012) 60.

- 9 The significance of this provision was that the purchase of sex for reward was also criminalised. Therefore, at present, prostituted persons, their clients and other parties related to the transaction can face criminal sanction.⁸

THE PROPOSED LEGISLATIVE MODEL

- 10 The proposed legislative model is based on the partial decriminalisation (abolitionist) approach, also referred to as the Equality model. The crux of the model decriminalises the conduct of prostituted persons and criminalises the activities of all other role players within the system, providing an option for diversion in certain instances. The model will begin to shift the public perception of prostituted persons and deal with the stigma attached to such persons. The legislative system is rooted in ideals related to gender equality and the protection of the prostituted person.

- 11 This section aims to explain the various facets of the legislative model as it purports to regulate the conduct of the different role players involved in prostitution.

11.1 Protection of prostituted persons

- (1) The proposed legislative model envisages the complete decriminalisation of the sale of sex for the prostituted person as well as all related offences for which prostituted persons are currently being sanctioned - such as solicitation to commit a sexual act, indecent dress and committing sexual acts in public.⁹
- (2) The proposed legislative model proposes a legal system that supports and facilitates the establishment and registration of accredited organisations for services for prostituted persons. The Minister of Social Development - after consultation with the Cabinet members responsible for the administration of justice, safety and security, correctional services, health and the National Director of Public Prosecutions - must make regulations regarding the system of accreditation of organisations to provide services to prostituted persons.
- (3) Any person who self-identifies as a prostituted person will be entitled to access programmes offered by these accredited organisations. After an assessment by an accredited organisation, prostituted persons will be made an offer to participate in a rehabilitative/recovery/assistive programme.
- (4) The accredited organisations must offer a programme aimed at-
 - (a) Supporting prostituted persons to exercise their constitutional and legal rights;
 - (b) The provision of counselling to prostituted persons;
 - (c) The facilitation and provision of exit programmes for prostituted persons;
 - (d) The reintegration of prostituted persons into their homes and families;
 - (e) The provisions of education and skills development training to prostituted persons;
 - (f) The provisions of accommodation to prostituted persons; and

⁸ Related offences such as brothel-keeping are still criminalised in terms of the Sexual Offences Act.

⁹ Section 19 (1) and (2), 20(1A)(a) and (b) Sexual Offences Act

(g) Educating the population on the cause and effects of prostitution and related matters.

(5) To assist with the funding of these accredited organisations, the establishment of a Dignified Work Fund for prostituted persons is proposed. It is recommended that the Fund be resourced by an annual allocation of state budget as well as through the fines that are collected from prostituted related offences. Asset forfeiture / criminal assets recovery account of prevention of organised crime ch 5 and 6 s 63(4) and 6

11.2 Buyers

(1) Those who purchase sexual acts from prostituted persons must remain criminalised and will be liable on conviction to payment of a fine or imprisonment.¹⁰

(2) However persons convicted as buyers will have the option to access a diversion programme for those who acknowledge responsibility for the offence. Diversion programmes, which must be strictly monitored, can involve compulsory therapy and community service. A matter may be considered for diversion by a court, after consideration of all relevant information presented, including whether the person alleged to have committed the prostitution related offence has a record of previous infringements of a similar nature, or any previous diversion orders, the nature and seriousness of the alleged offence, the personal circumstances of the person alleged to have committed a prostitution related offence and the prospect of success of the diversion in preventing further infringements. Failure to comply with such orders can result in arrest and continuation of the criminal trial. The acknowledgement of responsibility can be recorded as an admission referred to in section 220 of the Criminal Procedure Act.¹¹

11.3 Those who benefit from the prostitution of others ('pimps' / managers)

(1) Those that benefit from the prostitution of others should remain criminalised. Accordingly, any adult who received or expects to receive financial or other reward favour or compensation as a result of his or her role in arranging, facilitating, encouraging, promoting or permitting the prostitution of a prostituted person will be guilty of an offence and will be liable on conviction to a fine or imprisonment.

(2) There is no option of diversion available to those who benefit from the prostitution of others.¹²

11.4 Third parties

(1) Those who play a role in furthering the prostitution industry in any way will also face criminal sanction of a fine. This includes:

(a) anyone who owns, manages or is otherwise in control of a brothel;¹³

(b) any person who recruits or attempts to recruit, whether directly or indirectly, a person to become a prostituted person or to continue to engage in prostitution;

¹⁰ 11 of the Amendment Act

¹¹ Diversion is aimed at reforming buyers of sexual services and providing perspective of the inherent abuse involved in prostitution, the effects of prostitution on prostituted persons as well as giving them an opportunity to comply with the law.

¹² This omission is intentional and emphasises the message that those benefiting from the prostitution of prostituted persons must be most severely punished in order to eradicate the most exploitative forms of the practice first.

¹³ Brothel refers to any movable or immovable property kept or used for purposes of prostitution. This refers to any person who, being the owner, occupier or manager of a brothel or otherwise being in control thereof, intentionally or knowingly permits it to be used as a brothel.

- (c) anyone who intentionally or knowingly performs for reward any act that is calculated to enable any other person to engage in prostitution with a third party are also included; and
- (d) anyone who intentionally or knowingly advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcast or distribution of information that facilitates or promotes the prostitution of another.

(2) Third party offenders under this section can benefit from a diversion programme.

11.5 Internet providers

- (1) An electronic communications services provider operating in the Republic must take all reasonable steps to prevent the use of its service for the hosting of information related to prostitution.
- (2) An electronic service provider that is aware or becomes aware of any electronic communications which contain information that is related to the prostitution of another and which is stored upon or transmitted over its electronic communications system must-
 - (a) Without delay report the electronic communications identity number from which those electronic communications originated;
 - (b) Take such steps as are necessary to preserve evidence as may be required by the relevant investigation and prosecuting authorities; and
 - (c) Without delay take such reasonable steps as are necessary to prevent continued access to those electronic communications.

11.6 Education

- (1) The proposed legislative model advocates for the following educational initiatives in addition to the educational initiatives provided for in diversion programmes and exit programmes:
 - (a) Training for professionals such as members of the South African Police Service (“SAPS”), healthcare professions, social service providers, educators, prosecutors and any other professionals who frequently engage with prostituted persons in order to educate them on the realities of prostitution and to teach these persons how to address and communicate with prostituted persons with respect and without any prejudice or violating their constitutional rights¹⁴; and
 - (b) The incorporation of topics such as the “the realities and harms related to prostitution” and the “dangers of the commodification of the body” into the academic curriculum of schools in order to educate students. The goal is to educate students on the involuntary and exploitative nature of prostitution at a young age so as to deter any demand for sexual services from a prostituted person that may arise during their adulthood.

12 A Criminal Law (Sexual Offences And Related Matters) Amendment Bill (the **Bill**) has been drafted to set out the exact legislative amendments that are being proposed. It is annexed hereto as annexure “A”.

¹⁴ This training can be done by accredited organisations or through the Department of Social Development

DOMESTIC SUPPORT FOR THE EQUALITY MODEL / PARTIAL DECRIMINALISATION

- 13 There are a variety of domestic sources such as the Constitution, the South African Law Reform Commission (**SALRC**), the National Council of Provinces, relevant jurisprudence and the Criminal Law (Sexual Offences and Related Matters) Amendment Act which provide support for the partial decriminalisation model.

The Constitution of the Republic of South Africa, 1996

- 13.1 The Rights in the Bill of Rights require the South Africa to adopt the partial decriminalisation model.

Equality

- 13.2 The right to equality is one of the founding values of the Bill of Rights.¹⁵ Section 9 prohibits unfair discrimination and provides for a standalone right to equality:

Section 9(1): *“Everyone is equal before the law and has the right to equal protection and benefit of the law.”*

Section 9(2): *“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”.*¹⁶

- 13.3 Critics of the partial decriminalisation approach note that the system unfairly discriminates against buyers of sexual services. They argue that both the prostituted person and the buyer should be equally liable for their joint conduct. This critique fundamentally misunderstands the inequality that is rooted in the prostitution industry. It is trite that the overwhelming majority of prostituted persons are female and the overwhelming majority of buyers are male. The unfair discrimination against women for centuries in South Africa has resulted in women often being in a far worse economic position than their male counterparts. This often influences women to enter and remain in the industry.
- 13.4 Whilst prostituted persons are still categorised as criminals, judicial redress for gender based violence as well as access to health care, particularly for HIV treatment, is not freely available to them. The Constitution clearly allows for prostitution laws to distinguish between buyers and prostituted persons as such distinction is justified based on the gender disparity of these roles and the past discrimination faced by women in accessing judicial redress for abuse and accessing health care.

Dignity

- 13.5 The right to human dignity is one of the founding values of the Bill of Rights and the South African Constitution.¹⁷
- 13.6 Dignity is also a standalone right enshrined in the Constitution. The drafters of the Constitution envisioned that the state adopts a proactive approach to the protection of a person’s dignity as the obligation of **protection** of dignity is created. Section 10 provides that:

*“Everyone has inherent dignity and the right to have their dignity respected and protected.”*¹⁸

- 13.7 Partial decriminalisation protects human dignity by sending out a message that the commodification or objectification of the bodies of prostituted persons is impermissible and thus

¹⁵ Section 1(a) and 7(1) South African Constitution 1996

¹⁶ Section 8(1) South African Constitution 1996

¹⁷ Section 1(a) and 7(1) South African Constitution 1996

¹⁸ Section 10 South African Constitution 1996

legally reprehensible. The model protects the inherent human dignity of prostituted persons by ensuring that their rights are protected and that they can report abuse from clients, the police and health care professionals without fear. The model further reaffirms the prostituted person's value by empowering them to access different career opportunities through skills and networks gained at accredited organisations. Partial decriminalisation also removes the stigmatisation attached to prostituted persons.

Freedom and security of the person

13.8 Section 12(1)(c) of the Constitution provides that:

"Everyone has the right to freedom and security of the person, which includes the right— to be free from all forms of violence from either public or private sources."¹⁹

13.9 Partial decriminalisation protects prostituted persons from violent abuse and exploitation by criminalising the conduct of buyers, pimps, brothel-keepers and any third party benefiting from the exploitation of a prostituted person. In addition, if the sale of sex is no longer criminalised in accordance with the partial decriminalisation model, prostituted persons will be protected from arbitrary arrests from the police as their conduct will not be a crime. Prostituted persons will also be at liberty to report any violence or abuse committed against them without fear of self-incrimination.

13.10 Section 12(2) of the Constitution provides that:

"Everyone has the right to bodily and psychological integrity, which includes the right— (a) to make decisions concerning reproduction; (b) to security in and control over their body."²⁰

13.11 Partial decriminalisation protects prostituted persons from bodily and psychological integrity as it not only criminalises the conduct of those who seek to exploit the body of the prostituted persons, but will also work to remove the control that such persons have over the prostituted persons' body. This will ideally lead to the prostituted person regaining security and control over their own body. It will also provide prostituted persons with the freedom to make their own decisions concerning reproduction.

13.12 Section 11 of the Constitution provides that:

"Everyone has the right to life."²¹

13.13 Partial decriminalisation will protect the lives of prostituted persons by providing them with the ability to report violence, abuse and threats to their lives and the lives of other prostituted persons from their managers, clients, the police and health care professionals without fear.

Access to healthcare

13.14 Section 27(1)(a) of the Constitution provides:

"Everyone has the right to have access to health care services."²²

13.15 Partial decriminalisation removes the negative stigma attached to prostituted persons. Healthcare professionals will be more amicable to assisting prostituted persons when they are observed as victims of the system of prostitution and prostituted persons will enjoy greater access to healthcare services.

¹⁹ Section 12(1)(c) South African Constitution 1996

²⁰ Section 12(2)(a) and (b) South African Constitution 1996

²¹ Section 11 South African Constitution, 1996.

²² Section 27(1)(a) South African Constitution 1996

- 13.16 Partial decriminalisation clearly affords prostituted persons increased protection and greater support for the realisation of their human rights. It follows that in accordance with the obligations imposed on the State, Parliament and the Courts, these organs of power are obliged to ensure that legal reform that enhances the lives of prostituted persons is affected in South Africa.
- 13.17 Partial decriminalisation does not infringe or remove any rights of the purchaser of sexual services as the soliciting of sexual services from a prostituted person or the derivation of an economic benefit stemming from the activities of a prostituted person does not fall within the ambit of the right to economic activity or any rights and as such acts are and shall remain unlawful.²³

South African Law Reform Commission

- 13.18 The SALRC is mandated to conduct research with reference to all branches of the law in order to make recommendations to Government for the development, improvement, modernisation or reform of the law.
- 13.19 In 2007, the SALRC commenced its investigation into the laws that criminalised adult prostitution in South Africa. The objective of the report was to review South Africa's current legislative framework and to investigate alternative legal approaches that could regulate, prevent or deter prostitution.²⁴ The report constituted the third leg of the investigation into sexual offences in South Africa and after a decade of investigation was released on 26 May 2017 (the **SALRC report**).²⁵
- 13.20 The SALRC recognises a number of key perspectives that are in alignment with the partial decriminalization model. These are:
- (1) Prostitution is inherently exploitative and that women are particularly vulnerable to being exploited due to the high levels of gender based violence, inequality and with the challenge of poverty;²⁶
 - (2) prostitution should not be considered decent work;²⁷ and
 - (3) the elimination of the industry is the desired outcome.²⁸
- 13.21 However, the SALRC concluded that that the Sexual Offences Act and section 11 of the Sexual Offences Amendment Act should be repealed and a new Act be promulgated, which would include or exclude provisions of the preceding Acts.²⁹
- 13.22 As a first alternative option, the SALRC puts forward the option of maintaining the status quo of full criminalisation, in which the buyers, prostituted persons and third parties are criminalised under South African Law.³⁰
- 13.23 Importantly, the SALRC recognised that most of the public comments received did not advocate for harsh punishment of prostituted persons but rather recognised them as a vulnerable group.³¹ In an attempt to soften the model, the SALRC also recommended that an option of diversion

²³ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22 para 54-55*. Hereafter referred to as "S v Jordan".

²⁴ South African Law Reform Commission Report on Sexual Offences: Adult Prostitution P 107/2017.

²⁵ Anonymous "Long-awaited report on adult prostitution released" (26-05-2017) *African News Agency* <<https://www.enca.com/south-africa/long-awaited-report-on-adult-prostitution-in-safrica-released>> (accessed 05-03-2018).

²⁶ At para 34 pg xviii SALRC report

²⁷ At para 2.452 pg 200 SALRC report

²⁸ SALRC (Project 107) *Discussion Paper 0001/2009 on Sexual Offences: Adult Prostitution* (2009) at 182.

²⁹ *Ibid* at 230.

³⁰ *Ibid* at 231.

³¹ At para 2.442 pg 195 SALRC report

should be available for prostituted persons which allows them to avoid the criminal justice system and access supportive resources and skills development programmes in order to exit the industry. The report also advocates for various non-legislative protective measures to be put in place to ensure protection from police harassment and abuse as well as adequate access to health care for prostituted persons. Upon leaving the industry their criminal records should be expunged.³²

13.24 As a secondary option the SALRC put forward a form of partial decriminalisation. Further findings in the SALRC report that supported the ideology behind partial decriminalisation is discussed below.

13.25 *Prostituted persons are oppressed by the social, cultural and economic realities*

- (1) The SALRC held that in South Africa, prostitution is practiced - from the prostituted person's perspective - amid complex social, cultural and economic realities. Relevant influences included sexual inequality, socio-economic isolation of women and other marginalized groups, racial inequality, lack of formal education, poverty, scarcity of employment in the formal sector, the disparate impact of the HIV/AIDS pandemic on women, and in some instances addiction to substances such as alcohol and drugs.
- (2) The SALRC also observed that the majority of prostitutes in South Africa sold sexual services for economic reasons. Because of entrenched gender and sexual inequality as well as dire financial or survival needs, the reality for most South African prostituted persons was that the transaction was seldom a contract entered into by equals.
- (3) Therefore, the SALRC shares the rationale underlying partial decriminalisation, namely that prostituted person engage in prostitution as a result of social and economic factors and are thus not to be blamed. As a result, prostituted persons should not be subjected to criminal sanctions for the sale of sex.

13.26 *Criminalisation of the buyer*

- (1) The SALRC concluded that prostitution was inherently dangerous in the context of extreme social inequality and sexual violence in this country, as well as evidence of high levels of violence perpetrated by many buyers of sexual services. Whether violence was associated primarily with the behaviour of individual buyers or is somehow inherent in all forms of prostitution-related activity, the SALRC found no justification for decriminalising the purchase of sex.
- (2) The SALRC contended that criminalising the purchase of sex was necessary to address this inequality, which was both economic and sexual. The SALRC contended that criminalisation sends out a clear message to society that buying sexual services that are mainly provided because of poverty, inequality and unemployment is exploitative, and therefore illegal.
- (3) The SALRC opined that decriminalising the purchase of sex would only increase the demand, locally and internationally, for more prostituted persons. This would in turn foster a culture in which prostitution and sexual coercion were normalised. The SALRC held that changing the legislative framework could be a dangerous cultural shift juxtaposed against the high incidence of sexual crime against women in South Africa; women would be considered even more expendable than before.
- (4) Furthermore, the SALRC found that one of the aims of combating demand is to find ways to reduce the demand for adult prostitution; therefore, the Commission recommended that advertising prostitution on radio, television or print media should be expressly banned.

³² At para 48 pg xxv SALRC report

- (5) The SALRC supports partial decriminalisation through its agreement that prostitution is inherently violent and could be effectively addressed by targeting the demand for the supply of sexual services through the continued criminalisation of the purchase of sex.

13.27 *Criminalisation of brothel-keeping and third parties*

- (1) With regards to brothel-keeping and based on the submissions and on comparative and local research, the Commission found that the fundamental rights of prostitutes to freedom and security of the person were not known to be protected in brothels. The establishment of legal brothels would not necessarily promote the quality of life of people in prostitution. The Commission therefore concluded that brothel-keeping should remain criminalised.
- (2) Furthermore, the SALRC was of the opinion that there is sufficient merit in retaining the offence of “knowingly living off the earnings of prostitution”. It recommended that this offence should be extended to include the offence of “benefiting from the prostitution of a person”.
- (3) The criminalisation of brothel-keeping and third parties who benefit off the prostitution of prostituted persons is an indispensable feature to the partial decriminalisation model. The SALRC, by strongly recommending the continued criminalisation of these prostitution related offences, clearly supports the tenets on which the partial decriminalisation model is based.

13.28 *The recognition of prostitution as a legitimate form of work*

- (1) The SALRC was of the view that if prostitution was to be regarded as a legitimate form of “labour” this only further reinforces the women’s subordination and could increase their objectification.
- (2) Due to the inherently violent and exploitative nature of the system of prostitution, the proponents of partial decriminalisation strongly advocate against the recognition of prostitution as a legitimate source of employment. The SALRC agreed with this position and once again supported the ideologies on which partial decriminalisation is based.

The National Council of Provinces (NCOP)

13.29 On 10 December 2014, the Office of the Chairperson of the National Council of Provinces (NCOP) received a petition submitted by Embrace Dignity. The petition addressed the following concerns:

- (1) South Africa’s failure to ensure the adequate implementation of legislation and policies that had been enacted in South Africa and international instruments that had been ratified by it result in a failure to address gender equality and violence against women;
- (2) The lack of social services for victims of sexual violence abuse, violence and indigence in South Africa; and
- (3) The general lack of understanding surrounding the cause, effect and harms inherent in prostitution and its relation to human trafficking.

13.30 Additionally, Embrace Dignity petitioned Parliament to set up a multiparty ad hoc committee of both houses to investigate the harms of prostitution and legal models that would reduce the extent of prostitution and to provide support and an exit to prostituted persons.³³

³³ Embrace Dignity *Submission to Multi-Party Parliamentary Women’s Caucus in response to the South African Law Reform Commission Report (SALRC) Report, Project 107 – Adult Prostitution (2018)* at 14.

- 13.31 The petition was submitted to the Select Committee on Petitions and Executive Undertakings (**Committee**) for consideration and the Committee presented its final report at a hearing convened on 2 May 2018.
- 13.32 In its report, the Committee concluded that there is a need for legal reform. The Committee appeared to favour the partial decriminalisation model.
- 13.33 The Committee recognised that Sweden's Prohibition of Purchase of Sexual Services Act of 1999 (**Sexual Services Act**) is a gender neutral act and is not entrenched in any specific morality or ethics. The Commission further noted that Sweden's government has declared itself a feminist government and has prioritised women empowerment and gender equality. The Committee acknowledged that the Sexual Services Act has successfully reduced the demand for prostitution and changed Swedish attitudes regarding the purchase of sex.
- 13.34 The Committee displayed an inclination towards the implementation of the Swedish model and thus partial decriminalisation as an alternative legislative model. The Committee seems to recognise that the current legislative framework regulating prostitution in South Africa is influenced by biases and conservative ideologies which restrict any positive empirical effect it ought to have on prostitutes.
- 13.35 The issue has been referred to the deputy speaker of the National Assembly who has subsequently referred it to the Portfolio Committee on Women, Youth and Persons with Disabilities.

Case law

- 13.36 The jurisprudence discussed below will demonstrate that the rationale employed by South African Courts, when adjudicating on matters related to adult prostitution, is akin to the ideologies underlying partial decriminalisation in which the human rights of prostituted persons are prioritised and where prostituted persons are not to be found criminally to blame.
- 13.37 *S v Jordan and Others*
- (1) *S v Jordan and Others*³⁶ concerned the prosecution of a prostituted person under section 20(1)(aA) for providing a police officer with sexual services for reward and the prosecution of brothel owners under section 2 of the Act. Counsel for the accused challenged the constitutionality of the provisions which criminalised prostituted persons, alleging that it was unconstitutional because it only criminalised the prostituted person and not the client and thus amounted to unfair gender discrimination.³⁴
 - (2) The Constitutional Court in its narrow majority judgment written by Ngcobo, declined to confirm the order of constitutional invalidity. In this brief judgment the court held that the distinction between the merchant and buyer is gender neutral, is common in statute and is aimed at addressing the source of the undesired activity. The court highlighted that the buyer was liable to equal punishment in law, even if they were not the primary offender in statute.³⁵
 - (3) The minority judgment, written by O'Regan and Sachs, held that the provision was discriminatory because prostituted persons, who were predominantly female, were

³⁴ The Transvaal High Court investigated the history of the offence as well as the purpose behind it before concluding that there was no legal justification for only criminalising the prostituted person. As a result, the court held that section 20(1)(aA) amounted to unfair gender discrimination and declared the provision unconstitutional. In obiter, the court noted that there was no difference between a prostituted person who provided sexual services for money and another individual who accepted a reward other than money. However, only the individual who accepted money as a reward would be guilty of an offence which was similarly discriminatory. The court's refusal to be confined to the ordinary literal meaning of the provision allowed it to identify the arbitrary nature of the provision and the impracticality of its application.

³⁵ At para 8 – 11 *S v Jordan*

portrayed as the primary criminals. The conduct of their clients, of whom the majority were males, was regarded as a consequence of the prostituted person's offence. The minority held that the portrayal of the client's conduct as ancillary to the prostituted person's conduct, gave rise to discrimination and stigmatisation which had the ability to impair the prostituted person's human dignity.³⁶ The minority judgment further argued that the law was partly representative of prejudicial social standards which were in conflict with the Constitution. Laws might appear to be gender neutral but their substantive effect may be to undermine constitutional values.³⁷

- (4) The court's order in this case should in no way hinder Parliament's adoption of a partial decriminalisation approach to prostitution in South Africa. The court expressly highlighted that "*In a democracy those are decisions that must be taken by the legislature and the government of the day, and not by courts. Courts are concerned with legality, and in dealing with this matter I have had regard only to the constitutionality of the legislation and not to its desirability. Nothing in this judgment should be understood as expressing any opinion on that issue.*"
- (5) The remarks in the minority judgment do not prescribe a legislative model (rightly so) but they so provide useful analysis of the court's interpretation of constitutional rights. The principles identified by the minority appear to support the principles upon which that partial decriminalisation is based:
 - (a) that the majority of prostituted persons are female and the majority of buyers are male;³⁸
 - (b) That prostitution reinforces patterns of inequality in society;³⁹
 - (c) that prostitution inherently offended a person's human dignity as it commoditised the body;⁴⁰
 - (d) that most prostituted persons engaged in the sale of commercial sex because they had few or no alternatives. Therefore, it was gravely unfair to suggest that their clients were less blameworthy;⁴¹ and
 - (e) that the fact that the buyer of sexual services generally comes from a more powerful economic class might suggest that buyers are more blameworthy than the prostituted person opposed to what the law and the majority judgment suggests. In this comment the minority implies that, if anything, a law that criminalised the buyers and not the prostituted persons would be more rational.⁴²

13.38 *Kylie v Commissioner for Conciliation, Mediation and Arbitration*

- (1) In *Kylie v Commission for Conciliation, Mediation and Arbitration*,⁴³ the appellant worked as a prostituted person in a massage parlour. The appellant's employment was terminated without prior hearing and the appellant sought relief provided for in the Labour Relations Act (**LRA**).
- (2) In the Labour Appeal Court (**LAC**), Davis JA held strongly that the illegality of prostitution did not negate prostitutes' right to be treated with dignity by both their clients and

³⁶ At para 55. *S v Jordan*

³⁷ At para 72 *S v Jordan*

³⁸ At 59 *S v Jordan*

³⁹ At 83 *S v Jordan*

⁴⁰ At 74 *S v Jordan*

⁴¹ At 68 *S v Jordan*

⁴² At 68 *S v Jordan*

⁴³ 2010 *Kylie v CCMA* 10 BCLR 1029 (LAC).

employers.⁴⁴ The court held that where a prostitute was exposed to abuse, exploitation and assaults on their dignity by virtue of the nature of their work, public policy and the foundational constitutional values dictated that they be entitled to constitutional protection.⁴⁵

- (3) This judgment has been criticized in law for going outside the ambit of the rule of law but what is clear is that the court wanted to emphasise the vulnerability of prostituted persons and highlight the need for further protection than the law provides.

13.39 *Sex Worker Education and Advocacy Task Force (SWEAT) v Minister of Safety and Security*

- (1) In *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security*,⁴⁶ the applicants sought relief aimed at restraining the unlawful and wrongful arrests of sex workers by members of the South African Police Services.⁴⁷ It was alleged that sex workers were frequently arrested despite a high probability that they would not be prosecuted and for the ulterior purpose of harassing them.
- (2) The Western Cape High Court found in favour of the applicants. The court found that police officers were compelled to execute arrests with the intention of bringing the arrestees under the physical control of the State to allow criminal proceedings to be instituted against them. The court held that the police officers in the matter arrested sex workers without the requisite intention as they knew with a high degree of probability that no successful prosecutions would ensue.⁴⁸ Consequently, the arrests were unlawful.⁴⁹
- (3) The court held that it was indisputable that police officers were prohibited from affecting any arrests in terms of section 40 of the CPA for a purpose other than prosecution.⁵⁰ The fact that the arrests were made in terms of non-existent or inapplicable statutory provisions served as evidentiary proof that prosecution was not anticipated. Furthermore, the court held that unlawful arrests amounted to a form of social control and violated the arrested person's rights to human dignity and freedom and security of the person.⁵¹
- (4) The court did not simply condone the police's conduct because they were employed by the State or because prostitution was illegal. As a result, the court successfully vindicated the prostitutes' constitutional rights to freedom and security of the person.
- (5) This judgment highlights the faults with the current model which criminalises prostituted persons. Including a diversion programme for prostituted persons will not escape the abuse faced by prostituted persons at the hands of the police. Prostituted persons need to be protected and have greater freedom to exert their rights. The aim of eradicating prostitution is not necessarily hindered by removing the criminal sanction from prostituted persons. As the SALRC report highlights, the majority of societal views aim to eradicate prostitution but not necessarily to punish the prostituted person or deprive them of their rights.⁵²

⁴⁴ Para 26 *Kylie v CCMA*

⁴⁵ Para 44. *Kylie v CCMA*

⁴⁶ 2009 6 SA 513 (WCC).

⁴⁷ Para 1.

⁴⁸ Para 26.

⁴⁹ Para 27.

⁵⁰ Para 44.

⁵¹ Para 48 and 56.

⁵² At para 2.442 pg 195 SALRC report

Criminal Law (Sexual Offences and Related Matters) Amendment Act

13.40 The Amendment Act supports implementation of the partial decriminalisation model by including several provisions in its preamble and objectives that are based on the same considerations, ideologies and objectives that the partial decriminalisation model is based on.

13.41 According to the Preamble of the Amendment Act, the legislature identified the following factors as the philosophy for the promulgation of the Amendment Act.

13.42 The legal considerations on which the Amendment Act was enacted are as follows:

- (1) Sexual offences have a particularly disadvantageous impact on vulnerable persons, society as a whole and the economy;
- (2) Women were particular vulnerable and were more likely to become victims of sexual offences including participating in prostitution;
- (3) The commission of sexual offences in South Africa was primarily a social phenomenon which was reflective of deep-seated systemic dysfunction in society and that legal mechanisms to address this social phenomenon was limited and reactive in nature;
- (4) The South African common law and statutory law failed to adequately, effectively and in a non-discriminatory manner address many aspects associated with the commission of sexual offences and which fails to provide adequate and effective protection to the victims of sexual offences. This exacerbates their plight through secondary victimisation and traumatisation;
- (5) The international obligations imposed by international legal instruments obliged South Africa to combat and eliminate the abuse and violence against women;
- (6) Constitutional rights enshrined in the Constitution - including the right to equality, the right to privacy, the right to dignity, the right to freedom and the right to freedom of security of the person - all underpin the right to freedom from all forms of violence from either public or private sources. Vulnerable persons have the right to have their best interests considered to be of paramount importance.

13.43 In Chapter of 1 of the Amendment Act, the objectives are set out as follows:

- (1) To afford complainants the maximum and least traumatising protection that the law can provide;
- (2) To combat and eradicate the relatively high incidence of sexual offences committed in the Republic by:
 - (a) Criminalising all forms of sexual abuse and exploitation;
 - (b) Protecting complainants of sexual offences and their families from secondary victimisation and trauma by establishing a co-operative response between all government departments involved in implementing an effective, responsive and sensitive criminal justice system relating to sexual offences;
 - (c) Giving proper recognition to the needs of victims of sexual offences through timeous, effective and non-discriminatory investigation and prosecution;
 - (d) Facilitating a uniform and co-ordinated approach by relevant Government departments in dealing with sexual offences;
 - (e) Entrenching accountability of government officials; and

- (f) Minimising disparities in the provision of services to victims of sexual offences.

14 The Amendment Act makes it clear that new sexual offences legislation must make special provision to protect women and other vulnerable groups within society. It aims to recognise the social and systemic consideration at play. The Act's focus on the protection of women highlight previous disadvantage faced by women as well as the facts that the overwhelming majority of victims of sexual offences are women. This aligns well to the partial decriminalisation model which recognises that the majority of prostituted persons are women and are more vulnerable to sexual abuse as a result of both their trade and their gender. The partial decriminalisation model also recognises the social and societal causes and impact on prostitution.

REGIONAL SUPPORT FOR THE MODEL

This section will examine various legislative instruments applicable to Southern African and the support for partial decriminalisation contained therein. This section will also explore the laws governing prostitution in comparable jurisdictions within Southern Africa and address the similarities that the comparative legislative models have to partial decriminalisation.

Support from the African Union

- 14.1 The African Union (**AU**) does not have any specific guidelines or commitments regarding prostitution legislation in Africa.
- 14.2 However, the African Union Migration Policy Framework for Africa (**AU migration policy**) urges and recommends all members states "to **condemn in very strong terms sexual tourism and prostitution in receiving States in order to discourage trafficking in women and children as well as paedophiles in source States.**"⁵³
- 14.3 In the AU migration policy, the AU appears to adopt the approach that prostitution should be discouraged as it contributes to the trafficking of women and girls in Africa.

South African Development Community

- 14.4 The South African Development Community (**SADC**) which represents a population of 257.7 million was established in 1992 to focus on integration of economic development within the region.⁵⁴ The SADC Protocol on Gender and Development was adopted in 2008 by 13 out of fifteen member states and 11 states have ratified the protocol.
- 14.5 The following countries are members of the SADC: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.
- 14.6 The main stated objectives of SADC include achieving development, peace and security and economic growth, to alleviate poverty, and to enhance the standard and quality of life of the peoples of Southern Africa.
- 14.7 *SADC treaties and policies encourage gender-sensitive legislation*
- (1) SADC Member States have undertaken to mainstream gender issues into the SADC Programme of Action and Community Building initiatives as a prerequisite for sustainable development. Gender mainstreaming means "the process of **identifying gender gaps and making women's, men's, girls' and boys' concerns and experiences integral to the**

⁵³ African Union Executive Council. June 2006. Migration Policy Framework for Africa. At 17. Available: https://au.int/sites/default/files/pages/32899-file-1_au_migration_policy_framework_for_africa.pdf

⁵⁴ SADC. 2012. History. Available: <https://www.sadc.int/about-sadc/overview/history-and-treaty/>

*design, implementation, monitoring and evaluation of policies and programmes in all spheres so that they benefit equally.*⁵⁵ The SADC also recognises that it is “of paramount importance that appropriate policies, legislation, programmes, projects and activities aimed at ensuring gender equality and **women’s empowerment** are implemented in all SADC Member States.”⁵⁶

- (2) The SADC Declaration provides that members states will engage in "*repealing and reforming all laws, amending constitutions and changing social practices which will still subject women to discrimination, and enacting **empowering gender-sensitive laws.***"
- (3) In the guiding principle in the SADC Gender Policy 2007 it is noted that SADC recognises that “*every policy, programme, project and development process **affects women and men differently.***”⁵⁷
- (4) Article 4(2) of the protocol commits states to “*implement **legislative** and other measures to eliminate all practices which negatively affect the fundamental rights of **women, men, girls** and boys such as their right to life, **health, dignity**, education and **physical integrity.***”
- (5) All member states have ratified or acceded to the UN Convention on the elimination of all forms of discrimination against women. Further, article 6(2) of the SADC Treaty commits member states “*not to discriminate against any person on the grounds of inter alia, **sex or gender.***” The SADC Protocol on Gender and Development notes that discrimination includes any distinction, exclusion or restriction that has the effect of impairing any person’s enjoyment of a human right or fundamental freedom.
- (6) Although nothing in SADC policy stipulates that prostitution offends the right to dignity, the SADC Gender Protocol Barometer 2011 notes that even when faced with poverty men mostly still have control over their sexual activities and whether they wish to use protection or not. Women on the other hand are frequently forced to exchange sex for survival in SADC regions. This violates women’s right to control their own sexuality.⁵⁸ It can be argued that an offence to someone’s sexuality is an infringement of their dignity.
- (7) SADC treaties and policies place an obligation on member states to consider how the legal framework which regulates prostitution affects women compared to men. There is a further duty on member states to ensure that such framework will not negatively affect women from enforcing their fundamental rights of dignity, physical integrity and health.
- (8) Legislation which regulates prostitution will affect women and men differently. The majority of prostitutes in Africa are female, while the majority of buyers are male. This is partly due to the low levels of other economic activities available for women. South Africa, Namibia and Lesotho have particularly high unemployment rates among young women.
- (9) It is argued that laws which hinder women from accessing judicial redress for abuse and from accessing health care services will not qualify as gender-sensitive and women-empowering legislation, which legislation SADC has committed itself to implementing.

14.8 SADC members have an obligation to take steps to prevent and treat HIV

- (1) The SADC region has the highest HIV prevalence rate among the regions.⁵⁹ It is for this reason that one of the eleven key SADC principles is to “*Combat HIV and AIDS and other*

⁵⁵ SADC Gender Policy 2007 at page 35

⁵⁶ SADC. 2012. Gender. Available: <https://www.sadc.int/issues/gender/>

⁵⁷ at paragraph 3.1.4 page 9

⁵⁸ SADC Gender Barometer 2011 at 182.

⁵⁹ SADC. 2012. HIV Prevalence Rate. Available: <https://www.sadc.int/about-sadc/overview/sadc-facts-figures/#HIV>

deadly or communicable diseases". SADC is guided by the fact that gender equality is key to HIV and AIDS mitigation.⁶⁰

- (2) Article 27(1) and (2) of the SADC Protocol on Gender and Development commits member states to adopt and implement **gender sensitive policies** and to enact legislation that addresses the prevention of HIV and AIDS. Such policies must take into account the **unequal status of women**.
- (3) Legislation and policy in the SADC region must take into account the reality that women do not have equal bargaining power when it comes to negotiating the use of protection during sex. This is especially true for women in prostitution who want to insist on protection in order to prevent the spread of STDs and HIV. Decriminalising prostitution in part will give prostitutes, who are mostly women, the ability to insist on the use of protection without fear of being exposed and facing sanctions. Adopting this approach will enable member states to take further steps towards preventing HIV and other STDs.
- (4) By decriminalising the act of prostitution, prostitutes can access health care without fear of judgment and arrest. Prostitutes will be better positioned to demand testing and treatment that would ordinarily be available to other citizens but are often unlawfully denied to prostitutes. This will assist member states in better treating HIV among their populations.
- (5) Removing the criminal sanction that attaches to the trade of prostitution will enable SADC member states to take one step closer to fulfilling their obligations to prevent and treat HIV, particularly among women, in their jurisdictions.

14.9 SADC's objectives are in line with the ending prostitution

- (1) In July 2016 the SADC Secretariat released a report entitled Trafficking in Persons in the SADC Region: a baseline report (the **baseline report**). This report records that the demand for the **commercial sex industry** and the **commodification of the human being** are pull factors for human trafficking in the SADC region.⁶¹
- (2) The SADC baseline report recognises that prostitution should be discouraged as it contributes to the trafficking of women and girls in Africa.
- (3) Article 6(2) of the SADC Protocol on Gender and Development commits member states to eliminating "*practices which are detrimental to the achievement of the rights of women by prohibiting such practices and attaching a **deterrent sanction** thereto*" (emphasis added).
- (4) Prostitution impairs women's dignity, health and bodily integrity. Furthermore prostitution has been identified as a pull factor for human trafficking, which the SADC has undertaken to eradicate. Criminalising buyers and third party actors in prostitution is consistent with the SADCs undertaking to ensure that deterrent sanctions exist for practices that affect women's rights

Comparative support

14.10 Partial decriminalisation has not been implemented in any African country. Although a European construct, partial decriminalisation is founded on the fact that prostitution is a result of social and economic circumstances and the express criminalisation of the conduct of the purchaser, brothel-keepers, pimps and third parties, are reflected in many African jurisdictions as discussed below.

⁶⁰ SADC Gender Policy 2007 at paragraph 3.1.4 page 10

⁶¹ SADC Secretariat. July 2016. Trafficking in Persons in the SADC Region: a baseline report. Gaborone, Botswana. at paragraph 5.3 page 57 - 58. Available: https://www.sadc.int/files/3514/7505/0085/SADC_Baseline_Report_Low_Resolution.pdf

14.11 Botswana

- (1) Prostitution itself is not per se illegal. However, the laws surrounding enticing clients and brothels restrict the practice of prostitution.
- (2) Advertising or negotiating prostitution services in a public place is unlawful in Botswana. The Botswana Penal Code provides that any person who “*persistently solicits or importunes for immoral purposes*” in a public place commits an offence.
- (3) Living off the earnings of a prostitute, benefiting from a prostituted person and running (or enabling) a brothel are also criminal offences.⁶²
- (4) The Botswanan government ran periodic sting operations on commercial sex establishments during 2017 in order to reduce the demand for the industry.⁶³
- (5) The UNHCR 2018 report on Botswana notes that “sex work is a negative coping mechanism” among refugees in Botswana.⁶⁴ This statement reflects the idea that prostitutes turn to the sex trade out of position of desperation in order to cope with difficult economic circumstances.

14.12 Tanzania

- (1) Living off the earnings of a prostitute, aiding and abetting women in prostitution and aiding or operating a brothel is illegal under Tanzanian law,⁶⁵ and there is also a prohibition against brothels.
- (2) As in many other African states prostitutes are often arrested under nuisance, vagabond and rogue legislation provisions.⁶⁶
- (3) There are no express laws criminalizing prostitution.

15 Swaziland

- (1) Sex work, procurement and brothel-keeping are illegal in Swaziland. The long awaited Sexual Offences and Domestic Violence Bill has been assented to by his Majesty King Mswati III in July 2018 and will now be passed into law.
- (2) The new Act will impose fines of up to \$2,000 and imprisonment of up to six years for those engaged in sex work. It would also impose fines on brothel keepers of up to \$13,000 and prison sentences up to a maximum of 25 years.⁶⁷

16 Namibia

- (1) In *Hendricks And Others V Attorney General, Namibia, And Others* the Namibian high court notes that while prostitution itself is not per se illegal many activities around the practice are criminalised including advertising of services in public, maintaining a brothel and living off a prostitute’s earnings.⁶⁸

⁶² Sections 149, 155 - 158 of the Botswana Penal Code; SALRC Discussion Paper. 2009 at 12- 13. Available: http://www.justice.gov.za/salrc/dpapers/dp0001-2009_prj107_2009.pdf .

⁶³ United States Department of State, 2018 Trafficking in Persons Report - Botswana, 28 June 2018. Prevention. Available: <http://www.refworld.org/country,...BWA,456d621e2,5b3e0b964,0.html>

⁶⁴ UN High Commissioner for Refugees (UNHCR), UNHCR Submission on Botswana: 29th UPR session, January 2018, available at: <http://www.refworld.org/docid/5b0813b44.html> [accessed 3 August 2018]

⁶⁵ Section 145, 146, 148 Penal Code

⁶⁶ Section 170, 177 Penal Code

⁶⁷ SWANGAA. 2018. Sexual Offences and Domestic Violence. Available: <https://www.swagaa.org.sz/sodv-act/> [accessed 3 August]

⁶⁸ 2002 Nr 353 (Hc) 2002 Nr P353

- (2) The Combating of Immoral Practices Act, 1980 criminalizes several sex-related activities, including soliciting sex in public, pandering, and keeping a brothel, immoral conduct in addition to indecency, procurement, living off the earnings of prostitution, and unlawful carnal knowledge of a sex worker⁶⁹.
- (3) Namibia has an unemployment rate of 36.7%, with the majority of unemployed persons being female. 94% of prostitutes in Windhoek, Namibia reported suffering abuse as a result of their profession ranging from rape to assault.⁶⁹ Studies reveal that as high as 70% of prostitutes tested positive for HIV in Windhoek.⁷⁰

16.2 Zimbabwe

- (1) Sections 81 to 84 of the Criminal Law (Codification and Reform) Act 23 of 2004 criminalizes solicitation, living off the earnings of prostitution, facilitating or procuring prostitution and brothel-keeping.⁷¹
- (2) Like most other SADC states, prostitution itself is not illegal.

16.3 Zambia

- (1) Living off the earnings of a sex worker as well as pimping sex workers and brothel-keeping (which includes an element of benefit and control on the brothel owner's part) is a criminal offence in Zambia.⁷² Publicly procuring sex workers is also subject to criminal sanction.⁷³
- (2) "(C)ommon prostitute(s) (who) are behaving in a disorderly or indecent manner in any public place" are liable to imprisonment of one month and / or a fine.⁷⁴
- (3) Zambian law does not criminalise the exchange of sexual activities for money.

16.4 Madagascar

- (1) Prostitution is not a crime in Madagascar, although related third party activities, such as pimping and benefiting from another's prostitution are illegal.⁷⁵

16.5 Malawi

- (1) The Malawi Penal Code does not expressly criminalize prostitution, however, prostitutes can be guilty of an offence of being a "*rougue and vagabond*" if they are near a road or highway and circumstances lead to the conclusion they are there for an "*illegal or disorderly purpose*".
- (2) Pimping, living off the earnings of prostitution and brothel-keeping are also offences for both women and men under the Penal Code.⁷⁶ Buyers can be guilty of an offence which is commonly described in SADC country legislation - "*Every male person who - in any public place persistently solicits or importunes for immoral purposes.*".⁷⁷

⁶⁹ Kiremire, MK. Prostitution in Windhoek, Namibia: An exploration of poverty. Analyses and Views Series 4:2. 2007 at 17.

⁷⁰ Kiremire, MK. Prostitution in Windhoek, Namibia: An exploration of poverty. Analyses and Views Series 4:2. 2007 at 19.

⁷¹ Criminal Law (Codification) Act 23 of 2004

⁷² Sections 146 and 147 of the Penal Code

⁷³ Section 146 (1)(b)

⁷⁴ Section 178(a)

⁷⁵ 334 Penal Code

⁷⁶ Section 145 – 147 Penal Code

⁷⁷ Section 145 Penal Code

16.6 With the exception of South Africa and recently Swaziland, no state in the SADC region has expressly legalised or criminalised prostitution. SADC states often legislate prostitutes and buyers behaviour in public in an attempt to prevent public nuisance. States also frequently use side line regulations to discourage the continuation of the industry (such as prohibitions on brothels). It is evident that decriminalising prostitution in respect of the prostituted person as well as criminalising third party role players is wholly in line with the regional practice. Although criminalising purchasers of sexual services will be a departure in the regional field, it is submitted that, for the reasons espoused in this report, it is a justifiable one. It is important to consider international and foreign law when interpreting any legislation, in particular with regard to legislation which pertains to rights contained in the Bill of Rights. This is emphasised in the Constitution in sections 39 and 233, which require the consideration of international and foreign law when interpreting the bill of rights and that any interpretation of legislation be as consistent with international law as reasonably possible.⁷⁸ Thus, it is recommended that one should make reference to the laws of other States with regard to Prostitution in order to better understand and consider the possible models of legislation and the advantages and disadvantages thereof.

INTERNATIONAL SUPPORT FOR THE MODEL

17 This section will analyse the position of international organisations such as the International Labour Organisation and the United Nations and various international legal instruments in relation to prostitution and will discuss its support for the partial decriminalisation of prostitution.

International Labour Organisation

17.1 The International Labour Organisation (“ILO”) – of which South Africa is a member State - is the United Nations (“UN”) Agency that promotes worker’s rights through the implementation of international labour standards and the issuing of normative guidelines.⁷⁹

17.2 The Fundamental Principles and Rights at Work⁸⁰ were adopted in 1998 and commits member states to universal rights including inter alia the right to the elimination of all forms of forced or compulsory labour.

17.3 The ILO has promoted the goal of decent work through their Decent Work Agenda. The concept of decent work involves amongst other things:

- (1) opportunities for work that is productive and delivers a fair income,
- (2) security in the workplace and social protection for families,
- (3) better prospects for personal development and social integration,
- (4) freedom for people to express their concerns,
- (5) organize and participate in the decisions that affect their lives, and;
- (6) equality of opportunity and treatment for all women and men. Decent work.

17.4 The ILO has also identified Unacceptable Forms of Work (UFW), defined as work arrangements that:

⁷⁸ Section 39 and 233 of the Constitution of the Republic of South Africa, 1996.

⁷⁹ International Labour Organization, “Decent Work and the 2030 agenda for sustainable development” available at <http://ilo.org/global/topics/sdg-2030/lang-en/index.htm> (last accessed 31 May, 2017).

⁸⁰ ILO Declaration on Fundamental Principles and Rights at Work adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010) available at <https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm>

- (1) deny fundamental principles and rights at work,
- (2) put at risk the lives, health, freedom, human dignity and security of workers, or;
- (3) keep households in conditions of poverty.

17.5 The concept of UFW relates to precarious, vulnerable and informal employment, and is based on the observation that, in a rapidly changing, globalised work environment, certain workers are suffering in unacceptable conditions and that policies to improve these forms of work are urgently required.

17.6 The ILO's Recommendation 200 was adopted in 2010 and addresses HIV and AIDS and the world of work. Recommendation 200 establishes principles and standards for workers' rights to be free from HIV-related stigma and discrimination; to occupational health and safety; and to access to HIV testing, prevention, treatment, care and support. It also addresses employer and government obligations to develop policies and programmes which protect those rights. While sex work is not specifically mentioned, Recommendation 200 applies to all workers working under all forms or arrangements, and at all workplaces, including "persons in any employment or occupation" in "all sectors of economic activity, including the private and public sectors, and the formal and informal economies." The Committee minutes concretely affirm that sex work is covered by the instrument.⁸¹

17.7 To date, the International Labour Organisation has not promoted the decriminalisation of prostitution as prostitution does not fit comfortably in the international and domestic definition of decent work.

The United Nations

17.8 Two binding UN Conventions prohibit the exploitation of the prostitution of others: the UN Convention on the Elimination of All Forms of Discrimination against Women - CEDAW (1979)⁸² and the UN Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949).⁸³ Both Conventions have been adopted by the General Assembly of the United Nations and thus have universal scope. Furthermore, they are directly legally binding upon the States that have ratified, or acceded to, them.

17.9 The decriminalisation of prostituted persons is not a direct, binding obligation under international law but it is wholly consistent with the purposes of human rights legislation. Article 16 of the United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others formally recognises the status of a "victim of prostitution" (our emphasis). This terminology supports the position that prostitution is not a voluntary undertaking.

17.10 UN bodies and agencies have the obligation to promote the respect of the "dignity and worth of the human person" and of the "equal rights of men and women". Given that prostitution is recognised as a violation of the dignity and worth of the human person by international human rights law, all UN bodies and agencies are obliged to contribute to the elimination of prostitution and the protection of its victims. As a consequence, UN agencies and bodies are further obliged to oppose the use of the term "sex work", which aims at normalising, and sometimes promoting, what is considered a human rights violation.

Conventions

⁸¹ International Labour Organization, "Fifth item on the agenda: HIV/AIDS and the world of work – Report of the Committee on HIV/AIDS" available at http://www.ilo.org/ilc/ILCSessions/99thSession/pr/WCMS_141773/lang--en/index.htm (last accessed 26 June, 2017)

⁸² South Africa is a State Party to CEDAW having signed same in January 1993 and ratified the Convention on 15 December 1995, without entering any reservations.

⁸³ South Africa signed the Convention and Protocols 1 and 2 on 14 December 2000. Protocol 3 (on firearms) was signed on 14 October 2002.

17.11 Various international instruments have been introduced to address and combat, *inter alia*, the violence, sexual abuse and discrimination committed against women which can be interpreted as support for partial decriminalisation.

17.12 *The Universal Declaration of Human Rights*

- (1) Article 3 of the Universal Declaration of Human Rights (“**UDHR**”) provides that everyone has the right to life, liberty and security of the person.
- (2) Article 5 of the UDHR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- (3) Article 7 of the UDHR provides that all are equal before the law and entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

17.13 *The Convention on the Elimination on all forms of Discrimination against Women*

- (1) Article 1 of the Convention on the Elimination on all forms of Discrimination against Women (“**CEDAW**”) defines the "discrimination against women" as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.
- (2) Article 2 of CEDAW obliges States Parties to condemn discrimination against women in all its forms, to agree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women and, to this end, undertake:
 - (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;
 - (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
 - (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
 - (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
 - (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
 - (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
 - (g) To repeal all national penal provisions which constitute discrimination against women.
- (3) Article 5 of CEDAW states that States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices, customs and other practices which are based on

the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

- (4) Most importantly, Article 6 of CEDAW compels States Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

17.14 *Declaration on the Elimination of Violence against Women*⁸⁴

- (1) Article 1 of the Declaration on the Elimination of Violence against Women (“**DEVAW**”) defines "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.
- (2) Article 2(c) of the DEVAW provides that violence against women shall be understood to include physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.
- (3) Article 3 of the DEVAW states that women are entitled to the equal enjoyment and protection of human rights and fundamental freedoms in the political, social, cultural, civil and any other sphere which include *inter alia*:
 - (a) The right to equality;
 - (b) The right to liberty and security of person;
 - (c) The right to equal protection under the law;
 - (d) The right to be free from all forms of discrimination;
 - (e) The right to the highest standard attainable of physical and mental health;
 - (f) The right not to be subjected to torture, or other cruel, inhuman or degrading treatment.
- (4) Article 4 of DEVAW mandates State Parties States to condemn violence against women and provides that State Parties should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.

17.15 *Palermo Protocol*⁸⁵

- (1) The purposes of this Protocol are:
 - (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
 - (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
 - (c) To promote cooperation among States Parties in order to meet those objectives.
- (2) Prostitution and related matters which fall outside the ambit of trafficking as defined in the Palermo Protocol have been reserved for the laws and policies of individual State

⁸⁴ 'Declaration on the Elimination of Violence against Women', UN Doc. A/RES/48/104 (20 December 1993), <http://www.un.org/documents/ga/res/48/a48r104.htm>

⁸⁵ South Africa signed the United Nations Trafficking in Persons Protocol in December 2000 and ratified that Protocol in February 2004

parties.⁸⁶ No definition for the term “*the exploitation of the prostitution of others*” has been provided to allow all States to ratify the Protocol, regardless of their individual prostitution policies.

- (3) The Protocol addresses prostitution only in so far as it relates to trafficking. No obligation has been imposed on State parties to criminalise prostitution.

18 In retrospect, the international instruments identified above all affirm the fundamental human rights of prostituted persons which include *inter alia* the right to human dignity, the right to equality, the right to protection from violence and exploitation and the right to protection from discrimination. Through the partial decriminalisation of prostitution, the proposed legislative model envisages increased protection of these rights. In accordance with the model, prostituted persons are no longer stigmatised and marginalised by society. In addition, prostituted persons are no longer exposed to arbitrary arrests and abuse by police, buyers, pimps, brothel-keepers or third parties or a denial of the right to access basic state services. If such abuse does occur, prostituted person will have rights or recourse without fear of self-incrimination.

Comparative support

This section will provide an analysis of the legal position in international jurisdictions that have implemented the partial decriminalisation model. There is a growing number of countries that are considering adopting or have adopted the model. These are:

18.1 *The Swedish position*

- (1) The current legal approach to adult prostitution in Sweden is partial decriminalisation thereof, where only the purchase (our emphasis) of sexual relations for reward is criminalised. The sale of sexual relations is not criminalised.
- (2) Prostitution is partially criminalised in Sweden because – on a policy level – the country considers the sex trade as undermining of gender equality. Furthermore, it is criminalised because prostitution is believed to have actually increased in countries where it has been decriminalised. Also, the social costs of prostitution such as the spread of sexually transmitted diseases are considered to be detrimental to society.⁸⁷
- (3) The objective of Sweden’s legal approach is:
 - (a) To deter buyers;
 - (b) To encourage prostitutes to leave the sex trade; and
 - (c) To prevent new recruits into prostitution.⁸⁸
- (4) During the 19th century, prostitution in Sweden was decriminalised and regulated by the Vagrancy Law of 1885 and the Law on Venereal Disease of 1918. This legislation was eventually repealed and replaced with the ‘Sex Purchase Act’. Now, the ban is found in the Swedish Penal Code.
- (5) Section 11 of Chapter 6 of the Swedish Penal Code provides that a person who “obtains a casual sexual relation in return for payment, shall be sentenced for purchase of sexual service to a fine or imprisonment for at most one year. The provision of the first paragraph shall also apply if the payment was promised or given by another person.”

⁸⁶ https://www.unodc.org/documents/treaties/organized_crime/2010_CTOC_COP_WG4/WG4_2010_2_E.pdf

⁸⁷ A Gould “The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden” (2001) 30 *Jnl Soc Pol* 437 440.

⁸⁸ Gould (2001) 30 *Jnl Soc Pol* 440.

- (6) In addition to this, Sweden's Code of Judicial Procedure provides that applicants who have been the victim of criminal conduct by purchasers of sex have the right to adduce damages claims against their clients.
- (7) Sweden's legal framework includes social services, exit programmes and drug and alcohol rehabilitation programmes to afford prostituted persons the opportunity to leave prostitution.⁸⁹ Training is also provided to police, and social service personnel likely to have contact with prostituted persons.⁹⁰
- (8) Advocates of the Swedish model claim that it has successfully reduced prostitution, that the stigma has shifted from prostituted persons to their clients, that demand has decreased and that the market has become less profitable.
- (9) In 2010, as part of an official evaluation of the ban against purchasing of sexual services, Sweden published a report noting that prostitution had not increased since the introduction of the prohibition. It noted that street prostitution had been halved since the prohibition was introduced in 1999 and this reduction was considered to be a direct result of the criminalisation of sex purchases.⁹¹ It also found that there was no increase in 'indoor' prostitution or an increase in buyers resorting to an internet platform to purchase sexual services.

18.2 *The French position*

- (1) The criminalisation of prostitution in France commenced in 1946 when the French government adopted a zero tolerance policy towards prostitution. In terms of this policy, the government adopted stringent legislation which resulted in the closure of brothels and a decrease in pimping.⁹²
- (2) In 2003, soliciting was criminalised in the French Penal Code ("**Code**").⁹³ In terms of the Code, a person founding guilty of soliciting another person by any means could be sentenced to two months imprisonment or a penalty in the amount of €3750. Pimping and owning a brothel remain criminalised under the Code.
- (3) On 13 April 2016, France passed a new law, Act no 2016-444 ("**the Act**"), which shifted the burden of criminalisation of prostitution away from the prostituted person to the buyer. This change was based on three main convictions:
 - (a) Prostitution is a form of violence against women;
 - (b) Prostitution is an obstacle to equality;
 - (c) Prostitution is a violation of human dignity.
- (4) The law has the effect of prohibiting all sexual acts for monetary exchange and decriminalises the prostituted person who engages in the exchange. In addition to this, the law creates a national policy to protect the prostituted person and should enable them to exit prostitution.
- (5) The law aims to:

⁸⁹ Longworth (2010) *Appeal* 81.

⁹⁰ Carson et al (2011) *Austl Feminist L J* 73. ¹⁰⁰

Longworth (2010) *Appeal* 81-82

⁹¹ Government Offices of Sweden "Inquiry on the Evaluation of the Prohibition of the Purchase of Sexual Services" 2 September 2010. It would be useful for Embrace Dignity to study this report.

⁹² Wooden C "Partial criminalisation of prostitution: How would we punish offenders?" (2014) Thesis University of Cape Town.

⁹³ Act n° 2003-239 of 18 March 2003, loi pour la sécurité intérieure.

- (a) Stem the flow of new entrants into prostitution;
 - (b) To protect the victims of prostitution;
 - (c) To exclude the human body and sexuality from the purview of the marketplace by curbing the demand for prostitution;
 - (d) To deter pimping and trafficking networks from investing in a country which does not favour profiting from the exploitation of women.
- (6) Prior to the enactment of the law, the legal means utilised in France to combat prostitution had not had the effect of reducing prostitution nor had the effect of protecting the victims of it. Comprehensive legislation was passed to meet these two objectives by:
- (a) Ending the repression of victims of prostitution by abolishing the offence of solicitation; and
 - (b) Creating access to exit pathways of prostitution.
- (7) Historically, the liability has been imposed on the victim for their own exploitation. The Act is often sold as criminalising sex buyers when in reality the legislation goes far further and encompasses a wide range of societal interventions aimed at assisting prostituted persons escape prostitution.
- (8) The legislation creates a comprehensive framework to help prostituted persons. This includes granting access to safe housing, secure employment, healthcare and education. In France, this works on a municipal level with governmental agencies working together with NGOs. A budget is provided for the provision of these services and intervention programs.
- (9) A comprehensive analysis of the provisions included in Act no 2016-444 submitted to Embrace Dignity in a previous memorandum and is attached.
- (10) Notwithstanding the comprehensive analysis alluded to above, significant legal developments included in the Act are briefly discussed below.
- (11) Article 255 criminalises procuring which includes *inter alia* acts such as assisting or protecting the prostitution of others, making a profit off the prostitution of others and exerting pressure on others to engage in prostitution. This provision is sufficiently broad enough to encompass a wide range of activities involved in the procurement process. The efficacy of this provision is further enhanced by the severe sanctions imposed on a person found guilty of procuring for purposes of prostitution. A person found guilty of this offence may be sentenced to seven years imprisonment and a fine of €150 000. The sanction increases to ten years and a fine of €1,500,000 where the procuring involves the exploitation of two or more persons or involves violence or fraudulent behaviour.
- (12) An addition penal sanction that may be imposed on clients is the compulsory participation in an awareness programme, at the client's own expense. Persons caught purchasing sex will be compelled to attend classes addressing the harms inherent in prostitution and how sex workers are often victims of trafficking and forced into working on the street.
- (13) Furthermore, the Act provides a mechanism to assist prostituted persons leave prostitution by making provision for social services. Article 3 of the Act enables any victim of prostitution to benefit from a system of protection and assistance which will be provided and administered in collaboration with social services.
- (14) The French legal position with regards to prostitution is relatively similar to the Swedish position. The only marked distinction is the severity of the penal sanctions imposed on perpetrators of prostitution related offences which has a direct impact on the efficacy of

the legislation upon implementation. In light of the fact that the Committee approved of the Swedish model in its report of, it is conceivable that it would be amenable to adopting the French position, given that the legal positions are so similar.

CONCLUSION

- 19 The aim of this booklet was to highlight the overwhelming international, comparative, domestic and intellectual support for the Equality model, a form of partial decriminalisation of adult prostitution.
- 20 The Equality model is a clear absolutist model with the ultimate aim of eliminating prostitution in South Africa. This approach argues that prostitution promotes gender violence, discrimination and gender inequality between men and women because it involves the sale of, most commonly, the female's body.⁹⁴ It rejects the notion that a prostituted person exercises any legitimate consent in choosing to engage in acts of prostitution because this "consent to commercial sex" is often induced by factors such as poverty and unemployment which leave the prostituted person with no viable alternate choice.⁹⁵ Finally, this approach contends that the subject matter of the transaction is the prostituted person themselves. A person is an inalienable being not capable of commodification and commercialisation.²³ The framework seeks to promote and protect the rights to life, bodily and psychological integrity, access to security, access to healthcare, and dignity of our citizens as well as other marginalised and prostituted persons.
- 21 A significant feature of the Equality model is that it decriminalises the sale of sex. As a result, a prostituted person who has engaged in the system of prostitution can no longer face intimidation and arbitrary arrest at the hand of the police. They can be free to report abuse and access health care without fear of prosecution. The model assists in combating the spread of sexually transmitted diseases by eliminating the stigma and prejudices experienced by prostituted persons when seeking medical treatment. Broadly, the Equality model aims to protect prostituted persons and to provide them with support and an exit out of the prostitution system.
- 22 The purchaser of sexual services on the other hand can face a fine or imprisonment for his role in perpetuating the system. All other parties including pimps and brothel owners will also face criminal sanction in the form of a fine or imprisonment. In doing so the model aims to punish those who exploit vulnerable persons in South Africa and who benefit from the suffering of others.
- 23 The draft bill, outlining the implementation of the Equality model into South African law, is in line with our Constitution, domestic jurisprudence and regional law as well as the premises advanced by the SALRC Report on adult prostitution and international law. In addition, the Equality model has been tested in both Sweden and France and the results thus far have been positive.
- 24 We recommend that Parliament strongly considers the implementation of the Equality model in accordance with the draft bill.

⁹⁴ West et al (2005) 53 *Sociol Rev* 139.

⁹⁵ K Beran "Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform" (2012) 30 *Law & Ineq J* 19 22. ²³ Beran (2012) 30 *Law & Ineq J* 37.