HEALTH JUSTICE INITIATIVE

3 June 2021

Adv. Fanyana Mdumbe

South African Law Reform Commission

By email: Email: fmdumbe@justice.gov.za

Dear Adv Mdumbe

Health Justice Initiative Submission on Repeal of Colonial and apartheid legislation (SALRC Project 149)

Thank you for the opportunity to make this submission.

A.) Background to submission:

1. On 7 May 2021, the South African Law Reform Commission (SALRC) invited members of the public to submit comments on "legislation enacted prior to 1994 or provisions therein which […] was designed to foster the policies of apartheid."[1] For reasons set out in this submission, we believe that section 20(1A)(a) of the Sexual Offences Act of 1957 falls within this definition and should be removed from South African law.

2. Section 20(1A)(a) of the Sexual Offences Act, Act 23 of 1957, reads:

[1] SALRC "Media statement: (Project 149) Repeal Of Colonial And Apartheid Legislation" available: https://www.justice.gov.za/salrc/media/20210504-prj149-ColonialLegislation.pdf

20. Persons living on earnings of prostitution or committing or assisting in commission of indecent acts.

(1A) Any person 18 years or older who —….

has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward…shall be guilty of an offence.

3. Our submission will focus on the historical roots of the above legislation that criminalises sex work and its continued far-reaching impact on poor, black women in particular.

4. We are aware that the SALRC oversaw Project 107 entitled "Sexual Offences: Adult Prostitution" that related to sex work and finalised its report in June 2015 and released it on 26 May 2017.[2] The aim of that SALRC project was to "to review the fragmented legislative framework that […] regulates adult prostitution within the larger framework of all statutory and common law sexual offences". In that investigation, the SALRC did not include nor consider the historical context or the apartheid origins of the Sexual Offences Act provisions that criminalise sex work. We believe the history of the legislation is key in understanding its current manifestation and the harm that it perpetuates. The research underpinning Project 107 was remarkably ahistorical, and no mention is made of the origins of the legislation and its entanglement with apartheid fears, and the ruling party's anxiety with miscegenation and preoccupation with sexual moralism.

5. We believe that the current SALRC project is well-placed to remedy this important oversight. It is in a position to analyse the impact of the permutation of laws drafted more than a century ago and that have a disproportionate impact on a particularly underserved group within South Africa.

B.) Background to the Health Justice Initiative:

6. The Health Justice Initiative (the 'HJI) is a dedicated public health and law initiative addressing the intersection between racial and gender inequality with a special focus on

[2] See https://www.justice.gov.za/salrc/reports/r-pr107-SXO-AdultProstitution-2017.pdf For an analysis of the SALRC Final Report, see Dean Peters and Zia Wasserman '"What happened to the evidence?" - A critical analysis of the South African Law Reform Commission's Report on 'Adult Prostitution (Project 107)' and law reform options for South Africa', Asijiki Coalition, August 2018.

access to life saving diagnostics, treatment and vaccines for COVID-19, TB and HIV. It draws on the expertise of researchers in law, public policy, economics, and public health, as well as on universities and scientific experts in and outside of South Africa. The HJI works in partnership with other organisations that focus broadly on rights protections. Given South Africa's massive inequality and dual health care system, we address the factors that influence inequity in health access (with a focus on medicine access) during pandemics, and beyond, with a focus on race, class, and gender.

7. The HJI works towards fostering a legal and policy framework that supports access to health care for particularly marginalised and underserved groups, and to challenge and reform laws that serve as barriers to realising basic human rights. As such, sex workers are regarded as a 'Key Population' within South Africa's HIV and STI response,[3] and the stigma that attaches to sex work, together with its criminalisation impede individual sex worker health and well-being. This has a far-reaching negative impact on public health and health equity and is of deep concern to the HJI.

8. In the context of public health evidence as well as the human rights provisions enshrined in South Africa's Constitution, the HJI views the removal of legal provisions that criminalise sex work as an important enabler of health equity.

9. This HJI submission draws on legal research work conducted in 2009[4] and here updated, and will focus on four distinct but overlapping areas:

    a. The historical and colonial roots of the current provisions on sex work in the Sexual Offences Act

    b. Intersectionality and overlapping vulnerabilities: race, class and gender

    c. The impossibility of concisely defining sex work within law and practice

    d. Comparative examples of apartheid-era legislation based on sexual moralism: homosexuality and abortion.

[3] The South African National Strategic Plan for HIV, TB and STIs 2017 – 2022 (NSP) available: https://sanac.org.za/download-the-full-version-of-the-national-strategic-plan-for-hiv-tb-and-stis-2017-2022-2/

[44] The submission draws significantly on C. Bodin & M. Richter (2009) "Adult, Consensual Sex Work In South Africa – The Cautionary Message Of Criminal Law And Sexual Morality" *South African Journal on Human Rights* Vol. 25, Issue 2, pp.179 -197

C.) Apartheid policies – the poor historical precedent of criminalising adult consensual sex:

10. The criminalisation of consensual adult sex has a long and unfortunate history in South Africa. The first attempt to criminalise sex across the colour bar came in the form of a Cape law in 1902 which prohibited intercourse 'for the purposes of gain' between white women and black men.[5] This law was also enacted in the Orange Free State, Transvaal and Natal with the latter two provinces omitting the clause on 'gain'. These laws were in direct response to the arrival of British sex workers to the Transvaal mines after the South African War. **The laws prohibiting interracial relations were thus from their inception entangled with anxieties surrounding sex work, female sexuality and race.**

11. Apartheid South Africa had a plethora of laws that prohibited and criminalised relationships across the colour bar. As we argue, infra, today's laws criminalising sex work have a common history with many of these apartheid policies which are today universally rejected. The following laws were the most notorious:[6]

a. The Immorality Act No 5 of 1927: Prohibited extra-marital intercourse between whites and blacks;[7]

b. The Prohibition of Mixed Marriages Act No 55 of 1949: prohibited marriage between whites and members of other racial groups;[8]

c. The Immorality Amendment Act No 21 of 1950: extended the Immorality Act of 1927's prohibition on extra-marital intercourse between blacks and whites to all non-whites - including coloureds and Asians; [9]

d. The Sexual Offences Act (Immorality Act) No 23 (s 16) of 1957: made it an offence for a white person to have sexual intercourse with a black person or to commit any 'immoral or indecent act';[10]

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[5] J Lewin *Politics and Law in South Africa: Essays on Race Relations London* (1963) 87.
[6] Truth & Reconciliation Commission of South Africa *Truth & Reconciliation Commission of South Africa Report* (1998) 452.
[7] It commenced on 30 September 1927 and was repealed by s 23 of Sexual Offences Act No 23 of 1957.
[8] It commenced on 8 July 1949 and was repealed by s 7 of the Immorality and Prohibition of Mixed Marriages Amendment Act, No 72 of 1985.
[9] It commenced on 12 May 1950 and was repealed by s 23 of the Sexual Offences Act No 23 of 1957.
[10] This Act repealed the Immorality Act of 1927 and the Immorality Amendment Act of 1950 and commenced on 12 April 1957.

e. The Prohibition of Mixed Marriages Amendment Act No 21 of 1968: invalidated any marriage entered into outside South Africa between a male citizen and a woman of another racial group;[11]

12. It is important to highlight here that the current Sexual Offences Act was renamed in 1988 and was previous entitled the Immorality Act.

13. The apartheid state went to great lengths to control South Africans' sexual behaviour in general and to enforce racial segregation in particular so as to ensure that private relationships reflected the National Party ideal of 'separate development'. Indeed, in the period 1950-1980, more than 11 500 people were convicted of contravening the Immorality Act and more than twice that number were charged.[12] Then, as now with the criminalisation of sex work, the state wasted resources and invaded personal privacy and autonomy by policing consensual adult sexual behaviour.

14. Many lives were destroyed as a direct result of the apartheid sexual morality laws. Investigating the far-ranging effects of apartheid, the Truth and Reconciliation Commission found the following about the Immorality Act in particular:

> The Immorality Act was energetically implemented for some two to three decades, resulting in untold suffering in the form of harassment, public humiliation and the destruction of marriages and family bonds. Suicide by those caught in the web of the provisions of this Act was not unknown.[13]

15. The vigorous implementation of these racist, invasive laws and the perverse logic used to justify prosecution under them can be seen in dozens of cases from that period. For example, in 1954, the Appellate Division heard a case that involved the Riotous Assemblies and Criminal Law Amendment Act, No. 27 of 1914 and the Immorality

[11] It commenced on 27 March 1968 and was repealed by the Immorality and Prohibition of Mixed Marriages Amendment Act No 72 of 1985.
[12] R Omond *The Apartheid Handbook* (1985) 28.
[13] Truth & Reconciliation Commission of South Africa *Truth & Reconciliation Commission of South Africa Report* (1998) at 31.

Amendment Act, Act No 21 of 1950.[14] The provisions at issue were sexual relations across the colour bar.[15] The case involved "a 'European male', [who] on February 15th, 1954, unlawfully incited a non-European female to permit him to have illicit carnal intercourse with her." Centlivres, CJ summarised the evidence as follows:

> The non-European woman referred to in the charge sheet stated that she was a native, that the appellant on the evening of the day alleged in the charge called to her from his motor in a street in a village, told her to get into the car and drove to a spot in the veld outside the village. She gave particulars showing that the appellant incited her to permit him to have carnal intercourse with her. A sergeant of the police said that as a result of complaints which he had received from native women he kept the appellant under observation on the evening in question and posted native constables at spots on three roads leading out of the village. He corroborated the native woman as to her movements on that evening. There was further corroboration by a native constable who had been posted, and concealed himself, at the spot in the veld where the appellant stopped his car.

16. The magistrate convicted the man and sentenced him to six months' imprisonment with compulsory labour. The appeal centred on whether the accused was indeed a 'European'. The magistrate thought he was as 'the accused had seemed in appearance to be obviously a European and accordingly he [the magistrate] had deemed him a European'. It is not clear from the case what the nature of complaints were that the sergeant had received from other women that alerted him to the fact that the appellant was an annoyance. It is also unclear whether the women who complained were sexually harassed or possibly raped by the appellant, or whether they themselves felt scandalized by sexual relations across the colour bar. The court, apparently, did not consider these issues worth exploring.

17. Cases like this one appear throughout South Africa's law books and demonstrate the absurdity of policing sexual behaviour across the colour bar. Historically, in South Africa, attempts to legislate sexual behaviour have been racist and oppressive, and they have led to the unnecessary destruction of relationships and families, while wasting public money on enforcement. They also demean the law, the judiciary, and the police who

[14] *R v S* 1954 (3) SA 522 (A).
[15] The Population Registration Act, Number 30 of 1950 classified people as white, Coloured or Native. Additional legislation was later enacted to tighten the racial classification.

could use their time more productively than investigating the sexual practices of consenting adults.

18. From the vantage point of 21st century democratic South Africa, these laws and enforcement practices are archaic, ethically repugnant and reflect the racism, sexism and heteronormativity of the ruling government of the time.[16] **Yet, a number of the provisions of the Sexual Offences Act remain on our statue books and give the police and the judiciary the power to interfere in people's private and sexual lives – as does 20(1A)(a) of the Sexual Offences Act.**

D.) <u>The impact of the law and intersectionality:</u>

19. The economic motivation behind sex work indicates the need to provide sex workers with better alternative opportunities for employment and economic empowerment, rather than criminalising their livelihood. This is particularly true in South Africa where the legacy of colonialism and apartheid has contributed to a significant overlap between race, gender and poverty. **Poverty and inequality in South Africa today are strongly correlated with race and gender: the most marginalized members of society are black women.[17] Not surprisingly, the majority of sex workers are black**.[18] In addition, South African legal institutions have often served to perpetuate sexual stereotypes and gender inequality.[19] There is a lamentable history of laws on marriage, divorce, restrictions on reproductive freedom, rape, and sex work that were employed to further disempower women.[20]

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[16] However, these enforcement practices are not a thing of the past. As recently as 1996 an undercover police officer used state funds to pay a woman in a night club for a "pelvic massage" in order to gather evidence of illegal sex work. *S. v Jordan* 2002 (11) BCLR 1117.
[17] Statistics South Africa (2017) "Poverty Trends in South Africa - An examination of absolute poverty between 2006 and 2015", available: http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf and Y Mokgoro 'Speech: Constitutional Claims for Gender Equality in South Africa: A Judicial Response' 67 *Albany Law Review* (2003) 565, 565.
[18] Reproductive Health Research Unit (RHRU), Sociology of Work Unit University of the Witwatersrand and Vrije University Amsterdam *Women at Risk: A Study of sex work in Hillbrow* (2002); C Gould & N Fick *Selling sex in Cape Town: Sex work and human trafficking in a South African city* (2008).
[19] J Julyan 'Women, Race and the Law' in A Rycroft (ed) *Race and the law in South Africa* (1987) 139.
[20] KL Karst 'Woman's Constitution'(1984) 3 *Duke LJ* 447, 456-57 cited in C Romany 'Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender'(1996) 21 *Brooklyn J of Int L* 857, 888.

20. Today, as much as a third of South Africa's population lives and struggles to survive in the informal economy. [21] Within the informal economy, women are often over represented in the least lucrative activities.[22] Especially for wo[23]men, there often is no legal or licensed alternative to informal economy work, including sex work.[24] Cognizant of this socio-political and historical reality, a number of feminists and advocates of women's rights have argued that voluntary sex work may reflect a woman's considered judgement about the best options available to her.[25] The dire conditions under which survival choices have to be made – particularly in the context of COVID-19 - is illustrated by the fact that a number of women take up sex work – and continue to work as sex workers – despite being subjected to regular violence, rape, abuse and social scorn.[26] Thus, any effort to reduce the prevalence of sex work (if that were indeed the stated goal of social policy) should focus on providing women with better economic options for survival and flourishing, or making the sex work context safer, rather than criminalising what may be their only viable option.

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[21] MA Chen 'Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment' *United Nations Department of Economic and Social Affairs Working Paper,* No. 46, 6 (2007) <http://www.un.org/esa/desa/papers/2007/wp46_2007.pdf>. See also M Hunter 'The changing political economy of sex in South Africa: The Significance of unemployment and inequalities to the scale of the AIDS pandemic'(2007) 64 *Social Science & Medicine* 689, 697.

[22] R Devey, C Skinner & I Valodia 'Second Best? Trends and Linkages in the Informal Economy in South Africa' *Development Policy Research Unit*, Working Paper 06/102, February 2006 <http://www.sarpn.org.za/documents/d0002003/Economy_SA_Feb2006.pdf>.

[23] Southern African Litigation Centre "The impact of the Covid-19 pandemic on sex workers in Southern Africa" Feb 2021, available https://www.southernafricalitigationcentre.org/2021/02/22/the-impact-of-the-covid-19-pandemic-on-sex-workers-in-southern-africa/

[24] C Roederer 'The Transformation of South African Private Law After Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy' (2006) 37 *Columbia Human Rights LR* 447, 472.

[25] J Halley 'Related Violence in Positive International Criminal Law' (2008) 5 *Univ of Michigan L School;* K Butcher 'Confusion between prostitution and sex trafficking' (2003) 361 Lancet, 1983.; J Gardner 'Criminalising the act of sex: Attitudes to adult commercial sex work in South Africa'" in M Steyn & M van Zyl (eds) *The Prize and The Price: Shaping sexualities in South Africa Pretoria* (2009) 329- 340.

[26] The vulnerability of sex workers to violence is immense. Sex workers often report violence and in particular police harassment and brutality to researchers. Research has documented sex worker complaints on assaults, rape, extortion, and demands for sex or money as bribes. See for example Evans, D., & Walker, R. (2017). "*Even though the man raped me and stole my cell phone, I am more frightened of the police than I am of that man". The policing of sex work in South Africa: A research report on the human rights challenges across two South African provinces*. Sonke Gender Justice. A Pettifor, ME Beksinska & H Rees 'High Knowledge and High Risk Behaviour: A Profile of Hotel-Based Sex Workers in Inner-City Johannesburg'(2000) 4. *African J of Reproductive Health*,35-43; JM Wojcicki & J Malala, 'Condom use, power and HIV/AIDS risk: sex-workers bargain for survival in Hillbrow/Joubert Park/Berea, Johannesburg' (2001) 53 *Social Science & Medicine* 99-121; J Arnott 'Sex Workers and law reform in South Africa'(2004) 9 *HIV/AIDS Policy and L Review* 78-80.
Almost one-third of sex workers in the RHRU study reported they had had sex against their will in the last six months. Reproductive Health Research Unit (RHRU), Sociology of Work Unit University of the Witwatersrand and Vrije University Amsterdam *Women at Risk: A Study of sex work in Hillbrow* (2002).

21. As noted earlier, sex work is a criminal offence under Section 20(1A)(a) of the Sexual Offences Act, Act 23 of 1957, which reads:

> 20. Persons living on earnings of prostitution or committing or assisting in commission of indecent acts.
>
> (1A) Any person 18 years or older who —….
>
> has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward…shall be guilty of an offence.

22. Section 1 of the statute still defines 'unlawful carnal intercourse' as 'carnal intercourse other than between husband and wife.' What is also notable about the statutory prohibition on sex work is its striking ambit: 'for reward' appears to include not merely money but almost any form of transactional inducement (including payment in kind, or other material benefits). There is a tension inherent in this formulation. In Project 107, the SALRC itself acknowledges the tension, referencing Milton and Cowling's interpretation of this section: they are convinced that the prohibition is aimed at 'professional prostitutes',[27] but fail to define what that means. The literal interpretation of Section 20(1A)(a) could be "sufficiently broad as to bring within the ambit of the prohibition any person (a lover or companion) who accepts a 'reward' for engaging in sexual intercourse".[28]

23. The heart of the discomfort about sex work and the criminalisation of workers' conduct seem to lie in the financial gain attached to sexual intercourse but remains couched in the racial anxieties of the apartheid era.

E.) <u>The impossibility of precise definition – legally and socially:</u>

24. In South Africa a range of sexual relationships exist where there is 'an element of material exchange'.[29] Indeed, in a context where unemployment has increased –

[27] SALRC Discussion Paper 001 Adult Prostitution (May 2009) at 15. See also J Burchell & J Milton *Principles of Criminal Law*, 2 ed (1997) 628.
[28] SALRC Discussion Paper 001 Adult Prostitution (May 2009) at 16.
[29] SALRC Discussion Paper 001 Adult Prostitution (May 2009) at 10.

dramatically so within the COVID-19 pandemic[30] - where more women are unemployed than men, and where women are increasingly expected to head up households, it is not surprising that many women engage in transactional sex – be it in the form of survival sex[31], 'Sugar Daddy' relationships, or sex work.[32]

25. Research in Hammanskraal and Soweto has revealed that the phenomenon of *ukuphanda* – the Zulu phrase for "trying to get money" – is widespread.[33] Sex-for-reward exchanges are frequent at shebeens/taverns and other social establishments where women accept money or drinks in exchange for sex. While commercial sex workers differ from women who informally exchange sex for resources (since most women who frequent taverns seem to experience less shame, do not identify as commercial sex workers and their families are often aware of their activities), there is clearly only a thin, perhaps arbitrary, line separating the two. Furthermore, as it is often culturally expected for a woman to exchange sex if she has been give resources or goods, there may be less stigma associated with these practices in the taverns.[34] But why should it be that women who exchange sex for drinks, food or an undetermined cash payment, are accepted when at the same time women who insist on a negotiated cash payment for the same services are criminalised?[35] Surely the criminal law should not prohibit a clear contract in favour of vague or tacit barroom agreements.

26. Mark Hunter clearly identifies the overlap between 'formal' and 'informal' sex work: 'Transactional sex has a number of similarities to prostitution. In both cases, non-marital sexual relationships, often with multiple partners, are underscored by the giving of gifts

[30] Statistics South Africa "P0211 - Quarterly Labour Force Survey (QLFS), 1st Quarter 2021" 01 June 2021, available: http://www.statssa.gov.za/?page_id=1854&PPN=P0211&SCH=72943
[31] JM Wojcicki '"She drank His Money": Survival sex and the problem of violence in taverns in Gauteng' (2002) 16 *South African Medical Anthropology Quarterly* 1, 1.
[32] MA Chen 'Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment' *United Nations Department of Economic and Social Affairs Working Paper,* No. 46, 6 (2007) <http://www.un.org/esa/desa/papers/2007/wp46_2007.pdf> at 6.
[33] JM Wojcicki 'Commercial sex work or *ukuphanda*? Sex-for-money exchange in Soweto and Hammanskraal area, South Africa' (2002) 26 *Culture Medicine & Psychiatry* 339, 340
[34] Ibid 365.
[35] The High Court made this point in *S. v Jordan*: "[i]n principle there is no difference between a prostitute who receives money for her favour and her sister who receives, for rendering a similar service, a benefit or reward of a different kind, such as a paid-for weekend, a free holiday, board and lodging for a shorter or longer period, a night at the opera, or any form of *quid pro quo*" *S. v Jordan* 2002 (11) BCLR 1117 para 47 cited in C Albertyn, L Artz, H Combrinck, S Mills & L Wolhuter 'Women's freedom and security of the person' in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 295, 354.

or cash'.[36] It would seem that the main distinguishing quality is whether the woman self-identifies as a "sex worker" or "prostitute" and indeed whether the man views himself as a 'client' or a 'sugar daddy'.

27. The ambiguity between 'formal' or commercial sex work and 'informal' or transactional sex is further problematised by the findings of the then Reproductive Health Research Unit's (RHRU – now called Wits RHI) research in Hillbrow, Johannesburg. In 2001, the RHRU and collaborators conducted research among female sex workers and their clients in Hillbrow in an attempt to understand sex work as a form of work and to describe working conditions in the area industry.[37] In that study, 202 female sex workers were interviewed during July and August 2001 about their experience with the pressures of making a living by engaging in sex work, the high level of sexual coercion, and the high level of concurrent sexual partners. The findings on the nature of sex-for-reward relationships were striking: most clients had paid the respondents in money, not kind, and a significant proportion of regular and main partners (or boyfriends)[38] had also paid for sex with the respondents. Remuneration ranged from R20–R100, while main and regular partners seemed to pay slightly more for sex than the once-off clients.[39] This data raises a question: how can a client be neatly distinguished from a regular partner or a main partner and ultimately why does that matter to the state?

28. The common relationships described as *ukuphanda* above would all fall into the definition of sex work as provided in the Project 107 Discussion Paper: 'prostitution [is] defined as the exchange of any financial or other reward, favour or compensation for the purpose of engaging in a sexual act'.[40] Yet, the women and men exchanging gifts, money, food or drink for sex may not be seen to be engaging in criminalised sexual behaviour. Nor, would we maintain, should they be. With this muddled, grey area as the

[36] M Hunter 'The materiality of everyday sex: thinking beyond 'prostitution'(2002) 61 *African Studies* 99, 100-1; and M Hunter 'The changing political economy of sex in South Africa: The Significance of unemployment and inequalities to the scale of the AIDS pandemic'(2007) 64 *Social Science & Medicine* 689, 697.
[37]Reproductive Health Research Unit (RHRU), Sociology of Work Unit University of the Witwatersrand and Vrije University Amsterdam *Women at Risk: A Study of sex work in Hillbrow* (2002); C Gould & N Fick *Selling sex in Cape Town: Sex work and human trafficking in a South African city* (2008).
[38] The study defined these partnerships as follows: "Respondents who lived with a partner were first asked to nominate if this person was a main or regular partner. A main partner was defined as someone they have sex with most of the time, whilst a regular partner was someone apart from their main partner that they had sex with regularly." Ibid 11.
[39] Ibid.
[40] SALRC Discussion Paper 001 Adult Prostitution (May 2009)

target of criminal legislation, it should be no surprise that enforcement is selective and uneven.[41]

29. **Evidence from these studies, as well as the vagueness of legal interpretations of Section 20(1A)(a) of the Sexual Offences Act, provides a strong case that the definition of sex work is impossible to pinpoint.** The SALRC points to this exact dilemma in its Discussion Paper in Project 107:

> The Commission is of the view that defining prostitution narrowly as the exchange of sexual acts for money is not realistic in light of the particular socioeconomic dynamics at play in South African society. However, it acknowledges that defining prostitution too broadly to include any sexual act accompanied or precipitated by a gift or goods would also not be helpful. [42]

30. **No precise definition of sex work is possible**. In the socio-cultural and economic context of 21st century South African society, where sexual relationships are fluid, ambiguous and carry a multitude of cultural meanings, the distinction between 'formal' and 'informal', 'legitimate' and 'illegitimate' sex becomes unmanageable by the police or the judiciary.[43] Applying the criminal law to a practice that cannot be characterized or adequately described has dire consequences for the multitude of women who are currently harassed and marginalised by an outdated legal system,[44] and diminishes the value of other, genuine criminal offences.

F. <u>The instructive examples of homosexuality and abortion and the evolution of South African law:</u>

31. Criminal laws regulating sexual behaviour between consenting adults have evolved over time, often reflecting dominant moral standards. Here, we argue that today's

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[41] Ibid., 56.
[42] Ibid., 10.
[43] Richter, M. (2012). Sex work as test case for African feminism. *BUWA!, 3*.
[44] After considering the available evidence, the Law Commission found that "In general, it appears that the criminalisation of prostitution may increase rather than reduce the possibilities of abuse and exploitation of women. There is no evidence that criminalisation prevents or deters women and men from entering prostitution, while there is evidence that, having entered the industry, prostitutes are rendered more vulnerable to exploitation and abuse by the fact that prostitution is criminalised. SALRC Discussion Paper 001 Adult Prostitution (May 2009) at 26.

criminalisation of sex work is antiquated and should be repealed just as laws criminalising homosexuality and abortion were. South Africa has a long, unfortunate and failed history of criminalising an area of sexual morality that is today legal and entirely unregulated: homosexuality. Laws criminalising same-sex male erotic behaviour date back to the colonial period.[45] These laws criminalising homosexual conduct became even stricter under the apartheid regime.[46] For example, the Criminal Procedure Act allowed a police officer to kill a man suspected of having committed sodomy if he tried to flee.[47]

32. Most of the provisions, however, came from the 1957 Immorality Act (later renamed the Sexual Offences Act, as noted above). It included a clause which criminalised any 'male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or give sexual gratification'.[48] The Immorality Act also codified the prohibition on interracial sex and prostitution.[49] In 1987 the Committee for Social Affairs of the tricameral President's Council published a Report on the Youth of South Africa which classified homosexuality, prostitution, and other sex out of wedlock as all forming part of the country's problem of promiscuity.[50]

33. The 1996 Constitution followed the interim Constitution in barring discrimination based on sexual orientation, thus establishing a framework for undoing the laws that had criminalised homosexual conduct for decades.[51] The criminalisation of homosexuality was found unconstitutional in 1998 by the Constitutional Court.[52] In its decision per

[45] See P De Vos 'On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution' (1996) 12 *SAJHR* 265, 276 (citing, inter alia, Immorality Ordinance 46 of 1903 21(1) (Transvaal)). For modern versions, see, inter alia, Criminal Procedure Act 51 of 1977 40, 42, 59; Defence Act 44 of 1957 132(4) cited in E Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 *SALJ* 450, 470.
[46] P De Vos 'On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution' (1996) 12 *SAJHR* at 278.
[47] Section 49(2).
[48] Immorality Amendment Act 57 of 1969.
[49] Section 19 of the Sexual Offences Act of 1957 cited in P De Vos 'On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution' (1996) 12 *SAJHR* at 278. Section 19 of the Act prohibits "enticing to commission of immoral acts".
[50] President's Council 'Report of the Committee for Social Affairs on the Youth of South Africa' *Government Printer*, Cape Town, 22 May 1987.
[51] 'The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation'. Section 9(3). See also HJ Schmid 'Decriminalisation of Sodomy Under South Africa's 1996 Constitution: Implications for South African and U.S. Law' (2000) 8 *Cardozo J of Int & Comparative L* 163, 165-6.
[52] *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and Others* 1998 (12) BCLR 1517.

Ackermann J, the Court held that the sodomy statute simply 'criminalise[d] conduct which fails to conform to the moral or religious views of a section of society.'[53] Then, on 30 November 2006, the Civil Union Act was enacted to recognize the right of all South Africans to marry regardless of their sexual orientation.

34. The legal and governmental approach to criminalising homosexuality was paralleled and even codified in the same statute as the criminalisation of sex work. These laws on homosexuality have been recognized as retrograde, in violation of human rights, and discriminatory; they have been overturned or repealed.

35. The criminalisation of sex work is similarly discriminatory because it disproportionately impacts women, especially those who are poor and black. Most sex workers are women and until the Constitutional Court's 2002 ruling in *S. v Jordan* and subsequent amendments to the Sexual Offences Act, the laws were written and enforced so as to only target those who sell sex not those who buy it.[54] Not only does the sex industry closely resemble the existing social and class hierarchies – with black women on the bottom – but the laws further entrench the status quo by targeting people who are seeking to make a living by selling sex rather than those who buy these services (mostly men[55]). Moreover, by criminalising their livelihood, these laws deny sex workers access to the protection of the law and expose them to abuse, degradation and human rights violations.[56]

36. A fundamental flaw with the laws criminalising homosexuality was their attempt to impose majoritarian moral values on society as a whole through a criminal framework. That same problem – held over from the same Immorality Act – can be seen today in the criminalisation of sex work.

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[53] Ibid para 26(b).
[54] *S. v Jordan* 2002 (11) BCLR 1117.
[55] We note that another harmful consequence of the *Jordan* judgement was the amendment of the Sexual Offences Act to explicitly criminalise the clients of sex workers. This new offense was created largely in response to "the suggestion in the minority judgment of *S. v Jordan* that it would be unconstitutional to penalize only one party to the act of prostitution." While, on the face of it, this amendment enhances formal equality between men and women, it can be seen to have worsened the material conditions of sex workers even further. An NGO working closely with sex workers and that has been leading advocacy for decriminalisation the Sex Work Education and Advocacy Taskforce (SWEAT), has argued that the new provision drives sex workers into more dangerous spaces to ply their trade in order to mitigate clients' fears of being prosecuted.
[56] SALRC Discussion Paper 001 Adult Prostitution (May 2009) at 21, 103.

37. A useful parallel can also be drawn to law reform on the termination of pregnancy in South Africa in the early 1990s. Anti-abortion organisations formed the National Alliance for Life who advanced religious and moral-based arguments against terminations on demand. These arguments ultimately failed against the material reality of women's lives – the high mortality rates and psycho-social and economic costs associated with backstreet abortions[57] – and the advancement of gender equality.[58] The Choice on Termination of Pregnancy Act of 1996 provides women with the right of termination of pregnancy on demand during the first trimester of pregnancy. The law was passed not because society necessarily encourages or condones abortion, but as with sex work, because of the recognition that it will occur whether it is criminalised or not and criminalisation makes it less safe and less secure. **Because, as with sex work, society recognises the need to give individuals control over their own bodies. Indeed, the disproportionate impact on the health and equality of women was a key consideration on legalising abortion in South Africa**.[59]

38. The law reform process with both homosexuality and abortion on demand took time and multiple efforts before the laws were finally corrected to reflect the values of a multicultural South Africa and of the human rights-oriented South African Constitution.

39. In 2002, in *S. v Jordan*, the Constitutional Court upheld the provisions of the Sexual Offences Act which criminalised commercial sex work on the basis that it provided equally to male or female sex workers.[60] The Court's findings – and in particular the majority's opinion in this case – has been criticized as disregarding the framework within which sex work takes place, especially the realities of female socio-economic standing,

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[57] M Gready 'Controlling our fertility' in M Goosen & Barbara Klugman (eds.) *The South African Women's Health Book* (1996) 281, 326-340.
[58] S Guttmacher, F Kapadia, JT Naude & H de Pinho 'Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24 *International Family Planning Perspectives* 191, 194.
[59] The preamble to the Choice on Termination of Pregnancy states "Recognising that the Constitution protects the right of persons to make decisions concerning reproduction and to security in and control over their bodies […] Recognising that the State has the responsibility to provide reproductive health to all, and also to provide safe conditions under which the right of choice can be exercised without fear or harm […]This Act therefore repeals the restrictive and inaccessible provisions of the Abortion and Sterilization Act, 1975 (Act No. 2 of 1975), and promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs."
[60] *S. v Jordan* 2002 (11) BCLR 1117.

the AIDS epidemic,[61] sex worker rights and dignity,[62] and the demographics of the sex industry.[63] Some of this criticism is clearly valid as was demonstrated by *amici* briefs to the Court.[64] Moreover, common sense and much of human history demonstrate that women tend to face limited employment opportunities and make up a majority of sex workers; this is especially true for poor black women in South Africa.

40. In the *Jordan* case, the Court illustrated its perspective on the issue of morality of sex work. Writing for the majority, Ngcogo, J. suggested "that by engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community, thus undermining their status and becoming vulnerable."[65] In their concurring opinion, Sachs, J. and O'Reagan, J. wrote, not uncritically, of traditional societal views on sex workers and their clients thus: "The female prostitute has been the social outcast, the male patron has been accepted or ignored. She is visible and denounced, her existence tainted by her activity…. A woman who is a prostitute is considered by most to be beyond the pale."[66]

41. These attitudes put forward and reiterated by the Court illustrate that the antiquated moral framework that once ruled the day on issues such as relationships across the colour bar, homosexuality, and abortion continue to influence the highest Court in the land when it comes to sex work. The Court's ruling thwarted an attempt to further modernise South African criminal codes through the Judiciary.

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[61] E Bonthuys 'Women's sexuality in the South African Constitutional Court'(2006) 14 *Feminist Legal Studies* 391, 406.
[62] R Krüger 'Sex work from a feminist perspective: a visit to the Jordan case' (2004) 20 *SAJHR* 138, 150.
[63] Y Mokgoro 'Speech: Constitutional Claims for Gender Equality in South Africa: A Judicial Response' 67 *Albany Law Review* (2003) 571; Also see C Albertyn, L Artz, H Combrinck, S Mills & L Wolhuter 'Women's freedom and security of the person' in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 295, 354.
[64] SWEAT (Sex Workers Education and Advocacy Task Force), CALS (Centre for Applied Legal Studies) & RHRU (Reproductive Health Research Unit) (2002) *S. v Jordan and others (Sex Workers Education and Advocacy Task Force and others) as Amici Curiae*. Case CCT31/01, 9 October 2002, Constitutional Court of South Africa. The amici set out six arguments on how the criminalisation of sex work harms sex workers. Those arguments were organised under the following themes: i) increased vulnerability to violence; ii) creating and sustaining unsafe, unfair and poor working conditions; iii) increasing the stigmatization of sex workers; iv) restricting access to health, social, police, legal and financial services; v) creating an adverse impact on safer-sex practices; and vi) impact on the ability to find other employment.
[65] *S. v Jordan* 2002 (11) BCLR 1117 at para 16.
[66] Ibid., para 64.

G.) Impact of the criminal law on sex workers and on health:

42. This combination of criminal law and stigma has far-reaching effects. International and local literature has documented how these joint forces make sex workers vulnerable to murder, rape, exploitation, abuse and other forms of violence, while increasing their risk of HIV and other forms of ill health.[67] In fact, HIV prevalence for female sex workers in South Africa ranged from 48% to 72%[68] and 88% in Pietermaritzburg[69] in 2013-2014. A recent study among female sex workers in Soweto, found that more than two thirds of sex workers had experienced sexual or physical violence in the last year.[70]

43. Sex workers – and particularly those even further marginalised, such as cross-border migrants, the homeless, substance-using individuals or transgender individuals within sex work – find it particularly hard to access health and social services, and legal support. These multiple vulnerabilities impact directly on public health, while making society, as a whole much less safe.[71]

44. The links between health, human rights and the criminal law within the context of sex work are increasingly appreciated by national policies in South Africa. The 'South African National Sex Worker HIV Plan' specifically recommended the removal of the criminal law from sex work as a strategy to reduce the prevalence of HIV/AIDS,[72] while the recent 'Gender Based Violence National Strategic Plan' views it as a strategy to reduce gender based violence.[73] Yet, the law remains mired in antiquated thinking.

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[67] Grover, A. (2010). Human Rights Council; fourteenth session; agenda item 3; "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development"; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010; A/HRC/14/20.
[68] University of California San Francisco. Population Size Estimation and HIV care and treatment cascades Updates for Female Sex Workers in South Africa. San Francisco: UCSF; 2019.
[69] University of California San Francisco, Anova Health Institute. Long distance truck drivers and sex worker integrated biobehavioural survey (KPN3) Study. FACTSHEET. Johannesburg: University of San Francisco Global Health Sciences; 2015.
[70] Coetzee J, Gray GE, Jewkes R. Prevalence and patterns of victimization and polyvictimization among female sex workers in Soweto, a South African township: a cross-sectional, respondent-driven sampling study. *Glob Health Action*. 2017;10(1):1403815.
[71] Scorgie, F., Nakato, D., Harper, E., Richter, M., Maseko, S., Nare, P. Chersich, M. F. (2013). "We are despised in the hospitals": Sex workers' experiences of accessing health care in four African countries. *Culture, Health and Sexuality*, 15(4), 450–465, and Richter, M. L., Chersich, M. F., Scorgie, F., Luchters, S., Temmerman, M., & Steen, R. (2010). Sex work and the 2010 FIFA World Cup: Time for public health imperatives to prevail. *Global Health*, 6, 1.
[72] South African National AIDS Council, "The South African National Sex Worker HIV Plan 2016-2019", available https://sanac.org.za/wpfd_file/south-african-national-sex-worker-hiv-plan-2016-2019/
[73] Department of Women, Youth and Persons with Disabilities "The Gender-based Violence and Femicide National Strategic Plan (GBVF-NSP)", March 2020 available https://www.justice.gov.za/vg/gbv/NSP-GBVF-FINAL-DOC-04-05.pdf

45. Thus, a cruel conundrum thus exists: South African society withholds the protection of the law to sex workers, while at the same time allowing the criminal law to compound sex worker vulnerability, risk and ill-health.

H. Conclusion: The SALRC must act

46. The colonial and apartheid legacies have left people living in South Africa at a marked disadvantage: especially black women. Criminalising what is often the only way for some women to support themselves or their extended families further compounds the status quo inequalities and subjects women – and particularly black women - to a range of institutional and personal abuses.

47. Worse still, the laws criminalising sex work have clear and direct antecedents in the ethically repugnant laws banning miscegenation and same-sex intimacy and relationships. **The racism, sexism, and oppression at the root of these antiquated proscriptions are at the root of today's prohibition on sex work**. These laws are particularly unacceptable given the socio-economic and cultural norms in South Africa when it comes to consensual adult sex. There is no clear distinction between transactional sex which is currently criminalised and that which is currently legal. Creating arbitrary distinctions in the realm of sexual morality demeans the law and is impossible to enforce equitably and sanely.

48. Through this timely SALRC process, the legislature is now presented with the opportunity to rethink, reform and modernize South Africa's approach to policing private morality in general and to criminalising sex work in particular. The Constitutional Court has made it clear that this is a legislative decision; now the legislature must take the law reform processes forward.

49. In view of the offensive historical roots of Section 20(1A)(a) of the Sexual Offences Act of 1957 and its far-reaching disproportionate impact on poor, black women, these legal provisions should be repealed, and all criminal prohibitions on sex work should be removed.

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3 June 2021

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