



## Decriminalisation of Sex Work in the SADC Region

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### 1. Introduction

The 2012 Global Commission on HIV and the Law called on nations to abolish punitive laws against sex work. The premise for campaigning to decriminalise sex work is to protect sex workers from human rights violations and create a safer working environment. This research paper will examine how the criminalisation of sex work has impacted on the human rights of sex workers throughout the Southern Africa Development Community ('SADC'). Further, it makes recommendations on advocacy approaches to eradicate discriminatory laws, policies and practices that lead to stigmatisation and violation of sex workers in the region.

## **2. What is sex work?**

The UNDP and various other international development agencies such as the World Health Organisations ("WHO") and UNAIDS have defined sex work as a consensual and contractual arrangement where sexual services are negotiated between consenting adults for either payment of money or goods.<sup>1</sup>

### **2.1. Contractual Capacity**

In an interview with Own Women Advocacy, Hazel Nesu<sup>2</sup> explained that there are inconsistencies in the law in respect of the age of consent to: marriage, sex and access to sexual and reproductive health and rights. These ages need to be clarified and made clear both in the law and to health care service providers, law enforcement and judicial officers. This is a SADC wide issue and there are differing ages for different issues. The United Nations Population Fund ("UNPFA") highlights in its technical brief that the minimum ages of consent do not need to be the same for marriage, sex and for access to sexual and reproductive health and rights. As marriage is essentially a contract, no person has capacity to consent if they are not an adult. The SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage suggests the age of 18 for marriage. They recommend the age of consent to sex to be 16 years old to match the age of sexual debut in the SADC and the general curiosity

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<sup>1</sup> UNDP, HIV/AIDS Group, 2012. *Global Commission on HIV and the Law Risks, Rights & Health*. New York: UNDP. <https://hivlawcommission.org/wp-content/uploads/2017/06/FinalReport-RisksRightsHealth-EN.pdf> , pg 39 and WHO, 2015. *A Technical Brief HIV and Young People who Sell Sex* [https://www.unaids.org/sites/default/files/media\\_asset/2015\\_young\\_people\\_who\\_sell\\_sex\\_en.pdf](https://www.unaids.org/sites/default/files/media_asset/2015_young_people_who_sell_sex_en.pdf) pg 1. (20 November 2023)

<sup>2</sup> Interview held on 21 September 2023.

of adolescents. However, the age of access to sexual and reproductive health and rights should be set at 12 years old. This would cover cases of children living with HIV/AIDS as well as young girls who are raped and require care or an abortion.<sup>3</sup>

It is important to note these different ages because this research paper only deems sex work, as voluntary, when it is consented to by an adult which in most SADC countries are persons over the age of 18. Any person engaging in sex work in exchange for gain, under the age of 18 is being exploited and this is illegal. This is also a good advocacy point for why there should be legal clarity in respect of sex work so that children are protected yet allowing adults to choose their work.

## 2.2. Who is a Sex Worker?

Organisations such as the Open Society Foundations have included sex workers to include adults carrying out erotic performances.<sup>4</sup> GenderLinks explains that the definition of a sex worker can also apply to strippers and pornography actors.<sup>5</sup> The interviews conducted with various participants revealed that throughout the SADC there is no standardised or agreed definition of sex work. The SADC itself has not defined sex work even though it refers to it in a number of its statements.<sup>6</sup> This may be due to legislation and practice referring to prostitution or to soliciting, while the international movement has moved away from those terms to refer to sex work in order to avoid stigmatisation.<sup>7</sup> By way of example, the Women's Legal Centre ("WLC") in South Africa specifically states that "sex work should not be confused with transactional sex, which occurs when some type of sexual service is exchanged for gifts, shelter or drugs."<sup>8</sup> However, in Botswana and Zimbabwe, organisations such as the Pilot Mathambo Centre for Men's Health ("the Mathambo Centre) and Own Women

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<sup>3</sup> UNFPA, 2020. "Technical Brief Harmonization of Minimum Ages and Adolescent Sexual and Reproductive Health and Rights" [https://esaro.unfpa.org/sites/default/files/pub-pdf/lates\\_technical\\_brief\\_harmonization\\_2.pdf](https://esaro.unfpa.org/sites/default/files/pub-pdf/lates_technical_brief_harmonization_2.pdf) (19 November 2023).

<sup>4</sup> Open Society Foundations, 2019. "Understanding Sex Work in an Open Society" <https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society> (26 October 2023).

<sup>5</sup> Gender Links, 2013. "Policy Brief Sex Work" [https://genderlinks.org.za/wp-content/uploads/imported/articles/attachments/16377\\_sex\\_work\\_policy\\_brief.pdf](https://genderlinks.org.za/wp-content/uploads/imported/articles/attachments/16377_sex_work_policy_brief.pdf) (16 November 2023).

<sup>6</sup> See "SADC has Promoted Women Empowerment and Gender Equality Across all Sectors" <https://www.sadc.int/latest-news/sadc-has-promoted-women-empowerment-and-gender-equality-across-all-sectors> (16 November 2023) and "HIV/AIDS" <https://www.sadc.int/pillars/hiv-aids> (16 November 2023).

<sup>7</sup> Supra 4.

<sup>8</sup> Women's Legal Centre, 2014. "Lawyer's Manual on Sex Work Litigation" [https://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual\\_final.pdf](https://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf), pg 99. (26 October 2023).

Advocacy, have launched advocacy initiatives which intend to expand the understanding of sex work to include any type of transactional sex such as sex in exchange for groceries and housing. The intention of these initiatives is to normalise and sensitise the discussion around sex work and challenge societal perceptions on the morality issues attached to sex work. For example, if traditional street sex workers are criminalised then how do these persons differ from those who have sex in exchange for housing, groceries and school fees? In Botswana, Pilot Mathambo explained that the culture of “slay queens” with their “blessers” as well as the “Ben 10’s” of older women who pay for their lifestyles in exchange for sex have been glorified while traditional street sex workers are criminalised.

One also needs to understand the patriarchal, conservative and religious context of societies in the SADC. South Africa has been described as relatively more tolerant and open of sex work<sup>9</sup> however, there is still significant opposition to decriminalisation along religious and conservative grounds.<sup>10</sup> There is significant taboo in the SADC in even openly talking about sex between consenting adults and more so when talking about sex work.<sup>11</sup> Mozambique and Zambia have criminalised any type of pornography whether photographs or cinematographic films. In the case of Botswana, operating adult sex shops or even selling of dildos is illegal and so the extent of stigma and discrimination can be far reaching and not only to sex workers but to those engaged in any type of service related to adult entertainment.

A further issue is that the nature and ways in which sex work can be negotiated and take place is constantly evolving. The COVID-19 pandemic resulted in sex workers advertising and offering their services through whatsapp and Facebook, even if through fake or anonymous accounts.<sup>12</sup> There is also online sex work, which refers to the exchange of sexual commodities and services via the Internet which can relate to both the delivery of a service or marketing of services delivered physically.<sup>13</sup> OnlyFans has also grown in popularity and is primarily used by sex workers who produce

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<sup>9</sup> Interview with Pilot Mathambo (17 October 2023).

<sup>10</sup> Interview with Chriscy Blouws (17 October 2023).

<sup>11</sup> Interview with Pilot Mathambo (17 October 2023).

<sup>12</sup> Karabo Mafolo, 2020. “Covid-19: Some sex workers move online as SA heads into lockdown” <https://www.groundup.org.za/article/some-sex-workers-move-online-sa-heads-lockdown/> (10 November 2023).

<sup>13</sup> Black Feminisms, 2015. “Online Sex Work: How the Internet Changed the Sex Industry” <https://blackfeminisms.com/online-sex-work/> (16 November 2023).

pornography<sup>14</sup> or even sexually related content. However, the interviews revealed that content creators in Botswana and Zimbabwe cannot upload their banking details<sup>15</sup> to the platform and are reliant on persons with South African bank accounts to receive payment for content. This can result in exploitation, should the person decide not to pay over the proceeds to the content creator.

Pilot Mathambo also explained that there is a certain picture which is being painted of sex workers namely poor and disease burdened individuals. This has likely occurred because researchers have access to street sex workers rather than to professional escorts with a range of upmarket clients. This does not paint the full picture of sex work in the SADC. Koshuma Mtengeti from Children's Forum Tanzania<sup>16</sup> also highlighted the different ranges of sex workers from the very poor to those servicing the elite of society and making a substantial income.

When viewing sex work through the lens of income generating work, then it becomes apparent that there is a need to discuss and reach consensus on a definition of sex work in the SADC. This will result in policy and legislation that can ensure an environment in which persons are free from discrimination regardless of their work. A recommendation was made by Pilot Mathambo that within the SADC, the broadest definition should be used including any type of online soliciting or selling. Presently, civil society is using a global definition to define sex work however, there is a need for a regional understanding as the circumstances are different.

### 2.3. Not just females

Although many laws in the SADC specifically refer to certain gender roles in the context of sex work, this research paper advocates that sex work is performed by both men, women, transgender and gender non-conforming individuals and the wider LGBTIQ+ community. The term sex worker recognises that sex work is work whereas prostitution is often used a derogatory term and is linked to criminality and immorality.<sup>17</sup>

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<sup>14</sup> Rolling Stone, 2020. "Sex Workers Built OnlyFans. Now They Say They're Getting Kicked Off" <https://www.rollingstone.com/culture/culture-features/onlyfans-sex-workers-porn-creators-999881/> 26 October 2023).

<sup>15</sup> Unfortunately, it is unclear whether it is a local or OnlyFans restriction to content creators from these countries.

<sup>16</sup> Interview held on 12 October 2023.

<sup>17</sup> Supra 4.

This report will use the word sex work, however where the word prostitute or prostitution is used it is because it is directly quoted from a piece of legislation or a judgement. The SADC-LA in no way endorses the use of the words prostitute or prostitution and uses the word to show how sex work is viewed in various jurisdictions in the SADC.

Sex work intersects with many other important discussions such as women's rights, LGBTIQ+ rights, migration, sexual and reproductive health and rights, HIV/AIDS and income inequality.<sup>18</sup> Various legal elements are at play when discussing sex work:

- Contractual in that sexual services are exchanged for some economic benefit whether in money or in kind;
- Labour in that rendering sexual services is a job, either in the context of an employment relationship within a brothel or for a pimp; or the sex worker works independently.
- Occupational health and safety;
- Issues of criminality wherein one needs to understand which aspects of sex work are criminalised. Comparatively speaking, various acts related to sex work are criminalised such as the act of buying and selling sex, pimping, running a brothel and/or living off the proceeds of sex work
- Health rights such as access to sexual and reproductive health and rights such as HIV/AIDS treatment and abortions, contraceptives and condoms;
- Social security such as access to unemployment insurance; sick leave, annual leave and maternity and paternity leave benefits; and
- Access to justice such as reporting and prosecuting of rape and sexual assault of sex workers; enforcing of a contract and remedies under labour law.

Criminalisation is a position that deems sex work illegal and is driven by a variety of factors such as poverty or a work choice.<sup>19</sup> As will be demonstrated below, in the SADC the criminalisation is driven by a range of archaic laws derived from colonialism or Apartheid, religion, morality and culture. There is a concern that promoting decriminalisation promotes sex work, which will encourage the youth to undertake

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<sup>18</sup> Supra 5.

<sup>19</sup> Commission for Gender Equality, 2013. "Decriminalising Sex Work in South Africa", pg 3.

such work.<sup>20</sup> Further, there is a conflation between sex work and human trafficking which is not based on any empirical evidence.

### **3. How has sex work been criminalised or decriminalised in the SADC?**

In this report, when analysing the various jurisdictions, this has been done by either classifying the legal framework as prohibitionist <sup>21</sup>wherein sex work is criminalised in its entirety i.e., selling and buying of sex and associated activities such as running a brothel, soliciting and living off the proceeds of sex work. The intention of this model is that sex work be eliminated entirely and that all actors in the value chain are punished: sex worker, client, pimp, brother keeper and landlord. However, there is no evidence of this model working globally.<sup>22</sup>The other approach of criminalisation is the abolitionist approach which does not ban the sale of sex but bans all related activities such as soliciting, living off the earnings of sex work, brothel keeping and procurement.<sup>23</sup> It criminalises the involvement of any third party and is viewed as trying to keep the sex worker safe. The intention of this model is that sex workers are seen as victims and sex work persists only through the efforts of procurers and pimps.<sup>24</sup> When going through the literature on the various advocacy initiatives around decriminalisation, many civil society organisations (CSOs) have explained that sex work is legal in their jurisdiction or that the law neither criminalises nor makes sex work legal. From a strict legal sense this can be misleading as the majority of jurisdictions in the SADC have adopted an abolitionist approach. The abolitionist approach however does not provide a safe or conducive environment wherein sex workers can exercise their full human rights and benefit from the protection of the law. Further, law enforcement use other mechanisms such as public morality or nuisance laws to arrest and harass sex workers.

Not a single jurisdiction in the SADC has recognised sex work, in that there is no specific piece of legislation wherein sex work is regulated by the State and is legal only under certain conditions and constraints.<sup>25</sup> At present, all advocacy initiatives only

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<sup>20</sup> Interview with Hazel Nezu on 21 September 2023.

<sup>21</sup> Marjan Wijers, 2004. "Criminal, victim, social evil or working girl: legal approaches to prostitution and their impact on sex workers": pg 1. <https://nswp.org/sites/default/files/WIJERS-CRIMINAL.pdf> (17 November 2023).

<sup>22</sup> Ibid.

<sup>23</sup> Hughes quoted in Commission for Gender Equality, 2013. "Decriminalising Sex Work in South Africa", pg 4.

<sup>24</sup> Supra 19.

<sup>25</sup> Ibid: pg 4.

call for the decriminalisation of sex work without advocating for what regulation of sex work should look like except for equal treatment in respect of human rights. This leaves the future of the industry and the agency of sex workers in the hands of the State. Sex workers should be involved in the development, implementation and evaluation of public policies and be engaged in public participation.<sup>26</sup> By doing this, they secure the future of their profession and their livelihoods.

A legalised system includes the existence of sex work with specific controls such as licensing, registration and mandatory health checks.<sup>27</sup> However, many of the CSO representatives were of the view that because there is such resistance in their respective countries to sex work to begin with, they do not feel that they can advocate for the regulation of sex work. They believe that decriminalisation of sex work will, as a first step, stop the harassment and abuse of sex workers by law enforcement and others such as clients and reduce the stigma and discrimination when accessing health and social services. However, the example of South Africa offers a warning for this limited approach. The Bill to decriminalise sex work was introduced in 2022, however the State Attorney was of the view that the bill did not curb the social ills associated with sex work and therefore regulations were required before decriminalisation could occur. In an interview with Chriscy Blouws (Blouws) from the WLC (South Africa),<sup>28</sup> she countered that they do not want a state of “over regulation”. They do not want instances where there is a special category of laws just for sex workers in order to contain them. This could result in mayhem and fear over sex work. Blouws argues that there are many sectors that are completely unregulated such as hair salons and shebeens and taverns in the same street as a school. However, they will be working with partners to develop some regulations going forward. Internationally, the Working Group on discrimination against women and girls (“the Working Group”) found that a regulatory approach aimed at controlling sex work has problematic aspects which has led to human rights violations.<sup>29</sup> Such restrictions include “who, where and how sex work can be practised, which leaves many sex

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<sup>26</sup> United Nations Human Rights Special Procedures, 2023. “Eliminating discrimination against sex workers and securing their human rights” <https://www.ohchr.org/sites/default/files/documents/issues/women/wg/sex-work-pp-fin-proofread-24-sept.pdf> (16 November 2023).

<sup>27</sup> Mossman quoted in Supra 19, pg 4.

<sup>28</sup> Interview held on 17 October 2023.

<sup>29</sup>Supra 26..

workers outside the scope of legality.”<sup>30</sup> Examples include registering with the police, mandatory sexual transmitted infections (“STIs”) testing, limitations in respect of sex, age and citizenship.<sup>31</sup> The most stringent of regulations leave a wide and more vulnerable section of the sexual services industry criminalised. The model that is generally advocated for is the decriminalisation of sex work with regulations that aim to respect and protect sex workers’ human and labour rights, including occupational health and safety standards and access to appropriate, quality health services.<sup>32</sup> The Special Rapporteur on the right to health concluded that “decriminalisation or legalisation of sex work with appropriate regulation forms a necessary part of a right to health approach to sex work.”<sup>33</sup>

#### **4. International Human Rights**

There is no specific international treaty which protects the rights of sex workers. The only reference to sex work is in Article 6 of the Convention on the Elimination of Discrimination against Women (“CEDAW”) wherein State Parties must take all efforts to suppress all forms of traffic in women and exploitation of prostitution in women. Sex work remains on the periphery of the global human rights movement in that it must be read within the wider context of human rights. All international treaties use the words “everyone” or “no one” which thus guarantees the human rights of sex workers. Historically, international law has been inconsistent in respect of its approach to sex work. In the mid twentieth century it called for its complete prohibition, through conflating sex work with sex trafficking.<sup>34</sup> The position has changed, in part due to the growing number and powerful voices of sex workers’ rights movements. Internationally, there is an acceptance of sex work and opposition to all forms of criminalisation.<sup>35</sup> In 2023, the Working Group released a position paper on “Eliminating discrimination against sex workers and securing their human rights”.<sup>36</sup> The Working Group considered it “high time for discrimination, marginalisation and

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Articles 1 and 2 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1951

<sup>35</sup> See the Global Network of Sex Work Projects <https://www.nswp.org/> (2 October 2023).

<sup>36</sup> Supra 26.

stigmatisation of sex workers to be addressed by human rights bodies so that their human rights are protected.”<sup>37</sup>

#### 4.1. The International Covenant on Civil and Political Rights (‘ICCPR’)

##### 4.1.1. The Right to Life<sup>38</sup>

Despite the right to life, many sex workers have been murdered with recent reports from South Africa<sup>39</sup> and Mozambique.<sup>40</sup> In a 2022 research report by Aidsfonds, there were 160 cases of homicide reported directly related to sex work and two suicides as a result of violence experienced.<sup>41</sup> Sex workers who operate on the streets are particularly unsafe. Due to fears of being arrested, they are forced into unsafe spaces where clients and law enforcement are free to abuse them.<sup>42</sup>

##### 4.1.2. The right be free from torture or cruel, inhuman or degrading treatment<sup>43</sup>

Law enforcement officials, pimps, clients and fellow sex workers<sup>44</sup> often inflict torture, cruel, inhuman and degrading treatment on sex workers whether it is with the intention of eliciting a bribe, sex or for no purpose other than to inflict humiliation and degradation. Aidsfonds reports that physical violence (at 25%) and stigma and discrimination (at 18%) are the two leading forms of human rights violations against sex workers in the reported countries namely Botswana, Mozambique, South Africa and Zimbabwe.<sup>45</sup> Increased competition among sex workers for clientele has also led to rising levels of peer violence.<sup>46</sup> This is based on the fact that “newcomers” are not

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<sup>37</sup> Ibid.

<sup>38</sup> Article 6 of the ICCPR.

<sup>39</sup> The Conversation, 2022. “Murder of Johannesburg sex workers shows why South Africa must urgently decriminalise the trade”. <https://theconversation.com/murder-of-johannesburg-sex-workers-shows-why-south-africa-must-urgently-decriminalise-the-trade-192686> (1 October 2023).

<sup>40</sup> Medecins Sans Frontieres, 2022. “MSF condemns killing of Beira sex workers and calls for their safety” <https://www.msf.org.za/news-and-resources/press-release/msf-condemns-killing-beira-sex-workers-and-calls-their-safety> (1 October 2023).

<sup>41</sup> Aidsfonds, 2022. “Equal Rights, Human Rights”. [https://aidsfonds.org/assets/resource/file/2022\\_Hands\\_Off\\_Human\\_Rights\\_violations\\_report.pdf](https://aidsfonds.org/assets/resource/file/2022_Hands_Off_Human_Rights_violations_report.pdf) (25 July 2023). Pg 2.

<sup>42</sup> The Conversation, 2022. “Murder of Johannesburg sex workers shows why South Africa must urgently decriminalise the trade”. <https://theconversation.com/murder-of-johannesburg-sex-workers-shows-why-south-africa-must-urgently-decriminalise-the-trade-192686> (1 October 2023).

<sup>43</sup> Article 7 of the ICCPR.

<sup>44</sup> Supra 41.

<sup>45</sup> Supra 41 Pg 4.

<sup>46</sup> Supra 41 Pg 2.

welcome.<sup>47</sup> In an interview with Chipiwa Mugabe, the Director of Space for Marginalised Groups in Diversity in Zimbabwe Trust (“SGDZT”),<sup>48</sup> she agreed with this observation. The question becomes about “how do we create a conducive environment filled with opportunities for sex workers?” Mugabe believes that this requires creating safe spaces for sex workers where there can be training to reduce self-stigma. There is also a need for sex workers to hold themselves accountable for their negative actions before “we say that the Government should be looking after us.”

#### 4.1.3. The Rights to liberty and security of the person, and the right not to be subjected to arbitrary arrest or detention.<sup>49</sup>

Law enforcement has used the law to arrest sex workers for no other reason than to elicit a bribe, whether monetary or in sex. In drawing in a perspective from Lesotho, since the enactment of the Penal Code in 2010, no person has been prosecuted for “prostitution”, however there have been many arrests.<sup>50</sup> As a result, criminalisation has only been used as a tool for exploitation by law enforcement.

Internationally, the position is similar, and the Working Group reported that sex work policies are:

“... characterised by wide and often arbitrary exercises of power by enforcement agencies, whether by the police, the council or social welfare, policies which target the most vulnerable sex workers – those working on the street.”<sup>51</sup>

The Working Group also reporting on the indirect criminalisation of sex work through the criminalisation of behaviours and activities adopted by marginalised and disadvantaged communities such as drug use and possession and homelessness. Sex workers may be charged with offences such as loitering, vagrancy, impeding the

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<sup>47</sup> Supra 41 Pg 2.

<sup>48</sup> Interview held on 15 September 2023.

<sup>49</sup> Article 9 of the ICCPR.

<sup>50</sup> Interview held on 15 September 2023.

<sup>51</sup> Supra 25.

flow of traffic, congregating for the purposes of prostitution, public indecency or disorderly behaviour.<sup>52</sup>

#### 4.1.4. The Right to Equality before the law and equal protection under the law<sup>53</sup>

As pointed out above, stigma and discrimination are the second highest forms of human rights violations experienced by sex workers. Despite all jurisdictions in the SADC having some or other form of Constitutional guarantee to equality; stigma and discrimination exist as a result of the influence of legally enforced religion and cultural beliefs.

Other issues include discriminatory laws against the LGBTIQ+ communities, of which we see in abundance in the SADC, conflation of sex trafficking and sex work, impeded access to reproductive rights and socio-economic injustice, which all contribute to the disadvantageous position of sex workers.<sup>54</sup>

### 4.2. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

#### 4.2.1. The Right to Work<sup>55</sup>

The ICESCR recognises the right to work, including the right of everyone to the opportunity to gain their living by work which they freely chose or accept with appropriate safeguards for this right.

The ICESCR also guarantees the right of everyone to enjoy just and favourable conditions of work, including a fair wage and decent living, and safe and health working conditions.<sup>56</sup>

The dominant narrative that sex work stems out of desperation due to poverty or a lack of opportunities, results in a lack of understanding that it may be a choice for

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<sup>52</sup> Ibid.

<sup>53</sup> Article 26 of the ICCPR.

<sup>54</sup> Supra 26.

<sup>55</sup> Article 6.1 of the ICESCR.

<sup>56</sup> Article 7 of the ICESCR.

people. Many sex workers enjoy what they do as it offers better pay, more flexible working conditions<sup>57</sup> or allows them to explore their sexuality.<sup>58</sup> This approach also denies sex workers the right to work and choose a profession.

Criminalisation, whether abolitionist or prohibitionist, has resulted in a denial of labour rights to sex workers. In South Africa, there is the well-known case of *Kylie v CCMA* (discussed in more detail below), where the Labour Appeal Court held that although sex work is illegal, sex workers still benefitted from the constitutional protection of their right to fair labour practices. Despite the case, this did not result in sex workers being able to claim employment benefits such as unemployment insurance, annual leave or maternity or parental leave. In fact, most narratives in the SADC view sex work, not as a choice, but as being forced to do such work and therefore the labour rights elements are missed.

#### 4.2.2. The Right to Adequate Housing<sup>59</sup>

The ICESCR recognises the right of everyone to an adequate standard of living for themselves and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. In many jurisdictions, allowing premises to be used for sex work or running of brothels is criminalised.<sup>60</sup> This affects sex workers' ability to secure an adequate standard of living and to access housing as landlords may be wary of renting to sex workers.<sup>61</sup>

#### 4.2.3. The Right to Health<sup>62</sup>

The ICESCR recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Criminalisation of sex work increases the risk of HIV and other STIs.<sup>63</sup> A further issue is the lack of access to health

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<sup>57</sup> "Sex Workers in South Africa." Unpacked with Relebogile Mabotja, Season 2, Episode 12, 15 June 2021.

<sup>58</sup> Rachel Marshall, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work*, 23 Wm. & Mary J. Women & L. 47 (2016), <https://scholarship.law.wm.edu/wmjowl/vol23/iss1/5>, (20 November 2023) pg 51.

<sup>59</sup> Article 11 of the ICESCR.

<sup>60</sup> See Botswana.

<sup>61</sup> Laone Rasaka, 2023. "Sex workers report Botswana to UN for banning their work" <https://www.weekendpost.co.bw/37110/news/sex-workers-report-botswana-to-un-for-banning-their-work/> 17 November 2023.

<sup>62</sup> Article 12 of the ICESCR.

<sup>63</sup> Supra 26.

and social services<sup>64</sup> due to discrimination in the health sector or the lack of services such as legal abortions or lack of publicly available condoms and contraceptives.

An issue which is often overlooked, is the mental health of sex workers. In an interview with SGDZT, it was explained how SGDZT has started rolling out mental health programmes for sex workers. Due to the nature of the work such as facing a harsh client or needing courage to perform sexual acts as well as the stressful environment of being “illegal”, many sex workers turn to drugs as a coping mechanism.

#### 4.3. The Convention on the Elimination of All Forms of Discrimination against Women (‘CEDAW’)

Article 1 of CEDAW defines “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.”

Article 2(b) of CEDAW places a positive obligation on State Parties to “adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women. “

Further, Article 2(c) mandates that State Parties 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.

This includes to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute

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<sup>64</sup> Supra 26.

discrimination against women.<sup>65</sup> CEDAW specifically mentions repealing all national penal provisions which constitute discrimination against women.<sup>66</sup>

Article 6 of CEDAW is the only provision to address sex work, wherein it states:

“States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

The CEDAW Committee has defined criminalisation of sex workers as a form of gender-based discrimination.<sup>67</sup> Some of the Committee’s Concluding Observations have recommended that State parties “review the laws that penalise sex workers, repeal provisions on administrative offences, suspend the imposition of fines and decriminalise women in prostitution.”<sup>68</sup>

#### 4.4. General Recommendation 19 on violence against women

This General Recommendation highlighted the driving forces behind sex work namely that

“15. Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalise them. They need the equal protection of laws against rape and other forms of violence.”

#### 4.5. General Recommendation 33 on women’s access to justice

“49. Women are also disproportionately criminalised owing to their situation or status, such as being involved in prostitution, being a migrant, having been accused of adultery, identity as a lesbian, bisexual or transgender woman or intersex person, having undergone an abortion or belonging to other groups that face discrimination.”

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<sup>65</sup> Article 2(f) of CEDAW.

<sup>66</sup> Article 2(g) of CEDAW.

<sup>67</sup> CEDAW Committee, General Recommendation no 19. (1992), paras 14-16.

<sup>68</sup> Supra 26.

The Committee then made a number of recommendations to State Parties such as taking appropriate measures to create supportive environments that encourage women to claim their rights and report crimes committed against them.<sup>69</sup> In keeping with the times, the Committee also recommended taking measures, including the adoption of legislation, to protect women from Internet crimes and misdemeanours.<sup>70</sup> Although sex work is not specifically mentioned, the General Recommendation called for discriminatory criminalisation to be abolished and to review and monitor all criminal procedures to ensure that they do not directly or indirectly discriminate against women.<sup>71</sup>

#### 4.6. General Recommendation 38 on trafficking in women and girls

This General Recommendation appeared to take a slight step backwards in respect of recognising sex work as voluntary and seeing it through the narrow lens of trafficking and referencing the “exploitation of prostitution.”<sup>72</sup> The General Recommendation also goes on further to state that the legal basis requires the Article 6 of CEDAW be “read as an indivisible provision, which links trafficking and sexual exploitation.”<sup>73</sup>

The Count Me In! Consortium issued a statement in response to the General Recommendation condemning the discriminatory and potentially harmful measures proposed. The General Recommendation failed to distinguish between trafficking, sexual exploitation and sex work. It continued to reinforce the erroneous conflation of sex work and trafficking which fuel harmful legislation, policies and practices, including an overly broad application of anti-trafficking measures. They continued that such broad legislative and normative frameworks seldom address the structural root causes of trafficking but rather perpetrate the invisible networks that structurally exclude sex workers.<sup>74</sup> The Working Group has also emphasized that anti-trafficking measures should not be implemented in a way that infringe sex workers’ rights.<sup>75</sup>

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<sup>69</sup> Article 51(c) of General Recommendation 33, 2015.

<sup>70</sup> Ibid.

<sup>71</sup> Article 51(l) of General Recommendation 33, 2015.

<sup>72</sup> Article 4 of General Recommendation 38, 2020.

<sup>73</sup> Ibid.

<sup>74</sup> Count Me In! Consortium, 2020. “To the CEDAW Committee: Sex work is work. It is not trafficking.” [https://www.mamacash.org/media/cedaw\\_statement\\_swaq.pdf](https://www.mamacash.org/media/cedaw_statement_swaq.pdf) (2 October 2023).

<sup>75</sup> Supra 26.

## 5. International Declarations

### 5.1. The Declaration on the Elimination of Violence against Women<sup>76</sup>

The Declaration defines gender-based abuse and provides that State Parties must ensure that law enforcement and public officials responsible for implementing policies to prevent, investigate and punish violence against women, receive training to sensitise them to the needs of women.

### 5.2. Beijing Declaration and Platform for Action, Beijing +5 Political Declaration and Outcome<sup>77</sup>

The Beijing Declaration promotes gender mainstreaming in policies and programmes and State Parties should undertake other concrete actions in an effort to eliminate all forms of discrimination against women in both public and private life.

## 6. The International Labour Organisation ('ILO')

The ILO has not specifically developed a convention on the rights of sex workers, however it has commissioned studies on sex workers and how it contributes towards gross domestic product (GDP) especially in Asia.<sup>78</sup> However, the ILO Recommendation concerning HIV and AIDS and the World of Work, 2010 reaches out to all workers including the HIV vulnerabilities of sex workers.<sup>79</sup>

In 2019, the ILO adopted the Violence and Harassment Convention (No. 190). The general international<sup>80</sup> approach to handling sexual harassment in the workplace, is that it is a form of unfair discrimination and is prohibited on the grounds of sex or

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<sup>76</sup> United Nations, 1993. "Declaration on the Elimination of Violence against Women" <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-violence-against-women> (2 October 2023).

<sup>77</sup> United Nations, 1995. "Beijing Declaration and Platform for Action, Beijing +5 Political Declaration and Outcome" <https://www.unwomen.org/en/digital-library/publications/2015/01/beijing-declaration> (2 October 2023).

<sup>78</sup> Global Network of Sex Work Projects, 2017. "Policy Brief Sex Work is Work" [https://www.nswp.org/sites/default/files/policy\\_brief\\_sex\\_work\\_as\\_work\\_nswp\\_-\\_2017.pdf](https://www.nswp.org/sites/default/files/policy_brief_sex_work_as_work_nswp_-_2017.pdf) (2 October 2023).

<sup>79</sup> ILO, 2010. "HIV + Work" [https://www.ilo.org/wcmsp5/groups/public/@ed\\_protect/@protrav/@ilo\\_aids/documents/genericdocument/wcms\\_185717.pdf](https://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@ilo_aids/documents/genericdocument/wcms_185717.pdf) (2 October 2023).

<sup>80</sup> EU Directive 2002/73/EC.

gender. However, as sex work is not recognised, it is very difficult for sex workers to obtain protection from harassment whether by clients, peers or law enforcement.

## 7. Regional Human Rights

### 7.1. The African Charter on Human and People's Rights

The African Charter guarantees the rights of all individuals to equality,<sup>81</sup> dignity,<sup>82</sup> work under equitable and satisfactory circumstances,<sup>83</sup> health<sup>84</sup> and freedom from exploitation.<sup>85</sup>

The African Charter, unlike the ICCPR and the ICESCR, specifically provides that every human being shall be entitled to respect of the integrity of their person.<sup>86</sup> Respect for bodily integrity is key to decriminalisation. The Working Group found that “enforcement of punitive provisions to regulate women’s control over their own bodies infringes on women’s dignity and bodily integrity by restricting their autonomy to make decisions over their own lives and health.”<sup>87</sup>

### 7.2. Protocol to the African Charter on Human and People's Rights on the Rights of Women

The Protocol focuses on the need to promote and protect women’s rights. Article 3 obligates State Parties to protect women from all forms of violence “particularly sexual and verbal violence”.

Article 4(2) calls for the enactment and enforcement of laws prohibiting all forms of violence against women “including unwanted or forced sex whether the violence takes place in private or public”.

The African Commission has not been active on the issue of sex workers. Sex workers have been included as a vulnerable group to integrate into the work of the Committee

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<sup>81</sup> Article 3 of the African Charter on Human and People's Rights.

<sup>82</sup> Article 5 of the African Charter on Human and People's Rights.

<sup>83</sup> Article 15 of the African Charter on Human and People's Rights.

<sup>84</sup> Article 16 of the of the African Charter on Human and People's Rights.

<sup>85</sup> Article 5 of the of the African Charter on Human and People's Rights.

<sup>86</sup> Article 4 of the of the African Charter on Human and People's Rights.

<sup>87</sup> Supra 26.

on the Protection of the Rights of People Living with HIV. However, this Committee has been relatively dormant and there are no reports of the type of work done.<sup>88</sup>

Even the first case to decide on the African Women's Protocol protected women who are not sex workers at the expense of sex workers' rights. In the case of *Dorothy Chioma Njemanze & 3 Others v Nigeria*,<sup>89</sup> the ECOWAS Court of Justice found that Nigeria had violated the rights of women because state agents from the Abuja Environmental Protection Board and Society against Prostitution and Child Labour had assumed they were sex workers and thereby arrested and beat them. The Court found that Nigeria had violated the women's rights to dignity as well as the right not to be arbitrarily detained and arrested. However, when looking at this case within the lens of promoting the rights of sex workers, the judgement protected women who are not sex workers at the expense of sex workers' rights. By ignoring the issue of sex work, the judgement has the potential to be harmful to sex workers.<sup>90</sup>

## 8. Sub-Regional Protocols

### 8.1. The SADC Protocol on Gender and Development

The Protocol calls for the empowerment of women, the elimination of discrimination and the achievement of gender equality. Article 7 requires State Parties to take action, including the enactment of legislation, to promote and ensure equality for women. This includes measures aimed at ensuring equality for women in the criminal justice system and addressing gender bias and stereotypes.

Despite the high rates of HIV/AIDS in the SADC and the continued poverty more acutely experienced by women and LGBTIQ+ communities, the SADC has failed to issue any specified statement, declaration or protocol on decriminalisation of sex work.

## 9. Global and Regional Initiatives to Decriminalise Sex Work

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<sup>88</sup> African Commission on Human and People's Rights. 2010. "Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV". <https://achpr.au.int/en/mechanisms/committee-protection-rights-people-living-hiv-plhiv-and-those-risk-vulnerable-and> (2 October 2023).

<sup>89</sup> ECW/CCJ/JUD/08/17 *Dorothy Chioma Njemanze & 3 Others v Nigeria* <https://ihrda.uwazi.io/en/document/0h6sf6nakud8ntpr39gdabrzfr> (2 October 2023).

<sup>90</sup> Ciara O'Connell, 2019. 'Reconceptualising the first African Women's Protocol case to work for all women. African Human Rights Law Journal, 19(1), 510-533. <https://dx.doi.org/10.17159/1996-2096/2019/v19n1a24> 20 November 2023.

## 9.1. Global Commission on HIV and the Law

In 2012, the Global Commission on HIV and the Law,<sup>91</sup> a UNDP sponsored commission, called on nations to abolish punitive laws against sex work. The report's findings were in the context that law has the power to bridge the gap between vulnerability and resilience to HIV.<sup>92</sup> The Commission found that the law, enforcement and the justice systems have immense potential to better the lives of HIV-positive people and to help turn the crisis around. However, nations had squandered the potential of the legal system punitive, discriminatory and brutal policing and denial of access to justice for people with and at risk of acquiring HIV are fuelling the HIV/AIDS epidemic.<sup>93</sup>

The report found that in many countries, the law (either on the books or on the streets) dehumanises many of those at the highest risk for HIV including sex workers, transgender, men who have sex with men, people who use drugs, prisoners and migrants (key and vulnerable populations). The law renders these key populations vulnerable to HIV especially law criminalising same-sex activity or prohibiting gender nonconformity as well as the criminalisation of sex work.<sup>94</sup> Even if sex workers are only detained briefly, their working lives are vexed by harassment and fear. These laws codify discrimination and reflect general social contempt toward sex workers.<sup>95</sup>

The Commission called to decriminalise private and consensual adult sexual behaviours including same sex sexual acts and voluntary sex work. Importantly, the Commission drew the distinction between voluntary and forced sex work and called on States that the

“enforcement of laws against human trafficking is carefully targeted to punish those who use force, dishonesty or coercion to procure people into commercial

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<sup>91</sup> The Global Commission on HIV and the Law is an independent body, established at the request of the Programme Coordinating Board of the Joint United Nations Programme on HIV/AIDS and supported by a Secretariate based at the United Nations Development Programme (UNDP).

<sup>92</sup> UNDP, HIV/AIDS Group, 2012. *Global Commission on HIV and the Law Risks, Rights & Health*. New York: UNDP. <https://hivlawcommission.org/wp-content/uploads/2017/06/FinalReport-RisksRightsHealth-EN.pdf> pg4 (20 November 2023).

<sup>93</sup> Ibid: pg 9.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid: pg. 36.

sex or who abuse migrant sex workers through debt bondage, violence or deprivation of liberty.”<sup>96</sup>

Further, the laws against human trafficking must be used to prohibit sexual exploitation, but they must not be used against adults involved in consensual sex work.<sup>97</sup>

## **10. Analysis of National Legislation in the SADC**

### 10.1. Angola

#### 10.1.1. Legal Framework

Angola has adopted the abolitionist approach in that there is no specific prohibition on the selling of sex, however the involvement of third parties has been criminalised. The Penal Code<sup>98</sup> criminalises pimping.<sup>99</sup> However, it contains an interesting provision in that together with the intention to profit or promote or facilitate prostitution, the perpetrator must take advantage of the economic need or particular vulnerability of the victim by using violence, threat or fraud. It appears that a defence may be raised if the sex worker voluntarily entered the arrangement with the third party and appears to be self-sufficient and not vulnerable. The Global Network of Sex Work Projects also commented that “it is unclear whether this law could be used to criminalise all third-party relationships or only those that involve exploitation or coercion of some kind”.<sup>100</sup> The crime, however, is deemed so serious that it is placed within the context of other sexual crimes such as rape and sex trafficking.<sup>101</sup>

#### 10.1.2. Social Context

In an interview with Kerena Mavinga Wete Panzo of Doces Para Sempre - SW,<sup>102</sup> a sex workers led organisation, it was explained that the organisation had not necessarily encountered problems with the law. The problem was rather that the law is silent on sex work, in that it neither prohibits nor authorises it, thus creating a grey

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<sup>96</sup> Ibid: pg 10.

<sup>97</sup> Ibid.

<sup>98</sup> Law No. 38/20 of 11 November.

<sup>99</sup> Article 189(1) of the Penal Code.

<sup>100</sup> Global Net Work of Sex Work Project, undated. “Angola” <https://www.nswp.org/country/angola> 17 November 2023.

<sup>101</sup> See Chapter IV Articles 181 to 198 of the Penal Code.

<sup>102</sup> Interview conducted on 18 October 2023.

area. Unfortunately, society is also not supportive in that Angolans have a discriminatory attitude towards sex workers.

### 10.1.3. Advocacy Initiatives

Doces Para Sempre – SW’s advocacy work has been limited however they have conducted several workshops with sex workers to raise awareness on their human rights. There is limited research on the situation of sex workers in Angola despite the obvious characteristics which result in popularity of sex work such as mining, transport routes and oil money.

## 10.2. Botswana

### 10.2.1. Legal Framework

Botswana has also adopted the abolitionist approach in that procuration to become a prostitute,<sup>103</sup> living on earnings derived from prostitution,<sup>104</sup> soliciting,<sup>105</sup> aiding,<sup>106</sup> using premises for prostitution<sup>107</sup> and brothel keeping<sup>108</sup> are criminalised. Botswana has adopted a wide range of criminal sanctions for various actors involved in facilitating sex work, except sex workers. There is also the crime of public indecency<sup>109</sup> and common nuisance.<sup>110</sup> Sex workers have been arrested and detained as being a common nuisance for soliciting to sell sex in public areas.<sup>111</sup>

Botswana has gone as far as to list “a prostitute, or a person, who lives or has lived or knowingly receives or has received any part of the earnings of prostitution or has procured another person for immoral purposes” as undesirable immigrants.<sup>112</sup> This empowers the Minister to issue a deportation order.<sup>113</sup>

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<sup>103</sup> Section 149 of the Penal Code Chapter 08:01.

<sup>104</sup> Section 155(1)(a) of the Penal Code Chapter 08:01.

<sup>105</sup> Section 155(1)(b) of the Penal Code Chapter 08:01.

<sup>106</sup> Section 156 of the Penal Code Chapter 08:01.

<sup>107</sup> Section 157 of the Penal Code Chapter 08:01.

<sup>108</sup> Section 158 of the Penal Code Chapter 08:01.

<sup>109</sup> Section 167 of the Penal Code Chapter 08:01.

<sup>110</sup> Section 176 of the Penal Code Chapter 08:01.

<sup>111</sup> Supra 61.

<sup>112</sup> Section 50(1)(e) of the Immigration Act, No 3 of 2011.

<sup>113</sup> Section 50(2) of the Immigration Act, No 3 of 2011.

### 10.2.2. Social Context

Although the law does not outright ban the selling and buying of sex, sex workers work underground or do transactional sex. In an interview with Pilot Mathambo (“Mathambo”) of the Pilot Mathambo Centre for Men’s Health (“the Centre”),<sup>114</sup> it was explained that sex workers have “no place to go when injustice has happened.” Sex workers cannot clearly explain themselves to law enforcement, as they may use the evidence gathered to charge the sex worker, instead of the perpetrator. There is a tendency among law enforcement to protect the buyer instead of the sex worker who may have reported gender-based violence. However, there have been some small victories, as the Government has officially recognised sex workers as key populations in public health. Discrimination does however remain in the public health care service; one example is that health care providers will start interrogating sex workers when they ask for a bulk supply of condoms.

Sex workers also tends to be mobile in Botswana because if they stay in one location, there is a high probability that their landlord will evict them or other people in the area will demand free sex in exchange for keeping their profession a secret. It also becomes easier for law enforcement to target sex workers if they know where they live. As a result, housing becomes a challenge with street sex workers greatly affected.

Mathambo also explained that Botswana is religiously and culturally conservative. Talking of sex and STIs is taboo, and it is only the younger generation who are now beginning to have these types of conversations. Despite the law not prohibiting the selling and buying of sex, the Registrar of Societies initially rejected the Centre’s registration, as their vision and mission was perceived as promoting sex work. They were also told to include rehabilitation, as one of their objectives. They eventually decided to register through their partner, BONELA, a well known non-profit organisation (“NPO”) in Botswana. As is evident, there is a clear misunderstanding of what the law allows and what society, through civil servants, can interpret as being the law.

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<sup>114</sup> Interview with Pilot Mathambo (17 October 2023).

### 10.2.3. Advocacy Initiatives

In respect of advocacy, it has been a challenging journey for sex worker advocates. Mathambo explained that it is “only now that we see advocacy being accepted on issues of sex work.” The Centre’s advocacy journey is a step-by-step process, where even before legalisation of sex work, there needs to be a free system wherein civil society can advocate for change that will support sex workers. A free system would also ensure that civil society could advocate for the type of regulation or support that sex workers require such as 24-hour health services because sex workers work at night and sleep in the day or by extending the availability of Pre-Exposure Prophylaxis (PrEP) and not limiting it to rape victims.

In respect of advocacy, the Centre’s advocacy strategy has been to “gradually infuse decriminalisation of sex work in the public health approach”. By way of example, for women to freely access sexual and reproductive health services, then there needs to be full decriminalisation.

One of the challenges in respect of advocacy is that State institutions and the public are not yet ready to accept sex work the way the Centre terms it. These institutions and the public will only support initiatives to help sex workers, as long as the end goal is to rehabilitate the sex workers. Even in respect of funding, bigger sums of money are available when the project includes a rehabilitation aspect and the smaller organisations are left behind. This does not support the human rights narrative that sex work is work. There is a lack of recognition that there may be a choice in respect of doing sex work. As a result of this, the Government is not at a stage where they will accept submissions that sex work is a human rights issue however the public health approach has had far more success.

In the Centre’s experience of engaging with Parliamentarians, there has been limited success because even if they initially agree to decriminalisation, the threat of losing an election results in a U-turn on the issue.

As for the future of sex workers, Mathambo urges that there needs to be training to sex workers on more ambitious projects. For example, for sex workers to transition

from sex work to bigger entrepreneurial ventures such as owning strip clubs or brothels.

### 10.3. Comoros

#### 10.3.1. Legal Framework

Comoros operates a dual legal system wherein there is both civil law and Sharia law. The Fundamental Law of the Union of the Comoros establishes the primacy of Islam within the Comoros.<sup>115</sup> Zina<sup>116</sup> laws, which treat any sexual contact outside a legal marriage as a crime, are applied. These Zina laws are disproportionately applied to sex workers.<sup>117</sup> As approximately 98% of Comorians are Muslim, Comoros has taken a prohibitionist approach to sex work.<sup>118</sup>

Apart from Sharia, which would not be applied to non-Muslims, the Penal code prohibits third party transactions with sex workers. The Penal Code criminalises pimping,<sup>119</sup> which includes anyone who aids, assists or protects prostitutes;<sup>120</sup> shares in the proceeds of prostitution;<sup>121</sup> knowingly lives with a person habitually engaged in prostitution;<sup>122</sup> hires, trains or maintains a person with a view to carrying out prostitution.<sup>123</sup> The Penal Code goes as far as to punish any person who tries to threaten or obstruct the assistance or rehabilitation undertaken by organisations trying to take people out of prostitution.<sup>124</sup> However, it was reported that due to the limited resources and other pressing issues, enforcement of these laws can be lax at times.<sup>125</sup>

#### 10.3.2. Social Context

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<sup>115</sup> Institute on Religion and Public Policy, undated. "Religious Freedom in Comoros" [https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session5/KM/IRPP\\_COM\\_UPR\\_S5\\_2009\\_InstituteonReligionandPublicPolicy.pdf](https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session5/KM/IRPP_COM_UPR_S5_2009_InstituteonReligionandPublicPolicy.pdf). (18 November 2023).

<sup>116</sup> Africa Regional Sexuality Resource Centre, undated. "Criminalising Sexuality: Zina Laws as Violence Against Women in Muslim Contexts" <http://www.arsrc.org/features/criminalising-sexuality.html> (18 November 2023).

<sup>117</sup> Global Net Work of Sex Work Project, undated. "Cook Islands" <https://www.nswp.org/country/cook-islands> (18 November 2023). (Article incorrectly refers to Cook Islands).

<sup>118</sup> Johsua Project, undated. "Country: Comoros" <https://joshuaproject.net/countries/cn> (18 November 2023).

<sup>119</sup> Article 310 of the Penal Code 2020, Law No 20-038/AU of 29 December 2020.

<sup>120</sup> Article 310(a) of the Penal Code 2020, Law No 20-038/AU of 29 December 2020.

<sup>121</sup> Article 310(b) of the Penal Code 2020, Law No 20-038/AU of 29 December 2020.

<sup>122</sup> Article 310(c) of the Penal Code 2020, Law No 20-038/AU of 29 December 2020.

<sup>123</sup> Article 310(e) of the Penal Code 2020, Law No 20-038/AU of 29 December 2020.

<sup>124</sup> Article 310(g) of the Penal Code 2020, Law No 20-038/AU of 29 December 2020.

<sup>125</sup> Legalitylens.com, undated. "What is the legality of prostitution in Comoros" <https://legalitylens.com/what-is-the-legality-of-prostitution-in-comoros/> (18 November 2023).

Comoros, as with the rest of the SADC, has high levels of poverty, unemployment and gender inequality as reasons for sex work.<sup>126</sup> An interesting point to note is that during the French colonial period (1841-1975), sex work was accepted and regulated by the colonial administration, with registered brothels in the capital, Moroni. However, at independence in 1975, the Government sought to suppress prostitution through criminalisation, which resulted in clandestine activities.<sup>127</sup>

### 10.3.3. Advocacy Initiatives

There is limited research on sex work in the Comoros. By way of example, the Universal Periodic Review makes no mention of sex work. Despite numerous attempts to make contact with civil society organisations, none responded for an interview. However, it did report that violence against women, harmful practices such as sexual violence and sexual harassment persisted.<sup>128</sup> However, in the country's report to the CEDAW Committee, the country representative explained that "prostitution was barely visible, which made it difficult to effectively tackle." They also referred to an organisation in the capital that "discreetly and informally helped prostitutes, in particular with medical check-ups and advice."<sup>129</sup> As can be seen by the tone of the Comorian representative, the attitude of the Government is one of eliminating sex work rather than protecting sex workers.

## 10.4. Democratic Republic of Congo ("DRC")

### 10.4.1. Legal Framework

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<sup>126</sup> Ibid.

<sup>127</sup> Legalitylens.com, undated. "What is the legality of prostitution in Comoros" <https://legalitylens.com/what-is-the-legality-of-prostitution-in-comoros/> (18 November 2023).

<sup>128</sup> Human Rights Council, 2018. "Compilation on the Comoros Report of the Office of the United National High Commissioner for Human Rights". <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/338/37/PDF/G1833837.pdf?OpenElement> (18 November 2023).

<sup>129</sup> UN Human Rights Office of the High Commissions, 2012. "Committee on the Elimination of Discrimination against Women considers report of the Comoros <https://www.ohchr.org/en/press-releases/2012/10/committee-elimination-discrimination-against-women-considers-report-comoros> (18 November 2023).  
18 November 2023.

The DRC has adopted the abolitionist approach in that pimping and procurement,<sup>130</sup> operating a brothel<sup>131</sup> and living off the proceeds of prostitution<sup>132</sup> are criminalised. Despite the lack of any criminal sanction against sex workers, there are many arbitrary arrests and violence against sex workers by state forces.<sup>133</sup> This points to a misinterpretation and abuse of the law by law enforcement. There are also public morality laws which are widely interpreted to harass and arrest sex workers.

#### 10.4.2. Social Context

Female sex workers are believed to be outside of social norms and immoral. These views are expressed not only by communities but by human rights organisations.<sup>134</sup> UNANDE and ACODHU-TS reported that some human rights organisations view sex work as immoral and cannot reconcile it within the human rights framework.

In 2018, an operation called UJANA was initiated by the Provincial Government of Kinshasa by Police and subsequently spread to all provinces. The objective of this operation was to combat underage prostitution however it disproportionately resulted in the abuse of sex workers and young women. Police officers arrested and abused over 300 female sex workers on public morality offences. The civil society organisations UNANDE and ACODHU-TS opened cases of rape, harassment and sexual violence.<sup>135</sup> Sex workers also receive abuse by clients and jealous wives.<sup>136</sup> However, neither the police nor the State took any action against perpetrators.<sup>137</sup> However, a high-level police official said that sex workers do not report the violence by police and there is no complainant to bring a case. As a result, it is very difficult for them to act on silence.<sup>138</sup>

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<sup>130</sup> Article 174(1) of the Penal Code, 30 January 1940 as amended.

<sup>131</sup> Article 174(2) of the Penal Code, 30 January 1940 as amended.

<sup>132</sup> Article 174(3) of the Penal Code, 30 January 1940 as amended.

<sup>133</sup> Joint Submission by UNANDE RD Congo and ACODHU-TS, 2019. "Shadow Report to the Committee on the Elimination of Discrimination against Women" [https://www.nswp.org/sites/default/files/drc\\_cedaw\\_shadow\\_report\\_umade\\_acodhu-ts\\_-\\_2019.pdf](https://www.nswp.org/sites/default/files/drc_cedaw_shadow_report_umade_acodhu-ts_-_2019.pdf) (19 November 2023).

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

One Major of the Military commented that the lack of protection in the law for sex workers makes it difficult for police, judicial officers and security services to act or speak in defense of sex workers. Further, the justice system does not facilitate the realisation of sex workers rights and allegation of human rights violations are not taken into account.<sup>139</sup>

#### 10.4.3. Advocacy Initiatives

There is limited research on sex work in the DRC. Human rights organisations defending female sex workers right face serious discrimination even with the human rights circle. There is a view that a “dignified woman cannot be a sex worker.” Any work regarding sex workers by these type of organisations focus on pushing them to leave sex work and no advocacy on the promotion of human rights of sex workers. There is a general attitude of shame towards sex workers by human rights organisations. As a result, many advocates feel that they are “fighting against other women, in the context of a complicit legal silence...”.<sup>140</sup>

Civil society has called for an end to law enforcement operations and for law enforcement to be prevented and held accountable for violence perpetuated against sex workers. They have also called for the review of legislation to ensure that sex workers are protected and ensure that sex workers have equitable access to justice. Furthermore, there needs to be measures to counter stigma and discrimination against sex workers.<sup>141</sup>

### 10.5. Eswatini

#### 10.5.1. Legal Framework

Eswatini has adopted an abolitionist approach.<sup>142</sup> Despite sex work not being criminalised, the law does not provide a conducive or safe environment for sex workers and sex workers are forced to go underground.

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<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> The Southern Africa Litigation Centre, 2019. “A Summary of Eswatini’s Sexual Offences and Domestic Violence Act”. <https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/10/SALC-New-Sexual-Offences-Legislation-SD-FINAL-WEB-version.pdf> (30 September 2023), pg 26.

The Sexual Offences and Domestic Violence Act, 2018<sup>143</sup> criminalises the acts of third parties who seek to benefit from the exchange of sexual acts between a sex worker and a client<sup>144</sup> namely pimping<sup>145</sup> whether through facilitating the commercial sexual exploitation, promoting commercial sexual exploitation<sup>146</sup> whether through printing or publishing or facilitating conduct that constitutes or is likely to constitute commercial sexual exploitation. The Act also criminalises sex trafficking<sup>147</sup> and sexual abuse of children.<sup>148</sup> Benefiting<sup>149</sup> or living from the earnings of prostitution<sup>150</sup> is also criminalised. The Act has also criminalised “keeping a brothel” which is defined as the “owning, controlling or managing a brothel or acting or assisting in the management of a brothel.”<sup>151</sup> Section 19 of the Act contains a deeming provision, in that any person is deemed to keep a brothel if they reside, manage, knowingly receive monies taken in a brothel, or any person found in a brothel who refuses to disclose the name and identity of the keeper, owner or manager of the brothel, among others.<sup>152</sup> A lease agreement will also be null and void if the house is used as a brothel and the owner will be able to apply for summary eviction.<sup>153</sup>

Despite the extensive protection offered under the Sexual Offences and Domestic Violence Act for victims of sexual violence, when sex workers experience sexual violence the provisions of the Act are often ignored. Sex workers who are sexually assaulted have no recourse. Reporting to the police comes with threats of arrest, detention and further criminalisation.<sup>154</sup> Sex workers are arrested, detained and expected to pay large arbitrary fines by police who rarely provide receipts for payment

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<sup>143</sup> The Sexual Offences and Domestic Violence Act No. 15 of 2018.

<sup>144</sup> The Southern Africa Litigation Centre, 2019. “A Summary of Eswatini’s Sexual Offences and Domestic Violence Act”. <https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/10/SALC-New-Sexual-Offences-Legislation-SD-FINAL-WEB-version.pdf> (accessed 30 September 2023), pg 26.

<sup>145</sup> Section 13(1) and (2)(a) to (c) and Section 15 of the Sexual Offences and Domestic Violence Act, 2018.

<sup>146</sup> Section 14(a) and (b) of the Sexual Offences and Domestic Violence Act, 2018.

<sup>147</sup> Section 13(2)(e) of the Sexual Offences and Domestic Violence Act, 2018.

<sup>148</sup> Section 13(2)(e) of the Sexual Offences and Domestic Violence Act, 2018.

<sup>148</sup> Section 13(2)(d) of the Sexual Offences and Domestic Violence Act, 2018.

<sup>149</sup> Section 16(1) and (2) of the Sexual Offences and Domestic Violence Act, 2018.

<sup>150</sup> Section 17(1) and (2) of the Sexual Offences and Domestic Violence Act, 2018.

<sup>151</sup> Section 18(1) – (3) of the Sexual Offences and Domestic Violence Act, 2018.

<sup>152</sup> Section 19 of the Sexual Offences and Domestic Violence Act, 2018..

<sup>153</sup> Section 20 and 21 of the Sexual Offences and Domestic Violence Act, 2018..

<sup>154</sup> African Sex Workers Alliance and the Sexual Rights Initiative , 2021. “Universal Periodic Review of Eswatini” <https://www.sexualrightsinitiative.org/sites/default/files/resources/files/2021-05/UPR%2039%20Eswatini%20ASWA%20and%20SRI.pdf> (30 September 2023), pg 4.

of fines.<sup>155</sup> Although the Act was theorised to protect sex workers from pimps and exploitation it has been abused by law enforcement.<sup>156</sup>

The Crime Act, 1889 has similar offences such as Immorality and Offences in Public Places<sup>157</sup> relating to keeping of a brothel and living off the earnings of prostitution. Further, Section 49 can be used against sex workers for indecently exposing his person or making indecent signs or gestures,<sup>158</sup> as well as the offence of loitering in any thoroughfare of public place.<sup>159</sup> Despite the Act being so old, it is used as a guise by policy for arbitrary arrests, extortion and perpetrating violence against sex workers. These offences are often handled through informal/traditional courts and the right to a fair trial as well as legal representation is not respected.<sup>160</sup>

The Girls' and Women's Protection, 1920<sup>161</sup> was implemented as an act to provide for the protection of women and girls and deals specifically with offences in relation to girls under sixteen. Section 3(3) provides a defence to men accused of rape or assault with intent to commit rape or any other immoral or indecent acts if the girl was a prostitute. A girl who is under the age of 16 cannot claim protection from the law if someone has sex with her against her will if their defence is that she is a prostitute.

A source who wished to remain anonymous stated that sex workers also fear being insulted or beaten for loitering by law enforcement.<sup>162</sup>

#### 10.5.2. Social Context

Moralistic shaming of sex work is highly prevalent and the rhetoric of "purity" is reinforced by government officials.<sup>163</sup> Politicians and government officials publicly state that sex work is illegal and not allowed.<sup>164</sup> Churches also maintain the moralistic

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<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> Section 31 to 50 of the Crime Act 6 of 1889

<sup>158</sup> Section 49(1)(b) of the Crime Act 6 of 1889. .

<sup>159</sup> Section 49(1)(e) of the Crime Act 6 of 1889. .

<sup>160</sup> The South African Litigation Centre, 2019. "Know Your Rights Sex Work and the Law in Eswatini" [https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/08/SALC-Sex-workers-rights-pamphlet\\_eSwatini-draft-5\\_POLICE.pdf](https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/08/SALC-Sex-workers-rights-pamphlet_eSwatini-draft-5_POLICE.pdf) (30 September 2023).

<sup>161</sup> Girls' and Women's Protection Act 39 of 1920.

<sup>162</sup> Interview held on 20 October 2023.

<sup>163</sup> Supra 154 pg 2.

<sup>164</sup> Ibid pg 5.

perspective that sex work is sinful and a disgrace against tradition.<sup>165</sup> Sex workers cannot access appropriate sexual and reproductive health care, services or information. Discrimination and stigmatisation of sex workers by health care professionals is wide spread and this results in sex workers either not seeking health care out of shame and fear or enduring discriminatory experiences from health care professionals.<sup>166</sup>

The anonymous source reported the depressing situation of discrimination and a lack of equality by donors and partners. It was felt that sex workers remain the victims of the situation even with people they work with on their own programs.

In respect of law enforcement and the justice system, the cases of rape and other types of violence against sex workers is not prioritised by the police and court make judgements about the credibility of a witness based on their sexual history. Courts do not take sufficient measures to protect victims' safety and they are shamed and ridiculed through informal and formal court systems.<sup>167</sup> Sex workers do not know their rights and require access to legal to comprehensive information on legal rights.<sup>168</sup>

The anonymous source also discussed the mental health challenges faced by sex workers as a result of stress, low self-esteem and suicidal ideations.

### 10.5.3. Advocacy Initiatives

The anonymous source explained that their advocacy initiatives include sensitisation of different stakeholders, creating a national whatsapp group for sex workers to communicate, discuss their successes and challenges and to promote solidarity. They also host an annual gathering which is a platform for all stakeholders to share their stories and commit to supporting sex worker movements.

## 10.6. Lesotho

### 10.6.1. Legal Framework

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<sup>165</sup> Ibid

<sup>166</sup> Ibid: pg 2.

<sup>167</sup> Ibid: pg 5.

<sup>168</sup> Ibid.

Section 55 of the Penal Code Act, 2010 adopts a similar approach to Eswatini in that it criminalises the acts of third parties namely pimping and harassing others for purposes of engaging in sexual intercourse. Section 55(1) defines a prostitute as a person who engages in sexual activity for payment. However, Section 55(2) criminalises when “a person who incites instigates or engages or procures another to engage either in Lesotho or elsewhere in prostitution.” Secondly, it criminalises importuning others in a public place with the intention of engaging sexual intercourse or with the intention of facilitating their sexual intercourse with another person.<sup>169</sup> It also criminalises pimping if it can be proven that the person lived or habitually associated with a prostitute or had exercised control or influence for commercial gain.<sup>170</sup>

Despite sex work not being criminalised, the police still arrest sex workers, make them pay bribes or they must perform sexual activities at no fee. In an interview was conducted with Mosooane Lepheana<sup>171</sup> from the Key Affected Populations Alliance of Lesotho (‘KAPAL’), it was explained as if “someone just said that sex work was illegal and then the police started to threaten sex workers. Despite arrests, no sex worker has ever been prosecuted as the law requires that one is “caught in the act”.

Law enforcement also use public indecency law to arrest people. However, public indecency is when someone is naked or doing something inappropriate in a public space. However, if someone is naked and hiding under the trees, then it is not indecency as they were in a private space and it is in fact a violation of their privacy. These results in sex workers and their clients being arrested, however they are never prosecuted as they normally pay a bribe. Law enforcement also make use of traffic laws. Due to the fact that sex workers operate mainly on the streets, the police will arrests the sex worker or the motorist for a traffic violation. However, they let the people go with a bribe.

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<sup>169</sup> Section 55(2) of the Penal Code Act, 2010.

<sup>170</sup> Section 55(4) of the Penal Code Act, 2010.

<sup>171</sup> Interview conducted on 15 September 2023.

In respect of the future of sex work, KAPAL noted that sex workers started advertising online especially using Facebook during COVID. They believe that there should be a discussion around the protection of sex workers online now that the Cybercrimes Bill is being discussed. However, they find themselves in a tricky situation whereas if they discuss sex work outside of the HIV/AIDS framework, then they are told that it is illegal. There is also a further problem that sex workers are operating anonymously online and it may be difficult to protect them.

#### 10.6.2. Social Context

KAPAL which prides itself as the first and only sex worker organisation legally registered in Lesotho.<sup>172</sup> In 2022, KAPAL engaged with members of Parliament, to sensitise them on the existence of sex workers, human rights and to discuss either fully or partial decriminalisation of sex work. One of the challenges is that Lesotho is dominated by Christianity and cultural belief. Politicians fear losing political followers if they immediately jump in and support decriminalisation of sex work. One angle of advocacy that KAPAL has taken is that if Parliamentarians and the Government are against decriminalisation of sex work, then they should also be against taking international funding to combat HIV/AIDS. There should not be double standards.

KAPAL has used the fact that Lesotho has the second highest rate of HIV prevalence in the world to promote decriminalisation. This impacts sex workers and the LGBTIQ+ community in particular, with many new infections emanating from sex work. However, HIV does not just stay with the sex worker it also spreads within communities. The message that KAPAL carries is that it is not only beneficial to sex workers themselves to decriminalise sex work but to the community at large.

In Lesotho, KAPAL has had to focus on advocating for decriminalisation through the lens of HIV because they do not want to lose the support of Parliamentarians, religious and traditional leaders. HIV is the primary focus, however they try to sensitise by advocating that sex work is a means of livelihood and a choice of work and that

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<sup>172</sup> Global Network of Sex Work Projects, 2020. "Key Affected Populations Alliance of Lesotho (KAPAL)" <https://www.nswp.org/featured/key-affected-populations-alliance-lesotho-kapal#:~:text=Currently%20the%20constitution%20of%20Lesotho,is%20neither%20legal%20nor%20illegal>. (1 October 2023).

everyone's bodily autonomy must be respected and that no one must be left behind. HIV has always been the gateway approach for sex workers as a result of the funding made available for the type of work and a way of navigating the religious and cultural beliefs. However, their next project will be to target religious leaders and sensitise them to understand that there are sex workers in their churches and that they should not spread hatred against them.

KAPAL's strategy has also been to have community sessions to discuss sex work openly. From some community discussions, it appeared that people were not actually against sex work as long as it was done in private. They also looked at historical cultural issues where widows are looked after by another man and there may be issues of transactional sex. The communities do not necessarily want brothels as they fear that this will threaten the culture. KAPAL have also observed that they have observed a gender element to the argument against decriminalisation. They believe that men support decriminalisation as they want to pay a standard fee for sex and not have to pay for groceries, rent and school fees. It is women who are insecure and are scared of sex workers stealing their husbands.

In respect of law enforcement, KAPAL described the police as being the biggest clientele of sex workers. When they have money they pay for sex, however when they do not have money then they arrest for sex without payment. They have held sensitisation sessions with the police to try and change this.

The LGBTIQ+ community is also criminalised and at present it is even difficult to start a conversation about the intersection between the discrimination faced by sex workers who are LGBTIQ+.

### 10.6.3. Advocacy Initiatives

KAPAL makes use of the Australian example to introduce anti-stigma or anti-discrimination laws for sex workers. It promotes the rights of sex workers against discrimination and people can be prosecuted for discrimination. It creates a situation where sex work is neither legal nor illegal but rights are protected. They have used this model to challenge Parliamentarians whereby one can live in a country dominated

by cultural and religious beliefs however people are losing their lives and are raped. That is not in keeping with these beliefs and people can be protected through an anti-discrimination type of law. This will give sex workers and civil society the opportunity to advocate for decriminalisation however they are safe in knowing that sex workers are protected when they are accessing health care, living in communities and not being abused by law enforcement.

## 10.7. Madagascar

### 10.7.1. Legal Framework

In terms of the Penal Code, Madagascar has adopted an abolitionist approach. It criminalises pimping,<sup>173</sup> aiding or assisting,<sup>174</sup> sharing in the proceeds of prostitution,<sup>175</sup> living with a prostitute and living off the proceeds of prostitution,<sup>176</sup> hiring, training or maintaining a prostitute,<sup>177</sup> or acting as an intermediary.<sup>178</sup> It is reported in several secondary sources such as the British Embassy in Madagascar<sup>179</sup> that the Malagasy Authorities had introduced laws against consorting with female prostitutes. This could not be confirmed from a primary source of legislation.

### 10.7.2. Social Context & Advocacy Initiatives

There is limited research on the situation of sex workers in Madagascar. In 2015, the State's report to the CEDAW Committee explained that prostitution was as a result of lack of employment opportunities which forced girls to accept suspicious employment contracts.<sup>180</sup>

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<sup>173</sup> Article 334 of the Penal Code of 31 December 2001.

<sup>174</sup> Article 334(1) of the Penal Code of 31 December 2001.

<sup>175</sup> Article 334(2) of the Penal Code of 31 December 2001.

<sup>176</sup> Article 334(3) of the Penal Code of 31 December 2001.

<sup>177</sup> Article 334(4) of the Penal Code of 31 December 2001.

<sup>178</sup> Article 334(5) of the Penal Code of 31 December 2001.

<sup>179</sup> British Embassy Madagascar, 2011. "UK in Madagascar" <https://webarchive.nationalarchives.gov.uk/ukgwa/20110314124058/http://ukinmadagascar.fco.gov.uk/en/help-for-british-nationals/travel-advicee> (19 November 2023).

<sup>180</sup> CEDAW Committee, 2015. "Committee on the Elimination of Discrimination against Women considers the Report of Madagascar" <https://www.ungeneva.org/en/news-media/meeting-summary/2015/11/committee-elimination-discrimination-against-women-considers-3> (19 November 2023).

Given the prevalence of tourism, including sex tourism, and mining in the country, many initiatives in the country focus on combating commercial sexual exploitation of children such as projects by the European Union (“EU”) and ILO.<sup>181</sup> The French NGO ECPAT reported that out of 1237 people engaged in prostitution in the capital Antananarivo, 1132 were under the ages of 18 years.<sup>182</sup> However in Madagascar’s report to the CEDAW Committee, it did not provide concrete evidence of any action to end sexual exploitation.

Despite the limited research on Madagascar, it is a concern that there only appears to be information on sexual exploitation. This paints a picture that all sex workers are victims in need of being rescued from sexual exploitation. This may result in closing of spaces for discussing the rights of sex workers.

## 10.8. Malawi

### 10.8.1. Legal Framework

Malawi has adopted an abolitionist approach to sex work in that it criminalises pimping, living on the earnings of prostitution and keeping a brothel. It specifically delineates the different roles between males and females in prostitution. It criminalises every male who knowingly lives wholly or in part on the earnings of prostitution; or in any public place persistently solicits or importunes for immoral purposes.<sup>183</sup> In respect of women, it also criminalises every woman who knowingly lives wholly or in part on the earnings of prostitution or who, for the purposes of gain, exercised control, direction or influence over the movements of a prostitute as to show that she is aiding, abetting or compelling prostitution.<sup>184</sup> It further criminalises brothel keeping<sup>185</sup> and any type of procuring, soliciting or transporting of a prostitute.<sup>186</sup>

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<sup>181</sup> ILO, 2014. “Combating the commercial sexual exploitation of children in Madagascar” [https://www.ilo.org/global/about-the-ilo/mission-and-objectives/features/WCMS\\_241223/lang--fr/index.htm](https://www.ilo.org/global/about-the-ilo/mission-and-objectives/features/WCMS_241223/lang--fr/index.htm) (19 November 2023).

<sup>182</sup> Ibid.

<sup>183</sup> Section 145 of the Penal Code Chapter 7:01, 2014.

<sup>184</sup> Section 146 of the Penal Code Chapter 7:01, 2014.

<sup>185</sup> Section 147 of the Penal Code Chapter 7:01, 2014.

<sup>186</sup> Section 147A of the Penal Code Chapter 7:01, 2014.

In addition to the direct sex work related offences, the Penal Code also has vagrancy prohibitions in which it criminalises being rogue or vagabond.<sup>187</sup> By way of example, section 184(1)(c) is so broad so as to include that “every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose.” This section is most often used to arrest and prosecute sex workers.<sup>188</sup> However, in 2017 the High Court declared this section unconstitutional and ordered Parliament to review the entire section and to report to the Court on the progress of legislative reform in July 2024. For the moment, the law remains on the Statute books.<sup>189</sup>

In an interview with Vincent Makuluni Thom from Phalombe Youth Arms,<sup>190</sup> it was explained that sex workers are not necessarily arrested based on doing sex work but during law enforcement’s “sweeping exercises”.<sup>191</sup> These sweeping exercises are normally done when there has been a tip off that a criminal is in certain vicinity. However, in November 2022, the High Court of Malawi handed down a judgement declaring the police’s indiscriminate practice of sweeping exercises unlawful and in violation of various constitutional rights and international human rights standards. The Court ordered the Malawi Police Services to develop proper guidelines for arrests.<sup>192</sup>

In the organisation’s experience, they have never heard of any sex worker being apprehended for sex work but if they confess to the police to being a sex worker then they are arrested and charged.

The interview also highlighted that sodomy laws in Malawi also impact on gay and transgender sex workers. Men who depend on sex work will hide their sexuality, as it is not legally or socially allowed.

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<sup>187</sup> Section 184 of the Penal Code Chapter 7:01, 2014.

<sup>188</sup> Global Network of Sex Work Projects, undated. “Malawi”. <https://www.nswp.org/country/malawi#:~:text=Selling%20sex%20is%20legal%20in.ls%20buying%20sex%20criminalised%3F>. (2 October 2023).

<sup>189</sup> Southern Africa Litigation Centre, 2022. “Malawi High Court declares mass arrests (sweeping exercises) unconstitutional” <https://www.southernafricalitigationcentre.org/2022/11/09/news-release-malawi-high-court-declares-mass-arrests-sweeping-exercises-unconstitutional/> (2 October 2023).

<sup>190</sup> Interview held on 19 September 2023.

<sup>191</sup> Crime prevention exercises by law enforcement.

<sup>192</sup> Supra 189.

### 10.8.2. Social Context

The interview with Phalombe Youth Arms elucidated that people fail to tell the difference between prostitution (forced) and sex work (voluntary). Civil society organisations try and steer clear of the word prostitution as it is criminalised in the Penal Code.

Sex workers are routinely harassed by law enforcement officials. The officials know who the sex workers are and demand sex from them for no payment. As highlighted above, sex workers are often caught up in law enforcement's sweeping exercises when they are arrested with other criminals.

There is also difficulty in that organisations associated with sex work and/or LGBTIQ+ may struggle to be legally recognised. For example, in 2017, the Southern Africa Litigation Centre ('SALC') reported that the Board of Trustees of Nyasa Rainbow Alliance, an organisation established to advocacy for the rights of LGBTIQ+ persons in Malawi applied for the organisation to be registered as a Trust under the laws of Malawi. The Ministry of Justice's Department of the Registrar General of Malawi rejected the proposed registration on the basis that the Penal Code criminalises consensual sex between same-sex partners and that the organisation was engaging in unlawful practices. The rejection was challenged in the High Court, however to date it has not sat for hearing.<sup>193</sup>

### 10.8.3. Advocacy Initiatives

In its advocacy initiatives, Phalombe Youth Arms, tries to ensure that sex worker associations have a good relationship with law enforcement to minimise harassment and so that the associations know when sex workers have been arrested or when there are sweeping exercises. The organisation also prioritises including sex workers as part of their organisation however this can be difficult as sex workers often do not publicly want to come forward. They also focus on the intersectionality of sex workers such as assisting men who have sex with men and people with disabilities as they try

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<sup>193</sup> Ibid.

and access sexual and reproductive health services. They are also focusing on improving awareness and education so that both leaders and citizens understand the nature of sex work and the need for decriminalisation.

## 10.9. Mauritius

### 10.9.1. Legal Framework

Mauritius has adopted the abolitionist approach whereby it has criminalised procuring,<sup>194</sup> exploitation,<sup>195</sup> and deriving benefit from prostitution,<sup>196</sup> share in the earnings of prostitution.<sup>197</sup>

### 10.9.2. Social Context

One of the main challenges faced by sex workers is the arbitrary arrests of street-based sex workers. Sex workers are arrested for “being on the streets at night”, “having condoms in their bags” or “wearing an indecent dress”; although these do not constitute formally punishable offenses.<sup>198</sup> A 2014 national survey estimates the sex worker population at 6 223 female, 1649 transgender and a very small number of male sex workers. However, Parapli Rouz believes this to be a gross underestimation and believes the numbers to be at two or three times of the survey. When sex workers are brought before the court, they are sentenced with fines from 2,000 to 8,000 Mauritian rupees and prison terms of up to 3 months.<sup>199</sup>

### 10.9.3. Advocacy Initiatives

Parapli Rouz is the only community-based organisation promoting the rights of sex workers in Mauritius.<sup>200</sup> One of their initiatives is outreach to various workplaces of sex workers around the island. It was reported that the presence of community workers in

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<sup>194</sup> Article 253(1)(a) of the Criminal Code Cap 195 – 29 December 1838 as amended.

<sup>195</sup> Article 253(1)(b) of the Criminal Code Cap 195 – 29 December 1838 as amended.

<sup>196</sup> Article 253(1)(c) of the Criminal Code Cap 195 – 29 December 1838 as amended.

<sup>197</sup> Article 153(1)(c) of the Criminal Code Cap 195 – 29 December 1838 as amended.

<sup>198</sup> Red Umbrella Fund, 2019. “We are Human Before Anything Else” – Sex Worker Organising in Mauritius” <https://www.redumbrellafund.org/we-are-human-before-anything-else-sex-worker-organising-in-mauritius/> 19 November 2023).

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

the areas visibly helped against the impunity of police officers.<sup>201</sup> They have also tried to provide legal support to sex workers who have been charged which has had positive results.<sup>202</sup>

In respect of lobbying institutional representatives, even if they take pro-sex work positions privately, they will never share them publicly. It was explained that Mauritian politicians risk ending their career if they support sex workers' rights.<sup>203</sup>

## 10.10. Mozambique

### 10.10.1. Legal Framework

The law has been described by one human rights organisation, Associação Tiyane Vavasate as not being clear.<sup>204</sup> The laws are also not known by the sex workers and therefore violations continue.

Mozambique has adopted an abolitionist approach whereby only facilitating<sup>205</sup> has been criminalised. There are also public indecency laws which law enforcement can use.<sup>206</sup> The Penal Code criminalises performing acts of a sexual nature in a public place or open or exposed to the public.<sup>207</sup> This has been extended to prohibit the display, making or importing of any sexually explicit content for the purpose of distribution or public exhibition, whether accessible to the public through theatre, radio, television or cinematography.<sup>208</sup> Strict reading of this will mean that strip clubs and any type of pornographic content makers are liable to a criminal offence.

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<sup>201</sup> Ibid.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

<sup>204</sup> Associação Tiyane Vavasate, 2019. Submissão de Associação Tiyane Vavasate ao Comité para a Eliminação de Todas as Formas de Discriminação contra as Mulheres em Moçambique [https://nswp.org/sites/default/files/mocambique\\_relatorio-sombra\\_ao\\_cedaw\\_tiyane\\_vavasate\\_2019.pdf](https://nswp.org/sites/default/files/mocambique_relatorio-sombra_ao_cedaw_tiyane_vavasate_2019.pdf) (19 November 2023).

<sup>205</sup> Article 214 of Law No. 24 of 2019 of 24 December.

<sup>206</sup> Associação Tiyane Vavasate, 2019. Submissão de Associação Tiyane Vavasate ao Comité para a Eliminação de Todas as Formas de Discriminação contra as Mulheres em Moçambique [https://nswp.org/sites/default/files/mocambique\\_relatorio-sombra\\_ao\\_cedaw\\_tiyane\\_vavasate\\_2019.pdf](https://nswp.org/sites/default/files/mocambique_relatorio-sombra_ao_cedaw_tiyane_vavasate_2019.pdf) (19 November 2023).

<sup>207</sup> Article 217(1) of Law No. 24 of 2019 of 24 December.

<sup>208</sup> Article 217(2)(a) and (b) of Law No. 24 of 2019 of 24 December.

Despite the prohibitions, sex workers have been identified as key population groups in the country's National Strategy Plan for HIV/AIDS in Mozambique.<sup>209</sup>

#### 10.10.2. Social Context

In 2019, Associação Tiyane Vavasate, in its shadow report to the CEDAW Committee highlighted that the rights of sex workers are not respect by health care providers and the police.<sup>210</sup>They describe the levels of violence against sex workers at elevated levels and in multiple forms including law enforcement.<sup>211</sup>Sex workers are routinely detained in obvious violation of the law.<sup>212</sup> Many report being arrested and taken to remote areas where they are raped and robbed.<sup>213</sup>Law enforcement are also known to intimidate and rob the sex workers' clients of their money. Clients are often known to pay bribes to the police officers.<sup>214</sup>

Sex workers are discriminated by health care providers including verbal and psychological abuse.<sup>215</sup>Other violations include a lack of confidentiality and privacy and a lack of access to healthcare. Due to these negative experiences, sex workers are reluctant to visit clinics.

#### 10.10.3. Advocacy Initiatives

Despite health care providers receiving sensitisation training in respect of key population groups, sex workers have witnessed an increase in discrimination. Associação Tiyane Vavasate reported that the sensitisation training is failing.<sup>216</sup> In respect of advocacy, they have recommended that health care providers be trained to treat key populations without stigma and discrimination.

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<sup>209</sup> Supra 204.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid,

Associação Tiyane Vavasate are also engaged in constant dialogue with the Government regarding the role of law enforcement in human rights violations of sex workers. They also called for the sensitisation training of law enforcement.

They also want the legal gaps which promote violence and discrimination against sex workers to be addressed. Additional recommendations include promoting the public participation of sex workers in decision-making regarding access to justice, health and human rights, including women sex workers under the mandate of the Ministry of Gender, Children and Social Support, creating legislation which protects the bodily integrity and respect for human rights of sex workers as well as that sex work is work.<sup>217</sup>

## 10.11. Namibia

### 10.11.1. Legal Framework

Namibia has adopted the abolitionist approach whereby sex work is not specifically decriminalised however pimping and running of brothels is a criminal offence. The Combating of Immoral Practices Act<sup>218</sup> specifically criminalises keeping a brothel<sup>219</sup> and that any lease to let any house as a brothel shall be null and void.<sup>220</sup> It further criminalises pimping, wherein any person who procures or attempts to procure any female to have unlawful carnal intercourse with any person other than the procurer<sup>221</sup> or procures or attempts to procure any female to become a prostitute.<sup>222</sup> It further criminalises living on the earnings of prostitution.<sup>223</sup> The Act also has a broad clause which can be used to arrest sex workers namely that “any person who in public commits any immoral act with another person shall be guilty of an offence.”<sup>224</sup>

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<sup>217</sup> Ibid.

<sup>218</sup> The Combating of Immoral Practices Act 21 of 1980.

<sup>219</sup> Section 2 of the Combating of Immoral Practices Act 21 of 1980.

<sup>220</sup> Section 3 of the Combating of Immoral Practices Act 21 of 1980.

<sup>221</sup> Section 5(a) of the Combating of Immoral Practices Act 21 of 1980.

<sup>222</sup> Section 5(c) of the Combating of Immoral Practices Act 21 of 1980.

<sup>223</sup> Section 10(a) and (b) of the Combating of Immoral Practices Act 21 of 1980.

<sup>224</sup> Section 8 of the Combating of Immoral Practices Act 21 of 1980.

In an interview with Love Rachel Gawases from Equal Rights for All Movements,<sup>225</sup> it was also highlighted that municipal by-laws criminalising loitering and public indecency laws are used to arrest sex workers.

The Combatting of Immoral Practices Act is used to punish men who have sex with men or transgender as the crime of sodomy and crimes of unnatural sexual offences still exists.

#### 10.11.2. Social Context

Gawases described Namibia as conservative, in the African sense, rooted in religion and culture. There has also been a conflation of sex work and human trafficking. Opponents to sex work argued that human trafficking will increase once sex work is decriminalised. This argument is proffered even though instances of human trafficking are very low in Namibia and is definitely a case of international arguments influencing the local.

In respect of abuse of sex workers, the Equal Rights for All Movements is of the view that it varies from region to region. In the capital Windhoek, sex workers are arrested, detained and then most likely released after 72 hours before they need to work. However, they need to exchange sex in order to be released. No one has ever appeared before a court of law for sex work as there is never enough evidence to pass the “beyond a reasonable doubt” burden of proof. Evidence is hard to come by in respect of the aspects of the crime. For example, one would need to be caught in the act of sex or soliciting. Law enforcement often tries to rely on condoms to arrest sex workers.

#### 10.11.3. Advocacy Initiatives

The Equal Rights for All Movements has taken on an all-encompassing approach to advocacy. They undertake outreach to law enforcement, communities and Parliamentarians on how the law affects sex workers. They have also extended beyond the HIV lens to advocate for equality, health rights and labour rights as well as

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<sup>225</sup> Interview held on 18 September 2023.

the rights of the LGBTIQ+ community. They advocate that sex work is work and that laws should be protective, inclusive and treat sex workers equally and with dignity. Given the conservative nature of Namibians, the organisation has faced backlash, however activists must be assertive. They are citizens of the country and do not benefit from the law despite a constitutional guarantee to equality. The organisation is often perceived as promoting sex work especially among teenagers and youth. However, they are not promoting sex work, but they are promoting the constitutional human rights of sex workers.

Gawases highlighted that in respect of the LGBTIQ+ community, even if sex work is decriminalised there will still be an element of gay and transgender that will be criminalised. It is important to address the intersectionality of sex work as the LGBTIQ+ community do not enjoy democracy or rights as Namibian citizens. Gawases proffers that it is important to address that people are liberated in totality without any aspect of their lives being outlawed.

Looking to the future of sex work advocacy, the organisation has not started to dealing with issues of whether sex workers are safe online and cyber bullying and it is something they will need to include as more sex work moves online.

## 10.12. Seychelles

### 10.12.1. Legal Framework

Seychelles has adopted an abolitionist approach to sex work. In terms of the penal code, brothel keeping, letting out premises, or being the landlord of a brothel is criminalised.<sup>226</sup> Further, procuring and knowingly living off the earnings of prostitution is criminalised.<sup>227</sup> The practical situation in Seychelles is that the “conflation of sex work and human trafficking has had sex workers vulnerable to human rights abuses.”<sup>228</sup>

### 10.12.2. Social Context

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<sup>226</sup> Article 155 of the Penal Code, 1 February 1955 as amended.

<sup>227</sup> Article 138 and 156 of the Penal Code, 1 February 1955 as amended.

<sup>228</sup> Global Network of Sex Work Projects, 2019. “Seychelles sex workers attend SWAA for the first time.” <https://www.nswp.org/news/seychelles-sex-workers-attend-swaa-the-first-time> 20 November 2023.

Sex workers are victimised because they are perceived as carriers of diseases such as STIs and HIV.<sup>229</sup> The stigma does not only stay with sex workers, but their children are bullied at school. There are also high levels of substance dependency, mainly heroin among sex workers. Many sex workers experienced violence whether at the hands of police, clients or a boyfriend or husband.<sup>230</sup> Sex workers also reported rape and other sexual assault.

Their relationship with the police tended to be poor and sex workers are mainly arrested for loitering, drug use and a small number have reported being arrested for selling sex.<sup>231</sup>

### 10.12.3. Advocacy Initiatives

Sex worker advocacy is very much at the early stages and there are very few organised sex worker focused organisations.<sup>232</sup> This is largely in part due to the country's landscape which is made up of an archipelago of about 115 islands.

In 2017, the AIDS and Rights Alliance ("ARASA") convened a meeting which brought together key populations and health sector representatives to develop a National Advocacy Plan.

Some key areas which the Plan identified included raising awareness among the police, health professionals, social services and civil society organisations about the national situation regarding sex workers, among other key populations; reducing self-stigma among key populations; assisting national efforts in amending legislation such as the Penal Code and other laws to create a conducive environment for service delivery to key populations.

### 10.13. South Africa

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<sup>229</sup> Ibid.

<sup>230</sup> ARASA & others, 2017. "Seychelles National Advocacy Plan 2018-2019." <https://arasa.info/wp-content/uploads/2021/12/seychelles-report-2v2.pdf> (20 November 2023).

<sup>231</sup> Ibid.

<sup>232</sup> Supra 228.

### 10.13.1. Legal Framework

South Africa has adopted a prohibitionist approach to sex work. Sex work is criminalised in South Africa whether the actual act of sex work,<sup>233</sup> pimping<sup>234</sup> or running a brothel<sup>235</sup> through the Sexual Offences Act, 1957. The Sexual Offences Act is similar to the Swazi Act in that it also contains a deeming provision regarding the running of a brothel and voiding of a lease agreement. The act of buying sex, is also criminalised and clients of sex workers can be prosecuted in terms of Section 11 of the Criminal Law (Sexual offences and Related Matters) Amendment Act.<sup>236</sup> As with other countries, the Sexual Offences Act, 1957 is a difficult law to prosecute and requires intensive and intrusive police methods such as entrapment to secure a conviction.<sup>237</sup> Sex workers are seldom brought to court nor they do they receive receipts for the fines paid.<sup>238</sup>

Section 18(2) of the Riotous Assemblies Act<sup>239</sup> is a generally worded law which provides for conspiracy or incitement to commit a crime. In the context of sex work, the client of the sex workers is liable to the same punishment to which the sex worker is liable.

Brothels are often targeted under the Business Act<sup>240</sup> where every business is required to be registered with the necessary municipal council and government department.<sup>241</sup> Brothels may have a license to operate as a massage parlour or escort and then are raised and get a fine for not operating a business in accordance with a license.<sup>242</sup>

Despite the criminalisation of sex work, police do not often enforce the law<sup>243</sup> and they make use of municipal by-laws. The police often target sex workers because they are responding to a complaint from a community member and to satisfy the complaint,

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<sup>233</sup> Section 20(1A)(a) and (b) of the Sexual Offences Act 23 of 1957.

<sup>234</sup> Section 10 and 20 of the Sexual Offences Act 23 of 1957.

<sup>235</sup> Section 2 to 8 of the Sexual Offences Act 23 of 1957.

<sup>236</sup> Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007.

<sup>237</sup> Women's Legal Centre, 2014. "Lawyer's Manual on Sex Work Litigation" [http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual\\_final.pdf](http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf) (30 September 2023), pg. 113. 20 November 2023.

<sup>238</sup> Ibid,

<sup>239</sup> Riotous Assemblies Act 17 of 1956.

<sup>240</sup> The Business Act 71 of 1999.

<sup>241</sup> Section 2(3) of the Business Act 71 of 1999.

<sup>242</sup> Supra 237 pg. 171.

<sup>243</sup> Ibid: pg. 112.

they use the by-laws to remove the sex workers. Municipal by-laws are used in the majority of arrests of sex workers.<sup>244</sup> The procedures under the by-laws are rarely followed and sex workers are required to pay “spot fines” or they are taken to the police cells and held overnight.<sup>245</sup> Municipal by law differ from Municipality to Municipality, however they generally prohibits performing of any sexual act in public, appearing nude or exposing their genitalia or soliciting any person for the purpose of prostitution or immorality.<sup>246</sup>

### 10.13.2. Social Context

Criminalising sex work has not eradicated it, instead the illegal status of sex work has created condition in which exploitation and abuse can thrive.<sup>247</sup> Many sex workers report that they are either arrested or fined for offences that they did not commit.<sup>248</sup> There are also reports that sex workers are raped, sworn at and assaulted by law enforcement or they have to offer sexual acts as a way of bribery.<sup>249</sup> Police also routinely take condoms away from sex workers making them more vulnerable to having unprotected sex and be at risk for contracting HIV.<sup>250</sup>

The WLC<sup>251</sup> explained that sex workers have a lack of access to basic services whether healthcare or social security. They are often met with stigma and stereotypes. The WLC put these issues before the Court in *S v Jordan* so that the court could understand the lived realities of sex workers, however it was met with limited success.

### 10.13.3. Advocacy Initiatives

#### *S v Jordan and others*<sup>252</sup>

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<sup>244</sup> Ibid: pg. 113.

<sup>245</sup> Ibid: pg. 115.

<sup>246</sup> Regulation 2 of the Western Cape By-Laws PG 6469 of 28 September 2007.

<sup>247</sup> Women’s Legal Centre, 2014. “Lawyer’s Manual on Sex Work Litigation” [http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual\\_final.pdf](http://wlce.co.za/wp-content/uploads/2017/02/Lawyer-Manual_final.pdf) (30 September 2023), pg. 111.

<sup>248</sup> Supra 237, pg. 113.

<sup>249</sup> Ibid: pg. 110 and 113.

<sup>250</sup> Ibid: pg. 117.

<sup>251</sup> Interview held on 17 October 2023.

<sup>252</sup> *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae* (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002).

As early as 2002, the Constitutional Court rejected the decriminalisation of sex work in challenging the constitutionality of the Sexual Offences Act in terms of the right of gender equality and equality before the law.<sup>253</sup> The Court was divided in its decision and the majority found against the decriminalisation of sex work while a minority found in favour of decriminalisation.

The Court first needed to determine whether section 20(1)(aA) unfairly discriminated against women. The State argued that upon proper construction the section strikes at both the prostitute and the customer and hence it is not discriminatory.<sup>254</sup> The Court however found that the section penalises “any person” who engages in sex for reward whether male or female prostitutes. The section was gender-neutral. Further, penalising the prostitute only does not amount to direct nor indirect discrimination.<sup>255</sup> The differentiation made by the section must be viewed against the fact that a man or woman who pays for sex is guilty of criminal conduct and liable to the same punishment as a prostitute.<sup>256</sup> The Court found that that the Act pursues an important and legitimate constitutional purposes, namely to outlaw commercial sex.<sup>257</sup> The Court also highlighted that it was not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes.<sup>258</sup> The argument that in practice, only prostitutes were prosecuted and not the customers did also not find favour with the court and that it pointed to a flaw in the application of the law but did not establish a constitutional defect.<sup>259</sup> The argument was also raised that the Sexual Offences Act constrains economic activity. However, the Court found that the legislature has a responsibility to combat social ills and where appropriate to use criminal sanction.<sup>260</sup> The Court emphasized that measures intended to eliminate the harmful effects of prostitution and brothel keeping are clearly measures designed to protect and improve the quality of life. It found that it was not for the Court to pass judgement on the effectiveness or otherwise of the choice made by the legislature.<sup>261</sup> In respect of the privacy challenge, the Court found that when a

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<sup>253</sup> Ibid: para 5.

<sup>254</sup> Ibid: para 8.

<sup>255</sup> Ibid: para 9 and 10.

<sup>256</sup> Ibid: para 11.

<sup>257</sup> Ibid: para 15.

<sup>258</sup> Ibid: para 17.

<sup>259</sup> Ibid: para 19.

<sup>260</sup> Ibid: para 25.

<sup>261</sup> Ibid: para 26.

person commits a crime in private, as with commercial exploitation of sex, a person cannot necessarily claim the protection of privacy clause.<sup>262</sup>The Court concluded that if there is a limitation on the right to privacy then the limitation is justified.<sup>263</sup> The majority decision concluded that the question as to whether the interests of society would be better served by legalising prostitution than by prohibiting it was a decision that must be taken by the legislature and the government of the day. Courts are concerned with legality.<sup>264</sup>The Sexual Offences Act was found not to be unconstitutional on these grounds.

What was clear from the judgement was the Court, was of the view that decriminalisation was up to the legislature and not to the courts to decide.

### *Kylie v CCMA*<sup>265</sup>

In 2010, Kylie was a sex worker and her employment had been terminated without a prior hearing. She referred a dispute to the Commissioner for Conciliation, Mediation and Arbitration (CCMA), which is an alternative dispute resolution mechanism in respect of labour related disputes. The CCMA held that it did not have jurisdiction to hear the matter as employment as a sex worker was unlawful.<sup>266</sup> The decision was referred to the Labour Court, which held that a sex worker was not entitled to protection against unfair dismissal because it would be contrary to a common law principles and that court ought not to sanction or encourage illegal activity.<sup>267</sup> Further, that a contract is illegal if it is contrary to public policy and it is against public policy to engage in a contract with is contrary to law or morality. <sup>268</sup>

On appeal, the Appellant (Kylie) argued that court a quo should have approached the issue by commencing with the Constitution and not contract but rather whether a person, such as the appellant, enjoyed constitutional rights in generally and

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<sup>262</sup> Ibid: para 28.

<sup>263</sup> Ibid: para 29.

<sup>264</sup> Ibid: para 30.

<sup>265</sup> *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA10/08) [2010] ZALAC 8; 2010 (4) SA 383 (LAC) ; 2010 (10) BCLR 1029 (LAC) ; (2010) 31 ILJ 1600 (LAC) ; [2010] 7 BLLR 705 (LAC) (26 May 2010)

<sup>266</sup> Ibid: para 2.

<sup>267</sup> Ibid: para 3.

<sup>268</sup> Ibid: para 7.

specifically the right to be protected against unfair labour practices.<sup>269</sup> Further, that previous decisions had interpreted the provision to include everyone and that the provision was supportive of an extremely broad approach to the scope of the right guaranteed under the Constitution.<sup>270</sup> The Court held that the appellant met the threshold requirement that she was a beneficiary of the applicable constitutional rights.<sup>271</sup>

The Court then needed to determine whether the court can determine a remedy in the case of an alleged unfair dismissal of a sex worker.<sup>272</sup> Even though there was an illegal contract between the parties and the obligations and rights that flowed from them, even if there was no valid contract there was still an employment relationship that fell within the protection of the Labour Relations Act (“LRA”).<sup>273</sup> The Court held that where a sex workers forms part of a vulnerable class by the nature of the work that she performs and the positions that she holds is subject to potential exploitation, abuse and assaults on her dignity, there is no principled reason by which she should not be entitled to some constitutional protection designed to protect her dignity and which protection has been operationalised by the LRA.<sup>274</sup> In concluding, the Court held that the Appellant would not necessarily benefit from the full range of remedies under the LRA such as reinstatement i.e. being ordered to return to illegal work but the LRA was flexible enough to allow an arbitrator a discretion in awarding a remedy.<sup>275</sup> As a sex worker, there should be some protection provided under the LRA, a protection “which can reduce her vulnerability, exploitation and the erosion of her dignity.”<sup>276</sup> The Court concluded that the judgement does not sanction sex work and that was a matter for the legislature.<sup>277</sup> However, the fact that prostitution is rendered illegal does not destroy all the constitutional protection which may be enjoyed by the appellant.<sup>278</sup> However, in determining the remedy, each case will have to be decided in terms of the facts

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<sup>269</sup> Ibid: para 14.

<sup>270</sup> Ibid: para 16 – 18.

<sup>271</sup> Ibid: para 28.

<sup>272</sup> Ibid: para 38.

<sup>273</sup> Ibid: para 38.

<sup>274</sup> Ibid: para 44.

<sup>275</sup> Ibid: para 52.

<sup>276</sup> Ibid: para 52.

<sup>277</sup> Ibid: para 54.

<sup>278</sup> Ibid: para 54.

thereof.<sup>279</sup>The Court set aside the ruling of the Labour Court and determined that the CCMA had jurisdiction to determine the dispute between the parties

#### 10.13.3.1. South African Law Reform Commission

Between 2002 and 2017, the South African Law Reform Commission (the Commission) published Issue and Discussion Papers as well as a Report on Adult Prostitution.<sup>280</sup>During the course of investigation, the Commission identified three central themes to the debate aimed at the legislative reform of adult prostitution, namely whether prostitution is work or exploitation; access to health and prevention of the transmission of HIV; and addressing arbitrary arrest and exploitation.<sup>281</sup>The Commission found that prostitution in South Africa is driven by a complex intersection of social and economic factors in which poverty, unemployment and inequality are key drivers.<sup>282</sup> The Commission was of the view that exploitation, particularly of women in prostitution, seems inherent in prostitution and depends on the external factors of gender violence, inequality and poverty and is not caused by the legislative framework in which it finds itself. The Commission concluded that changing the legislative framework could create an extremely dangerous cultural shift juxtaposed against the high numbers of sexual crimes already committed against women. Women would be considered even more expendable than at present. The Commission noted that the prevalence of prostitution in our society and the inherent exploitation associated with it is primarily a social phenomenon, which is reflective of deep-seated, economic and sexual inequality, and that legal mechanisms to address this social phenomenon are limited and are reactive in nature, but nonetheless necessary.<sup>283</sup>In respect of legislative reform, the Commission preferred the repeal of the Sexual Offences Act and the amendment of the Sexual Offences Amendment Act by the inclusion of offences which criminalise prostitution and prostitution related activities, coupled with an option for people in prostitution to divert out of the criminal justice system so that they can access supportive resources and systems in order to exist prostitution if they

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<sup>279</sup> Ibid: para 56.

<sup>280</sup> South African Law Reform Commission, 2015. "Report Project 107 Sexual Offences Adult Prostitution". <https://www.justice.gov.za/salrc/reports/r-pr107-SXO-AdultProstitution-2017-Sum.pdf> (30 September 2023), pg 2.

<sup>281</sup> Ibid: pg 2.

<sup>282</sup> Ibid: pg 4.

<sup>283</sup> Ibid: pg 4 – 5.

choose to do so.<sup>284</sup>The Commission also found that there was no national strategy to deal with prostitution and that such national strategy should seek to implement the proposed legislation or policy and offer viable alternatives to prostitution including reskilling, health and education initiatives for prostitutes and promote sexual health and safer sexual practices.<sup>285</sup>

When the report was submitted to Parliament, there were two highly polarised groups in favour of partial or full criminalisation of adult prostitution while the other half favoured decriminalisation.<sup>286</sup> All presenters recognised the social ills associated with adult prostitution but those who advocated decriminalisation believed that it would make sex work safer and that sex workers would have easier access to health care and benefit from the relevant labour laws. Advocates for decriminalisation also believed that women needed to exercise their own agency and that the SALRC took a patriarchal position in which the State decided what was best for women. Further, the SALRC had assumed that the sex workers had not chosen their work or the manner of their work.

#### 10.13.3.2. The Commission for Gender Equality

In 2013, the Commission for Gender Equality (CGE) released its official position of decriminalisation of sex work. The position of the CGE was that criminalising had failed sex workers and failed to reduce the levels of sex work and violence against sex workers. The CGE believes that legislation on sex work should adopt the principle of sex work as ordinary work, and all the industry to be governed by existing labour and business laws intended to prevent unsafe, exploitative and unfair business practices.<sup>287</sup>The CGE concluded in advocating for decriminalisation of sex work to fulfil South Africa's constitutional and human rights commitments.<sup>288</sup>

#### Government's Intention to Decriminalise

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<sup>284</sup> Ibid: pg 5.

<sup>285</sup> Ibid: pg 5.

<sup>286</sup> Parliamentary Monitoring Group, 2018. "South African Law Reform Commission Report: Adult Prostitution: response by stakeholders" <https://pmg.org.za/committee-meeting/25902/> (1 October 2023).

<sup>287</sup> Commission for Gender Equality, 2013. "Decriminalising Sex Work in South Africa", pg 6.

<sup>288</sup> Ibid: pg 7.

In November 2022, Cabinet approved the publishing of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill regarding the decriminalisation of sex work for public comments. The Bill intended to decriminalise both the sale and purchase of adult sexual services.<sup>289</sup> At the time of releasing the Bill, the Government's intention was to first decriminalise with regulation to follow at a later state. This was done so as to ensure that sex workers were no longer criminally charged, de-stigmatise and protect sex workers. Blouws from the WLC explained that the Government released this Bill as part of its national objective to address violence against women. Decriminalisation has also been part of the National Strategic Plan. However, by June 2023, the Bill was withdrawn after the State's legal advisors flagged serious shortfalls as it was doubtful that Cabinet would approve the bill if the necessary regulations were not yet in place. These regulations would deal with brothels or how each municipality's by laws would be impacted. This would only be done under the next administration as South Africa holds general elections in 2024.<sup>290</sup> Civil society organisations expressed their disappointment that they would not achieve decriminalisation by 2024, however they supported the view that regulations were needed including how bylaws would be affected, regulations around brothels and the legal age of consent and employment.

The view from the WLC is that they are "back at square one" in having gone from almost achieving decriminalisation to achieving zero.

#### 10.13.4. Lessons Learnt

Out of all the countries in the SADC, South Africa has come the closest to decriminalisation. The interview with the WLC shared the following lessons:

- Being prepared for the push back from the anti-rights, religious and moral groups. The dominant narratives that sex workers are associated with drugs, human trafficking and other social ills still exist.

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<sup>289</sup> South African Government, 2022. "Minister Ronald Lamola on Criminal Law Amendment Bill of 2022 – decriminalization of sex work". <https://www.gov.za/speeches/speaking-notes-%E2%80%93-media-briefing-criminal-law-sexual-offences-and-related-matters-amendment> (20 November 2023).

<sup>290</sup> Liezl Human, 2023. "'Tough blow' for sex workers as decrim bill delayed". *Ground Up*. <https://www.groundup.org.za/article/sex-work-decriminalisation-bill-heads-back-to-the-drawing-board/> (16 August 2023).

- In addition to litigation make sure to use communication and social media to paint how sex workers contribute to the wellness of society. There needs to be a multi-prong approach to advocacy and one cannot rely on litigation alone. This needs to include education and training.
- Be aware of how much influence there comes from outside your own country. When the decriminalisation Bill was released, there was an influx of opposition from the global North.
- Start consulting with sex worker communities to understand the type of environment they want to work in. This will inform proposals for regulation of sex work.

## 10.14. Tanzania

### 10.14.1. Legal Framework

Tanzania has adopted an abolitionist approach in criminalising third parties. The Penal Code criminalises procuring,<sup>291</sup> living off the earnings of prostitution<sup>292</sup> or soliciting,<sup>293</sup> using a house for prostitution,<sup>294</sup> and brothel keeping.<sup>295</sup> Further, idle and disorderly persons are defined as “a common prostitute behaving in a disorderly or indecent manner in a public place or loitering or soliciting in a public place for the purposes of prostitution”,<sup>296</sup> “a person who without lawful excuse publicly does an indecent act”<sup>297</sup> and “a person who solicits for immoral purposes”.<sup>298</sup>

In an interview with Koshuma Mtengeti (“Mtengeti”) from the Children’s Dignity Forum (“CDF”), it was explained that sex workers are mainly arrested for loitering. However, by the next day they are released as they cannot be charged with anything substantive.

### 10.14.2. Social Context

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<sup>291</sup> Article 139 of the Penal Code, 22 June 2022.

<sup>292</sup> Article 145(1)(a) and 146 of the Penal Code, 22 June 2022.

<sup>293</sup> Article 145(1)(b) of the Penal Code, 22 June 2022.

<sup>294</sup> Article 147 of the Penal Code, 22 June 2022.

<sup>295</sup> Article 148 of the Penal Code, 22 June 2022.

<sup>296</sup> Article 176(a) of the Penal Code, 22 June 2022.

<sup>297</sup> Article 176(f) of the Penal Code, 22 June 2022.

<sup>298</sup> Article 176(g) of the Penal Code, 22 June 2022.

Mtengeti highlighted that sex workers are harassed by police, arrested and they often take their money and belongings. In more serious cases, sex workers have been raped by the police.

There is also a lack of understanding around sex work. There is an image that it is mainly very poor women engaged in sex work. However, there are varying degrees such as women who are engaged in sex work with Parliamentarians. "Sex workers follow where business is."

Accessing sexual and reproductive health and rights is also a challenge for sex workers. There are issues of affordability as well as stigma when they do manage to access clinic.

Culture and religion play a major obstacle in the decriminalisation agenda. There is a tendency for Tanzanians to say, "this is not in our culture". However, Mtengeti does not know which culture they are speaking about in the first place. In terms of religion, Islam and Christianity are the two major religions in Tanzania. The religious leaders are very outspoken on the issue of sex work and oppose it vehemently.

Due to these religious and cultural constraints, the LGBTIQ+ community face severe discrimination. They experience stigma when going to the hospital and very few come from wealthy families who can afford private health care. Mtengeti also explained that the draconian laws imposed in Uganda are starting to have a regional affect whereby neighbours are also considering imposing similar laws.

#### 10.14.3. Advocacy Initiatives

Mtengeti explained that it is a sensitive matter to talk about sex work. Mtengeti was of the view that there should be a law that protects or at a least a mechanism to protect sex workers. In respect of this law, Mtengeti does not believe taking a business angle such as taxing and licensing will work in Tanzania. The advocacy should take the health or social side as preventing HIV/AIDS.

In Mtengeti's experience, a good way to get the compassion of the public is to push forward the notion that sex workers are just human beings and they have responsibilities. They are mothers and sisters and together with their mothers, the children suffer when their mothers are arrested. They still need to go to school the next day and eat, despite their mother being detained.

In respect of lobbying Parliamentarians, Mtengenti described them as hypocritical. Behind closed doors, they support the decriminalisation however in public they are against it. This also occurs in the context that there are many sex workers stationed in Dodoma which serves as the administrative and Parliamentarian capital of the country.

There is a long road for sex workers in Tanzania and Mtengeti explained that there is a need to build strong movements. These movements must first start discussing decriminalisation through the human rights lens and then through the business lens.

## 10.15. Zambia

### 10.15.1. Legal Framework

Zambia has various provisions dealing with human trafficking and has specified different ages dependent on the age of the girl.<sup>299</sup>The Penal Code criminalises procuring any girl or woman into prostitution,<sup>300</sup>soliciting or living off the proceeds of prostitution,<sup>301</sup>and brothel keeping.<sup>302</sup>

Zambia, similar to Mozambique, criminalises producing or being in possession of obscene writings, photographs or cinematograph films,<sup>303</sup>running a business concerned with such matters,<sup>304</sup> advertising or publicly exhibiting any indecent show or performance.<sup>305</sup>As with Mozambique, owning a strip club or making and distributing pornography is a criminal offence.

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<sup>299</sup> Section 143 and 144 of the Penal Code, 1 November 1931 as amended.

<sup>300</sup> Section 140 of the Penal Code, 1 November 1931 as amended.

<sup>301</sup> Article 146(1)(a) and (b) and Section 147 of the Penal Code, 1 November 1931 as amended.

<sup>302</sup> Article 148 and 149 of the Penal Code, 1 November 1931 as amended.

<sup>303</sup> Article 177(1)(a) of the Penal Code, 1 November 1931 as amended.

<sup>304</sup> Article 177(1)(c) of the Penal Code, 1 November 1931 as amended.

<sup>305</sup> Article 177(1)(e) of the Penal Code, 1 November 1931 as amended.

Zambia also criminalises idle and disorderly persons who have been defined as “every common prostitute behaving in a disorderly or indecent manner in any public place”,<sup>306</sup> “every person who, without lawful excuse, publicly does any indecent act”<sup>307</sup> and soliciting for immoral purposes”.<sup>308</sup>

In a report by the Southern Africa Litigation Centre (“SALC”), it was reported that these provisions are seldom enforced because they require police officials to investigate and provide evidence. Evidence of these offences are difficult to obtain. The police authorities instead use vagrancy provisions to arrest and detain sex workers.<sup>309</sup> As demonstrated above, the vagrancy laws are broad and arbitrarily applied by police officials.<sup>310</sup> Sex workers are included in the National AIDS Strategic Framework as key population for the promotion of HIV prevention.<sup>311</sup>

#### 10.15.2. Social Context

SALC reported that sex workers experience violence from police and clients, and they are often forced to give their money over to police.<sup>312</sup> The violence can be the most severe resulting in sexual assault and rape.<sup>313</sup> They are also forced to have sex with them in exchange for avoiding arrest. Police also confiscate condoms from sex workers. Despite abuse from various sectors, sex workers are reluctant to report to the police as they believe they will be abused further or the nothing will be done.

Sex workers also experience challenges in respect of accessing sexual and reproductive health and rights. SALC explains that one may not be able to access condoms without undergoing voluntary counselling and testing or other

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<sup>306</sup> Article 178(a) of the Penal Code, 1 November 1931 as amended.

<sup>307</sup> Article 178(e) of the Penal Code, 1 November 1931 as amended.

<sup>308</sup> Article 178(g) of the Penal Code, 1 November 1931 as amended.

<sup>309</sup> Southern Africa Litigation Centre, 2016. “They should protect us because that is their job”: A preliminary assessment of sex workers’ experiences of police abuse in Lusaka, Zambia.” <https://www.southernafricalitigationcentre.org/wp-content/uploads/2016/09/They-should-protect-us-pblctn.pdf>. (20 November 2023).

<sup>310</sup> Ibid.

<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

treatment.<sup>314</sup> Sex workers also experience stigmatising attitudes from health care providers.

The Zambia Sex Workers Alliances (“ZASWA”)<sup>315</sup> also reports stigma and discrimination from the communities where sex workers live and work. They also highlight the parallel programming that aims to “reform” sex workers which results in stigmatisation.

### 10.15.3. Advocacy Initiatives

There is limited research about sex workers in Zambia. By way of example, there is only one sex worker-led organisation in the country namely ZASWA.<sup>316</sup> ZASWA reported a lack of direct funding to the sector. They also report on the challenges with non-sex worker-led organisations who provide health services but do not recognise sex work as work. A further issue is the lack of research about sex work and sex workers to inform advocacy and programming.

## 10.16. Zimbabwe

### 10.16.1. Legal Framework

The Criminal Law (Codification and Reform) Act<sup>317</sup> adopts an abolitionist approach whereby pimping, keeping a brothel and living off the proceeds of prostitution are criminalised. Section 81 specifically criminalises soliciting in a public place or soliciting in any printed or electronic medium for reception by the public. Zimbabwe has been specific to include electronic mediums which would include social media.

Section 82 criminalises keeping a brothel or any person who demands payment or reward from a prostitute. This results in landlords being punished, if it is found that they lease rooms or houses to sex workers.<sup>318</sup> It further criminalises living off or facilitating prostitution. Section 83 criminalises procuring any other person to engage

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<sup>314</sup> Ibid.

<sup>315</sup> Global Network of Sex Work Projects, 2019. “Zambia Sex Workers Alliance” <https://www.nswp.org/featured/zambia-sex-workers-alliance> (20 November 2023).

<sup>316</sup> Ibid.

<sup>317</sup> The Criminal Law (Codification and Reform) Act 23/2004.

<sup>318</sup> interview held on 15 September 2023.

in unlawful sexual conduct with another person or to become a prostitute. In addition to criminalising sex work, Zimbabwe still has sodomy laws and same sex relationships are generally taboo.

In 2014, nine women were arrested for solicitation and subsequently convicted. The law, however stipulates that both the conduct of solicitation must be specified i.e. evidence of a proactive attempt to procure a client rather than based on the person's location and/or clothing and the person who was being solicited must be present in court. A Constitutional Court challenge successfully argued that the conviction was in violation of the right to personal liberty including the right not to be arbitrarily arrested and the right to equality.<sup>319</sup> Many Zimbabweans took this to mean that the Court had legalised sex work. Unfortunately, the judgement did not have that effect but rather it means that it will be more difficult to arrest and prosecute sex workers. In this case, no proof was presented by the prosecution that there had in actual fact been soliciting for the purposes of prostitution.<sup>320</sup> Further, the men who were allegedly being solicited were not in court to give evidence that these women were soliciting them for prostitution. Despite this court ruling, there are still instances where sex workers are arrested or harassed by police. Police will, for example, place condoms in the pockets of sex workers. There are still reports of sex workers being arrested and being made to bribe the police with sex.

An interview with Hazel Nesu from Own Women Advocacy<sup>321</sup> also highlighted the irregularities in respect of the age of consent. For example, one can consent to sex at 16 years old, however the marriage age is 18 years. Secondly, one can consent to sex at 16 but cannot request sexual and reproductive health services if they are younger than 18 years. There needs to be an alignment in the different ages as this will inevitably affect sex work if it were ever to be legalised.

#### 10.16.2. Social Context

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<sup>319</sup> Joanna Busza and others, 2017. "Good news for sex workers in Zimbabwe: how a court order improved safety in the absence of decriminalization". <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5515058/> (15 September 2023).

<sup>320</sup> The Herald, 2015. "Unpacking law on prostitution...Women have the same right to Freedom of Movement as Men". <https://www.herald.co.zw/unpacking-law-on-prostitution-women-have-the-same-right-to-freedom-of-movement-as-men/> (2 October 2023).

<sup>321</sup> Interview held on 21 September 2023.

In an interview with Chipiwa Mugabe from the Space for Marginalised Groups in Diversity Zimbabwe Trust ('SGDZT')<sup>322</sup> she explained that it is very difficult in Zimbabwe when it comes to issues of marginalised groups especially if one advocates for the rights of LGBTIQ+ persons. In respect of LGBTIQ+ persons, Mugabe was of the view that there has been some progress in Zimbabwe whereby transgender persons are accepted however men having sex with men is still taboo.

The issue of accessing health care by sex workers, is not only about physical health but also mental health. Some issues include increases in drug use by sex workers either as a result of their personal circumstances or the difficulties in undertaking sex work.

#### 10.16.3. Advocacy Initiatives

Nesu described Zimbabwe as being patriarchal and deeply religious. Hence, CSOs cannot “ask for everything all at once”. CSOs need to be strategic and take it one step at a time. For example, at present One Women Advocacy’s strategy is to focus on decriminalisation first and then advocate for an enabling environment for sex workers. They have started the decriminalisation process by “normalising” the discussion of sex work. They have taken the example of the “small houses” in Zimbabwe, whereby a man in a relationship is supporting another woman and/or family. Transactional sex takes place whereby the man supports the woman in return for sex. The objective is to make Zimbabweans understand that it is all transactional sex and should therefore not be criminalised. Sex workers on the street are being targeted, while there are other forms of transactional sex that are deemed acceptable by society.

Despite the discriminatory environment in which organisations operate SGDZT have taken the approach that to rely on the Constitution which guarantees equality and non-discrimination and the right of health to all. SGDZT uses these sections to promote the rights of sex workers to health services without discrimination and stigma. Further,

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<sup>322</sup> Interview held on 15 September 2023.

they promote sex work as work and engage with various UN and ILO agencies to fight discrimination and stigma in Zimbabwe.

SGDZT has also started looking at the mental health of sex workers which is often ignored and the discourse is dominated by physical health. SGDZT has had some success as in Masvingo province, sex workers can freely access services at local clinics and the community have taken a stand against police abuse of sex workers.

SGDZT aims to ensure that their programmes are owned and managed by sex workers. By doing this, sex workers are given self-determination. Mugabe highlighted that “when I am the one being criminalised, I should have the power and respect that is promoted within the law”.

The issue of sex workers also needs to become more political, in Mugabe’s view. Sex workers should also run for political office in order to ensure their representation and agency. Nesu also touched on this that no Parliamentarian has had the guts to debate the issue of sex work in Parliament. In respect of online security of sex workers, SGDZT had been engaged in training sex workers on online safety however they need to do more work in this area.

Nesu also highlighted the importance of timing in Zimbabwe. CSOs are focusing on grassroots engagement, policy discussions and awareness raising with religious and political leaders. They know that in Zimbabwe, they will not have any success by taking to the streets. Their strategy is about strategic engagement not activism. They focus on presenting data such as the increase in HIV infections with sex work to persons so that there is understanding and normalising of the issues.

## **11. Conclusion**

Despite different languages and legal systems, sex workers experience the same stigma and discrimination whether from law enforcement, health care service providers or the public.

Out of the 16 SADC countries, only two have implemented a prohibitionist approach while the rest have an abolitionist approach to sex work. Despite this, law enforcement in the SADC has decided to target sex workers and not the third parties it aims to protect sex workers from. Law enforcement has instead relied on overly broad legislation to criminalise sex workers. These include morality law, public indecency law and nuisance laws. There is clearly a misinterpretation of the law throughout the region. This is further exasperated by the fact that sex workers are not aware of their rights.

However, even if they were aware of their rights, they do not have adequate support structures. Even human rights organisations discriminate against sex workers. There is little legal support whereby sex workers could call on a legal practitioner to argue their case to a police officer or a prosecutor. Due to this, sex workers resort to “bribing” law enforcement with offering sex or they are raped.

In respect of access to health and reproductive health and rights, sex workers experience stigma and discrimination. Despite being key populations within many countries’ national AIDS strategies, they still have difficulty in accessing health care.

A further problem is that either criminalisation or discrimination of the LGBTIQ+ community exists in the SADC. This results in further challenges for sex workers who belong to this community.

## **12. Recommendations for Advocacy**

### **12.1. Definition of Sex Work in the SADC**

From the interviews and desktop research, there is a need to understand what sex work means in the SADC. Due to conservative and religious standpoints, various aspects of sexuality are criminalised whether it is paying for sex or paying for entertainment such as strippers and pornography actors. This will require a consultation with various sex workers movements throughout the region to develop a consensus on the definition and to develop a SADC wide strategy for placing the sex worker agenda at the SADC level.

## 12.2. Piecemeal Approach to Advocacy

As a result of the conservative nature of the societies in the SADC, the current advocacy initiatives are focused primarily on decriminalisation and with that a normalising of sex work. The problem with this, as evident by the situation in South Africa, is that once the Government or Parliamentarians have been convinced that sex work should be decriminalised then the process could be delayed due to the lack of an enabling framework. Sex worker activists and CSOs should start developing a framework such as a model law on what sex worker regulation should look like. Such a framework should address issues such as age of consent for sex work, registration with councils or with ministries of labour as businesses and employers, access to social security such as unemployment insurance, maternity and paternity benefits, labour rights such as regulation of working hours and access to health care services such as HIV/AIDS or mandatory STI testing. The movement runs the risk that regulation will be created without their involvement and left solely up to politicians. Decriminalisation is not the silver bullet to creating a conducive environment which upholds and respects the rights of sex workers.

Sex worker movement should also join forces with other groups from the key populations groups as the public morality and nuisance laws criminalise these groups of people. Groups representing the key population groups could collectively lobby for the decriminalisation of these laws as they impact the marginalised of society.

In addition to envisaging a conducive environment to sex work, the sex workers movement in the SADC should consider awareness raising initiatives where the law is explained to law enforcement, policy and law makers and the greater public. It is only in South Africa and Comoros which have criminalised sex workers, however all other countries in the SADC criminalise the third parties. Sex workers are the wrong group to be arrested and detained. A second aspect is to capacitate sex workers more strongly and educate them on their rights, that they can adequately defend themselves to police, the prosecuting authority and perhaps even judicial officers so that if they cannot afford a legal representative or cannot access legal aid, that they have the means to at least try and defend themselves.

Parapli Rouz reported that “funders tend to focus strongly on HIV/AIDS on the African continent, which often makes it difficult for civil society organisations to extend their activities beyond health services and to work on a rights-based approach.” They were able to dedicate more time to external advocacy and while still working on HIV prevention, they have a comprehensive advocacy plan targeting health providers, politicians, police and media.<sup>323</sup>

### 12.3. The LGBTIQ+ Community on the periphery

An observation from many of the interviews was that many interviewees were reluctant to talk about LGBTIQ+ issues and this is understandable given the levels of criminalisation. However, even if sex work is decriminalised in the SADC, the LGBTIQ+ community will still be criminalised as they will not be able to engage in same sex transactions. Advocacy for decriminalisation will need to include anti-discrimination against LGBTIQ+ sex workers to ensure that they are protected. Given the intense opposition domestically to LGBTIQ+, the SADC has the potential to take a driving seat in promoting the rights of the LGBTIQ+ community to support the work of grassroots organisations.

### 12.4. Focusing on traditional methods of sex work

Most of the organisations interviewed are focused on the traditional methods of soliciting and procuring sex work, namely in streets, hotels and bars. However, the COVID pandemic increased the use of social media to advertise and attract customers. The online safety of sex workers needs to be considered including how to prevent harassment and cyberbullying.

One example in the DRC was that in 2019, was that a female sex worker was kidnapped and humiliated by a group of married women. The attack was published on social media. Despite complaints by activists in the DRC, no action was taken against the women. As the author of the social media lived in Belgium, a criminal

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<sup>323</sup> Red Umbrella Fund, 2019. “We are Human Before Anything Else” – Sex Worker Organising in Mauritius” <https://www.redumbrellafund.org/we-are-human-before-anything-else-sex-worker-organising-in-mauritius/> 19 November 2023).

complaint was lodge in Belgium where she was finally arrested for kidnapping, sexual violence, beatings and naked humiliation on social media and sentenced to a prison term.

#### 12.5. Conflating of sex work and sex trafficking

In Namibia and South Africa, opponents to sex work have linked its decriminalisation to sex trafficking. This is largely in keeping with the international communities approach to sex work and sex trafficking. This is unhelpful to sex workers and denies them their agency. The SADC has the potential to diffuse this debate by supporting the factual position that legalising sex work has not led to an increase in sex trafficking and promoting the agency of people who choose to do sex work.

#### 12.6. What should be done at the SADC level?

KAPAL (Lesotho) calls for accountability at the highest level. If the SADC region is serious about ending HIV and that new infections are emerging from sex workers, then the SADC needs to be enforcing its own protocols and policies. They need to encourage states to repeal punitive laws that discriminate against key populations. Money is being pumped into the fight against HIV but with no results.

The Equal Rights for All Movements (Namibia) is that SADC leaders need to work at understanding what sex work is and the impact of criminalisation. There needs to be a better understanding of all the rights that are affected by the criminalising of sex work and a better understanding of the intersectionality of sex work. There also needs to be a better understanding of the difference between sex work and human trafficking. The narrative around sex workers needs to change as these are citizens who contribute to the national economic GDP and contribute towards the economy and can increase tourism. It is important to decriminalise sex work to avoid the negative consequences that criminalisation is having on society. The Pilot Mathambo Centre for Men's Health (Botswana) suggested that the SADC develop a collective strategy around sex work so that it would trickle down to the individual member States. However, this should not simply be left in the hands of the Member States and CSOs and communities should be involved and forums such as SADC-Parliamentary Forum

(SADC-PF) would be a great avenue for promoting the rights of sex workers. There is also a need for sex worker CSOs to work together and be strengthened. CDF (Tanzania) was of the view that if the issues of sex workers could be discussed at a regional level, then it would allow for more freedom to discuss at the local level.

The Pilot Mathambo Centre for Men's Health (Botswana) proffered that the SADC and its various functions, if working properly would be an adequate mechanism to prevent and combat human trafficking. If human trafficking was properly dealt with, then there would not be this conflation between sex work and human trafficking.

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