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Sex Work in the SADC Region:  
The Importance of Creating a  
Framework to Protect Sex  
Workers from HIV and Human  
Rights Abuses

Master thesis  
30 credits (30 ECTS)

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Master's Programme international Human Rights Law

Spring 2010

This Research was Commissioned by ARASA(The Aids and  
Rights Alliance of Southern Africa)

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# Summary

Sub Saharan Africa is the region most affected by HIV in the world. There is evidence that commercial sex work is a significant factor in many countries and preventing HIV infection amongst those involved in the sex trade has proven to be an instrumental part of many countries' fight against AIDS. However these preventative measures cannot be implemented effectively with the current lack of legal protection available to sex workers within the SADC region, and leaves this already vulnerable group unable to protect themselves and their clients from HIV infection.

After examining the legal position of sex workers in each of the SADC countries, in conjunction with individual research projects and the descriptions of public attitudes, the following conclusions were drawn: 1) There has been very little research carried out with regard to sex workers, however what little research exists indicates very high levels of HIV among the sex worker population – HIV prevalence rates amongst sex workers as high as 86% in Zimbabwe and 70% in Namibia been recorded. 2) The legal position of sex workers varies in each of the SADC countries with eight countries having laws explicitly criminalising sex work. Similar reports of police harassment, client abuse, inadequate health care, and exploitative working conditions emerge throughout the region - even in countries where sex work is not regarded as a criminal offence. 3) Research indicated that sex workers throughout the region are often targeted indirectly by public by-laws such as public nuisance offences. 4) Public attitudes varied according to the country, but in general they were negative, this was a particular problem with regard to healthcare workers and the police force, which affected sex worker's ability to access healthcare and police protection.<sup>1</sup>

In view of the absence of research on sex work within SADC, it is impossible to determine how many sex workers are currently operating within the SADC region and how many are living with HIV or AIDS. From the limited research available, it is clear that sex workers have extremely high levels of HIV and should be the focus of social, legal and health interventions based firmly within a human rights framework. What is evident is that regardless of whether harmful legislation exists or not, sex workers are negatively affected to a similar degree. It is therefore imperative that not only is the industry decriminalized throughout the region, but that laws are put in place regulating the industry and providing sex workers with regular labour protections.

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<sup>1</sup> This research was carried out in conjunction with ARASA (The Aids and Rights Alliance for Southern Africa)

# Methodology

The fight against HIV has increasingly been conducted on a regional basis in the SADC region through an integration of policies and partnerships amongst organisations which deal with HIV. What is becoming increasingly apparent however, despite evidence that sex workers are extremely vulnerable to HIV, is that they are largely ignored in the fight against HIV on a regional basis and that a dearth of research exists. This is attributed to the criminalisation of the industry and the underground nature of the work. The purpose of this thesis was to look at this issue on a regional basis to determine if in fact a connection exists, and if sex workers are experiencing similar problems on a regional basis.

This objective was achieved by looking at legislation affecting sex workers, or lack thereof, in each of the SADC Countries in order to gain an insight into the effect that these laws have on sex worker's ability to access health care facilities and practice safe sex and thus protect themselves from HIV. Individual research projects carried out in various SADC countries were looked at in conjunction with this legislation to establish whether a connection existed. Indirect policies relating to gender discrimination and police harassment were also looked at in light of sex worker's perceptions of their personal identities and the influence this has on their ability to take precautions during high-risk sexual encounters.

# Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
ARASA	AIDS and Rights Alliance for Southern Africa
CARE Everywhere	Cooperative for Assistance and Relief
CSW	Commercial Sex Workers
DRC	Democratic Republic of the Congo
EU	European Union
ECJ	European Court of Justice
HIV	Human Immunodeficiency Virus
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organisation
IRIN	Integrated Regional Information Networks
LAC	Legal Assistance Centre
LRC	Law Reform Commission
PEPFAR	President's Emergency Plan for AIDS Relief
PSI	Population Services International
UDHR	Universal Declaration of Human Rights
UNAIDS	United Nations Joint Program on HIV/AIDS
UNICEF	United Nations Children's Fund
SADC	Southern African Development Community
SALC	South African Law Commission

SIECUS	Sexuality Information and Education Council of the United States
SOSPA	Sexual Offences Special Provisions Act
SWEAT	Sex Worker Education and Advocacy Task Force
WAG	Women's Action Group
WHO	World Health Organisation

# 1 Introduction

*To be able to advocate for the suppression of commercial sex, one's outlook must, I think, be completely ahistorical. For if there is one single general truth about human societies, it is that all attempts at suppressing prostitution – and they are innumerable – have failed completely... History also teaches us that the effects of attempted suppression of prostitution are usually devastating, particularly for the prostitutes. As far as I can see, it would take at least a society as repugnant as that described by Orwell in 1984, in terms of totalitarian and coercive measures, to suppress prostitution. And who but a fanatic antiprostitutionalist would be willing to achieve this end at that price.'*<sup>2</sup>

Sex work has increasingly become a form of labour performed for income. Many enter in to sex work as the only means of survival for themselves and their families. Various factors have contributed to the growth of sex work in the SADC region such as poverty, gender inequality, and abuse.<sup>3</sup> Regardless of the reasons why an individual chooses to enter in to sex work, it is a profession which represents a proportion of the female population which has been increasing in recent years and is too large to ignore. Mozambique's Deputy Minister of Women's Affairs and Social Welfare, Joao Kandiyane recently declared that it is “urgent that each southern African country should establish a legal framework appropriate to its own reality, in order to respect the fundamental rights of prostitutes.”<sup>4</sup>

Whilst it is dangerous to suggest that sex workers are the only high risk group, it is a reality that significantly higher rates of HIV infection have been documented amongst sex workers. Harmful legislation or a lack of legislation leaves sex workers in a vulnerable position, as a marginalized group who have limited access to health care, who are abused and exploited, who are prohibited from demanding safe working conditions, and who do not have access to police protection. SWEAT<sup>5</sup> argues that the only argument against placing the rights of sex workers on a legal footing is a moral one

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<sup>2</sup> Ericsson L. O., ‘Charges against Prostitution: An Attempt at a Philosophical Assesment’, in Gruen, L; Panichas, G.E, (1997) ‘Sex, Morality and the Law’ Routledge, p. 93

<sup>3</sup> Perschler-Desai, Viktoria, *Childhood On The Market: Teenage prostitution in Southern Africa*, African Security Review Vol. 10 No 4, 2001

<sup>4</sup> Katerere, F, (2007) *Mozambique: Respecting sex work*, Agencia de Informacao de Mocambique (Maputo), 5 November

<sup>5</sup> SWEAT (Sex Worker Education and Advocacy Taskforce) is a non-governmental organization based in Cape Town, which provides information and education to sex workers on the issues of safer sex and human rights.



and such an argument cannot justify the adverse effects which harmful legislation creates.<sup>6</sup>

In eight of the fourteen SADC countries sex work is currently criminalized. In Mozambique, Malawi, DRC, Angola, Lesotho, and Madagascar it is neither legal nor illegal. Sub Saharan Africa is the region most affected by HIV in the world, with current figures been estimated by UNAIDS at 22.5 million.<sup>7</sup> There is evidence that commercial sex work is a significant factor in many countries and preventing HIV infection amongst those involved in the sex trade has proven to be an instrumental part of many countries' fight against AIDS.<sup>8</sup> However these preventative measures cannot be implemented effectively with the current lack of legal protection available to sex workers within the SADC region.

There has not been much debate in Southern Africa, as a region, with regard to the legalisation of sex work, although there has been some intensification of debate with regard to the issue in South Africa with the advent of the 2010 Soccer World Cup. It is necessary before entering in to any form of debate that there is a basic understanding of the primary issues involved, that prejudicial myths are dispelled, and that supportive research exists to support claims that legalisation is necessary to allow sex workers to work in an environment where they are protected from abuse, discrimination and inadequate health care. The second chapter of the thesis will concentrate on understanding what constitutes commercial sex work as well as discussing moral issues which generally abound when discussing the topic. Defining sex work is not always easy, particularly when looked at in the regional context of Southern Africa, where as an occupation it can appear in many different forms, for instance sex is not always exchanged for money nor is the occupation always conducted on a fulltime basis. The moral issue will also be looked at in the context of the two opposing views which exist with respect to the legalisation of sex work, which is important when understanding barriers which might exist in proposing legislative change. The third chapter will look at barriers which exist with respect to access to health care. This will be looked at under three different headings. Firstly, misconceptions which generally exist with respect to the industry are dealt with, such as the confusion which exists between trafficking and commercial sex work. Secondly, studies which look at how sex worker's self perception of their personal identities affect their ability to access healthcare will be examined and lastly funding plans which hinder access to condoms will be considered. The fourth chapter will look at successful preventative methods which have been proven to reduce the levels of HIV amongst the sex worker population, such as law reform and respect for

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<sup>6</sup> Alexander, H., (2006) 'Morality and Human Rights: the Sex Work Debate', Rights Now, June Issue @ [http://www.sweat.org.za/index.php?option=com\\_content&task=view&id=58&Itemid=28](http://www.sweat.org.za/index.php?option=com_content&task=view&id=58&Itemid=28)

<sup>7</sup> UNAIDS 'Sub Saharan Africa' Joint United Nations Programme on HIV/AIDS, @ <http://www.unaids.org/en/CountryResponses/Regions/default.asp>

<sup>8</sup> AVERT (2008), *Why Is 'AIDS and Prostitution' an issue?* @, <http://www.avert.org/prostitution-aids.htm>

human rights. The fifth chapter will move on to look at the different legal models which can be applied to the industry, looking at each model separately to examine their advantages and disadvantages. The sixth chapter will look more specifically at the SADC region. This section will start by examining obligations under the SADC Declaration with respect to obligations which arise with regard to gender discrimination, and continue to look at countries which both directly criminalise the industry and those who do not. In this section, not only will legislation which directly affects sex workers be examined, but indirect legislation and policies will also be examined. Research with respect to public attitudes, healthcare access, and human rights abuses, where available, will also be examined in light of the legislation which exists. The seventh chapter will establish from the results which have been obtained what are the common characteristics which exist with respect to health access and human rights abuses. The last section will determine whether the results show if it is necessary to establish a legal framework and why, based on the evidence obtained during the study.

# 2 Understanding Sex Work

## 2.1 The Moral Issue

By far the most common ground on which society argues against the legalisation of the sex work is on the grounds that it constitutes sexual immorality. <sup>9</sup> Sir John Wolfenden in his 1957 'Report of the Committee on Homosexual Offences and Prostitution' in England stated that 'many issues in society', with the inclusion of the exchange of money for sex' may be considered immoral, but this did not mean that they fell under the umbrella of the law. <sup>10</sup> Nevertheless the report continued that the 'visibility' of sex workers was 'injurious to society'. Any discussion of sex work will be dominated by issues concerning morality, and as SWEAT points out almost all Southern African legislation has 'some foundation in morality'. <sup>11</sup> It is not the purpose of this thesis to pronounce judgement on individual views with regard to this issue. As was stated in the introduction, sex work is a reality in Southern Africa and will therefore be dealt with as such. The moral issue, however, will be dealt with briefly as it is often central to any discussion dealing with the legalisation of sex work.

Two opposing camps exist with regard to the moral issue. One, which is largely associated with the feminist movement, argues that sex work is not legitimate work. <sup>12</sup> According to Ericsson, it is not unusual to find it argued that sex work should remain illegal for the good of the sex worker as it is in their own interests to be rehabilitated and reintegrated in to society. <sup>13</sup> This is the line of argument which is followed by the 'Abolitionist' approach to sex work, where it is argued that the 'institution of sex work' is in itself a violation of human rights, and even an adult cannot consent to engaging in commercial sex. <sup>14</sup> This approach requires that the client and the 'third party who profits' from commercial sex is criminalised and if this element is removed the commercial sex industry will disappear. Exemplifying this view, that a woman is victimised by engaging in commercial sex, a 1986 meeting of experts organised by UNESCO and CATW stated that:

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<sup>9</sup> Ericsson, L.O., 'Charges against Prostitution: An Attempt at a Philosophical Assessment', cited in Panichas, G.E, (1997) 'Sex, Morality and the Law' Routledge, p.92

<sup>10</sup> Wolfenden, J. (1957) 'Report of the Committee on Homosexual Offences and Prostitution' para. 12, cited in Sagar, T., (2009) 'Anti – Social Powers and the Regulation of Street Sex Work', Cambridge University Press, 9 (1), p. 101

<sup>11</sup> Op. cit, Alexander

<sup>12</sup> Aoyama, K., (2009) 'Thai Migrant Workers: From Modernisation to Globalisation', Palgrave Macmillan, p.2

<sup>13</sup> Ibid, 93

<sup>14</sup> Bindman, J, (1997) 'Redefining Prostitution as Sex Work on the International Agenda' a report written with participation of Jo Doezeema, Network of Sex Work Projects

*“The “sex”; that the customer purchases requires that the body of the woman becomes an instrument for men to use... this constitutes an assault against the dignity of women and a form of sexual violence”<sup>15</sup>*

In accordance with this view sex work is seen as incompatible with the dignity and equality of the individual. According to one view expressed by feminists, and voiced by authors such as Carole Pateman (1988), the act of prostitution is ‘unambiguously subject to the client’s command’. Kathleen Barry argues that ‘there can be no ‘right to prostitute’ and no distinction between ‘free’ and forced’ prostitution. According to Barry sex work in itself is an abuse of human rights. This attitude as Barry points out rests on the assumption that sex work necessarily involves ‘inhuman and degrading treatment’.<sup>16</sup>

The alternative view argues that ‘sex work is work’ and sex workers have the ‘human right’ to work and be free from abuse, be treated equally and with dignity. Julia O’ Connell Davidson exploring the question of whether we can truly consent to prostitution states that there is little difference, between the Barry’s assessment of adult sex work and that of child prostitution.<sup>17</sup> Jo Bindman in ‘An International Perspective on Slavery in the Sex Industry’ states that:

*“In our world today, people in general and women in particular are often faced with limited opportunities to provide for themselves and their families. These are women considering all the dangers to which social exclusion will expose them, and the economic exploitation that they may face, and still calculating that this is their best available option.*

*Can we tell such people what they may or may not do? Do they deserve anything less than the best possible conditions sought for other workers?”<sup>18</sup>*

Bindman takes that view that dismissing the industry in itself as abusive ignores the violations of human rights and the international labour regulations which exist.<sup>19</sup> According to Kempadoo, one of the most confounding conceptualisations of sex work is that in many people’s minds they associate sex with love, and therefore they cannot comprehend the exchange of something considered so intimate for money. But as Kempadoo points out, this ignores the fact that there is no common universal

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<sup>15</sup> LAC, (2002) ‘Whose Body Is It? Commercial Sex Work and the Law in Namibia’, Austrian Development Fund, p. 9

<sup>16</sup> O’ Connell Davidson, J (2006) ‘Prostitution Power and Freedom’ Polity Press, p.15

<sup>17</sup> *ibid*

<sup>18</sup> An International Perspective on Slavery in the Sex Industry, 2002 " *The Socialist Feminist Project: A Contemporary Reader in Theory and Politics*

<sup>19</sup> Op. cit., Bindman

conception of the meaning of sex and ignores the variety of meaning both men and women give to sex.<sup>20</sup>

## 2.2 Definition of Sex Work

The term sex work is often preferred to the more commonly used term 'Prostitution'. This is because it can more readily be equated with a form of labour.<sup>21</sup> According to Law, the word 'Prostitution' both describes the act as well as condemning it. It has, as the author describes, been traditionally associated with the sale of sex for money, however, in modern times it has also been attributed a secondary meaning, including the sale of anything for 'an unworthy cause'.<sup>22</sup> This is exemplified by the definition found in Webster's World Dictionary, which defines the term prostitute as: "1) To sell the services of (oneself or another) for purposes of sexual intercourse; 2) to sell (oneself, one's artistic or moral integrity, etc.) for low or unworthy purposes."<sup>23</sup> Jo Bindman argues that the term 'sex work' should replace the term 'prostitution' in all circumstances to ensure that sex workers are entitled to 'their full human and labour rights'.<sup>24</sup> Kempadoo points out that using the term sex worker instead of more derogatory terms which fall under the banner of prostitution implies that sex work is an 'income generating activity or form of labour for women and men. The definition stresses the social location of those engaged in the sex industries as working people'. According to Kempadoo the idea of sex work is directly linked to the struggle to recognise basic human rights and women's right to work and to experience decent labour conditions. The definition emphasises the flexibility of many dimensions involved in sex work as a form of labour, and recognises that sex work is not necessarily the defining activity around which their self identity is formed.<sup>25</sup>

Sex work is difficult to define, primarily because sex work takes many different forms. For example, it may not necessarily be a sex worker's sole occupation, but may simply supplement an alternative or temporary form of income. Payment methods may also vary, with sex being exchanged for food, gifts, and subsequent favours.<sup>26</sup>

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<sup>20</sup> Ibid, 5

<sup>21</sup> Op. cit., LAC, p. 9

<sup>22</sup> Law, S. A, (2002) 'Commercial Sex: Beyond Decriminalisation', p. 525

<sup>23</sup> Webster's New World Dictionary (1994, 3<sup>rd</sup> College Ed.) 1080, cited in

ibid

<sup>24</sup> Op. cit., Bindman

<sup>25</sup> Kempadoo K., 'Globalising Sex Worker's Rights' in Kempadoo, K &

Doezema, J, (1998) 'Global Sex Workers; Rights, Resistance, and Redefinition', Routledge

UNAIDS defines Sex Work as:

*'female, male and transgender adults and young people who receive money or goods in exchange for sexual services, either regularly or occasionally, and who may or may not consciously define those activities as income-generating.'*<sup>27</sup>

Definitions such as this have been criticized as being incomplete because they concentrate on the role of the sex worker and underestimate the role of the client in the transaction.<sup>28</sup>

Julia O'Connell Davidson in *Prostitution, Power and Freedom* provides a definition which focuses on the role of the client and defines sex work as:

*'...an institution which allows certain powers of command over one person's body to be exercised by another. The client parts with money and/or other material benefits in order to secure powers over the prostitute's person which he (or more rarely she) could not otherwise exercise.'*<sup>29</sup>

Bindman suggests a definition of sex work which describes sex work as a form of labour and focuses on the fact that work is carried out for remuneration. He defines sex work as:

*'Negotiation and performance of sexual services for remuneration:*  
*i. with or without the intervention of a third party*  
*ii. where those services are advertised or generally recognized as available from a specific location.*  
*iii. where the price of services reflects the pressures of supply and demand.'*<sup>30</sup>

This definition is intended to create a divide between the public and private sphere, because as he points out, although International Human Rights are universal and applicable in all situations, in order for International labour standards to apply, it is necessary that there is a separation between the private and public domain.<sup>31</sup> John F Decker argues, however that changing the definition *"by itself* will have little effect; what is more sorely needed is a change in attitude."<sup>32</sup>

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Nordic Journal of African Studies 9 (1), pp. 1-19

<sup>27</sup> UNAIDS., (2002) 'Sex work and HIV/AIDS' UNAID'S Technical Update, June 2002

<sup>28</sup> Op. cit., LAC

<sup>29</sup> O'Connell Davidson, Julia. (1998) *Prostitution, Power and Freedom*, p. 9, cited in LAC (2002), 'Whose Body Is It? Commercial Sex Work and the Law in Namibia'

<sup>30</sup> Op. cit, Bindman

<sup>31</sup> ibid

<sup>32</sup> Decker, J, F (1979), *Prostitution: Regulation and Control*, p. 455, cited in ibid, 525



# 3 Misconceptions and Barriers affecting access to Healthcare

## 3.1 Misconceptions regarding Sex Work

Sex workers are often discriminated against and are a marginalized group in their respective societies. There are many misconceptions about sex workers, the following are some of the most prevalent:

**1) Sex workers are vectors of the HIV<sup>33</sup>** - One of the most prevalent misconceptions is that sex workers are ‘vectors’ of HIV, spreading the disease from themselves to other members of society. In fact, according to UNAIDS females are two to four times more at risk of contracting HIV than males, and sex workers<sup>34</sup> have a greater need of protection from their clients than vice versa. Sex workers are often subjected to violent or ‘rough’ sex. According to the Global Rights Alliance, violence against women is associated with an increased risk of acquiring sexually transmitted infections, and violent sexual assault can cause trauma to the vaginal wall that allows easier access to HIV.<sup>35</sup> It is often the case where sex workers demand the use of condoms that their clients will refuse because sex workers have very little power in saying ‘no’ and their negotiating skills are limited.<sup>36</sup>

**2) All migrant sex workers are victims of Trafficking<sup>37</sup>** – Anti trafficking policies and those which concern sex worker’s health and rights are not the same thing. There is little evidence that laws criminalizing sex work have any effect in curbing trafficking. Trafficking can be defined as: ‘*the recruitment, transportation, harbouring, or receipt of people for the purpose of exploitation, including forcing people into sex work*’.<sup>38</sup> Trafficking involves a level of exploitation and forced labour, people are trafficked into a variety of industries and there is little element of choice as distinguished from sex work, where individuals enter the profession voluntarily. In research recently carried out in Cape Town, it was found that

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<sup>33</sup> Op. cit., Alexander

<sup>34</sup> Op. cit., LAC, P. 211

<sup>35</sup> Global Aids Alliance, (2008) ‘Violence against Women and Children & HIV/AIDS’

[http://www.globalaidsalliance.org/page/-/documents/FactSheet\\_VAWC.doc](http://www.globalaidsalliance.org/page/-/documents/FactSheet_VAWC.doc)

<sup>36</sup> Rojanapithayakorn, W., (2006) ‘The 100% Condom Usage Programme in Asia’ Reproductive Health Matters, 1 (70), p. 42

<sup>37</sup> ibid

<sup>38</sup> Anonymous, ‘[Economic Roots of Trafficking in the UNECE Region - Regional Prep](#)’, Meeting for Beijing+10 - pr2004/04gen\_n03e.htm



very few individuals involved in the sex work industry were victims of trafficking, and that most had entered the industry voluntarily.<sup>39</sup>

The South African Law reform commission in its 2002 report distinguishes trafficking from voluntary entry into the commercial sex work industry and describes four situations in which women may become involved in sex work as follows:

*‘1) The first group includes women who have been completely deceived and coerced. Such women have no idea where they are going or the nature of work they will be doing.*

*2) The second group comprises women who are told half-truths by their recruiters about their employment and are then forced to do work to which they have not previously agreed and about which they have little or no choice. Both their movement and their power to change their situation are severely restricted by debt bondage and confiscation of their travel documents or passports.*

*3) The third group are women who are informed about the kind of work they will be doing. Although they do not want to do such work, they see no viable economic alternative, and therefore relinquish control to their trafficker who exploits their economic and legal vulnerability for financial gain, while keeping them, often against their will, in situations of debt bondage.*

*4) The fourth group is comprised of women who are fully informed about the work they are to perform, have no objections to performing it, are in control of their finances and have relatively unrestricted movement. This is the only situation of the above four that cannot be classified as trafficking.’<sup>40</sup>*

Bindman argues that the majority of women involved in the sex trade industry never leave their ‘country of origin’, and the focus on abuse for the deceived sex worker runs the risk of distinguishing the ‘innocent victim’ from the majority of sex workers who enter the industry voluntarily, who also should be protected from abuse to the same extent as the victims of trafficking.<sup>41</sup>

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<sup>39</sup> Gould, C., (2008), *Selling Sex in Cape Town: Sex Work and Human Trafficking in a South African City*, July 2008 in Collaboration with Nicole Fick (SWEAT), p.135

<sup>40</sup> South African Law Commission (2002), *Sexual Offences: Adult Prostitution*, Issue Paper 19, 195

<sup>41</sup> Op. cit., Bindman

### 3) Laws prohibiting Sex Work protect against Child Prostitution<sup>42</sup> –

Commercial Sexual exploitation of Children can be defined as ‘*sexual abuse by the adult and remuneration in cash or in kind to the child or a third person or persons.*’<sup>43</sup> The exploitation of children is a form child abuse and therefore specific laws protecting children should be put in place. There is no evidence that laws prohibiting adult sex work protect children. In the 2002 South African case of *S v Jordan*<sup>44</sup>, one of the arguments put forward by the state for the continued criminalisation of sex work was that it was necessary in order to protect against child prostitution. However, as SWEAT points out, there is already sufficient legislation in place, in the form of the South African Child Care Act, which specifically protects children against sexual exploitation. SWEAT argue that criminalising sex work in order to protect children is not only unnecessary, but also unhelpful, as the further the industry is driven underground the more difficult it is to find adult sex workers who will co operate in exposing ‘child prostitution syndicates’, which is often essential in identifying the perpetrators and rescuing children from the industry.<sup>45</sup> It is also the case that the criminalisation of the industry, makes it less likely that sex workers will report such syndicates to the police; this is also true with regard trafficking.<sup>46</sup>

**4) Laws prohibiting Sex Work protect against HIV<sup>47</sup> -** Sex Workers are disempowered as a result of laws prohibiting sex work. Clients may refuse to use condoms through violence or intimidation, in many cases increasing sex worker’s vulnerability to HIV. In research conducted at a KwaZulu-Natal truck stop in South Africa sex workers reported that condom use was responsible for client loss and non payment, as well as physical abuse.<sup>48</sup> **Shahmanesh et al** in a review of effective interventions to prevent HIV and other STIs noted the importance of structural interventions, policy change and the empowerment of sex workers in reducing HIV and STI prevalence.<sup>49</sup>

**Sex work is a persistent cause of Public Nuisance-** In the South African Case *S v Jordan*<sup>50</sup>, the appellants argued that the criminalisation of sex work

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<sup>42</sup>                   ibid

<sup>43</sup>                   ECPAT International,(2001) ‘Child Sexual Exploitation, Report: Five years after Stockholm@ The Fifth Report on the implementation of the Agenda for Action adopted at the World Congress against Commercial Sexual Exploitation of Children held in Stockholm, Sweden, August 1996.

<sup>44</sup>                   Constitutional Court of South Africa, Case CCT 31/01

<sup>45</sup>                   Op. cit., Alexander

<sup>46</sup>                   Gould, C; Richter, M, (2010) ‘The Myth and Reality of Human Trafficking’, @ [http://sasexwork.org/wordpress/?page\\_id=88](http://sasexwork.org/wordpress/?page_id=88)

<sup>47</sup>                   Op. Cit., SWEAT

<sup>48</sup>                   Karrim A, *et al*, at 1523, in Richter, M,, (2008) Erotic Labour in Hillbrow: Sex work, Johannesburg's 'Den of Iniquity' and HIV/AIDS, Submission to “HIV and the World of Work” conference

<sup>49</sup>                   Ibid

<sup>50</sup>                   *Jordan v State* 2002 (6) SA 642 (CC)

exacerbates the links between sex work and public nuisance and that such ills could be corrected by appropriate regulatory measures. SWEAT argues that not all sex workers cause a public nuisance and large numbers of complaints with regards to sex workers causing a public nuisance arise as a result of aggravating factors such as a lack of public toilet facilities at night time.<sup>51</sup>

## 3.2 How Self Perception influences Safe Sex

Sex worker's perceptions of their personal identities influence their ability to take precautions during high-risk sexual encounters. Situational constraints such as the illegality of sex work, physical violence and police harassment distort sex worker's self perception and limit their ability to protect themselves. Campbell points out African literature in relation to HIV/AIDS has primarily focused on women's powerlessness to negotiate safe sex and 'the key goal of community-based outreach health interventions is to promote the development of communities and contexts in which women can reshape their social and sexual identities in more assertive and health-enhancing ways.'<sup>52</sup> Wojcicki and Malala argue that it the portrayal of Sex workers as victims who are powerless to make decisions which affects their ability to control negotiations with regard to condom use. Many sex workers suffer from depression and low self esteem as a result of discrimination, stigmatisation and abuse, particularly at the hands of those who should be helping them, such as the police. According to Wojcicki and Malala, as long as this situation continues, public health initiatives which encourage condom use among sex workers will continue to be unsuccessful.<sup>53</sup>

In a study examining the 'mental health, victimisation, and sexual risk behaviours among a sample of 278 street based workers in Miami', Surrat et al. found that in comparison to the general population, that street based sex workers were more likely to suffer from depression and mild psychosis. They also found that Brothel based sex workers were far less likely to suffer from mental ill health, and their mental health approximated to that of the general public. In a study conducted in Puerto Rico in 1994, Algria et al. found that 70% of street based sex workers were suffering from a depression, anxiety and alienation<sup>54</sup>. According to Surrat, results have

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<sup>51</sup> Op. cit., Alexander

<sup>52</sup> Campbell, C., (2000), 'Selling sex in the time of AIDS: the psycho-social context of condom use by sex workers on a Southern African Mine', *Social Science & Medicine*, 50, p. 482

<sup>53</sup> Wojcicki J. M.; Malala J.,(2001), 'Condom use, power and HIV/AIDS risk: sex-workers bargain for survival in Hillbrow/Joubert Park/ Berea, Johannesburg' *Social Science & Medicine* 53, pp. 99–121

<sup>54</sup> Surrat, H; Kurtz, S P; Weaver, J C; Inciardi, J A, 'The Connections of Mental Health Problems, Violent Life Experiences, and the Social Milieu of the "Stroll"

shown that the relationship between sex and mental disorder is normally as a result of childhood abuse, or been subjected to violence as an adult, little of which is ever reported.<sup>55</sup>

Sohail Agha and Mwaba Chulu Nchima conducted research on 20 sex workers in Lusaka, Zambia which indicated important differences between identity and self perception in night club workers and street based workers. Findings showed that sex workers who conducted transactions on the street, had a much greater sense of professional identity and were willing to be acknowledged as sex workers, while those who worked in Night clubs were less willing to be identified as sex workers and considered the profession as a means of finding a marriage partner. As a result, street sex workers were much more likely to demand the use of condoms and practice safe sex. Sohail Agha and Mwaba Chulu Nchima conclude this is probably due to the same personal resources that allow sex workers to publicly acknowledge that they are sex workers and this possibly enables them to practice preventive sexual behaviours, while the night club worker's desired marital respectability and placed more importance on how society judges them. It is suggested that legislative change, along with more responsible police behaviour could positively influence sex worker's self perception and thus provide a safer working environment.<sup>56</sup>

### 3.3 PEPFAR

Southern Africa's battle against HIV is often dependent on global funding schemes, however, PEPFAR (President's Emergency Plan for Aids Relief) which is a 15 billion dollar U.S. Government initiative to combat HIV/AIDS, is considered by many to have placed sex workers, who are one of the most vulnerable groups at even greater risk. The initiative affects five countries in the SADC region, including Namibia, South Africa, Zambia, Tanzania, and Botswana. In 2005 PEPFAR introduced a rule whereby two thirds of all funding should be allocated to promote abstinence, while the other third should be allocated to high risk groups and the provision of condoms.<sup>57</sup> This is known as the ABC model which stands for 'abstinence-until-marriage, be-faithful, and correct and consistent use of condoms.'<sup>58</sup>The Leadership Act 2003 implements the 'global gag rule' and

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with the HIV Risk Behaviours of Female Street Sex Workers', in Parsons, J. T. (2005) 'Contemporary Research on Sex Work' Hawthorn Press Inc., pp.23 - 25

<sup>55</sup> Ibid, p.25

<sup>56</sup> Op. Cit., Sohail A.; Mwaba C., M

<sup>57</sup> Crago, A. L., (2006)' Condom shortages in Sub – Saharan Africa' Sex work and Money, Research for Sex work, P.5

<sup>58</sup> Childs G, A., 'Making Prevention Work: Lessons from Zambia on Reshaping the U.S. Response to the Global HIV/AIDS Epidemic' Sexuality Information and Education Council of the United States, p. 3

provides that no funding should be provided to organisations promoting 'prostitution and trafficking'.<sup>59</sup> The Act states that "No funds may be made available to any group or organisation that does not have a policy explicitly opposing prostitution and sex trafficking".<sup>60</sup> According to Childs, this represents the single greatest obstacle deterring organisations from reaching the most at risk population; sex workers.

Anna Louisa Crago points out that Sex worker groups have fought successfully through peer education groups and condom distribution to lower the rate of HIV infection among sex workers, however since the implementation of PEPFAR; many organizations throughout Sub Saharan Africa have complained of condom shortages, this has particularly affected Zambia and Tanzania.<sup>61</sup> According to a Sexuality Information and Education Council of the United States (SIECUS) report, as a result of the prohibitions imposed by PEPFAR, sex workers were not receiving the attention and resources needed in order to protect themselves from HIV.<sup>62</sup> In a study conducted in Zambia, they discovered that in 2008, \$ 2.4 million was provided for 'HIV prevention through abstinence and/or been faithful', while \$600,000 was provided for condom distribution. They also found that an 'overly restrictive moralistic' approach was been taken by organisations and that commercial sex workers, who were the group most at risk, were been ignored when it came to condom distribution. In addition, it was discovered that condoms in general were not been distributed as widely and regularly as they had been pre PEPFAR, this, according to the report, is because of an almost exclusive focus on promoting abstinence and faithfulness.<sup>63</sup> In Kafue, a town which is located on a major trucking route between Zambia and the Democratic Republic of Congo and where the commercial sex trade was thriving, SIECUS found that it was difficult to find condoms to meet demand.<sup>64</sup>

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<sup>59</sup> AVERT, 'AVERT 'What is PEPFAR?' @

<http://www.avert.org/pepfar.htm>

<sup>60</sup> HR 1298 US leadership against HIV/AIDS, tuberculosis and malaria act of 2003. [http://www.thebody.com/govt/global\\_aids.html](http://www.thebody.com/govt/global_aids.html) (accessed May, 2003), cited in Butcher. K., (2003), 'Confusion between Sex Work and Trafficking', The Lancet, 361, June 7

<sup>61</sup> Op. cit., Crago, A, L, p.5

<sup>62</sup> Op. cit., Childs, p.3

<sup>63</sup> ibid

<sup>64</sup> Ibid, 21

## 4 Successful HIV prevention methods for Sex Workers

According to Rojanapithayakorn, the HIV/AIDS team leader for the World Health Organisation in China, the ‘ineffectiveness’ of many HIV prevention programs is as a result of the vulnerability of certain groups such as sex workers.<sup>65</sup> Rojanapithayakorn argues that it is not easy to encourage condom use amongst sex workers because women who enter the profession are subject to a ‘triple vulnerability’. Sex workers, according to Rojanapithayakorn, are vulnerable because they are ‘women, financially dependent and are involved in a profession which is illegal. The most significant method to reduce HIV in Thailand and Cambodia, has been accredited to the ‘100% Condom Use Program’ which through ‘self help groups, peer education, and the issuance of membership cards by local authorities’ ensures that sex workers are empowered to ‘refuse sex’ without a condom. The Program in Thailand resulted in increased condom use from 14% - 90% from 1989 – 1992. It has also resulted in both Cambodia and Thailand in the decline of the HIV epidemic<sup>66</sup>. It was suggested at a 1996 conference on AIDS in Vancouver that the program had potentially prevented 2 million HIV infections.<sup>67</sup>

A PSI study conducted in Angola found that positive trends in condom use could be attributed to placing an emphasis on ‘self efficacy to use condoms’, ‘heightening personal risk perception’, and creating an environment which encouraged positive norms with regard to condom use.<sup>68</sup> In Bolivia, there has been a dramatic reduction in the rate of the sexually transmitted diseases because of the introduction of sex education programs. The rate of HIV infection reported amongst sex workers has been reported as only 0.1 %.<sup>69</sup> A UNAIDS report on ‘*Sex Work and HIV*’<sup>70</sup> points to a number of effective HIV/ AIDS preventative strategies for sex workers which include:

- 1) *Promotion of safer sexual behaviour among sex workers, clients and institutions or groups associated with sex workers, such as police and sex workers’ partners;*
- 2) *Condom availability and correct use;*
- 3) *Negotiation skills;*
- 4) *Supportive policies*
- 5) *Promotion and availability of STI prevention and care services*

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<sup>65</sup> Op. cit., Rojanapithayakorn, p.41

<sup>66</sup> ibid

<sup>67</sup> Ibid, 44

<sup>68</sup> PSI Research and Metrics (2008) ‘Angola (2008): HIV/AIDS TRaC Study Evaluating Condom Use amongst Commercial Sex Workers in Luanda Province, Second Round’, Population Services International, p.3

<sup>69</sup> Op. cit., Law, p. 547

<sup>70</sup> Op. Cit., UNAIDS., ‘Sex work and HIV/AIDS’

- 6) *Outreach work that includes health, social and legal services*
- 7) *Peer education among sex workers, clients and associated groups*
- 8) *Care of people living with HIV/AIDS (PLWHA)*
- 9) *Advocacy for policy and law reform at national and local levels, including respect of human rights.*<sup>71</sup>

# 5 Legal Models

There are various responses to the commercial sex industry:

## 5.1 Criminalisation

Eight of the Countries in the SADC region have direct legislation criminalizing the industry. Under this system selling sex and/or all associated activities, such as soliciting and keeping a brothel are crimes. This invariably penalizes the sex worker and not the client and creates an environment where sex workers are labelled criminals and face human rights abuses. The system fails to eradicate the sex work industry and prevents the industry from being regulated or controlled in any way.<sup>72</sup>

Sweden has taken an alternative approach to this model where engaging in commercial sex is now a crime only on the part of the client. The Swedish approach has been criticized for various reasons. While decriminalising the role of the sex worker, the sex worker remains unprotected under Swedish labour legislation. In order for them to continue working, sex workers have become less visible and it is reported that they are now forced to work later and more irregular hours in less visible areas.<sup>73</sup> Legislation which was enacted with the intention of protecting sex workers has in fact placed them in more danger. According to Brandt, criminalising the client imposes extra costs and burdens on the sex worker and rather than helping them, it appears to inflict more harm, as well as undermining democratic and egalitarian values.<sup>74</sup>

## 5.2 Legalisation

The law allows sex work to be legal under certain conditions and with certain controls in place. The sex work industry in the Netherlands operates under this model, whereby there are zones where sex work is allowed to happen (red light districts); and there is compulsory registration of sex workers.<sup>75</sup> In the Netherlands sex workers can join unions and have to pay taxes. Legalisation allows for the industry to be regulated and protects labour rights. Problems associated with this model is the creation of a ‘two

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<sup>72</sup> Gardner, G., (2001) *Legalisation or Decriminalisation*, Conference on Adult Commercial Sex Work: The Health Issues, [http://www.sweat.org.za/index.php?option=com\\_content&task=view&id=56&Itemid=28](http://www.sweat.org.za/index.php?option=com_content&task=view&id=56&Itemid=28)

<sup>73</sup> Op. cit., LAC, p.170

<sup>74</sup> Op. cit., Brandt, p. 569

<sup>75</sup> Op. cit., Gardner



tiered' system, where those who do not register, will not enjoy the protection of the law. Criticism has also been leveled at compulsory registration, which it is argued is aimed at enforcing mandatory health checks. Dr. Sinead Delany at the Reproductive Health Unit at the University of Witwatersrand argues that this fuels the belief that sex workers are vectors of the disease.<sup>76</sup> Compulsory registration within this model should be purely for tax purposes and to extend regular labour protections to sex workers.

One of the most liberal approaches to this model can be seen in New Zealand. Since 2003, sex work has been legal in New Zealand, following the adoption of the Prostitution Reform Act, which decriminalised sex work, as well as introducing provisions to protect sex workers and their client's 'health and safety'.<sup>77</sup> Research conducted with regard to the effects of this legislation, which were measured over a five year period, revealed that there had been no increase in the number of sex workers entering the industry, and that sex workers reported feeling more confident about reporting abuse to the police, as well as enjoying a safer working environment, and increased access to health care.<sup>78</sup>

In the "Case of Jany", where four Czech and two Polish sex workers were refused working permits as a result of their occupation, the European Court of Justice equated prostitution with other forms of self employment, holding that prostitutes from Eastern Europe have a right to work in any European Union country where prostitution is legal.<sup>79</sup>

### 5.3 Decriminalisation

Six SADC Countries have no direct legislation with regards to Sex Work. This means that Sex Workers and their clients will not be subject to the criminal law. However, forcing adults into the industry and the commercial sexual exploitation of children will remain crimes.<sup>80</sup> Problems associated with decriminalizing the industry are that it will not remove the stigma associated with the profession nor will it deal with the laws which are intended to indirectly target sex workers. In Canada, where the criminal laws directly targeting sex workers were repealed in 1972, however, laws relating to the public nuisance aspects of sex work continued to operate, such as public solicitation. A report of the 'Royal Commission of the Status of Women in Canada' found that the existence of these by laws directed

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<sup>76</sup> Op. cit., Gardner

<sup>77</sup> New Zealand Ministry of Justice, 'Prostitution Law Reform', @ <http://www.justice.govt.nz/policy-and-consultation/legislation/prostitution-law-reform>

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1.1 Op. cit., Gould; Richter

<sup>79</sup> Case C-268/99, *Jany* (European Court of Justice, ruling issued on 20 November 2001 )

<sup>80</sup> Op. cit., SWEAT

towards solicitation and vagrancy were both ‘futile and stigmatising’.<sup>81</sup> Bindman argues, that the decriminalisation of sex work would remove the laws directly criminalizing commercial sex but would not regulate or legislate for sex workers rights, and this allows for the arbitrary arrest of sex workers, which is in contravention of ILO R35 (c).<sup>82</sup>

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<sup>81</sup> Report of the Royal Commission of the Status of Women in Canada, (1970), pp. 370-71, cited in op. cit., Brandt, p. 555

<sup>82</sup> Op. cit Bindman, J

# 6 The Criminalisation of Sex Work in SADC: Legislation and its Effects

The SADC Region is comprised of a group of different and diverse countries and as a result the laws with respect to sex work also differ greatly. However, even where sex work is partially legal or the law remains silent on the issue; each Country shares a common characteristic in that the law rarely protects sex workers.<sup>83</sup>

## 6.1 The SADC Declaration

While all SADC states accept the discourse of gender equality, in some states the law nonetheless continues to discriminate against women. The SADC Declaration provides that States undertake to engage in "repealing and reforming all laws, amending constitutions and changing social practices which will still subject women to discrimination, and enacting empowering gender-sensitive laws".<sup>84</sup>

Historically sex work has been a form of labour predominately occupied by women, and as a result it is generally caught up in the national and social mores which predominate society's perception of women and condemn those who go beyond the boundaries of womanhood.<sup>85</sup> Sexual acts performed by women for economic gain are therefore seen within the context of male hegemony and are thus frowned upon as immoral and perverse.<sup>86</sup> As an occupation which is generally carried out by females, sex work should be looked at in the broader context of women's economic positions in the SADC region where women often have limited opportunities and few skills and sex work serves as their only means of survival, or in some cases supplements their otherwise meagre wages. In addition to this, sex workers often face harsh punishments for engaging in commercial sex while their clients, who are predominantly male, are rarely arrested or convicted.

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<sup>83</sup> Op. cit., AVERT  
<sup>84</sup> Op. cit., LAC, introduction  
<sup>85</sup> Ibid, 5  
<sup>86</sup> ibid

## 6.2 COUNTRIES IN THE SADC REGION WHICH DIRECTLY CRIMINALISE SEX WORK

### 6.2.1 South Africa

Solicitation, as well as profiting from the sale of sex or maintaining a brothel is criminalized in South Africa under the *Sexual Offences Act 23, of 1957. Section 21 (Aa) Sexual offences Act* states that: ‘Persons living on earnings of prostitution or committing or assisting in commission of indecent acts ... and any person ‘who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; shall be guilty of an offence.’<sup>87</sup> Sections 2 and 3 and section 20(1) (aA) prohibit brothel keeping under this Act. The act of purchase on the part of the client has also been recently criminalized under Section 11 of the Criminal Law (*Sexual Offences and Related Matters*) Amendment Act of 2007.<sup>88</sup>

According to the 2002 LRC report because of the difficulty of enforcing the Sexual Offences Act, municipal by-laws are primarily employed by police against sex workers. These by-laws typically penalise ‘loitering’ or ‘creating a public nuisance’.<sup>89</sup> Sex workers are often arrested under these by-laws and detained in custody for a 48 hour period, and then released without charge. The report points out that apart from violating the human rights of the sex worker, many sex workers have children for whom they are the primary carer.<sup>90</sup> Sex worker’s report that the police confiscate condoms, undermining health initiatives. In addition to this, they report a high level of police abuse, including threats, beatings and rape. A study carried out by ISS/SWEAT found that 63% of those interviewed has been sworn at by the police, while 47% had suffered abuse.<sup>91</sup> During February 2000, ten prostitutes working in Cape Town obtained an *interim* interdict in the Cape High Court against three police officials to stop police harassment. In May 2000 the Independent Complaints Directorate recommended ‘that two of the officials face charges of assault and that one official face an additional charge of *crimen iniuria*, and the other a charge of corruption’.<sup>92</sup>

It is not known how many sex workers are working in South Africa.<sup>93</sup> However, research conducted in Cape Town<sup>94</sup> identified 103 brothels, with

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<sup>87</sup> Op. cit, Richter, p. 7 - 8

<sup>88</sup> ibid

<sup>89</sup> South African Law Commission, (2002), ‘Sexual offences: Adult

Prostitution’, Issue Paper 19, p. 127

<sup>90</sup> ibid

<sup>91</sup> Op. cit., Gould; Richter

<sup>92</sup> Op. cit, SALC, p. 91

<sup>93</sup> Op. cit., Richter

<sup>94</sup> Op. cit., Gould, Chandré

an estimated 1209 sex workers operating in Cape Town. Sex Workers were often subject to exploitation and abuse and have ‘very little recourse to the law’. Most street based workers had experienced been abandoned ‘many kilometres from safe terrain’ by abusive clients. Most entered the industry out of financial necessity, as a means of survival. Evidence suggested that due to the underground nature of Sex Work in Cape Town employers were able to exploit sex workers and engage in activities that would be unacceptable if the industry were regulated. According to the report, while changing the laws governing the industry will not put an end to the exploitative nature of the industry or provide absolute protection from abusive clients, it will make it safer for them to work.<sup>95</sup>

In 1996, Ramje et al. reported that over half of commercial sex workers working at truck stops in South Africa were infected with HIV.<sup>96</sup> In 1998 it was reported that 45% of sex workers in Hillbrow, Johannesburg were HIV positive.<sup>97</sup> A survey conducted in 1999 in Cartonville, a mining project revealed that 25% of miners and 69% of sex workers were HIV positive.<sup>98</sup> Studies conducted by Pauw and Brenner in Cape Town indicated that the majority of Sex Workers use condoms during intercourse with clients.<sup>99</sup> However, research conducted at a KwaZulu Natal reported that clients abused sex workers who insisted on condom use and ‘insisted on paying less’.<sup>100</sup> According to the 2002 LRC report the majority of sex workers are uncomfortable attending health care facilities, this was primarily due to the negative attitudes of health care staff and other clinic attendees.

In *S v Jordan*,<sup>101</sup> decided in 2002, the constitutional court upheld the prohibition of commercial sex work, rejecting the contention that the relevant provisions of the Sexual Offences Act violated constitutional protections for human dignity, freedom of the person, privacy, and economic activity.<sup>102</sup> It was argued that the Act was discriminatory on the basis of sex and gender, as the legislation had a disproportionate impact in women. The Court found that the act did not discriminate against women as the “section is gender-neutral”. The Court agreed that the section did “make a distinction” between the sex worker and client, but since the purpose of the legislation was to “outlaw commercial sex”, and the sex worker was

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<sup>95</sup> Ibid, 162

<sup>96</sup> Gita R., Salim S. Abdool Karim & Adriaan W. S, ‘Sexually Transmitted Infections

Among Sex Workers in KwaZulu-Natal, South Africa’, 25 Sexually Transmitted Diseases 346, 346 (1998), cited in Law, S. A, (2002) ‘Commercial Sex: Beyond Decriminalisation’, 73, pp. 523 - 603

<sup>97</sup> Rees et al., 2000 in Op. cit., Richter, p. 4

<sup>98</sup> Williams et al., in ibid

<sup>99</sup> Pauw and Brener MRC Study at 26 in Op. cit., LRC, 92

<sup>100</sup> Abdool K *et al* at 1523, in ibid

<sup>101</sup> Constitutional Court of South Africa, Case CCT 31/01

<sup>102</sup> Long, S, Before the law: Criminalizing sexual conduct in colonial and post-colonial southern African societies, Human Rights watch <http://www.hrw.org/reports/2003/safrica/safrighrc0303-07.htm>

more likely to be a “repeat offender”, this was a constitutionally permissible distinction.<sup>103</sup>

In *Kylie*<sup>104</sup> the labor court dismissed a case for unfair dismissal, where a sex worker was dismissed from a Bellville massage parlor by her employers for being too picky and refusing to perform oral sex. The applicants argued that the right to fair practices in Section 23(1) vests in everyone, including sex workers ‘because a denial of fundamental protections against exploitation would be a gross denigration of their dignity.’<sup>105</sup> The court however dismissed the claim based on the fact that “her work was prohibited by the Sexual Offences Act” and “her contract of employment was accordingly invalid. Section 23 of the constitution and the (Labour Relations Act) do not apply to workers who do not have a valid and enforceable contract.”<sup>106</sup> The case is currently before the Labour Appeal Court, where the appellants are arguing that they have the right to protection against unfair dismissal regardless of the illegality of the sex work. The question which will now be decided by the court is whether section 213 of the Labour Act which protects against unfair dismissal can be applied to work which is illegal.<sup>107</sup> It is unlikely, however, that the court will reach such a conclusion until the industry is regulated, given the fact that it could give rise to cases in the future where plaintiffs have been involved in serious criminal activity. If the court were to reach a decision in favour of Kylie it is difficult to know where they could draw the line with regard to granting access to the labour courts for those involved in illegal activity. It is unlikely therefore that future claims will be entertained by the courts in the absence of legislative change.

## 6.2.2 Namibia

The *Combating of Immoral Practices Act, 1980* criminalises several sex-related activities including ‘soliciting sex in public, pandering, and keeping a brothel, immoral conduct’<sup>108</sup>, in addition to “indecenty, procurement, living off the earnings of prostitution, and unlawful carnal knowledge of a sex worker”<sup>109</sup> Several provisions of the act were declared unconstitutional in the case of *Hendricks and Others v Attorney General of Namibia and*

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<sup>103</sup> Gerntholtz, Liesl, *Sex work and the Law in South Africa*, Tshwaranang Legal Advocacy Centre

<sup>104</sup> *Kylie* ( Labor Court of South Africa, CASE NO: C52/07)

<sup>105</sup> *Ibid*, at Para 14

<sup>106</sup> Joseph, N, (2008) ' Ruling against sex worker disapointiong' The Pretoria News, August 01, 2008

<sup>107</sup> SWEAT (2010) ‘Sex workers’ Case Stumps Three Judges’ March 13<sup>th</sup>, @ <http://sasework.org/wordpress/?p=26>

<sup>108</sup> La Font, S, (2008) ‘Help wanted in Katutura, Namibia’, Gender Research and Advocacy Project, Legal Assistance Centre, p.1

<sup>109</sup> *Op. cit*, LAC, introduction, xix

*Others*.<sup>110</sup> The court also narrowed the definition of brothel in section 1 (i), which states that: “brothel” includes any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or immoral purpose’, finding it to be ‘constitutionally overbroad’, as it could be interpreted to include any place where unmarried intercourse takes place.

The Woman’s Action Group (WAG) estimated that there were as many as 1240 sex workers in Namibia’s capital Windhoek in 2006; however recent research indicates that there may be as many as 5000 sex worker’s currently working in Windhoek.<sup>111</sup> The unemployment rate in Namibia is 36.7% with unemployment been highest among the female population.<sup>112</sup> According to Legal Assistance Centre in Windhoek, most sex workers are involved in ‘survival sex’.<sup>113</sup> A research project conducted in Windhoek, Oshakati, and Oshikango reported that 86% of sex worker’s became involved in the industry because of ‘serious financial difficulties’<sup>114</sup>. Respondents reported that they made between 100 and 400 Namibian dollars a day. Ninety four per cent of sex workers interviewed reported suffering from abuse. The types of violence ranged from assault (91%) rape (67%), and sex worker’s claimed that “Prostitution in Windhoek has become very dangerous and painful”.<sup>115</sup> 83% of the interviewees reported that they did not use condoms or those who did reported they did not do so regularly. Of the 1240 sex worker’s tested by the Catholic Mission’s “Stand Together” project, 70% were HIV positive.<sup>116</sup>

Research conducted for the Legal assistance Centre in Katutura, a township on the outskirts of Windhoek, found that Sex Worker’s were harassed by the police, with women been held in custody from anywhere between one night and two weeks before release. Sex worker’s also reported that they were beaten and threatened by the police force. 86% Of sex worker’s interviewed wanted to see the industry regulated, so that they could work in a safer work environment, with 22% believing it would provide them with greater protect from HIV.

### **6.2.3 Zambia**

Living off the earnings of sex work or solicitation is a criminal offence in Zambia. *Sections 140-49* of the *Zambian Penal Code* punish procurers, brothel-keepers, and any "male person living on [the] earnings of

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<sup>110</sup> Hendricks and Others v Attorney General of Namibia and Others 2002 NR 353 (HC)

<sup>111</sup> Kiremire, M, K., (2007), ‘Prostitution in Windhoek, Namibia: An exploration of poverty, Analyses and Views’, 4 (2), 19

<sup>112</sup> *ibid*

<sup>113</sup> *Op. cit.*, La Font, P.3

<sup>114</sup> *ibid*

<sup>115</sup> *Op. cit.*, Merab

<sup>116</sup> *ibid*

prostitution." The Zambian code also allows "every common prostitute behaving in a disorderly or indecent manner in any public place" to be jailed for a month as an "idle and disorderly person" (Section 178.a)<sup>117</sup>. Under *Section 146 (1)* of the Penal Code a person who: 'Knowingly lives wholly or in part on the earnings of prostitution; Or In any public place, persistently solicits or importunes for immoral purposes; commits a felony and is liable, upon conviction, to imprisonment for a term not exceeding fifteen years' *Section 146 (2)* provides that ' Where a person is proved to live with or to be habitually in the company of a prostitute or is proved to have exercised control, direction or influence over the movements of a prostitute in such manner as to show that the person is aiding, abetting or compelling the prostitution with any other person, or generally, that person shall, unless the person shall satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution.'

*Section 178* of the Penal Code provides a definition of "idle and disorderly persons," including "every person who, without lawful excuse, publicly does any indecent act." Any person convicted under this section is liable to one month in prison. *Section 181 (a)* provides that more than one conviction under 178 can cause one to "be deemed to be a rogue and vagabond," liable to three months' imprisonment for the first offense and one year upon further conviction.<sup>118</sup> Sex workers are seldom convicted under any of these sections, although Police often detain them for loitering in public places, or for indecent exposure.

Although commercial sex work is currently thriving on the trucking routes in Zambia, there are currently only 3 organisations who work with sex workers.<sup>119</sup> A UNAIDS study conducted in 1998 reported that HIV prevalence among sex workers in Ndola had reached 69%. In addition, SIECUS report figures as high as 65.4% in the capital Lusaka.<sup>120</sup> They also reported that the difference between sex with and without a condom can be much as \$25.<sup>121</sup> Official policy towards sex workers is 'highly unsympathetic'. Police raids against sex workers occur regularly, with sex workers living in constant fear of being arrested.<sup>122</sup> According to research conducted by Sohail Agha and Mwaba Chulu Nchima a number of factors keep women in sex work including 'the need to support children or other close relatives such as younger siblings or elderly relatives who do not have other means of support'. Sex workers also saw their lack of educational attainment and poor qualifications for formal sector employment, and their

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<sup>117</sup> Long, S., Before the law: Criminalizing sexual conduct in colonial and post-colonial southern African societies, Human Rights watch <http://www.hrw.org/reports/2003/safrica/safriglhr0303-07.htm>

<sup>118</sup> IBID

<sup>119</sup> Op. cit., Childs, p.21

<sup>120</sup> ibid

<sup>121</sup> ibid

<sup>122</sup> Agha, S and Nchima, M. C, (2004) 'Life-Circumstances, Working Conditions and HIV Risk among Street and Nightclub-Based Sex Workers in Lusaka', Zambia, Culture, Health & Sexuality, 6 (4 ), pp. 283-299



lack of success in forming a permanent partnership with a man as factors that keep them tied to sex work.<sup>123</sup>

## 6.2.4 Swaziland

Sex work, procurement and brothel keeping are illegal in Swaziland.<sup>124</sup> The Crimes Act 1989 imposes an 80 dollar fine and up to two years imprisonment on any person who encourages or ‘entices or encourages immoral acts’.<sup>125</sup> This legislation may soon however be replaced by the Sexual Offences and Domestic Violence Bill 2009, which could impose fines of up to \$2000 and imprisonment of up to six years for those engaged in sex work. This, if enacted, will also impose fines on brothel keepers of up to \$13,000 and prison sentences up to a maximum of twenty five years.<sup>126</sup>

A recent study, conducted for the UN Population Fund by the National Emergency Response Council on HIV and AIDS found that a session with a sex worker costs a typical client R50 (US\$7), but can escalate to R1,000 (\$146) for some pastors. Members of parliament and other wealthy clients reportedly paid nearly R3, 000 (US\$439) per session.<sup>127</sup> Poverty is a key factor influencing entry into commercial sex work in Swaziland. It is reported that almost a third of commercial sex workers are employed and undertake commercial sex work to supplement their income. There are two groups of commercial sex workers in Swaziland – those mainly providing sexual services for the local Basotho and those providing sexual services mainly to foreigners, whom it is claimed are willing to pay more than locals, particularly to engage in sex without a condom. The latter included schoolgirls and school dropouts who became involved in commercial sex work to support their families.<sup>128</sup> A survey conducted in 2007 revealed that 60% of sex workers used condoms with their clients, however 67% did not use condoms with their partners. In 2007 the Swaziland National AIDS/STI Program found that 60% of sex workers in Swaziland were under the age of 25.<sup>129</sup>

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<sup>123</sup>

ibid

<sup>124</sup>

United States Department of State (2008), ‘Trafficking in Persons Report 2008 - Special Cases – Swaziland’, @ UNHCR Refworld, available at:<http://www.unhcr.org/refworld/docid/484f9a50c.html>

<sup>125</sup>

Phakathi, M. (2010) ‘Help Sex Workers – Senator’ Inter Press Service Agency, January 19., at <http://ipsnews.net/africa/nota.asp?idnews=49242>

<sup>126</sup>

ibid

<sup>127</sup>

IRIN, Swaziland, (2007), ‘Risky business: report sheds new light on sex trade’, Plus News, @ <http://www.plusnews.org/report.aspx?ReportID=75876>

### 1.1.1.1.1

<sup>128</sup>

MbirimtengerenjI, N. D., (2007) ‘Is HIV/AIDS Epidemic Outcome of Poverty in Sub-Saharan Africa?’, Croatian medical journal, @ <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=2205968>

<sup>129</sup>

Op. cit., Phakathi

Senator Thuli Msane recently spoke out against the criminalisation of sex work in Swaziland and called for the decriminalisation of the industry. Msane argued that arresting sex workers only places them in more danger from their clients, making them more vulnerable to exploitation and abuse, and more particularly with ‘those’ who are entrusted with protecting citizens’. She also commented that moralising the issue of sex work was a means of discriminating against an already marginalised and vulnerable group. There are currently no figures available with regard to the percentage of sex workers suffering from HIV. A recent survey, however of the general population revealed that 26% of 15 to 49 year olds were suffering from HIV.<sup>130</sup>

### 6.2.5 Botswana

Living off the earnings of sex work or solicitation are criminal offences in Botswana. Sections 149-58 of the *Botswana Penal Code* punishes procurers, brothel-keepers, and any "male person living on [the] earnings of prostitution."<sup>131</sup> Under section 153(1) of the *Botswana Penal Code* "Any person who detains a woman or girl against her will-a) in or upon any premises with intent that she may be unlawfully and carnally known by any man, whether any particular man or generally; or b) in a brothel,-is guilty of an offence."<sup>132</sup> The laws with regard to this are vague and difficult to enforce. It is a far more common occurrence that sex workers are prosecuted under public nuisance laws.<sup>133</sup> Under the same Sections the criminal code punishes anyone who "in any public place solicits for immoral purposes"<sup>134</sup>. According to a local attorney in Gaborone "police lay a charge that they can prove before the court of law while the culprits always agree to pay the admission of guilt fine and then return to their trade..... it is difficult to arrest clients of prostitutes as they often claim they were just passing by and the lady stopped them to ask for a lift home"<sup>135</sup>

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<sup>130</sup>                    ibid

<sup>131</sup>                    Long, S., (2003) 'Before the law: Criminalizing sexual conduct in colonial and post-colonial southern African societies', Human Rights watch <http://www.hrw.org/reports/2003/safrica/safrighrc0303-07.htm>

<sup>132</sup>                    'Detention of females for immoral purpose', Section 153 of the Penal Code

<sup>133</sup>                    U.S. Department of State, (2008), 'Country Reports on Human Rights Practices - Botswana 2007', Released by the Bureau of Democracy, Human Rights, and Labour, @ <http://www.state.gov/g/drl/rls/hrrpt/2007/100467.htm>

<sup>134</sup>                    Op. cit., Long

<sup>135</sup>                    Oteng M, quoted in SWEAT, 'Sex work in Botswana', [http://www.sweat.org.za/index.php?option=com\\_content&task=view&id=76&Itemid=29](http://www.sweat.org.za/index.php?option=com_content&task=view&id=76&Itemid=29)

Four commercial sex workers while addressing a City Council meeting in 2006 blamed the government for not legalising the profession, so that they could access adequate health care and could be taught how to “handle themselves”. The sex workers complained of mistreatment on the part of health care professionals, particularly in relation to confidentiality. They also revealed that they often meet with clients who refuse to use condoms and that sex without a condom costs P100, 00, while with a condom it costs between P250 and P300.<sup>136</sup>

In a HIV needs assessment conducted in Botswana conducted in Gantsi, Gaborone, Selebi-Phikwe, Francistown, Letlhakane and Kasane, sex workers perceived that their entry into the industry arose due to a lack of male support and the shortage of jobs and earning power available to woman to Botswana. The research revealed that sex workers are often subject to violent behavior from their clients, who often refuse to use condoms, and are afraid to report abuse to the police. The report also concluded that trucks and lodges were safer for sex workers as there is better lighting, with designated buildings providing the safest work environment for Sex Workers.<sup>137</sup>

## 6.2.6 Tanzania

Prostitution is illegal under Tanzanian law, and there is also a prohibition against brothels and defilement of children below age 14.<sup>138</sup> The law similarly forbids child pornography and prostitution and considers any sexual act with a girl below the age of 18 to be rape, which is punishable by life imprisonment. However, enforcing these provisions is very difficult, because the legal age for marriage at 15.<sup>139</sup>

The most significant factors which lead to individuals entering the commercial sex trade in Tanzania are poverty and the disintegration of the family unit. Child Prostitution will often arise when children are sent to wealthy relatives, where they are forced to enter into commercial sex work or sold to traffickers. The expansion of the Tourism industry is also said to contribute the growing number of women entering the trade.<sup>140</sup>

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<sup>136</sup> Botswana Gazette, *Prostitutes Cry Out For Help*, 2006-09-06

<sup>137</sup> Chwaana, T., (2007), ‘Botswana: Measures against sex work revealed’, The Reporter (Botswana), @ <http://www.afrika.no/Detailed/14674.html>

<sup>138</sup> The Sexual Offences Special Provisions Act, (SOSPA) 1998, Section 138(B) ‘Sexual exploitation of children’

<sup>139</sup> Bahati, A. A, (2004) ‘A Critical Analysis of International Legal Regulations of Child Labor: A Case Study Of Tanzania, Faculty of Law’, University of Cape Town, p.65

<sup>140</sup> *ibid*

Figures released by UNAIDS in 2002 revealed that 7.8% of the adult population in Tanzania were living with HIV<sup>141</sup>. Qualitative research carried out in a gold mining town in Northern Tanzania in 2004 by Desmond et al found that three groups were at the highest risk of contracting HIV, this included Commercial Sex Workers, female bar workers, and male mineworkers.<sup>142</sup> While research found that there was a high knowledge that HIV could be transmitted by vaginal sex, and that condoms should be used to protect from transmission it also revealed that misconceptions also abounded, for instance it was a widely held belief that HIV could not be transmitted by engaging in anal sex.<sup>143</sup>

The Joint United Nations Programme on Aids has urged Tanzania to consider decriminalizing homosexuality and prostitution so that they could be involved in planning national Aids responses. According to a UNAID's report, this could lead to availability of statistics which would help in setting up programme and regulations to help such groups who are at greater risk of contracting HIV.<sup>144</sup> A cross sectional survey carried out on females employed in video and disco halls, restaurants, hotels and bars found a HIV prevalence rate of 45%.<sup>145</sup> 36% of those surveyed claimed that they had sex within the last week, while 49% claimed that they had 'not used a condom with the last month'.<sup>146</sup>

## 6.2.7 Mauritius

The *Criminal Code of Mauritius* criminalises sex work. *Article 253(1)* of the *Criminal Code of Mauritius* prohibits procuring, enticing, and exploiting another person for prostitution. *Article 253(3)* of the code prohibits procurement by means of fraud, deceit, threat, violence, or any other means of duress. Procuring, enticing, leading away, or exploiting a person to send the person abroad is a criminal offense. *Article 253(2)(b)*. Under *Article 253(4)* trafficking is punishable by imprisonment for up to 2 years and a fine.<sup>147</sup>

Under *Section 14* of the 1994 Child Protection Act, any person who causes, incites, or allows any child to be sexually abused, to have access to a brothel, or to engage in prostitution has committed a crime. *The Sexual*

<sup>141</sup> UNAIDS (2002), cited in Desmond, L.; Allen C. F.; Clift, S., Butolwa, J.; Mzugu, J., Plummer, M. L.; Watson-Jones, D., Ross, D. A., (2005) 'A Typology of Groups at Risk of HIV/STI in a Gold Mining Town in North-Western Tanzania', *Social Science & Medicine* 60 (2005) 1739 - 1749

<sup>142</sup> Ibid, Desmond et al, p. 1748

<sup>143</sup> Ibid, p. 1747

<sup>144</sup> Kabendera, Eric, *Tanzania: Country Is Counseled On Responses*, The Citizen (Dar es Salaam), 6 August 2008, at <http://allafrica.com/stories/200808070010.html>

<sup>145</sup> Op., cit., Desmond, p. 1740

<sup>146</sup> ibid

<sup>147</sup> Protection Project, 'Country Report – Mauritius', @ [www.protectionproject.org/human\\_rights\\_reports/report\\_documents/mauritius.doc](http://www.protectionproject.org/human_rights_reports/report_documents/mauritius.doc) -

*Offences Bill 2007*<sup>148</sup> addresses gender violence in Mauritius, however activists have called for further clarification in relation to sex trafficking of children and adults; offences covering commercial sexual exploitation related to pimps and others who force children and adults into prostitution.<sup>149</sup>

HIV was introduced late to Mauritius and there are relatively low levels of HIV in comparison with other countries in the Region. Little is known about the epidemic in Mauritius, but national records in 2002 suggested a prevalence of less than 1%.<sup>150</sup> A study carried out between 1988 to 1999 which monitored the trend of HIV amongst the population of Mauritius showed that Commercial Sex workers were amongst the groups with the highest prevalence of HIV, with 7.6% of those surveyed suffering from the HIV.<sup>151</sup>

## 6.2.8 Zimbabwe

Sex work is illegal in Zimbabwe. The *Criminal Law (Codification) Act 2004*<sup>152</sup> came into effect in July 2007 replacing *the Sexual offences Act 2001*. Section 81 to 84 criminalises solicitation, living off the earnings of sex work, procurement and brothel-keeping as follows. Section 81 of the act makes it illegal to solicit with a maximum prison sentence of up to six months. Section 82 prohibits 'living off or facilitating prostitution' with a maximum prison sentence of two years. Section 83 makes it illegal to procure any person to engage in 'unlawful sexual behaviour' with a maximum prison sentence of up to 2 years.<sup>153</sup>

It was reported in 2001 that 25% of adults suffered from HIV.<sup>154</sup> Ray et al argue that one of the main reasons for this is the inability of women in

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<sup>148</sup> Sexual Offences Bill, Bill no. 6 of 2007, Government Gazette of Mauritius No. 35 of 14 Apr 07

<sup>149</sup> Virahsawmy, Loga, (2009), 'Sexual Offences Bill 2007', afrol News / Gender Links, @ <http://www.afrol.com>

<sup>150</sup> Nishimura, Y, H; Ono-Kihara, M, Mohith J, C; NgManSun, R; Homma, T; DiClemente, R, J; Lang, D, L; Kihara, M, (2007) 'Sexual Behaviours and their Correlates among young people in Mauritius; A cross sectional study, *BMC International Health and Human Rights*, 7 (8), p. 2

<sup>151</sup> Pyndiah, M, N, (2000) 'Surveillance of HIV in the Republic of Mauritius' *International Aids Conference*, 14 (13), abstract @ <http://gateway.nlm.nih.gov/MeetingAbstracts/ma?f=102238069.html>

<sup>152</sup> *Zimbabwe - criminal law (codification and reform) Act [chapter 9:23] Act 23/2004, Part III, Sexual Crimes And Crimes Against Morality, Division E: Crimes relating to prostitution or the facilitation of sexual crimes, distributed by Veritas Trust*

<sup>153</sup> Zimbabwe - criminal law (codification and reform) Act

<sup>154</sup> Ray, S.; Van de Wiggert, J., Mason, P.; Ndowa, F., Maposhere, C., (2001) 'Constraints faced by Sex Workers in Use of Female and Male Condoms for Safer Sex in

Zimbabwe to insist upon condom use.<sup>155</sup> Ninety per cent of the Zimbabwe's population live on less than 1\$ a day. A UN report in 2003 claimed that poverty and hunger were fuelling child labour and sex work. Ninety per cent of the country's population live on less than 1\$ a day.<sup>156</sup> It is reported that many professionals including nurses, teachers and police officers have turned to sex work to survive. Deteriorating economic conditions have also caused forced family separation in Zimbabwe and separated or divorced women may supplement their low incomes by becoming involved in commercial sex work. Men who work in mines often replace their rural wives with town women, which leads to divorce or reduction in monetary remittances. For women in Zimbabwe, 'sexual relationships represent the only means of social and economic survival.'<sup>157</sup> Ray et al reported in a study carried out in Harare, Sex workers earned between \$3.40 for a short sexual episode to \$9.50 for a whole night.

In 2001, Ray et al. reported, while investigating the acceptability of condom use amongst a group of 149 sex workers in Harare, that 86% of their study group were infected with HIV.<sup>158</sup> At enrolment most sex workers reported that they used condoms infrequently and not at all with partners. The Report found that the primary reason why high rates of HIV are found amongst sex workers in the region is incorrect condom use. Reasons given for non condom use included 'partner refusal', followed by not wanting to use condoms with a regular partner, the unavailability of condoms, and been too drunk.<sup>159</sup>

## 6.3 SADC COUNTRIES WITH NO CRIMINAL LEGISLATION DIRECTLY TARGETING SEX WORKERS

### 6.3.1 Madagascar

Prostitution is not a crime in Madagascar, however, related activities, such as pimping, are illegal. In 2004 a report a '*Trafficking in persons report*'<sup>160</sup>

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Urban Zimbabwe', Journal of Urban Health, The New York Academy of Medicine, 78 (4.), pp. 581

<sup>155</sup>

Ibid, p. 582

<sup>156</sup>

Op. Cit, Mbirintengerenji

<sup>157</sup>

Carroll, R,(2004) 'Harare elite driven into prostitution, The Observer,

October 17, @ [www.guardian.co.uk/world/2004/oct/17/zimbabwe.aids](http://www.guardian.co.uk/world/2004/oct/17/zimbabwe.aids)

<sup>158</sup>

Op. cit., Ray et al, p. 584

<sup>159</sup>

Ibid, 584

<sup>160</sup>

U.S. Embassy – Antananarivo, (2004), 'Madagascar Trafficking in Persons Report', Political & Economic Section, @ [www.usmission.mg/MadTIP04eng.htm](http://www.usmission.mg/MadTIP04eng.htm) - 23k

produced by the US embassy in Antananarivo pointed out that domestic statutes with regards to sex work are often inconsistent are sometimes particularly with respect to ages. *Article 331* of the Malagasy Penal Code specifies fourteen as the age of consent, however, *Article 332* dealing with rape, uses fifteen as the definition of someone underage. Confusingly, *Article 334* provides sentences for those convicted of "habitually" procuring prostitutes under the age of twenty-one and "occasionally" procuring prostitutes under the age of sixteen.<sup>161</sup>

In a 2006 Country Report on Human Rights in Madagascar, the US Department of State stated that sex work was particularly visible in areas frequented by tourists. Sex Tourism has been a particular issue in Madagascar, with President Ravalomanana in 2005 warning foreigners not to travel to Madagascar for the purposes of engaging in 'Sex Tourism'.<sup>162</sup>

According to a report conducted Behets et al there is a relatively low number of sex workers suffering from HIV. In research conducted in 2002 they reported out of the 986 sex workers involved in the study, two of sex workers were infected with HIV. While this was the case with regard to HIV, 77.5% in Antananarivo and 73.5% in Tamatave suffered from at least one curable STI.<sup>163</sup> Since 2000, according to Behets et al there has been a conscious attempt to improve health services for Sex workers, however few sex workers attended health clinics, claiming that they were not happy with the public health service.<sup>164</sup>

### 6.3.2 Angola

Angola has no specific laws dealing with sex work; however it is widely regarded as an illegal activity<sup>165</sup>. Due to poverty many women engage in sex work. With poverty levels in Angola at 65 percent and scarce employment opportunities, many women are forced into prostitution.<sup>166</sup> The three-decade war gave Angolans a momentary buffer from HIV/AIDS. With many transport routes blocked preventing a more rapid spread of the disease. However, this situation has now a changed. Risk factors include high

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<sup>161</sup>                   ibid

<sup>162</sup>                   United States Department of State, *Country Reports on Human Rights Practices - Madagascar 2006*, Released by the Bureau of Democracy, Human Rights, and Labor March 6, 2007

<sup>163</sup>                   Behets, F. M. T. F.; Rasolofomanana, J. R.; Van Damme, K.; Vaovola, G.; Andriamiadana, J.; Ranaivo, A.; McClamroch, K.; Dallabetta, G.; van Dam, J.; Rasamilalao, D.; Rasamindra, A.; Mad – STI Working Group, (2003) 'Evidence- based treatment guidelines for sexually transmitted infections developed with and for female sex workers', *Tropical Medicine and International Health*, 8 (3), pp 251–258.

<sup>164</sup>                   Ibid, 252

<sup>165</sup>                   Information provided by ASSOCIAÇÃO DE REINTEGRAÇÃO DOS

JOVENS

<sup>166</sup>                   Asia Intelligence Wire, (2002), 'Women Prostitute in Angola to Survive', 19 June

displacement rates, coupled with massive population movements of internally displaced people, low education levels, a destroyed health infrastructure; and the disintegration of social structures, which results in women being forced to exchange sex for survival. In some cases, children work because there are no schools in their region.<sup>167</sup> According to the United Nations Integrated Regional Information Network many young girls will sell goods during the day and prostitute themselves at night.<sup>168</sup>

UNICEF studies reveal that nearly one-third of all Angolan women, aged 15-49, have never heard of HIV/AIDS, and 92 percent of Angolan women don't have sufficient knowledge about HIV/AIDS transmission and prevention. UNICEF reports HIV prevalence rates among women in antenatal clinics in Luanda at 8.6 percent, in Benguela 2.6 percent and in Huila 4.4. Prevalence rates of 33 percent for HIV/AIDS have been found amongst commercial sex workers.<sup>169</sup> The SADC Parliamentary Forum's Regional Standing Committee on HIV/AIDS whilst carrying out an 'oversight mission' on the borders of both Angola and Namibia in 2007, revealed that sex workers along the Angolan Namibian border reported police abuse as well as abuse from immigration officials who often stigmatised and discriminated against the sex worker population working along the border.<sup>170</sup>

In 2008 PSI carried out research evaluating condom used amongst sex workers in Luanda, as a follow up to a previous study conducted in 2005. The report found that sex workers' condom usage had increased significantly from 2005 – 2008 from 74.7% to 86.6%. In addition, those who reported having HIV tests increased from 37.4% to 59%. Two motivating constructs were considered central to 'consistent condom use', the first of which was the sex worker's awareness of their susceptibility to HIV, and secondly whether key individuals within society approved of the use of condoms.<sup>171</sup>

### **6.3.3 DRC**

There is no legislation with regard to sex work in the Democratic Republic of the Congo except in cases involving girls under the age of 14. The war has had a devastating effect on ordinary people and according to the US department of state the primary reasons why women enter into sex work are

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<sup>167</sup>

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<sup>169</sup>                *ibid*

<sup>170</sup>                SADC Parliamentary Forum's Regional Standing Committee on HIV/AIDS ' Interim Statement on the Bi-National Oversight Mission on Strengthening the Implementation of Cross Border HIV/AIDS Interventions by Members of Parliament from Angola and Namibia' 18<sup>th</sup> and 27<sup>th</sup> of November, p. 3

<sup>171</sup>                PSI Research and Metrics (2008) 'Angola (2008): HIV/AIDS TRaC Study Evaluating Condom Use amongst Commercial Sex Workers in Luanda Province, Second Round', Population Services International, pp. 2- 3



poverty and poor economic conditions. They also reported that Security forces encouraged prostitution and used prostitutes, and there were unconfirmed reports that security forces harassed and raped prostitutes.<sup>172</sup>

According to Human Rights Watch the war which has spurred an increase in crimes of sexual violence against women has pushed a number of women into survival sex. The burden of trying to survive and ensure that others in the family survive lies predominantly with women and as the situation in the DRC worsens more women and girls are resorting to trading sex for food, shelter, or money in order to provide for themselves and their families.<sup>173</sup> It is reported that many families will push female members into prostitution in order to survive within the worsening economic climate. Survival sex in the DRC is characterised by offering sexual services 'in exchange for payment in kind – some biscuits, soap, a plastic sheet, clothing, shoes, books or pencils'<sup>174</sup>

The systematic use of rape as a weapon of war in the DRC, has led to many Congolese girls been rejected by their families. They are left with very few means of survival other than commercial sex work. Due to the subordinate position of females, particularly young girls, they have very little negotiating power over the use of condoms. According to Marleen Bosman in this way females, who have been raped are victimized again when they enter sex work, as they are loathed by society and are extremely vulnerable to HIV.<sup>175</sup>

Kayembe et al. whilst carrying out research on the effects of constant condom use amongst sex workers in DRC found that both condom availability and voluntary counselling could have impact on sex worker behaviour when it came to take precautions in high risk sexual encounters. The study which consisted of 2638 sex workers found that 40% of those involved in the study used condoms consistently. Consistent condom use was associated with age with 20 – 40 year olds more likely to use condoms, citing it as a means to protect them from HIV.<sup>176</sup>

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<sup>172</sup> U.S. Department of State (2006), 'Country Reports on Human Rights Practices - DRC [2005](http://www.state.gov/g/drl/rls/hrrpt/2005/61563.htm)', Released by the Bureau of Democracy, Human Rights, and Labour, @ <http://www.state.gov/g/drl/rls/hrrpt/2005/61563.htm>

<sup>173</sup> Human Rights watch, *The war within a war*, [http://www.hrw.org/reports/2002/drc/Congo0602-03.htm#P356\\_57471](http://www.hrw.org/reports/2002/drc/Congo0602-03.htm#P356_57471)

<sup>174</sup> Bosmanns, M., 'Challenges in Aid to Rape Victims: the Case of the Democratic Republic of the Congo', at [projects.essex.ac.uk](http://projects.essex.ac.uk)

<sup>175</sup> *ibid*

<sup>176</sup> Kayembe, P, K; Mapatano, M, A; Busangu, A, F; Nyandwe, J, K, Musema, G, M, Kibungu, J, P; Mashinda, D, K; Matamba, L, T; Mayala, G, M, (2008) 'Determinants of consistent condom use among female commercial sex workers in the Democratic Republic of Congo: implications for interventions' *Sexually Transmitted Infections*, 84: 202 - 206

### 6.3.4 Mozambique

There is currently no legal framework in place in Mozambique with regard to sex work. Mozambique's Deputy Minister of Women's Affairs and Social Welfare, Joao Kandiyane pointed out that the current situation in Mozambique whereby Sex Work "is neither prohibited nor permitted by law" allows a situation where sex workers are not even treated as human beings, leaving them subject to abuse and exploitation. He called for legislation which would guarantee basic fundamental rights including the "right to health, to dignity, protection against violence and other forms of abuse, and respect for the women's choice of profession, regardless of their motives for becoming prostitutes."<sup>177</sup>

In interviews carried out in Beira and the Beira corridor with child sex workers, most of the girls interviewed mentioned poverty as well as limited educational opportunities as the reason for getting involved in sex work; 3200 primary schools were destroyed as a result of the civil war in the last decade. Prices varied and were higher for intercourse without a condom, which could potentially mean the difference between been paid \$1.50 and \$6.00. One third of girls reported never using condoms. Several of the girls complained that they were assaulted, insulted and beaten by clients.<sup>178</sup> Many migrant sex workers from Zimbabwe are currently working in Mozambique. As a result of Zimbabwe's 'economic meltdown' many have fled to Mozambique in the hope of earning US dollars. Zimbabwean sex workers in Mozambique report earning as little as US 0.50 cent per sex act.<sup>179</sup>

### 6.3.5 Malawi

Sex Work is not a criminal offence in Malawi, however the law prohibits living off wages earned through prostitution, owning a brothel, or forcing another person into prostitution.<sup>180</sup> Although Sex work is not a criminal offence, Sex Workers are indirectly targeted and loitering is the main charge under which prostitutes are arrested. The *Malawi Penal Code, Section 180(e)* contains the following provision as part of the offence of idle and disorderly conduct:

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<sup>177</sup> Op. cit., Katerere

<sup>178</sup> Op. cit., Perschler-Desai

<sup>179</sup> Takavarasha, T., (2008), 'Mozambique, Zim Women sell sex for food, May 23, @ [news@hararetribune.com](mailto:news@hararetribune.com)

<sup>180</sup> U.S. Department of State, (2008)., *Country Reports on Human Rights Practices 2007*

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*Malawi*, Released by the Bureau of Democracy, Human Rights, and Labour, @ <http://www.state.gov/g/drl/rls/hrrpt/2007/100491.htm>

*[E]very person who in any public place solicits for immoral purposes...shall be deemed idle and disorderly persons and shall be liable for the first offence to a fine of K20 and to imprisonment for three months and for a subsequent offence to a fine of K50 and up to imprisonment for six months.*<sup>181</sup>

In 2009, fourteen sex workers were arrested and forced to take HIV tests causing outrage amongst organisations in Malawi, who claimed that it was a violation of their human rights. CEDEP claimed that the action was a violation of the sex workers' right to privacy and equality and amounted to a mental torture to them.<sup>182</sup> The fourteen sex workers were arrested and fined 80 dollars not for engaging in sex work, but because they were deliberately working while been infected with HIV. This action was carried out in conjunction with Section 192 of the Penal Code which states that "Any person who unlawfully or negligently does any act which is and which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life shall be guilty of a misdemeanor."<sup>183</sup> It has been argued that this measure was unconstitutional, as consent was requested from the sex workers, which is not permitted under the Malawi Constitution.<sup>184</sup>

In *Kaseka and 6 others v Republic*<sup>185</sup> police arrested seven women under section 180 (e) at a rest house, claiming they were on the premises for 'immoral purposes'. The court, noting that none of the male clients were arrested, cited article 23(1) of the Malawi Constitution and stated that:

*'It seems to me that police action was rather discriminatory because only the appellants were arrested leaving their male companions free. Even those who had no male companions were not to be arrested just because they were suspected to be there for purposes of immoral activity.'*

The convictions were overturned on the basis that they were 'discriminatory against women'<sup>186</sup>

The practice of exchange of sex for money is widespread in Malawi and as such it is suggested that that such exchange has become so common that it is

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<sup>181</sup> Op. cit., LAC, 203

<sup>182</sup> Mpaka, C., 'Rights: Police Force HIV Tests for Sex Workers' Inter Press Service Agency, Oct 10, 2009, at <http://www.ipsnews.net/news.asp?idnews=48800>

<sup>183</sup> ibid

<sup>184</sup> ibid

<sup>185</sup> *Kaseka and 6 others v Republic*, Malawi High Court, Case 75/390, 22

January 1999

<sup>186</sup> Op. cit, LAC, 203

seen as legitimate.<sup>187</sup> According to the Secretary for HIV/AIDS and Nutrition in the Office of the President and the cabinet, based on research conducted on 28 districts in Malawi, HIV infections amongst sex workers ranged between 70 – 80%. With respect to these figures, Shawa argued that it was important that sex workers were empowered in order to form part of the solution in the fight against HIV.<sup>188</sup> Research conducted in Zomba found that the motives of most sex workers was primarily economic, as alternative forms of employment for females was either non – existent or very poorly. All of the sex worker’s surveyed were aware of the dangers of AIDS but saw a change in behaviour as pointless as sex work was a reasonably paid job.<sup>189</sup>

### 6.3.6 Lesotho

The law in Lesotho does not address sex work. Entry into the commercial sex work industry is predominantly driven by poverty. The unemployment rate in Lesotho is 45%<sup>190</sup> and traditional law and custom severely limit the rights of women in areas such as property rights, inheritance, and contracts. There is also a strong link between migrancy and the spread of HIV/AIDS and Lesotho is particularly vulnerable in this respect. ‘Maseru is Lesotho’s major border crossing, with transport corridors to and from South Africa and other destinations in SSA, involving large and regular cross-border movements of people. There is increasing internal rural migration to the city, particularly by women unsuccessfully searching for work’.<sup>191</sup>

In research conducted on sex workers in Maseru, they reported earning between 300 to 1000 maloti per week, depending on the type of customer and the nature of the sex act. A few interviewees stated that they had received free condoms and advice on sexual health from CARE Lesotho and Carewell in Maseru, but all the interviewees stated that they had not received any help from other organisations, including Government agencies. The National AIDS Strategic Plan intends to reduce HIV/AIDS in Lesotho through peer education, voluntary counselling and testing, management of sexually transmitted infections; however, Commercial Sex Workers are not recognised as a target group in the National AIDS Strategic Plan.<sup>192</sup>

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<sup>187</sup> Forster, P. G., (2000), ‘Prostitution in Malawi and the HIV/AIDS Risk, Nordic Journal of African Studies 9 (1), pp. 1-19

<sup>188</sup> Op. cit., Mpaka

<sup>189</sup> Ibid

<sup>190</sup> Waterman, Nick, ‘Commercial Sex Workers and TVET: An Urgent, Sub-Regional Challenge – 2003’ @ <http://www.unevoc.unesco.org/southernafrica/workshop2003/papers/LES-Waterman-HIV-AIDS.doc>

<sup>191</sup> Ibid

<sup>192</sup> ibid

# **7 What's the Reality? The Connection between the Legislation Affecting Sex Workers and HIV/Human Rights Abuses**

## **7.1 Some Common Characteristics**

From the limited research available, it is clear that whether the industry is illegal or not sex workers across suffer from excessive human rights abuses and inadequate health care. Although the SADC region is very diverse, sex workers throughout the region have reported similar problems.

### ***7.1.1 Access to Healthcare***

Sex workers throughout the region were found to be in a very vulnerable position with regard to accessing healthcare and protecting themselves from HIV transmission. This was as a result of numerous different factors, including the confiscation of condoms by the police and discrimination from health care workers which were exasperated by the stigmatisation attached to the occupation. The number of sex workers suffering from HIV was extremely high in comparison to the general population, indicating that they a group which is most in need of protection from the virus.

HIV figures as high as 86% in Zimbabwe, 70% in Katutura, Namibia, 69% in Ndola Zambia, 69% in Cartonville, South Africa, and 33% amongst populations in Angola have been recorded amongst the sex worker population. Sex Worker's throughout the region reported feeling stigmatised and being ill-treated and verbally abused by health care workers in public clinics. Studies conducted in the region showed that sex worker's were aware of the risks of HIV, but felt that the immediate gain outweighed the long term risks. In almost all countries in the region it was a regular occurrence that partners either refused to engage in sex without a condom, either abusing the sex worker or offering much them a lesser sum of money. Studies carried out in Beira Mozambique showed that intercourse without a condom could mean the difference between been paid \$1.50 and \$ 6. Research conducted in KwaZulu Natal in South Africa found that clients abused those who insisted on condom use and 'insisted on paying less' In Botswana and Zimbabwe, again, the main reason for non condom usage was client refusal. In DRC, due to their subordinated position, women

complained of having very little control over condom usage. One third of sex workers interviewed in Mozambique stated that they never used condoms. Sex workers also complained in countries, such as Zimbabwe, that there was no availability of condoms.

The number of health statistic available with respect to sex workers is extremely limited, however, HIV figures amongst sex workers in the region, according to the research which is currently available, is high. Whilst there have been some studies conducted in South Africa and Namibia, information with regard to sex work in the other countries which make up the SADC region is practically non-existent. Even with regard to South Africa, which has had the greatest amount of research conducted on the issue, and where some debate has taken place, a recent report published by Marlise Richter and Christine Gould, found that of 1939 abstracts published by South African Conferences on HIV/AIDS since 2003, only 22 contained any reference to sex work, which amounts to only 1.1%. Taking in to account, that figures of HIV infections amongst some sex worker populations in South Africa has been recorded as high as 69%, this is surprising.<sup>193</sup>

It is necessary that health initiatives are put in place that are based on 'evidence based' research. It is therefore essential that Governmental organisations, NGOs and UN organisations take an increasing interest in sex worker populations, whilst researching HIV in the region.<sup>194</sup> This, will clearly be made easier, by the removal of criminal laws targeting sex workers and impeding access to them as a group in order to conduct research, the implementation of educational programs to educate the public and NGOs so that the issue is brought to the fore in the fights against HIV, and the removal of initiatives, such as the 'global gag' rule, which disable organisations from conducting research or implementing health care initiatives where such initiative focus on sex work. In addition to conducting more research, it is essential that condoms are not confiscated from sex workers from the police, which effectively leaves them vulnerable to the virus, and that health care workers are educated and sensitised to the necessity of treating sex workers with dignity and respect so that they can enjoy equal access to health care.

It could be argued that looking at the HIV data, that the countries where sex work is criminalised are those with the highest figures. However, it is impossible to draw this conclusion, especially when you consider the small samples which have been taken, but also when you consider that the countries where sex workers have been recorded to have some of the highest

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<sup>193</sup> Gould, C; Richter, M, (2010) 'The Myth and Reality of Human Trafficking', @ [http://sasework.org/wordpress/?page\\_id=88](http://sasework.org/wordpress/?page_id=88)

<sup>194</sup> Crago, A. L; Arnott, J, (2008), 'Rights Not Rescue: A Report on Female, Trans and Male Sex Workers' Human Rights in Botswana, Namibia, and South Africa' Sexual Health and Rights Project, Open Society Initiative for South Africa, pp. 1-14

levels of HIV, are those which have the highest levels in the overall population. The highest figures recorded in a country where sex work is decriminalised is Angola, at 33%, however this is extremely high given that the overall population infected with HIV is 2.2%.<sup>195</sup> What this indicates is that it does not matter whether the industry is criminalised or decriminalised. What is necessary is that the industry is regulated so that sex workers are no longer persecuted by public by laws which allow the police to confiscate condoms, so that they can enjoy better negotiating positions with their clients, and so that the industry is legitimised in the eyes of health care workers, the public, and most importantly for the sex workers themselves.

### ***7.1.2 Human Rights Abuses***

Research shows that there are widespread human rights violations throughout the SADC region. It is evident that the abuse is inflicted by both state and non state actors, namely the police and clients. There were widespread reports of police violence, in particular sexual abuse and rape, in addition to unlawful detention and arrests. Sex workers suffered a range of abuse from clients which included beatings, rape, and sexual violence. In South Africa, sex workers complained of been abused by clients when requested to wear a condom. In Namibia sex workers complained that their work had become painful and dangerous, as a result of client abuse. In Swaziland Senator Thuli Msane, claimed that sex workers were constantly in danger of exploitation and abuse. In Botswana, it was reported that sex workers often face violent behaviour from their clients. In Mozambique sex workers complained of been ‘assaulted, insulted, and abused by clients.

It is regularly the case that criminal sanctions are targeted against those who are engaged in commercial sex work, and it is rarely the client or those who primarily profit from the sale of sex who are targeted. In addition, it often those who are the poorest and most vulnerable, such as street workers, who are commonly targeted because of ease of access.<sup>196</sup> As Law points out, although massive police resources are utilised in targeting sex workers, little of these resources are used to ensure that they are protected from abuse.<sup>197</sup> It is regularly the case that criminal sanctions are targeted against those who are engaged in commercial sex work, and it is rarely the client or those who primarily profit from the sale of sex who are targeted. In addition, it often those who are the poorest and most vulnerable, such as street workers, who are commonly targeted because of ease of access.<sup>198</sup> In 1968 Herbert Packer stated that:

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<sup>195</sup> AVERT, ‘Sub Saharan Africa: HIV and AIDS Statistics’, @ <http://www.avert.org/africa-hiv-aids-statistics.htm>

<sup>196</sup> Ibid., 527

<sup>197</sup> Ibid, 608

<sup>198</sup> Ibid, 527

*There seems little reason to believe that the incidence of prostitution has been seriously reduced by criminal law enforcement . . . . . The side effects on law enforcement are unfortunate. Police corruption is closely associated with this kind of vice control. . . . An equally disgusting kind of enforcement practice is the use of the police or police-employed decoy to detect solicitation. . . . . What does society gain from this kind of law enforcement activity? If the effort is to stamp out prostitution, it is plainly doomed to failure. If it is to eradicate or curb the spread of venereal disease, that too is illusory . . . . To put it crudely, but accurately, the law is perverted . . . . It seems that prostitution, like obscenity, and like other sexual offenses, should be viewed as a nuisance offense whose gravamen is not the act itself, or even the accompanying commercial transaction, but rather its status as a public indecency.*

Sex workers throughout the region were afraid to report abuse to the police for fear that they would be abused again by those they were reporting the abuse to. In South Africa, sex workers complained that they were beaten and threatened by police. In Namibia sex workers claimed that they were harassed. In Zambia women claimed that they lived in constant fear from the police. In DRC, Human Rights Watch claimed that there were unconfirmed reports of sex workers been harassed and raped by the police Force. In addition to been abused and threatened by the police, there were various reports of illegal detention, particularly in South Africa, Namibia, and Malawi. This often results in sex workers been unable to look after their children, unable to earn a living, and also been unable to access anti retroviral drugs. Bindman argues that it is rarely in the interests of the police to arrest every sex worker engaging in sex work, and as a result sex workers are often arrested on a arbitrary basis, and are often used as a source of ‘extortion and intimidation’. This violates the right to liberty under article 3 UDHR, and article 9.1 of the ICCPR, which provides for ‘freedom from arbitrary arrest and detention.’<sup>199</sup>

The lack of data available indicates that although sex workers are one of the most vulnerable groups in society, there are very few organisations focusing on securing and protecting them from human rights abuse. The predominant attitude towards sex workers in the region is largely discriminatory; with sex work commonly seen as an immoral occupation. Given the widespread human rights violations, it is necessary that more dialogue and social interventions take place; that sex workers are adequately protected by the law, both in terms of access to the courts and police protection; and that legislative change occurs in order to facilitate this. It is necessary, as Crago and Arnott point out, that those who violated the human rights of sex workers can no longer operate with impunity.<sup>200</sup>

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<sup>199</sup> Op. cit, Bindman

<sup>200</sup> Op. cit, Crago; Arnott, p. 12



## 7.2 Differing Approaches of the Courts to Protecting Sex Workers' Human Rights

From the few cases which have appeared before the courts in the SADC region, it would appear that both access to, and protection from, the courts for human rights violations are extremely limited for sex workers. With regard to the approach which the courts have taken when dealing with sex worker rights, it is interesting to note the constitutional challenges which have taken place in South Africa and Malawi, because of the fact that sex work is illegal in South Africa, whilst it is not a criminal offence in Malawi. Comparatively speaking, what is clear is that firstly, the courts are much more willing to protect the constitutional rights of sex workers where the industry is decriminalised, and secondly, it may be easier to launch a constitutional challenge, where the legislation concerned is indirectly targeting sex workers. Sex work is not illegal in Malawi, and in fact, it has been argued that sex work has become an almost legitimate activity, which may explain the courts willingness to protect the sex workers in question from gender discrimination in *Kaseka*. The decision in *Jordan* clearly demonstrates the gender discrimination which is regularly employed by state authorities, and the difficulties in protecting sex workers constitutional rights in a country where the industry continues to be illegal.

With regard to labour rights, the only case to date dealing with this issue is *Kylie*. As stressed earlier, it is unlikely that the labour courts will move to protect the rights of sex workers in South Africa while the industry continues to be criminalised. It remains to be seen, if a case were to appear before one of the courts where sex work is not a criminal offence, whether sex workers will enjoy equal access to the courts. In any case it necessary that the industry is regulated, so that sex workers can enjoy labour rights and protections similar to those of other employees.

# 8 Recommendations

## 8.1 Legalisation or Decriminalisation

As discussed in chapter five, there are various different responses with regard to how sex work is legislated. Clearly, the criminalisation model does not provide any advantage for either the sex worker or the public, prohibiting efforts to combat HIV in the region, and facilitating human rights abuses. This leaves us with the remaining two models: decriminalisation and criminalisation.

It is often argued, with regard to the countries where sex work is a criminal offence, particularly with regard to South Africa, that the industry should not be legalized, but should instead be decriminalized. However, it is clear from the data obtained in this report, that simply decriminalizing the industry, without granting any legal rights to sex workers, still leaves this group susceptible to violence, abuse, and discrimination. Arguments are often put forward that regulating the industry, simply means that the state has more control, and this is heralded as a negative development. However, as discussed earlier, legalization does not necessarily have to follow a particular model, and for instance, mandatory health checks do not have to be included in such a model. In fact the idea is that sex workers enjoy the same rights as other individuals enjoy by being members of the labour force. Work is regulated, and whilst there are disadvantages to this, the advantages and protections which such regulation offers far outweighs the negative aspects.

Webster's Law dictionary defines the term 'legal' as that which is 'created by, based upon, or authorized by law'. It further defines 'legal rights' as 'that which can be enforced by a court'.<sup>201</sup> Keeping this definition in mind, the legalization of sex work simply means that the activity is authorized by law, that the sex workers is granted certain legal rights, and that these are legally enforceable in court. It should also be acknowledged that sex workers already enjoy legal rights as nationals of their individual countries. It is important that not only is the industry legalized in order to provide labour protections, but as Brandt points out, that these rights are enforced, because whilst the industry is criminalized in certain countries and there are no criminal sanctions in others, no where is it the case that legislation provides for the exclusion of sex workers from basic constitutional, or other legal protections which are granted to the individual in order to protect them from abuse and discrimination.<sup>202</sup>

It should also be reiterated again, as Kandiyama argued, it is necessary that each African country adopt laws which reflect their own political and social

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<sup>201</sup> Op. cit., Webster's New World Dictionary

<sup>202</sup> Op. cit., Brandt, 525

realities. It is therefore, not particularly useful, when individuals argue against the legalization of sex work, without acknowledging the variety of different legal frameworks which can be adopted in order to best suit the country in which they are been adopted.

## 8.2 The Need for a Legal Framework

It is clear, from the constitutional case of *Jordan* that came before the courts in South Africa, that even where fundamental constitutional rights are at issue, sex workers are unable to receive equal treatment. Sex workers are not excluded from laws which protect citizens from exploitation, rape, and abuse, but because of the stigma attached to the commercial sex work, this often prohibits them from reporting abuse, or in situations where they do report abuse they are often subject to more abuse by the authorities.<sup>203</sup> The imposition of criminal sanctions by a state presupposes that the element which is been criminalised poses some type of threat to society. But with regard to sex work, where does this threat lie? As previously discussed, criminalising sex work should not be equated with criminalising child prostitution, trafficking or public nuisance, nor does it protect society from HIV. In fact, the research gathered in this report, points to the contrary; that criminal laws exasperate these issues. So where does the threat lie, some argue that it is the threat to the human dignity of sex workers themselves, that undermines the values and public morality of society. But again, as this report illustrates, the criminalisation of sex work does not restore the human dignity of the sex worker. The number of sex workers continue to grow, and it is in fact that the criminalisation of the industry which undermines there human dignity, depriving them of basic human rights, such as the ability to work and live in an environment free of abuse and discrimination.

Clearly the legalisation of sex work is not going to dramatically improve social perceptions with regard to sex workers, nor will it lead to the prevention of abuse and discrimination, however, what it will do is to remove the barriers which prevent sex improving their situations and protecting their human rights. In 1979, David A Richards in *Commercial Sex and the Rights of the Person: a Moral Argument for the Decriminalisation of Prostitution* stated that:

*‘To think of persons as possessing human rights is to commit oneself to two crucial normative assumptions: first, that persons have the capacity to be autonomous, and second, that persons are entitled, as persons, to equal concern and respect in exercising that capacity. . . .[A]utonomy gives to persons the capacity to call their lives their own. The development of these capacities for separation and individuation is, from the earliest life of the infant, the central developmental task of becoming a person. . . . . Because autonomy is so fundamental to the concept of what it is to be a*

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<sup>203</sup>

Ibid, 524

*person and because all are equal in their possession of it, all persons are entitled to equal concern and respect, as persons.*<sup>204</sup>

According to Richards the right to individual liberty is not unconditional. With regard to anti social behaviour he argues that the state has the right to control such behaviour, but the sale of sex for money does not equate to such behaviour. In Richards's opinion, the sale of sex is simply the provision of a personal service.<sup>205</sup> In the case of Jany which appeared before the European Court of Justice in 2001, the court found that the 'perceived immorality' of the occupation did not affect its status as an economic activity.

The ECJ, stated that sex work constituted economic activity as it involved the provision of services for 'remuneration'. The Court, in this regard, defined sex work as "an activity by which the provider satisfies a request by the beneficiary in return for consideration without producing or transferring material goods".<sup>206</sup> The Labour Relations Act of South Africa also provides that an 'employee is any person working for another person for remuneration.' However, sex work continues to be excluded from 'fair labour practices'.<sup>207</sup>

Sex work is a form of labour and should be considered within the broader context of the struggle to acquire rights and benefits for those who are oppressed. As Anne McClintok has pointed out, traditionally the ILO has 'argued for the radical transformation of labour, not its abolition'.<sup>208</sup> Legislation or a lack of protective legislation has a significant influence on sex work in the SADC region. Although sex work may not be directly illegal in almost half of the countries surveyed, sex workers are not afforded any rights. They don't pay taxes or collect them from clients; nor do they receive 'compensation for workplace injuries'.<sup>209</sup> As independent contractors, sex workers are not protected by employment health and safety regulations or regulations governing employer responsibility.<sup>210</sup>

According to Ericson, just because society finds a job undesirable or even dangerous does not justify its illegality. For example, he points out, that the

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<sup>204</sup> David A.J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979), cited in *ibid*, 530-531

<sup>205</sup> *Ibid*, 531

<sup>206</sup> *NTER* (2002), pp. 1-7.

<sup>207</sup> Crago, A. L; Arnott, J, (2008), 'Rights Not Rescue: A Report on Female, Trans and Male Sex Workers' Human Rights in Botswana, Namibia, and South Africa' Sexual Health and Rights Project, Open Society Initiative for South Africa, p. 5

<sup>208</sup> *Ibid*, 8

<sup>209</sup> Lewis, J; Maticka – Tyndale, E; Shaver, F; Schramm, H, 'Managing Risk and Safety on the Job: The Experience of Canadian Sex Workers' in Parsons, J. T. (2005) 'Contemporary Research on Sex Work' Hawthorn Press Inc., p. 149

<sup>210</sup> *ibid*

job of a miner could also be considered both undesirable and dangerous however we do not prohibit it because we recognise that it is socially valuable. Instead of protecting the miner from himself and removing him from the activity, we instead look at the external factors which make the job more difficult and work at minimising the risks by improving their working conditions. Comparatively speaking, if the occupation of the sex worker is considered both dangerous and undesirable, extraneous factors which make this job more difficult and dangerous should be addressed, such as punitive legislation which creates a hostile environment for the sex worker to work in.<sup>211</sup>

Jo Bindman argues that laws which prohibit sex work severely impact on the welfare of the sex worker. They are often the reason for the underground nature of the work, and sex workers are often forced to work alone on premises, without the security of having another worker for security, In addition the prohibition against brothel keeping will often compromise the worker's safety, by forcing a larger number of workers to solicit on the street. Because of the illegality of the profession workers will often be forced to conclude negotiations quickly and work in areas which will protect them from police detection but may place them in more danger from client abuse.<sup>212</sup> This violates art. 20.1 UDHR, with regard to 'freedom of association', and art 12.1 ICCPR and 15.4 of CEDAW, with regard to 'freedom of movement' and 'choice of residence'.<sup>213</sup> In 1997, the South African government in its first report to CEDAW reported that 'anti – prostitution' laws violate some constitutional rights, with respect to dignity, security of one's person, the right to privacy, freedom of association, and the right to choose one's profession or trade.<sup>214</sup>

According to Bindman, the conditions which sex workers are forced to work in are similar to those of other low status jobs which are engaged in by those with poor economic prospects, but the situation is exasperated by the criminalisation and stigma attached to sex work, which allows them to be abused by those who are who are supposed to uphold their basic human rights. Nussbaum, comparing the work of sex workers to that of factory workers states:

*Both face health risks, but the health risk in prostitution can be very much reduced by legalization and regulation, whereas the particular type of work the factory worker is performing carries a high risk of nerve damage in the hands, a fact about it that appears unlikely to change. The prostitute may well have better working hours and conditions than the factory worker; especially in a legalized regime, she may have much more control over her working conditions. She has a degree of choice about which clients she*

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<sup>211</sup> Ibid, 93

<sup>212</sup> Bindman, Jo., (1997) Redefining Prostitution as Sex Work on the International Agenda," a report written with participation of Jo Doezema, Network of Sex Work Projects

<sup>213</sup> ibid

<sup>214</sup> Op. cit, LRC, 12

*accepts and what activities she performs, whereas the factory worker has no choices but must perform the same motions again and again for years. The prostitute also performs a service that requires skill and responsiveness to new situations; whereas the factory worker's repetitive motion exercises relatively little human skill and contains no variety. . . [On the other hand the] factory worker suffers no invasion of her internal private space, whereas the prostitute's activity involves such (consensual) invasion. Finally, the prostitute suffers from social stigma, whereas the factory worker does not . . .*<sup>215</sup>

Punitive or a complete lack of legislative protection has a significant influence on sex work in the SADC region. Although sex work may not be directly illegal in almost half of the Countries surveyed, sex workers are not afforded any rights. They don't pay taxes or collect them from clients; nor do they receive 'compensation for workplace injuries'.<sup>216</sup> As independent contractors sex workers are not protected by employment health and safety regulations or regulations governing employer responsibility.<sup>217</sup> As Bindman points out many of the issues which are faced by sex workers fall within the ambit of International labour and Human Rights standards, however sex workers are excluded from their application because of their vulnerability and the marginalisation which accompanies their profession which results from the criminalisation and lack of regulations which exist protecting sex workers from abuse.<sup>218</sup>

It is argued that one of the primary ways in which commercial sex workers can protect themselves from abuse is through unionization. At least this has been the experience of sex workers in both Australia and Hawaii, however in order to unionise sex workers need to be categorised as employees. This can only be achieved by the regulation of the industry. Unionisation, as Brandt argues, provides sex workers with an effective way of promoting 'decent working conditions so that they can protect themselves from violence and abuse' and ensure they are able to access effective healthcare. However, it should be noted, that in a social climate which is not receptive to the sex work, as exemplified by one establishment in San Francisco, it may be difficult for sex worker unions to integrate in to larger established organisations.<sup>219</sup>

Creating a legal framework will not be an easy task, particularly because, as discussed in the introduction, many different forms of sex work exist. Any

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<sup>215</sup> Martha C. Nussbaum, "Whether from Reason or Prejudice": Taking Money for Bodily Services, 27 J. LEGAL STUD. 701-02 (1998), cited in op. cit., Brandt, 587

<sup>216</sup> Lewis, J; Maticka – Tyndale, E; Shaver, F; Schramm, H, 'Managing Risk and Safety on the Job: The Experience of Canadian Sex Workers' in Parsons, J. T. (2005) 'Contemporary Research on Sex Work' Hawthorn Press Inc., p. 149

<sup>217</sup> ibid

<sup>218</sup> ibid

<sup>219</sup> Op. Cit., Law

framework will have to acknowledge this, for instance, some sex workers may be self employed, whilst others may have a direct employment relationship with a brothel. In addition, as previously pointed out, the SADC region is very diverse, and as such very different frameworks must be created to reflect political and social realities. However, regardless of the difficulties, what is clear is that legalising the industry is a necessity. As Gould points out, although legalisation of the industry may not have a massive effect on the power relations which dominate the industry, it will at least 'strengthen the bargaining power' of sex workers and allow them to report abuse and non payment, while improving overall labour standards.<sup>220</sup> This is what is important, regardless of what form such legislation takes.

Further to the discussion in section 3.3, it is also necessary that in addition to legal reform that moralistic provisions contained in global funding mechanisms are tackled. Five of the countries, which criminalise sex work are doubly effected by the PEPFAR. In three of these countries extremely high levels of HIV of 69% and above have been recorded amongst sex worker populations. In addition to obstacles which are created by the ongoing criminalisation in these countries, PEPFAR, by creating condom shortages, as well as preventing organisations from aiding one the groups most at risk from HIV infection. If it is in fact an 'emergency plan for Aids Relief', then it is imperative that it is realistically implemented as such. Realistic implementation must include condom distribution and targeting the most at risk groups, without exclusion.

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<sup>220</sup>

Op. Cit., Gould et al, p. 157

## 9 Conclusion

*'...the relationship between prostitute and third party, as well as that between prostitute and client, takes place in a specific legal, institutional, social, political and ideological context, and this represents another set of constraints upon relationships. In many cases, for example, prostitution is legally regulated in ways which so heavily penalise independent prostitution that law enforcement effectively operates as a pressure on prostitutes to enter and remain in third party controlled prostitution no matter how exploitative the third party maybe.'* (O'Connell Davidson)<sup>221</sup>

*'Female subordination runs so deep that it is still viewed as inevitable ...rather than a politically contracted reality ... The physical territory of this struggle is women's bodies. The importance of control over women can be seen in the intensity of resistance to laws and social changes that put control of women's bodies in women's hands.'* (Charlotte Bunch)<sup>222</sup>

It is undisputable that the rapid spread of HIV has been accelerated by 'a wide range of human rights abuses'.<sup>223</sup> At the 1994 Fourth World Conference on Women held in Beijing it was concluded that the woman's right to 'control her sexuality' was a human right.<sup>224</sup> Rojanapthayokorn illustrates in chapter four, that sex workers are subject to triple vulnerability, not just as financially dependent females, but also because of the illegality of the industry. As a result, sex workers, as a group, have been largely ignored in the fight against AIDS.

It is very difficult to obtain figures in relation to how many sex workers are currently operating in the SADC region, or what percentage of sex workers currently suffer from HIV. This is due to a number of factors; the lack of research in the area, sex workers reluctance to attend health clinics and the underground nature of the work which exists as a result of harmful legislation. However, the research projects looked at in this report, although generally focusing on smaller communities of sex workers, indicate that the prevalence of HIV among sex workers is high in comparison to the general population; with HIV levels amongst sex worker as high as 86% in Zimbabwe and 70% in Namibia. As discussed in chapter four, and

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<sup>221</sup> O'Connell Davidson, J, (1998), 17 – 18, cited in ibid

<sup>222</sup> Charlotte Bunch, "Transforming Human Rights from a Feminist Perspective," cited in Doezema Jo, 'Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy', p. 34, in Kempadoo, K & Doezema, J, (1998) 'Global Sex Workers; Rights, Resistance, and Redefinition', Routledge

<sup>223</sup> O' Malley, J., Director, HIV/AIDS Practice, cited in Pretoria University Law Press (PULP), (2008) 'Compendium of Key Documents Relating to Human Rights and HIV in Eastern and Southern Africa', UNDP and Pretoria University Law Press, p. 3

<sup>224</sup> Klugman, B., (2000), 'Sexual Rights in Southern Africa: A Beijing Discourse', Health and Human Rights, Vol. 4, No. 2, Reproductive and Sexual Rights, p. 144



illustrated by various studies conducted in Angola, Thailand, and Cambodia, one of the most effective prevention mechanisms to curb the spread of HIV amongst the sex worker population, is the adequate provision and use of condoms. It is clear however from the various reports which exist detailing the experiences of sex workers in the region that laws directly and indirectly targeting sex workers curb their ability to access, utilize, and keep condoms in their possession.

The link between practicing preventative sexual behaviours sex workers' self perception cannot be underestimated and must be viewed in light of their current legal position. The PSI study which was conducted in Angola emphasises the importance of encouraging positive norms and heightening personal risk perception when encouraging sex workers to use condoms during high risk sexual encounters with their clients. As discussed in Section 3.3, it is important that sex workers can acknowledge their profession in order to feel confident in negotiating safer sex with their partners, however, it is often the case that as a result of stigmatisation and discrimination sex workers are unable to practice preventative behaviours. The legalisation, and the accompanying legitimisation of the industry will help to achieve this. The 100% condom use programs carried out in Thailand and Cambodia, clearly illustrate the importance that self empowerment can have on sex workers' ability to protect themselves and on a larger scale the positive impact that the implementation of programs such as these have on the HIV epidemic. It must be emphasised, however, that these programs included the utilisation of certain methods, such as the issuance of membership cards to sex workers by the local authorities. The implementation of such a program, would therefore, seem impossible in SADC, without legal reform legitimising the industry, and allowing sex workers, local authorities and organisations to partake.

With two thirds of the global population of people suffering from HIV living in Southern Africa<sup>225</sup>, it is important that Sex workers have access to education and healthcare, and that the appropriate legislation is put in place to protect sex workers from exploitation and abuse, allowing them to practice preventive sexual behaviours. The SADC region is culturally diverse, and as such sex work is tolerated to varying degrees, this is reflected in each country's laws regarding sex work, with some criminalising sex work and others remaining silent on the issue. What is evident, however, is that regardless of whether harmful legislation exists or not, sex workers are negatively affected to a similar degree. Similar reports of police harassment, client abuse, inadequate healthcare, and exploitative working conditions emerge throughout the region even where sex work is not a criminal offence. It is therefore imperative that not only is the industry decriminalized throughout the region, but that laws are put in place regulating the industry and providing sex workers with regular labour protections.

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<sup>225</sup>

Op. cit., UNAIDS



# Acknowledgements

This thesis is dedicated to my husband, Amit, and my mother, Regina.

To Amit, I thank you for your patience and support while I completed my studies on another continent. It was certainly not easy, thank you for waiting – I love you.

To my Mother, thank you for all the love and support (and phone calls). Most of all thank you for putting up with your daughters' never ending studies – I hope it was worth it!

There is a group of people without whom, this period in Lund would have been impossible. I would like to thank my friends, Elif, Alena, Alessandra, Pedro, Cornelius, Wictor, and Bekim. Thank you for been my family for the last two years, for providing me with so much warmth and friendship, and for making the library a much more interesting place.

This thesis would have not have been possible, without ARASA (The Aids and Rights Alliance for Southern Africa) , and I would like to thank their director, Michaela Clayton, for introducing me to this topic, and for providing me with an internship which made this research possible. Thank you for the office, the contacts, and most of all your time. I am very proud to have been able to work with such a great organisation.

Very special thanks to Marlise Richter at the Regional Health Unit in South Africa. Thank you for all your ideas, your help, your insights, and your expertise. It was an honour to be able to have the support of someone who is so passionate about sex worker rights. Without you, this thesis would probably have dealt with a completely different topic. Thank you for educating me.

Lastly, I would like to extend my gratitude to my supervisor, Nina Louisa Arold, who has kept me focused and been an excellent mentor. Thank you for your help and advice.

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[AIDS and Human Rights Research Unit, University of Pretoria](#) – South Africa

[AIDS Law Project - South Africa](#)

[AIDS Law Unit of the Legal Assistance Centre - Namibia](#)

**Attorney General's Chambers** – Botswana

**BONEPWA** - Botswana Network of people living with HIV/AIDS  
Coalition of Women Living with HIV and AIDS – Malawi

**DANIDA** – Danish Aid – Mozambique

**DITSHWANELO** – The Botswana Centre for Human Rights

**LAPCA** - Lesotho AIDS Programme Coordinating Authority

**Lironga Eparu** – Namibia

**MONASO** - Mozambican Network of AIDS Service Organizations

**Muleide** – Law Women and Rights – Mozambique

**NAC** – National Aids Council

**NACA** – National Aids Coordinating Agency – Botswana

**National Council on HIV/AIDS** – Mozambique

**Medicos Sen Fronteirs** – Mozambique

**UNAIDS** – Maputo

**SAfAIDS** - Southern Africa AIDS Information Dissemination Service – Zimbabwe

**SAHRiNGON** - Southern African Human Rights NGO Network – Tanzania

**SARDC** - Southern African Research & Documentation Centre – Zimbabwe

**SCARJOV** - Associacao de Reintegracao dos Jovens, Crianças na Vida Social Angola

**Veritas Trust** – Zimbabwe

**WAG** – Women’s Action Group – Zimbabwe

**WASN** – Women and AIDS Support Network – Zimbabwe

**WLSA** – Lesotho, Swaziland, Zambia, Zimbabwe, Malawi, and Mozambique

**ZARAN** - Zambia AIDS Law Research and Advocacy Network

**Zimbabwe Lawyers for Human Rights** - Zimbabwe

**ZWLA** - Zimbabwe Women Lawyers Association – Zimbabwe

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