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**TSHWARANANG**  
LEGAL ADVOCACY CENTRE  
TO END VIOLENCE AGAINST WOMEN

## SUBMISSION TO THE SOUTH AFRICAN LAW REFORM COMMISSION ON DISCUSSION PAPER 1/2009 SEXUAL OFFENCES: ADULT PROSTITUTION

Tshwaranang Legal Advocacy Centre (TLAC) was established in 1996 to eradicate the victimization of women by the law and the legal system. It aims to make the legal system a vehicle for social change for women by influencing policy and legislation through advocacy, lobbying, education, training and research. TLAC has two focus areas:

1. Promoting women's access to justice;
2. Holding government accountable for protecting and enforcing women's right to be free from all forms of violence.

TLAC is a women's rights organization that works towards ensuring that laws and policies and their implementation are grounded in human rights and substantive equality. As part of its legal services TLAC provides legal advice to women who have experienced violence, including women who have experienced assault, rape and unlawful arrest at the hands of police officers because they are involved in adult consensual sex work. This submission focuses on two aspects of the law relating to sex work:

1. The irrational use of criminal laws to regulate consensual sexual relations between adults and
2. The extent to which current criminal laws dealing with sex work perpetuate crime and encourage police corruption.

TLAC hereby submits comments on the South African Law Reform Commission's Discussion Paper on Adult Prostitution. In its submissions, TLAC chooses to refer to prostitutes as sex workers, a term which has less derogatory connotations and recognizes the right to choose your employment.

**Board of Directors:** Prof Sheila Meintjes (Chairperson), Ms Portia Kobue, Adv Kgomotso Moroka SC, Mr Mark Peters, Ms Anu Pillay, Dr Shereen Usdin, Ms Anneke Meerkotter (Executive Director)

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## **Criminal laws and consensual adult commercial sex work**

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### ***The purpose of criminal laws dealing with consensual adult commercial sex work***

Initially, laws criminalizing sex work were largely informed by arguments on morality. Morality is in fact a complex issue and criminal laws are seldom an appropriate avenue for addressing issues relating to sexual morality. The main ‘morality’ arguments in favour of a continued criminalization of sex work are that sex work attacks the institution of marriage and encourages extra-marital sex and sex outside relationships.<sup>1</sup> No research has been submitted to substantiate these arguments. We would argue that these arguments reflect a particular form of ‘morality.’ We would further argue that the denial of basic human rights to a specific group of people and leaving them vulnerable to exploitation as a result of continued criminalisation of sex work is also not moral. This latter view of morality is informed by the Constitution which emphasizes that South African society is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

The Constitution has been used by some groups to justify criminalization through arguments where sex workers are projected as victims who should be protected and where sex work is equated with violence against women. We do not support these arguments and argue instead that such views disregard women’s agency in deciding to engage in consensual adult sex work and their right to make such decisions.

Religious organizations argue vehemently for the continued imposition of their view of morality on others through the criminalization of sex work. Such arguments were rejected by our society when the State and the courts retracted laws opposing interracial relationships and sexual relationships between consenting adults of the same sex. Religious organizations further fail to put forward in their arguments sustainable remedies to the continued human rights violations faced by sex workers under a criminalized system.

It has further been argued by the State in the Jordan case that additional reasons for criminalizing sex work are to prevent social ills, particularly child prostitution, trafficking in women and children, public nuisance and public health. Whether these reasons are sufficient or rational to justify the criminalization of sex work is explored below:

#### ***Child prostitution and trafficking***

Both child prostitution and trafficking is currently dealt with in terms of the Children’s Act 38 of 2005 and the Criminal Law (Sexual Offences) Amendment Act 32 of 2007. In

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<sup>1</sup> Recent research indicate that it is a fallacy to suggest that the institution of marriage is the prevailing and most accepted form of intimate relationship in South Africa. Based on the 2001 Census figures 2.3 million South Africans described themselves as ‘living together like married partners’. This is probably a conservative figure and points to the fact that families take many forms in our society and that marriage is not the only, or even predominant, form of intimate union. Findings from research by the South African Institute of Race Relations further indicate that more children are growing up with single mothers than with both parents. Article by Chandre Prince “The changing face of SA families” published in The Times, 12 July 2009, <http://www.thetimes.co.za>

addition, the Department of Justice is currently finalizing a draft Prevention of Trafficking Bill which will provide a comprehensive legal framework for dealing with trafficking. Both child prostitution and trafficking are criminal activities and we encourage the proper implementation of the above laws to deal with these activities.

Child prostitution and trafficking are both coercive and exploitative, which makes them criminal and distinguishes them from consensual adult commercial sex work. As long as consensual adult commercial sex work remains illegal, it provides the space for criminals to engage in child prostitution and trafficking without fear of persecution – this is because the sex industry operates largely underground, and because sex workers, who witness these crimes, are not able to report them for fear of persecution by the police or criminals.

#### *Public nuisance*

It would be grossly unfair to generalize that all forms of sex work or all sex workers engage in some public nuisance activity. The majority of sex workers operate indoor or outside the public's sight and cannot be associated with public nuisance activities. Where, for instance, a sex worker or client engages in a public nuisance activity flowing from the act of selling sex, it is not rational to outlaw the sale of sex in general to prevent the occasional public nuisance activities perpetrated by a minority that stem from this. In this case, general public nuisance by-laws, applied in a reasonable manner, would be sufficient to address public nuisance activities.

#### *Public health*

Criminalising sex work cannot be justified as a public health response to the HIV epidemic facing South Africa. Recent research makes it quite clear that it is disingenuous to blame sex workers for the spread of the HIV epidemic and that criminalizing sex work is not an appropriate response to the HIV epidemic. For example, a study of 421 men in an urban informal settlement in Cape Town noted that:

- 98% reported having concurrent sexual relationships during the same period;
- 83% indicated that their friends would approve if they had sex with women who were not their steady partners or wives;
- 86% indicated that their friends would approve if they changed girlfriends often;
- 46% thought that their main partners had sex with them because they expected or had received any form of material goods;
- 64% did not use a condom during the last sexual encounter with their main partner, 36% with their casual partner and 30% with their once-off partner.<sup>2</sup>

Transactional sex, inconsistent condom use and concurrent relationships seem to be common in South African society, a society which has legally criminalized sex work for 50 years. Sex workers themselves can therefore neither be blamed for the spread of HIV nor for an increase in extra-marital relationships. Criminal laws against sex work accordingly do not seem to be an appropriate way to regulate relationships, safe sex or 'morality' in South Africa.

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<sup>2</sup> Chopra M et al (2008) *Sexual risk behaviour among men with multiple, concurrent female sexual partners in an informal settlement on the outskirts of Cape Town*, Medical Research Council Policy Brief, April 2008.

A study conducted amongst 50 brothel based sex workers in Hillbrow/Joubert Park looked at the factors influencing sex workers' use of condoms.<sup>3</sup> The study emphasized that men in Southern Africa regularly do not want to use condoms, and 'flesh to flesh' is seen as a key component of their masculinity. Women's sexual decision-making should be seen in the context of such cultural pressures. Participants in the study noted that they regularly use condoms but that they would engage in unsafe sex where more money was offered in a competitive environment.<sup>4</sup> It is important to improve access to health services for sex workers and their clients by focusing on reducing the stigma faced by sex workers when accessing health services and decriminalizing sex work.

The selling of sex is a response to the continued demand for such services and the need to earn a living. Wojcicki argues that "women's (sex-working and otherwise) decision-making in the sexual realm can be interpreted as maximizing possibilities and potentials in an inhospitable and difficult environment."<sup>5</sup> In the absence of other forms of employment or employment offering a similar income, it cannot be expected that the criminalization of sex work will reduce the sale of sex or address public nuisance, public health, child prostitution or trafficking concerns.

### ***The context of sex work***

Research has shown that many poor women resort to exchanging sex for cash, food, clothing and shelter and to provide for their families.<sup>6</sup> It is important to recognize that poverty, unemployment and economic crises fuel a political economy of sex and the exchange of sex for money or gifts.<sup>7</sup> This is not new or unusual. Throughout centuries and throughout the world, women's exchange of sex for money has been associated with

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<sup>3</sup> Wojcicki JM and 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 (2001) 99-121.

<sup>4</sup> Wojcicki JM and 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 (2001) 99-121 at 110.

<sup>5</sup> Wojcicki JM and 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 (2001) 99-121 at 116.

<sup>6</sup> Wechsberg W, Parry C and Jewkes R (2008) *Drugs, sex, and gender-based violence: The intersection of the HIV/AIDS epidemic with vulnerable women in South Africa – forging a multilevel collaborative response*, Research Triangle Institute, Research and Policy brief, September 2008. Wojcicki JM and 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 (2001) 99-121.

<sup>7</sup> Hunter M (2007) "The changing political economy of sex in South Africa: The significance of unemployment and inequalities to the scale of the AIDS pandemic" *Social Science & Medicine*, Vol 64 Issue 2, February 2007, p689-700.

gendered economic inequalities including a gender wage gap.<sup>8</sup> Sex-money exchanges are also generally accepted in our society and manifest itself in a variety of ways.<sup>9</sup>

A decrease in formal employment, which is already exacerbated by the economic recession, means that many people living in South Africa have to survive by informal means. With more people migrating to urban areas and living in informal settlements, the opportunities for engaging in the informal sector is reduced. The sexual economy accordingly becomes an important survival mechanism, either by way of informal transactional sexual relationships or through formally engaging as a sex worker.

Wojcicki examines the nature of sex-for-money exchanges that take place outside commercial sex work, where women who engage themselves in sex for money exchanges do not self-identify as sex workers. Also defined as informal sex work, engaging in this form of exchange, as with commercial sex work is often the result of poverty.<sup>10</sup> The existence of various forms of sex-for-money exchanges points to the futility of trying to criminalise or police the act of sex for reward.

Interestingly, Hunter notes that remittances from sex exchanges in themselves do not cause family breakdown and “on the contrary, remittances from sexual networks can help to foster kinship ties. There is an expectation that money will be given by migrating women to a rural home, especially if a woman’s child is looked after by family members.”<sup>11</sup> Other factors influencing women’s decision to enter the sex industry include low self-esteem, depression and lack of education, with many women feeling powerless and limited in their opportunities.<sup>12</sup> It would be foolish to punish those who sell sex in the absence of putting in place meaningful alternative forms of income generation. In light of the socio-economic conditions existing in South Africa and the great limitations of South Africa’s public works, education and social services programmes, the continued criminalization of sex work violates the basic human rights of sex workers to dignity, equality and to choose their employment.

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<sup>8</sup> Based on government statistics, the unemployment rate of women (30,7%) were higher than men (21,2%) when measured in September 2006. Statistics South Africa (2008) Stats in brief 2008, p35-36. See also Muller C (2009) Trends in the gender wage gap and gender discrimination among part-time and full-time workers in post-apartheid South Africa, University of KwaZulu Natal, Working Paper Number 124.

<sup>9</sup> Hunter highlights the need to acknowledge that poverty and unemployment are drivers of transactional sexual relationships. Whilst migrant men engaged in sexual relationships with sex workers in urban areas in the 20<sup>th</sup> century, more recently, many women themselves are moving to informal settlements. It is important to note that due to chronic unemployment and the collapse of the rural economy, both men and women now engage in migration patters and rural areas are dependent on remittances from both men and women. In the 1900s, migrant men had multiple partners and some women were dependent on men in extra-marital relationships. Today, many women are dependent on men, sometimes multiple men outside marriage and pre-marital relationships are typified by sex-money exchanges.

<sup>10</sup> Wojcicki JM (2002) “Commercial sex work or ukuphanda? Sex-for-money exchange in Soweto and Hammanskraal area, South Africa” *Culture, Medicine and Psychiatry* 26: 339-370

<sup>11</sup> Hunter M (2007) “The changing political economy of sex in South Africa: The significance of unemployment and inequalities to the scale of the AIDS pandemic” *Social Science & Medicine*, Vol 64 Issue 2, February 2007, p689-700.

<sup>12</sup> Wojcicki JM and 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 (2001) 99-121 at 107.

### ***What laws will be appropriate to deal with consensual adult commercial sex work?***

Female sex workers are often subject to considerable control by pimps, sometimes also functioning as landlords and drug dealers.<sup>13</sup> Ensuring protection for sex workers from the coercive behaviour exercised by third parties would improve the human rights of sex workers and also decrease the spread of HIV. We would support legal provisions which deal with coercive behaviour by pimps and brothel owners, to the extent that this is not already provided for in other laws. We would further support the application of existing labour and occupational health and safety laws to the sex industry.

### **The consequences of policing consensual adult commercial sex work**

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What SAPS needs more than anything now is strong and dynamic leadership that is capable of firm control and re-establishing of discipline, as well as strict command and control throughout the police. Government should also seriously reconsider the mandate of the police and relieve it of those expectations that are impossible to meet.<sup>14</sup>

### ***Policing sex work diverts attention from more serious crimes***

The recent case brought by SWEAT against the Minister of Safety and Security<sup>15</sup> focused on the legal issue whether sex workers are arrested in circumstances where the arresting officers know with a high degree of probability that no prosecution will result and, if so, whether this renders the arrests unlawful. The respondents' own evidence indicated that police dockets are seldom opened when sex workers are arrested. The judgment noted that the general method for dealing with sex workers seem to be that sex workers are arrested and detained overnight in police cells, whereafter they are taken to the magistrates' court cells, detained for a few hours and then released. The judge concluded that in the circumstances, "the peace officers who effected the arrests of the sex workers during the relevant period, did not do so with the required object or purpose of having the sex workers prosecuted. This is so because they knew with a high degree of probability that no prosecutions would follow" [para 26]. Fourie J concluded that "a peace officer who arrests a person, knowing with a high degree of probability that there will not be a prosecution, acts unlawfully even if he or she would have preferred a prosecution to have followed the arrest" [para 27]. The judge granted an interdict on the basis that "the reasonable inference to be drawn from the evidence before the court, is that arrests of sex workers by the SAPS and the City Police, without the required lawful object or purpose, namely to ensure the prosecution of the sex workers, will probably continue in the future" [para 53]. These examples mentioned in the Cape Town study correspond with our

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<sup>13</sup> Parry C et al (2008) "Rapid assessment, response and evaluation of drug-using sex workers in Durban, Cape Town and Pretoria" *AIDS & Behaviour*, Research Triangle International.

<sup>14</sup> Burger J (2009) Two sides of the same South African Police Service, *ISS today*, 17 March 2009, <http://www.iss.org.za>

<sup>15</sup> Case number 3378/07, Cape High Court, Fourie J, judgment delivered on 20 April 2009.

clients' cases of police harassment, unlawful arrest and abuse at various police stations in Johannesburg.

We accordingly have a situation in South Africa where police frequently engage in a labour intensive exercise of arresting sex workers without any intention to prosecute them. The mere arresting of sex workers is unlawful and do not have an impact on preventing the occurrence of sex work in a particular area. In fact, the ISS and SWEAT study notes that, since sex work is usually used as a means of income, arrests of sex workers normally has the effect of increasing a sex worker's need to sell sex to make up for the time she lost in custody or to pay the fines incurred as a result of the arrest.<sup>16</sup>

In contrast, South Africa has one of the highest rates of rape reported to the police in the world, yet a recent study on the attrition of rape cases through the criminal justice system in Gauteng, showed a shocking lack of attention being paid to serious crimes such a rape.<sup>17</sup> It would make much more sense for the police to focus their attention on adequately dealing with rape cases and other serious crimes instead of wasting time and resources policing consensual adult commercial sex work.

### ***Criminalising sex work drives it underground and conceals other crimes***

Sex workers are as much at risk of rape and abuse by their partners and clients, as the rest of society, and it is important that they are able to report such rapes to ensure that perpetrators of rape are prosecuted for this crime.<sup>18</sup> However, of a third of street-based sex workers in Cape Town who reported having been raped by a client, more than half did not report this to the police.<sup>19</sup> Similarly in a Johannesburg study, Wojciki noted that "all women interviewed indicated that they would not feel comfortable approaching the police for help in the instance of assault or any type of violence from clients or security/managers".<sup>20</sup>

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<sup>16</sup> Gould & Fick (2008) *Selling sex in Cape Town: sex work and human trafficking in a South African city*, Institute for Security Studies, p60.

<sup>17</sup> Vetten et al (2008) *Tracking justice: the Attrition of rape cases through the criminal justice system in Gauteng*, research report, Tshwaranang Legal Advocacy Centre, Medical Research Council and Centre for the Study of Violence and Reconciliation. Of the 2 064 cases in the study:

- Half of cases resulted in arrests (50.5%) but only 42.8% of suspects were charged in court.
- Trials commenced in less than one in five cases (17.3%).
- Overall only 4.1% of cases reported as rape resulted in convictions for rape.

The study revealed significant problems with how police investigate and manage rape cases: More than half of the cases closed by the police were closed because the perpetrator could not be identified or located (52.3%). Notably, descriptions of the perpetrator were absent from more than three-quarters of victims' statements (78.4%). In more than half the dockets (52.7%), an instruction to arrest the suspect had to be issued twice or more before the investigating officer complied with it. In 30.2% of these cases, the suspect had disappeared by the time the investigating officer attempted to comply with the instruction to arrest.

<sup>18</sup> Jewkes R, Sikweyiya Y, Morrell R and Dunkle K (2009) *Understanding men's health and use of violence: interface of rape and HIV in South Africa*, Medical Research Council, June 2009.

<sup>19</sup> Gould & Fick (2008) *Selling sex in Cape Town: sex work and human trafficking in a South African city*, Institute for Security Studies, p69.

<sup>20</sup> Wojcicki JM and 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 (2001) 99-121 at 105.

The survey by ISS and SWEAT noted that where police treated sex workers with respect, they were able to establish a relationship where sex workers report child prostitution or other criminal activities without fear of persecution.<sup>21</sup> However, where police displayed negative attitudes towards sex workers, this was reciprocated by a general mistrust of the police and a reluctance to report crimes perpetrated against sex workers or others.<sup>22</sup>

### ***Criminalising sex work encourages police abuse and corruption***

The willingness to engage with the use of force, and to engage with police about questions of values and how these relate to the work of the police, is unlikely to emerge unless there is a police leadership which is committed to accountability. This depends significantly on the personal philosophies and policies of the police chief and senior police management. For force to be managed effectively therefore requires that police leadership is not only committed to and understands the need for police to observe high standards in using force but also has the courage, commitment and skill both to hold serving police officers to these standards and to support police in achieving them.<sup>23</sup>

The survey conducted by ISS and SWEAT on sex work in Cape Town, notes that 63% of sex workers have been sworn at by a police officer, 47% have been threatened with violence by the police, 12% have been forced to have sex with police officers (raped), and 28% had been asked for sex by police in exchange for release from custody.<sup>24</sup> Sex workers further reported that police blackmailed their clients or asked for protection money. This was also mentioned in another study of sex workers in Hillbrow/Joubert Park noting that all participants who have worked on the streets reported harassment and bribery from the police. The study quotes a sex worker as saying: “To us, the police are useless. You can die in the presence of the police because at the end of the day they are the ones who harass you.”<sup>25</sup>

The extent to which police engage in the unlawful arrest and abuse of sex workers was recently brought to light in the case of *SWEAT v The Minister of Safety and Security and others* (Cape High Court, Case no 3378/07, Applicant’s court papers). The applicants sought to interdict the police from unlawfully arresting sex workers, in particular arresting sex workers only to harass, punish or intimidate them or for any ulterior purpose. The case itself arose out of a frustration experienced by the applicant with the high incidence of unlawful police arrests and abuse of sex workers despite frequent intervention by the applicant to authorities to try to prevent this practice.

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<sup>21</sup> Gould & Fick (2008) *Selling sex in Cape Town: sex work and human trafficking in a South African city*, Institute for Security Studies, p58.

<sup>22</sup> Gould & Fick (2008) *Selling sex in Cape Town: sex work and human trafficking in a South African city*, Institute for Security Studies, p68.

<sup>23</sup> Bruce D (2006) *Building respect for the badge: The management of the use of force by police*, Research report for the Centre for the Study of Violence and Reconciliation, September 2006.

<sup>24</sup> Gould & Fick (2008) *Selling sex in Cape Town: sex work and human trafficking in a South African city*, Institute for Security Studies, p55.

<sup>25</sup> Wojcicki JM and 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 (2001) 99-121.

Bruce comments that “the SAPS has a good statement of values, but commitment to these values is not consistently carried through in its organizational practice. There is evidence of a pervasive problem of corruption and anti-corruption measures are weak.”<sup>26</sup> This is an understatement when it comes to the endemic police corruption evident in relation to sex work. Sex workers in Hillbrow and surrounding areas frequently report that the police would extort money from them or search their rooms and steal their money or other assets. These activities occur even though the police have no evidence of any crime having been committed and no intention of opening a criminal case against the sex workers. Where sex workers refuse to comply with such extortion, they are called names, assaulted or taken to the police station and assaulted there. Sex workers are also often detained at the police station without any record of such detention noted in the police station’s Occurrence Book. This suggests that although two or more police officers might be involved in the initial arrest, the practice of unlawful arrests and assault are condoned by police officers who turn a blind eye to sex workers who are brought to the station and detained without a case being opened. Sex workers further report being denied access to medical treatment for injuries sustained during the arrest or subsequent assaults or rapes perpetrated at the police station.

TLAC has assisted a number of sex workers who have been assaulted by the police. In many such cases the collusion within the police station and the fact that the practice is widely adopted by the police as well as reservists is of great concern. Sex workers are used by police and reservists as a means to supplement income and access sex. Since police are not arresting sex workers for prosecution, any arguments by police requesting the continued criminalization of sex workers should be treated with extreme caution.

## **Conclusion**

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### ***TLAC proposes the non-criminalization of sex work***

Based on our experienced, TLAC strongly feels that the criminalization of sex work has the following negative consequences:

- It fuels crime against sex workers;
- It conceals crimes such as trafficking, drug dealing and child prostitution;
- It encourages police corruption and subverts the human rights values within the police force;
- It detracts from the effective policing of serious crimes such as rape and murder;
- It violates the basic human rights of people who choose to sell sex, including the rights to equality, dignity, privacy, freedom and security of person, to choose your employment, to access justice and not to be subjected to torture.

We propose the repeal of all criminal laws relating to sex work in the Sexual Offences Act of 1957 and section 11 of the Criminal Law (Sexual Offences) Amendment Act of 2007.

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<sup>26</sup> Bruce D (2007) “Good cops? Bad cops? Assessing the South African Police Service” *SA Crime Quarterly* no 21, September 2007, p15-20.

We propose the enactment of a law which will clearly spell out that sex workers have the same human rights as everyone else. The law should deal with coercive practices in the sex industry. The law should allow sex workers to employ others to engage in punting or protection provided that sex workers are their employers and the situation is not exploitative or coercive.

We support the creation of a supervisory body which oversees the sex industry and is representatives of sex workers, sex worker organizations, associations and trade unions.