

An Easy Guide to Sex Work Law Reform: The difference between criminalisation, decriminalisation, legalisation and regulation of sex work

1. Criminalisation

1.1 The fundamentals

Introduction to the model

Criminalisation varies in its specifics from country to country, but usually bans the act of receiving money or goods in return for sex (i.e. being a sex worker); the act of providing the money or goods (i.e. being a client), or the act of working in other ways with sex workers or living off their earnings.

This is the model of sex work law which applies in much of the African continent. In some countries the criminal law is vague or even silent on sex work, and police/local authorities use by-laws and pro-morality clauses in law to treat sex workers as though they are criminalised.

Criminalisation is sometimes referred to as prohibition.

What is the public policy objective of criminalisation?

The elimination of sex work through the deterrent effect on sex workers and all others of criminalisation. Prostitution is seen as a violation of human dignity, and criminal law combined with effective law enforcement are seen as critical tools in reducing the numbers of people involved in sex work.

How does the purpose relate to the requirements of the Constitution?

The public policy purpose of criminalisation is to prevent sex workers' rights to work, and to prevent those who wish to buy their services from doing that, which fails to meet the requirements for justifiable limitations to all fundamental rights as per s36 of the Constitution. Unionisation is also effectively prevented, so denying the right to association and to collective bargaining.

What the criminalisation legislative model entails

Criminalisation



- Prohibition of brothel-keeping
- Prohibition of living off/gaining from the earnings of sex workers
- Prohibition of receiving money in return for the provision of sexual services

Examples of countries

South Africa, Botswana

1.2 The impact

Impact on sex work - has the law fulfilled its purpose?

Not much – the evidence is that the law has little effect on the number of sex workers or the number of clients, but a big effect on the behaviour of the police towards sex workers and on the sustaining of stigma towards sex workers.

Impact of criminalisation on sex workers

In South Africa, studies have documented substantial levels of direct violence against sex workers from clients, non-paying partners and the police (A) as well as structural violence against sex workers (B). The unequal power relations between sex workers and their sexual partners, heightened in a criminalised environment, limit sex workers' ability to insist on the use of condoms during sex, thus increasing their risk of contracting HIV and other STIs (C). Discrimination, prejudices and sexual moralism of some health care workers create barriers for sex workers to access the health services that they are entitled to (D). If sex workers employ someone to act as security for them, to help increase their safety, that security person is labelled as a criminal by South African law¹.

SWEAT recorded approximately 360 reported human rights abuses of sex workers in 2011; however, based on the number of abuses reported to SWEAT, but not reported to Police, we believe that there are far more unreported cases.

The dignity of women is denied in all these aspects. Criminalisation exposes sex workers, who are overwhelmingly women, to massive indignities through their interaction with police and other state agents, both in the work they do, and if they fall victim to crimes.

Impact of criminalisation on sex worker-police relationship

The fact that the work of sex workers is criminalised means that there is no incentive for the police to respect the human rights of sex workers unless they are receiving some financial, sexual or other benefit in return.

Refer to SWEAT website – examples of police abuse of sex workers.

1.3 Evaluation

Criminalisation is necessary to prevent the furtherance of conduct abhorrent to the public good - *the morals of some are imposed on the whole community, unleashing a new immorality of police abuse.*

¹ "I Expect to be Abused and Have Fear: Sex Workers' Experiences of Human Rights Violations and Barriers to Healthcare in Four African Countries" Fiona Scorgie et al, April 2011, African Sex Worker Alliance

Criminalisation is vital if society is to uphold moral standards – *why is prostitution uniquely harmful to the public good?*

What is the morality of law which has no deterrent effect, and exposes sex workers to police and other abuse?

The law and a moral position are not necessarily the same thing.

The clients of sex workers are more likely to be violent, and thus sex work should not be encouraged.

Some research does indicate this, but surely the focus should be on recognising the reality that sex work will happen and on minimising the threat from clients through good police-sex worker relationships, and strong incentives against dangerous behaviour by clients.

Sex workers work in an inherently violent industry and are (in the main) damaged by post-traumatic stress disorder and unable to make rational decisions for themselves.

xxxxx

1.4 Would it work in South Africa? If not, why not?

It is in operation in South Africa for 55 years (although clients were only criminalised in 2007). It fails in its policy aim.

Impact of criminalisation on issues

| | |
|-------------------------------------|--|
| Numbers of sex workers | Australian research shows decriminalisation does not increase numbers of sex workers. Sex work industry had increased, in spite of 55 years of criminalisation |
| Violence against sex workers | Eastern Cape report on Violence against sex workers ² |
| Leaving sex work | Criminal records prevent job seeking Psychological and emotional impact of criminalisation. |
| Trafficking | A hidden sex industry. No motivation to engage with the police. |
| Under-age sex work | A hidden sex industry. No motivation to engage with the police, no access by social service agencies, and incentives to report |
| Affected neighbourhoods | Communities are disempowered by a criminalisation law, since the long term solutions – engagement directly with sex workers – is not incentivised. |

Criminalisation in relation to the SWEAT Test:

- ✖Safe from police abuse: can sex workers work without fear of police abuse?
- ✖Workers rights: are the labour rights of those in the industry protected full?
- ✖Exit: can sex workers leave the sex industry of their own free will without fear of prejudice?
- ✖Access to health care: can sex workers access respectful health care services?
- ✖Trafficking and child sexual exploitation: can sex workers report crimes like trafficking and child exploitation without fear?

² "A Snapshot of Sex Workers' Experiences of Human Rights Violations and Barriers to Healthcare in East London, South Africa" Prince Nare December 2011, SWEAT, UNFPA

References

A - Campbell 2000; Pettifor, Beksinska et al. 2000; Vetten and Dladla 2000; Gould and Fick 2008

B - CORMSA 2011; Scorgie, Chersich et al. 2011; Scorgie, Nakato et al. 2011; Vearey, Oliveira et al. 2011

C - Varga 1997; Varga 2001; Pauw and Brener 2003

D - Nairne 1999; Stadler and Delany 2006; Oliveira and Lety 2011

2. Decriminalisation

2.1 The fundamentals

Introduction to the model

Decriminalisation is the only rights-based approach to sex work law. Prostitution-related criminal law which is not designed to protect the rights of sex workers is repealed. Sex workers have the right to work without artificial and arbitrary (unjustifiable) limitation, and brothels operate as ordinary businesses. Laws protecting the rights of sex workers and offering protection from the special risks in their job are put in place. Existing laws govern objectionable behaviour by sex workers.

What is the public policy objective of decriminalisation?

Acceptance of the reality and inevitability of the existence of sex work. Recognition of the human rights and right to work of sex workers. Avoiding the sex industry going underground. Constructive relationships between police and sex workers.

How does the purpose relate to the requirements of the Constitution?

It is aligned with the Constitution, as a rights-based approach.

What the decriminalisation legislative model entails

A **fully decriminalised system of sex work** (law and policy changes) does not mean “no law on sex work”. It would involve the following:

- **the removal of laws** which make sex workers, clients and others involved in sex work into criminals because of the sex work they are involved in;
- **preventing** local councils from making by-laws which can be used unfairly against sex workers; but allowing restrictions on offensive signage
- the **introduction of new laws** which give new protections to sex workers and their clients, for example obliging clients to practice safer sex and brothel owners to promote safer sex, giving sex workers the same labour and occupational health and safety protections that other workers have.
- **promoting human dignity**, so that discrimination on the basis that someone is a sex worker or has been a sex worker would be illegal;
- **continued laws against public indecency**.

Examples of countries

Decriminalisation



New Zealand; New South Wales, state of Australia

2.2 The impact

Impact on sex work - has the law fulfilled its purpose?

- a. **Decriminalisation of sex work has happened, and has been successful** from the viewpoint of communities, sex workers, police and the Government. It was introduced in New South Wales (a state/province in Australia) from 1995, and in New Zealand from 2003.

The New Zealand law contained a 5-year review process, and its report in 2008 had positive outcomes, with:

- **no evidence** of an increase in the number of sex workers, of increased trafficking, or of more under-age sex workers.
- **evidence** of much better relationships between police and sex workers, of both police and sex workers taking clients and owners to court for abusive behaviour, and of government agencies with responsibility for the rights and safety of employees gaining expertise in how to inform and protect sex workers from harm.
- **reports from sex workers** of improved working conditions and well-being, feeling safer under the new legal framework, and being able to negotiate safer sex and to report abuse to police.³ Studies indicate that the harm reduction-focussed decriminalisation approach in New Zealand has yielded positive results, especially in terms of reducing transmission of HIV and other diseases.

There is proof that **decriminalisation promotes engagement with public health services**. A study (A) compared the health coverage in three Australian cities with different legal frameworks for sex work:

- a. More Sydney sex workers (in the decriminalised state of New South Wales) reported a sexual health centre as a source of safer-sex training and information:

- Sydney (decriminalised) 52%
- Melbourne (legalised) 33%
- Perth (criminalised) 35% (p<0.001).

- b. The legal context appeared to affect the conduct of health promotion programmes targeting the sex industry.

Brothel licensing and police-controlled illegal brothels can result in the unlicensed sector being isolated from peer-education and support

Impact of decriminalisation on sex workers

³ New Zealand Ministry of Justice 'Review of the Prostitution Reform Act 2003' May 2008. Also see E Mossman and P Mayhew 'Key Informant Interviews - Review of the Prostitution Reform Act 2003' Crime and Justice Research Centre, Victoria University of Wellington, October 2007. The authors interviewed a number of sex workers on the Prostitution Review Act, and noted the following:

'The positive outcomes resulting from the PRA [Prostitution Reform Act] were seen as significant. Sex workers were no longer considered criminals, and they could earn a living as a sex worker without fear of being prosecuted and having to live with the stigma associated with criminal convictions. They now had rights similar to those working in other occupations, and were able to take legal action against those who denied them these rights. They were better able to negotiate safer-sex practices and seek assistance from the Police over issues of safety. Providing assistance to sex workers was also seen to be easier – as sex workers were more accessible, and barriers to discussing illegal behaviour had been removed.' 77.

A and B detailed below give specific evidence of benefits. C concluded: “The positive outcomes resulting from the PRA [Prostitution Reform Act] were seen as significant. Sex workers were no longer considered criminals, and they could earn a living as a sex worker without fear of being prosecuted and having to live with the stigma associated with criminal convictions. They now had rights similar to those working in other occupations, and were able to take legal action against those who denied them these rights. They were better able to negotiate safer-sex practices and seek assistance from the Police over issues of safety. Providing assistance to sex workers was also seen to be easier – as sex workers were more accessible, and barriers to discussing illegal behaviour had been removed.’

This is the preferred legal model by sex workers and for sex workers, since it is based on their rights, and offers the potential for free choice around entry, activity and exiting.

Impact of decriminalisation on sex worker-police relationship

Improvement researched and reported in New Zealand – see **B**

2.3 Evaluation: Claims made about decriminalisation, responses

Decriminalisation is the only one of the four legal approaches to sex work which offers a **win-win solution** -

- it costs the **government** much less money to enforce (e.g. policing, court costs);
- for **sex workers** it makes it easier to get HIV prevention and treatment services, and other health services, and dramatically changes the basis of their relationship with the police;
- it gives **communities affected by sex work** new opportunities to engage directly with sex workers and their advocates to work out solutions; *and*
- it rewards **business people** who manage brothels and other sex work businesses to a high standard.

The only **losers** under decriminalisation are those people who make money and get other benefits **out of exploiting people** under a criminalised system (e.g. police forcing sex workers to give them bribes to stop them being arrested; gangs demanding “protection money” from sex workers).

2.4 Would it work in South Africa? If not, why not?

Decriminalisation of sex work would be right for South Africa because it is human rights-focused, it is proven, it is built on a public health model (harm minimisation) and it moves the relationship between sex workers and the state from a conflict-based relationship with the police (as enforcers of criminalisation) to links through to a wide range of government agencies responsible for promoting welfare, guarding health and safety and protecting labour rights, all of which reinforce fundamental rights of citizenship. All this builds the dignity of sex workers, the great majority of whom are women.

Impact of decriminalisation on issues

| | |
|-------------------------------|--|
| Numbers of sex workers | New Zealand research indicated no clear impact on overall numbers involved in the sex industry, but evidence in two cities – Auckland and Wellington – of a move from the streets into brothels and escort work. |
|-------------------------------|--|

| | |
|-------------------------------------|---|
| Violence against sex workers | <p>The marked improvement in sex worker-police relationships under decriminalisation was illustrated by 60% of sex workers surveyed after law saying that (b) they felt that had more power to refuse clients under the Prostitution Reform Act than before.</p> <p>Decriminalisation does not mean protective legislation cannot be introduced, with the clear intention of ensuring sex workers' safety, health and labour rights.</p> |
| Trafficking | <p>Decriminalisation has a transformative effect on the police-sex worker relationship, with a freer flow of information and less sense of inequity, and a mutual sense of responsibility which comes with greater equity. It follows that evidence of trafficking – which is an economic and reputational threat to adult and consensual sex workers – would be more likely to be passed on from sex workers to the police under decriminalisation.</p> <p>The New Zealand law attempts to combat trafficking by denying immigration permits to anyone who intends to work in, invest in or run a sex work business.</p> |
| Under-age sex work | <p>Decriminalisation has a transformative effect on the police-sex worker relationship, with a freer flow of information and less sense of inequity, and a mutual sense of responsibility which comes with greater equity. It follows that evidence of involvement by children (under 18) in sex work – which is an economic and reputational threat to adult and consensual sex workers – would be more likely to be passed on from sex workers to the police under decriminalisation.</p> <p>The 2008 Review Committee on the law reform found that only 1.3% of sex workers were aged under 18.</p> |
| Affected neighbourhoods | <p>Decriminalisation changes the relationship between representatives of neighbourhoods where street sex work takes place and the sex workers themselves. Unless the behaviour of the sex workers is offensive to the point that it breaches existing and non sex work-specific by-laws, the police are not part of the equation and some sort of negotiated solution (which itself depends on the ability of the community leaders and the sex work leaders to genuinely represent those they seek to represent) is needed.</p> |

Decriminalisation in relation to the SWEAT Test

- ✓ Safe from police abuse: can sex workers work without fear of police abuse?
- ✓ Workers rights: are the labour rights of those in the industry protected full?
- ✓ Exit: can sex workers leave the sex industry of their own free will without fear of prejudice?
- ✓ Access to health care: can sex workers access respectful health care services?
- ✓ Trafficking and child sexual exploitation: can sex workers report crimes like trafficking and child exploitation without fear?

References

- A** - Harcourt et al (2010) - Harcourt C, O'Connor J, Egger S, Fairley C.K, Wand H, Chen M.Y, Marshall L, Kaldor J.M, Donovan B. "The Decriminalisation of Prostitution is Associated with Better Coverage of Health Promotion Programs for Sex Workers." Aust N Z J Public Health, 34(5):482-6, 2010 –
- B** - New Zealand Ministry of Justice 'Review of the Prostitution Reform Act 2003' May 2008.

C - E Mossman and P Mayhew 'Key Informant Interviews - Review of the Prostitution Reform Act 2003' Crime and Justice Research Centre, Victoria University of Wellington, October 2007. The authors interviewed a number of sex workers on the Prostitution Review Act.

3. Legalisation

3.1 The fundamentals

Introduction to the model

Legalisation involves the state creating and sustaining various controls over sex workers which is greater than control over people in most categories of employment. The specific controls vary between countries, but typically include being only allowed to work in defined areas and situations, being required to register with the government and/or being required to undergo regular health tests. Many sex workers end up being "illegal" because they breach such rules, which - they reasonably argue – only exist because government seeks to control sex workers rather than to develop their rights or protect their dignity.



What is the public policy objective of legalisation?

Sex work is regarded as a legal occupation. It needs to be regulated/controlled through criminal law or some other type of legislation. Sex workers can operate under sex work-specific controls defined and policed by the state.

How does the purpose relate to the requirements of the Constitution?

Legalisation attempts to draw fine lines between legal and illegal activity, and in the course of doing this criminalises a range of consensual and adult activity. That may, as shown in Canada, lead to breaches of constitutional principles.

What the legalisation legislative model entails

There is no standard range of elements but they commonly involve one or more of the following:

- Registration of sex workers by Government.
- Mandatory regular testing for HIV and STIs.
- Bans on street work, or establishment of ones where sex work is allowed
- Restrictions on brothels, e.g. number of rooms and employees, equipment in each room.

Failure to comply with regulations results in a criminal sanction.

Examples of countries : Germany; Mali; The Netherlands; Senegal

3.2 The impact

Impact on sex work - has the law fulfilled its purpose?

Not much – the evidence is that the law has little effect on the number of sex workers or the number of clients, and that most sex workers do not register, and so work illegally. There is evidence in The Netherlands and Victoria that there is a concentration of sex workers in large brothels, with the high level of regulations deterring them from setting up their own businesses.

Impact of legalisation on sex workers

If sex workers fail to register, they are breaking the law. In The Netherlands, only around 4% of sex workers register **A**, meaning that 96% are criminalised. Sex workers refuse or fail to register because they see no purpose in doing so, seeing little benefit from this in terms of their safety or rights, and they see risks around privacy and the freedom it gives police to interfere in their work and lives. Many are suspicious of the state holding such personal details, including the perceived threat of exposing their sex work should they choose to move on to other employment. Many sex workers, particularly those who want to avoid State authorities for other reasons (relating to drug use, or undocumented or illegal migrants) are particularly unlikely to register under a legalised system, thus reinforcing their vulnerability. Other controls, such as regular testing for HIV and STIs, have no proven public health benefit.

Many brothels also operate illegally – for example, 400 out of 500 in the state of Victoria in 2002/3 **B**

Licensing systems discourage sex workers from setting up their own small brothels through stringent requirements and costs, and possible requirements for planning permission from local councils, and zoning **C**

Impact of legalisation on sex worker-police relationship

Sex workers operating legally are subject to tight policing; sex workers operating illegally are in the same position as sex workers under criminalisation.

3.3 Impact of legalisation on issues

| | |
|-------------------------------------|--|
| Numbers of sex workers | Australian research. |
| Violence against sex workers | Effect of legalised and illegal groups of sex workers, and the possible banning of street work. |
| Trafficking | Since part of the sex industry remains underground, the necessary transparency and positive relationship with the police is not there. |
| Under-age sex work | Since part of the sex industry remains underground, the necessary transparency and positive relationship with the police is not present. |
| Affected neighbourhoods | Depends on the legal position of street sex work. |

3.4 Evaluation

Claims made about legalisation, response

“The legalisation of prostitution in The Netherlands has had its share of successes and setbacks. In particular, critics note that while legalisation benefits prostitutes who are residents of the European Union- who are now able to obtain legal, health, and social services- illegal immigrants and other “undesirables” have been pushed further underground and are thus even more vulnerable to violence and exploitation” - D

“This research shows that the Victorian [the Australian state of Victoria] system of law reform and its associated politics have served to reinforce negative views of the sex industry. It is argued that it is not enough to make sex work a legal occupation. Both legislators and the general public need to consider it a legitimate occupation of choice” – source??

Would it work in South Africa?

If not, why not?

If legalisation is to be enforced seriously and not just be agreed and then ignored, it involves the state in considerable regulatory expense and involves police in significant volumes of work. It is particularly difficult to operate in an environment such as South Africa, where around 70% of sex work is street-based.

Most regulations of sex work are unnecessary and unreasonable in that they serve no purpose other than to target sex workers and treat them differently than other people; it is the states’ rather than the sex workers’ agenda. Regulations prohibiting offensive behaviours already exist in the national and municipal by-laws of most democratic countries. Examples in South Africa are public indecency and loitering laws. In fact, under criminalisation, these are the laws which are frequently used to arrest sex workers working outdoors. To then enact further regulations specifically targeting the offensive behaviour against sex workers would amount to unfair and unreasonable discrimination on the basis of type of work (in this case sex work).

References

The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws. Report of the Standing Committee on Justice and Human Rights Art Hanger, M.P. Chair December 2006

(http://www.parl.gc.ca/Content/HOC/Committee/391/SSLR/Reports/RP2610157/391_JUST_Rpt06_PDF/391_JUST_Rpt06-e.pdf)

Not Up to the Challenge of Change: An analysis of the report of the Subcommittee on Solicitation Laws Briefing Paper | February 2007

(<http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=975>)

B – Prostitution: A Review of Legislation in Selected Countries K Hindle; L Barnett; L Casavant Legal and Legislative Affairs Division, Parliamentary Information and Research Service 20 November 2003, revised 19 November 2008 Parliament of Canada 2008

(<http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0329-e.pdf>)

C – as B

D – as B

Decriminalisation in relation to the SWEAT Test

Safe from police abuse: can sex workers work without fear of police abuse? ✖ unless they are registered;

Workers rights: are the labour rights of those in the industry protected full? X unless they are registered✖

Exit: can sex workers leave the sex industry of their own free will without fear of prejudice? X unless they are registered, and restrictions on sex work are frequently unnecessary, unreasonable and discriminatory; ✓

Access to health care: can sex workers access respectful health care services? ✖ only if they are registered, and the need for registration may discourage access to health care.

Trafficking and child sexual exploitation: can sex workers report crimes like trafficking and child exploitation without fear? ✖✓To some extent, but relationships between police and sex workers are still strained, illegal industry still exists and those working within it don't come forward with information (and are themselves vulnerable)

4. Partial criminalisation

4.1 The fundamentals

Introduction to the model

This approach involves the sex worker not being criminalised for their work, while everyone else who works with them is criminalised, including their clients and people acting as security guards for them. The evidence from Sweden is that it reduces incentives on clients to behave well towards sex workers, and forces sex workers into the shadows (A) (B). Sex workers are treated as victims but without the rights of victims, with their dignity denied.

The model is sometimes referred to as “neo-abolitionist”.

What is the public policy objective of partial criminalisation?

On the basis that sex work violates a person’s human rights, and that there is no such thing as free choice in this matter so that sex work in all its forms constitutes the sale and consumption of human bodies, it seeks the abolition of sex work, through the removal of demand. They see prostitution as a serious form of male violence against women.

How does the purpose relate to the requirements of the Constitution?

South Africa’s Constitutional Court has already found against gender discrimination in sex work law (*S v Jordaan and others 2002*), and partial criminalisation/decriminalisation clearly discriminates on the same basis since the sex worker and client are treated absolutely differently by the law. Thus **this law risks failing constitutional review in South Africa.**

What the partial decriminalisation legislative model entails

Sex workers cannot be charged for soliciting or for offering sex for payment, but their clients, and others involved in managing sex workers, are criminalised. Criminal sanctions are imposed unilaterally on the client or buyer of a sexual service. As distinct from criminalisation, the sale of sex is not illegal as such, with the seller or sex worker falling outside the reach of criminal prosecution. As distinct from legalisation, however, the government does not regulate the sex trade industry.

Examples of countries: Israel, Sweden, Norway, Iceland, South Korea.

4.2 The impact

Impact on sex work - has the law fulfilled its purpose?

Partial Criminalisation



Social services and health outreach report that the existence of the law has made it harder for them to maintain contact with sex workers.

Impact of partial criminalisation on sex workers

Research in Sweden (see references below)

Ironically, partial criminalisation goes further than criminalisation to dehumanise and objectify sex workers by not recognising the seller of sex as an accessory to the crime of buying sex. She {the sex worker} just does not feature at all, with no basis on which to participate in the legal procedures regarding the crime; sex workers are denied legal recognition in the criminal process. The presumption that it is undesirable to criminalise the "victim" of the crime – the sex worker – is further contradicted by supplementary legal provisions that clearly criminalise and marginalise sex workers through other means.

The most significant direct impact of the law on sex workers, however, is the way in which the law pathologises sex workers. Pye Jakobsson, the international spokesperson for the Rose Alliance, states that "the message that the law is sending is that everybody is a victim and people are treated accordingly... The claim is that the law is to save sex workers, but in fact, the message of the law is pushing sex workers further away from society." In terms of the way in which authorities and service providers treat sex workers, repeated testimonies indicate that most difficulties occur when sex workers refuse to comply with their imposed victim status. Where sex workers refuse to stop their work, refuse to submit to being saved and decline to cry for help, service provision is often withheld, rights to have alleged rape or abuse reported or prosecuted frequently denied and parental rights, at times, removed. In other words, when sex workers insist on their own agency they are persecuted for it. With popular academic and media reports often grouping all sex work, including stripping, as "prostitution" and reporting strip clubs as "brothels", sex workers in the broad sense, and women sex workers in particular, are disempowered and stigmatised. Should sex workers wish to leave the industry, this stigma makes entering the conventional job market particularly challenging.

The view of sex work taken by the Swedish law is that there can be no such thing as voluntary prostitution. By emphasising structural subordination of the seller, the will and agency of the sex worker is regarded as irrelevant or non-existent. If her/his agency in the conduct of selling sex is acknowledged in individual instances, it is viewed as contrary to the perceived public good and is subordinated to it for this reason. **The official view is thus that all sex workers are 'victims', sexual objects of patriarchal dominance. This notion of the irrelevance of seller's consent is central to the laws structure and impact.**

The "shamefulness" of purchasing sex is most certainly projected onto the seller, exemplified in a statement by Detective Superintendent Jonas Trolle of the Swedish Police, who said, "*It should be difficult to be a prostitute in our society - so even though we don't put prostitutes in jail, we make life difficult for them*". (B) The paradoxical conceptions of sex workers as both victims and participants in the crime **serves to marginalise, disempower and cast shame on sex workers.**

Impact of partial criminalisation on sex worker-police relationship

Sex workers are not liable to arrest, but since they are normally the people who have the most evidence about clients and managers, they are liable to police pressure.

Offences under the *Sexköpslagen* have been seen as a low priority crimes by police, largely due to the low penal value attached to the crime. It is reported that investigative difficulties, funding limitations, higher visibility and the perceived low symbolic value of street-based sex work to the public, have led to **police efforts focussing largely on street-based work**. Police have generally not undertaken undercover work to enforce the law in in-door sex work due to the high resource demands and uncertain results. (B)

Policing of sex workers does not reflect their supposedly “legal” status. For the police, consequences include the ways in which sex workers’ privacy rights are infringed, how sex workers are harassed by the police and are subject to invasive questioning, surprise visits and privacy intrusions that would be unacceptable to “normal” victims of crime or “regular” citizens. For example, one sex worker has stated that following a raid during a sex act with a client, police refused to allow her to clothe herself, stating that she was “used to people seeing her naked” (C) This is what happens when a **law views sex workers as lacking agency and humanity**.

Impact of partial criminalisation on issues

| | |
|-------------------------------------|--|
| Numbers of sex workers | See References in Sweden (and critical responses on claimed successes, based on unknown numbers of sex workers and no adequate baseline for assessment) |
| Violence against sex workers | The Sexköpslagen requires that the legal capacity of the sex worker to consent is completely unacknowledged , to the extent that cases of sexual violence, rape and kidnapping perpetrated against sex workers are considered simply as aggravated instances of purchasing sex and not as independent sexual offences liable to high sanctions and damages, as would be the case in circumstances outside of sex work. Actual statements on increases or declines in sex workers’ exposure to violence cannot be motivated statistically: violence against sex workers has not been recorded systematically by hospitals or police either prior to or after the implementation of the ban. However, much qualitative research and testimonies from sex workers indicate the market to be much tougher and more violent following the ban. The argument made by critics of the law, (including a number of sex workers both currently still working and retired from the trade) is that the law has made the “decent clients” disappear. Faced with a diminished pool of “good purchasers” sex workers are now faced with having to negotiate with less trustworthy clients: “You just can’t afford to ignore the assholes anymore” (Pye Jakobsson). This forces sex workers who are reliant on their work for income to expose themselves to more dangerous clients and riskier legal situations that expose sex workers to increased violence (and yet flimsy legal redress). |
| Leaving sex work | Research in Sweden |
| Trafficking | In some respects in Sweden, the law has been harmful to the reporting and policing of trafficking . A perception exists that prior to the law, it was typically purchasers or clients who reported instances of trafficking and abuse to the police. A number of testimonies and reports now acknowledge that clients, due to fear of their own criminal prosecution |

| | |
|---------------------------|--|
| | under the ban, are now hesitant to report or evidence instances of abuse or trafficking to the authorities. In one instance, a sex worker has reported as having to function as an intermediary for fearful clients wishing to report abuses: resulting in clients reporting concerns to sympathetic sex workers, who may then relay suspicions of abuse of third parties to the police (B). |
| Under-age sex work | As above |

4.3 Evaluation

Claims made about partial criminalisation, responses

Thus, while quantitative evidence is sparse, it is clear that **despite not including sex workers in the criminal sanction, the ban serves to drive sex work underground**. No longer allowed to be visible to acceptable society, the dangers of pressured negotiations and a narrowing of safe options forces sex workers, particularly those already more vulnerable to abuse, into riskier exchanges.

The practices of the police, prosecutors and courts is to ignore allegations of rape and abuse made by sex workers and to charge a person who has committed an act of non-consensual sex with a sex worker merely as “gross purchasing of sex” and not as rape; these are **judicially sanctioned violations of sex worker’s dignity and rights to their physical and psychological integrity**. The legal presumption that all sex workers are exploited and subordinated by their clients leads to the presumption that sex workers are unable to consent to have sex in return for pay, but that they are always coerced. The concrete consequence of the law’s normative influence is a chilling violation of sex workers’ rights to be acknowledged in the most basic way as socially-relevant human beings, bearing the capacity to decide on their own physical integrity. In trial, sex worker have neither the rights of the accused nor the victim but are merely objects of evidence against purchasers, whose true abuses are trivialised as expected conditions in the sex trade. The practice is discriminatory and reduces sex workers to second class citizens whose perpetrators, when they are truly sexually or physically violated outside of their consent, are subject to lower penalties.⁴

References

A – The Jordan Case (S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002) <http://www.saflii.org/za/cases/ZACC/2002/22.html>

B – Annabel Raw, Masters student research (used above) , unpublished, and see also The Swedish Sex Purchase Act: Claimed Success and Documented Effects By Susanne Dodillet and Petra Östergren Conference paper presented at the International Workshop: Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges. The Hague, March 3 and 4, 2011

C – Impacts of the Swedish Criminalisation of the Purchase of Sex on Sex Workers Presented at the British Society of Criminology Annual Conference, Northumbria University. Jay Levy. 4th July 2011

D- THE BAN ON PURCHASING SEX IN SWEDEN: THE SO-CALLED ‘SWEDISH MODEL’ by Bob Wallace, Principal Policy Officer, Office of the Prostitution licensing Authority Authority of Queensland Undated (<http://www.traffickingpolicyresearchproject.org/PurchasingSexSweden.pdf>); And: SWAN

(Sex Workers Rights and Advocacy Network Central and Eastern Europe) Video titled: Sweden: “We want to save you. And if you don’t appreciate it, we will punish you!” Interview with Pye Jacobsson (<http://swannet.org/node/1512>)

Decriminalisation in relation to the SWEAT Test

Safe from police abuse: can sex workers work without fear of police abuse? ✘

Workers rights: are the labour rights of those in the industry protected full? ✘, criminalised, whilst sex work is not illegal, the criminalisation of the buying of sex is a refusal in law to accept sex work as work

Exit: can sex workers leave the sex industry of their own free will without fear of prejudice? ✓ no criminal record, but stigma still present

Access to health care: can sex workers access respectful health care services? ✘compromised, stigma still enabled

Trafficking and child sexual exploitation: can sex workers report crimes like trafficking and child exploitation without fear? ✓

Contact:

- Sisonke sex workers movement (021 448 7875)
- Toll free 24 hour Sex Work help line 0800 60 60 60
- SWEAT 021 448-7875
- Women’s Legal Centre 021 424-5660
- Tshwaranang Legal Advocacy Centre 011 403-8230