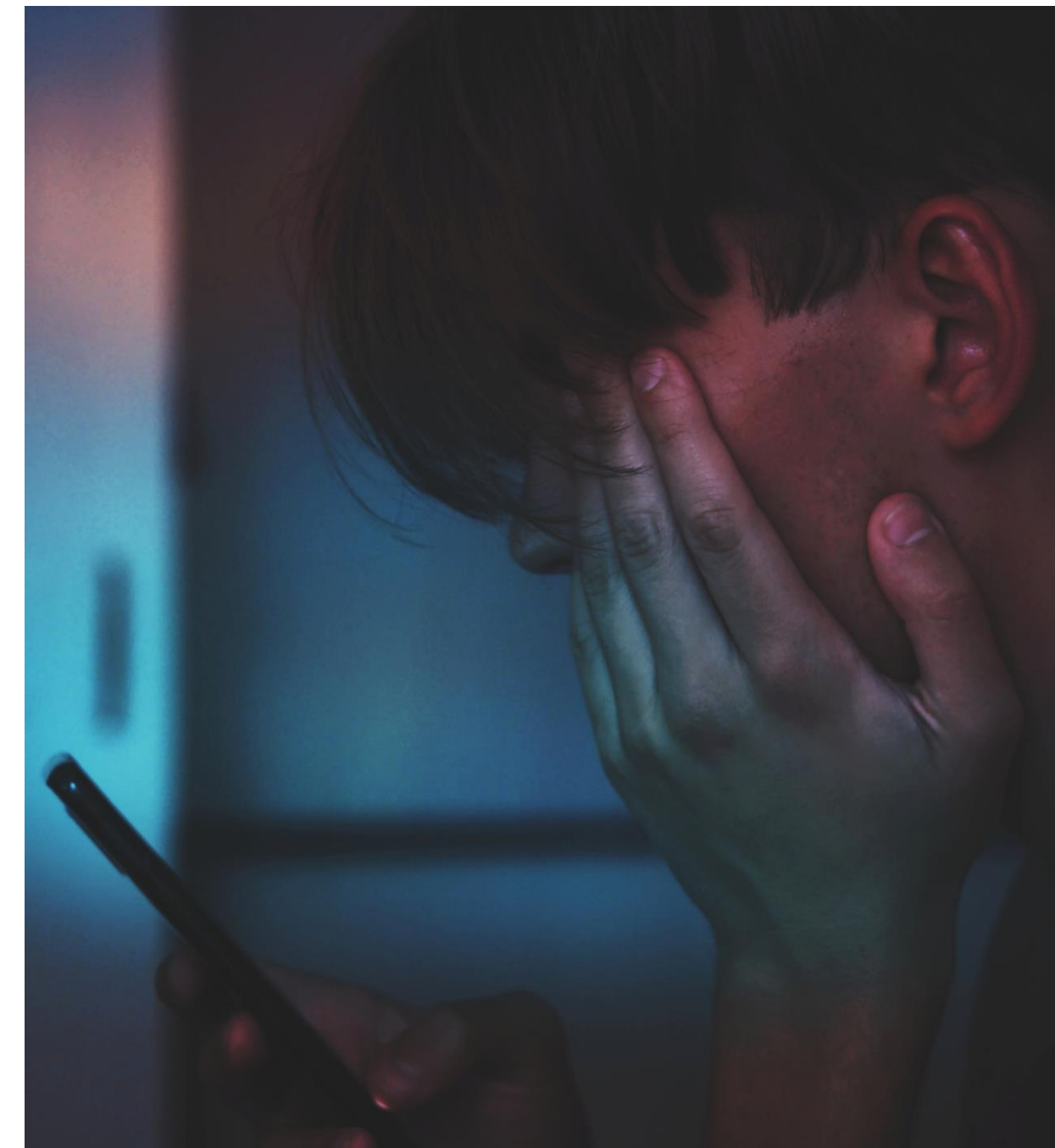


LEGAL STATUS OF PROSTITUTION

# Impact on Pornography, and in turn on Prostitution and Sex Trafficking

NFN Session on Prostitution and Trafficking in Persons

28 May 2021



EDUCATE

EMPOWER

ERADICATE



QUOTE

**“PROSTITUTION CAN NEVER BE ABOLISHED  
AS LONG AS PORNOGRAPHY EXISTS.”**

– Vednita Carter, Founder and Executive Director, Breaking Free

# WHAT IS 'SEXUAL EXPLOITATION'?

Neither the [Sexual Offences Act, 1957](#) nor the [Criminal Law \(Sexual Offences and Related Matters\) Act, 2007](#) define 'exploitation' or 'sexual exploitation'

[Prevention and Combatting of Trafficking in Persons Act, 2013](#) defines both '**exploitation**' and '**sexual exploitation**' – and '**abuse of vulnerability**'

- See definitions of 'exploitation', 'sexual exploitation' and 'abuse of vulnerability' in section 1 of Prevention and Combatting of Trafficking in Persons Act (PACOTIP)

# WHAT IS 'SEXUAL EXPLOITATION'?

## **Working definition of 'sexual exploitation'**

When person takes part in a sexual activity in exchange for something (e.g. gain or benefit, or even the promise of such) from a third party, the perpetrator, or by the person him or herself (commercial sexual exploitation) – Adapted from **ECPAT** "[Briefing Paper on Sexual Exploitation of Children in South Africa](#)" and **Hilary Clayton** "[South Africa's Obligations regarding Sexual Exploitation of Children](#)"

## RELATIONSHIP BETWEEN 'ABUSE OF VULNERABILITY' AND 'EXPLOITATION'

'**abuse of vulnerability**' for purposes of ['**trafficking in persons**'], means any abuse that leads a person to believe that he or she has no reasonable alternative but to **submit to exploitation**, and includes but is not limited to, **taking advantage of the vulnerabilities** of that person resulting from –

- the person having entered or remained in the Republic illegally or without proper documentation
  - pregnancy
  - any disability of the person
  - **addiction to the use of any dependence producing substance**
  - being a child
  - **social circumstances**
  - **economic circumstances**
- See definition of 'abuse of vulnerability' in section 1 of PACOTIP

# SEXUAL EXPLOITATION IS A HUMAN RIGHTS VIOLATION

[S v Jordan 2002 \(6\) SA 642 \(CC\)](#) at para [74] –

*"Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. ..."*



*"... **The very nature of prostitution is the commodification of one's body.** Even though we accept that prostitutes may have few alternatives to prostitution, **the dignity of prostitutes is diminished** not by section 20(1)(aA) but **by their engaging in commercial sex work.** The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body."*



# WHAT IS 'SEX TRAFFICKING'?

[Prevention and Combatting of Trafficking in Persons Act](#) defines 'trafficking in persons'

## 'trafficking in persons'

- Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of –
  - a threat of harm
  - the **threat or use of force or other forms of coercion**
  - the **abuse of vulnerability**
  - fraud
  - deception

- abduction
- kidnapping
- the **abuse of power**
- the direct or indirect giving or receiving of **payments or benefits to obtain the consent** of a person having control or authority over another person
- the direct or indirect giving or receiving of **payments, compensation, rewards, benefits or any other advantage**

aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, **for the purpose of any form or manner of exploitation**, is guilty of the offence of trafficking in persons

- See section 4(1)(a) to (j) of PACOTIP

- Any person who –
  - adopts a child, facilitated or secured through legal or illegal means
  - concludes a forced marriage with another person, within or across the borders of the Republic

for the purpose of the **exploitation of that child or other person** in any form or manner, is guilty of an offence

- See section 4(2)(a) and (b) of PACOTIP

[Prevention and Combatting of Trafficking in Persons Act](#) recognises that '**trafficking in persons**' is a form of '**exploitation**' and '**sex trafficking**' is a form of '**sexual exploitation**'

## INTERNATIONAL OBLIGATIONS

### UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others –

- “[T]he ... **evil of the traffic in persons** for the purpose of prostitution [is] **incompatible with the dignity and worth of the human person** and endanger[s] the welfare of the individual, the family and the community”

### UN Convention on the Elimination of All Forms of Discrimination against Women –

- “[S]tate parties shall take all appropriate measures, including legislation, to **suppress all forms of traffic in women and exploitation of prostitution of women**”

**UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol) –**

- Requires party states to take *"effective action to **prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to **prevent such trafficking, to punish the traffickers and to protect the victims** of such trafficking, including by protecting their internationally recognized human rights"***

# WHAT IS 'PROSTITUTION'?

Neither [Sexual Offences Act](#) nor [Criminal Law \(Sexual Offences and Related Matters\) Act](#) define 'prostitution' (or 'prostitute') – but criminalises 'supply' of and 'demand' for acts of prostitution

- **Acts of prostitution** ('supply') criminalised by **section 20(1A)** of the [Sexual Offences Act](#)
- **Demand for acts of prostitution** criminalised by **section 11** of the [Criminal Law \(Sexual Offences and Related Matters\) Amendment Act](#)

South African Law Reform Commission "[Report 107 on Adult Prostitution](#)" –

- **Prostitution** "*[refers] to the buying and selling of sexual acts and related activities*"
- A **person in prostitution** is "*an adult person (older than 18 years) who **voluntarily offers or provides sexual services for financial or other reward, favour or compensation**, irrespective of whether the sexual act occurs or not*"

# IS PROSTITUTION A HUMAN RIGHTS VIOLATION?

[S v Jordan 2002 \(6\) SA 642 \(CC\)](#) at para [74] –

*"Our **Constitution values human dignity** which inheres in various aspects of what it means to be a human being. One of these aspects is the **fundamental dignity of the human body** which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. **We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body.** Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but by their engaging in commercial sex work. **The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.**"*



# IS 'PROSTITUTION' INHERENTLY HARMFUL?

**Evidence strongly suggests** that **harms of prostitution is inherent in prostitution itself** – i.e. originates from and exists when and wherever prostitution is practiced (irrespective of legal regime)

**Identified harms of prostitution** (include) –

- Extremely high risk of experiencing physical violence (including assault, rape and murder) and psychological trauma
- Intrinsic racism, sexism and class prejudice
- Social stigma and isolation (including discriminatory treatment by law enforcement and health care workers)
- Indirect sexual coercion for especially the economically marginalised and vulnerable

**Identified harms of prostitution** (continued) –

- Close association with sex trafficking
- Severe health consequences (including HIV/AIDS and STDs)
- Association with substance abuse and other criminal activities
- Summary of research findings by [National Centre on Sexual Exploitation](#) and [Prostitution Research and Education](#) (Dr Melissa Farley)

# IS 'PROSTITUTION' SEXUAL EXPLOITATION?

**Prostitution** is the **commodification of human sexuality** for purposes of the commercial **exploitation of the bodily expression of human sexuality** through sexual acts (CASE-SA working definition)

- Prostitution by its very nature (i.e. inherently) involves a violation of human dignity – [S v Jordan](#)
- Persons in prostitution not truly treated as human beings (i.e. with intrinsic value in and of themselves) – but used solely (or mainly) as objects for the sexual stimulation and gratification others when prostituted
- Sexuality of person in prostitution not protected or promoted in context of human individuality, dignity and personhood

Prostitution cannot be divorced from **socio-economic circumstances** (vulnerability) from which it originates or **harms** it causes.

# RELATIONSHIP BETWEEN 'PROSTITUTION' AND 'SEX TRAFFICKING'

UN Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children "[Integration of the Human Rights of Women and a Gender Perspective](#)" –

- *"For the most part, prostitution as actually practised in the world usually does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution and/or a person's experiences within prostitution do not involve, at the very least, an abuse of power and/or an abuse of vulnerability."*

Dr Max Waltman "[Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law](#)" –

- *"[A]ny effective approach against sex trafficking must also reduce prostitution and the demand for it"*

# WHAT IS (ADULT) 'PORNOGRAPHY'?

Pornography is **content** that has the **potential to sexually arouse** (broad colloquial definition)

## Criminal Law (Sexual Offences and Related Matters) Act

- **'pornography'** means **any image, however created, or any description of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature that is intended to stimulate erotic feelings,** including any such image or description of such person –
  - engaged in an act that constitutes a sexual offence
  - engaged in an act of sexual penetration
  - engaged in an act of sexual violation
  - engaged in an act of self-masturbation

- displaying the genital organs of such person in a state of arousal or stimulation
  - unduly displaying the genital organs or anus of such person
  - displaying any form of stimulation of a sexual nature of the female breasts
  - engaged in sexually suggestive or lewd acts
  - engaged in or as the subject of sadistic or masochistic acts of a sexual nature
  - engaged in any conduct or activity characteristically associated with sexual intercourse
  - showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any other person or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person or any other person
- See definition of 'pornography' in section 1 of Criminal Law (Sexual Offences and Related Matters) Act

## Films and Publications Act, 1996 –

- **'XX' classification (restricted distribution)**
  - Explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person
  - Bestiality, incest, rape or conduct or an act which is degrading of human beings
  - conduct or an act which constitutes incitement of encourages or promotes harmful behaviour
  - Explicit infliction of sexual or domestic violence
  - Explicit visual presentations of extreme violence
- **'X18' classification (restricted distribution)**
  - Contains explicit sexual conduct
- See sections 16(4)(b) and 18(3)(b) ('XX' classification) and sections 16(4)(c) and 18(3)(c) ('X18' classification) of the Films and Publications Act



# TO WHAT EXTENT IS PORNOGRAPHY LEGAL?

## Constitution of the Republic South Africa, 1996 – Section 16 'Freedom of Expression'

- *"Everyone has the right to freedom of expression, which includes –"*

### 'Protected' expressions (section 16(1) ) –

- Freedom of the press and other media
  - Freedom to receive or impart information or ideas
  - Freedom of artistic creativity
  - Academic freedom and freedom of scientific research
- 
- See section 16(1)(a) to (d) of the Constitution

## Constitution of South Africa – Section 36 'Limitation of Rights'

- The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors

## Iain Currie and Johan de Waal “Bill of Rights Handbook” –

- *“The Constitutional Court has **distinguished** between **the ‘core values’ of freedom of expression** and **‘expression of little value which is found on the periphery of the right’**. **The latter type of expression receives less protection in that limitation of such forms of expression is relatively easily justified, compared to limitations on expression at the core.**”*

## NATURE OF RIGHT TO FREEDOM OF EXPRESSION

**S v Mamabolo 2001 (3) SA 409 (CC)** at para [41] –

- Not superior in status or pre-eminent freedom ranking above all others – also not unqualified
- Human dignity, equality and freedom are three conjoined, reciprocal and covalent values – and together foundational to Republic – i.e. **'human dignity' at least as worthy of protection as freedom of expression** and not automatically trumped by it

## HUMAN DIGNITY - GERMAN APPROACH

### 'Menschenwurde'

- Mathias Reimann summarized the characteristically Kantian German approach: The court essentially asks whether the material presents the characters truly as human beings with a value in and of themselves. If the material does, the court will find the sexual explicitness acceptable because sex forms a natural part of life.
- *"If, on the other hand, the **material basically employs its characters only as objects for other purposes, notably sexual stimulation**, the court will find the depiction of sex unacceptable because **the work treats the characters not as humans, but only as objects**. Such a work **denies the characters their human individuality and personhood**. The approach of the German court thus concerns itself not with the viewer's prurient interest but – ultimately – with **human dignity**." – Mathias Reimann "**Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the US**"*

## DE REUCK V DIRECTOR OF PUBLIC PROSECUTIONS 2004 (1) SA 406 (CC)

### **Facts –**

- Challenge to the constitutionality of the Films and Publications Act's prohibition on the creation, production, possession etc. of child pornography.

### **Conceptual analysis –**

- Prohibition of child pornography is a limitation on the right to freedom of expression
- Question: Can the limitation be justified?

### **Limitations analysis –**

- Entails a weighing up of the harm done by limiting freedom of expression against the benefits achieved by doing so (harm done by the prohibition depends on whether pornography is core to what is valuable about freedom of expression) - core values of freedom of expression

## **Conclusion –**

- Pornography does not implicate the core values of freedom of expression. It is, for the most part, expression of little value which is found on the periphery of the right
- Purpose of limiting child pornography –
  - protecting the dignity of children
  - stopping production of child abuse material
  - preventing use of such materials for child sexual grooming
  - the relatively narrow infringement of expression is outweighed by the important purposes performed by the prohibition

**In other words** – The scope of legitimate exercise of constitutional freedoms does not extend to the use of such freedoms to violate human dignity and placing people at risk of harm and exploitation. That would constitute abuse of constitutional freedoms. **Put differently** – Freedom of expression should not be used to trample on or violate people's inherent worth (human dignity).

# IS 'PORNOGRAPHY' INHERENTLY HARMFUL?

**Well-documented scientific research evidence** of the **extensive individual** (physical and psychological), **relational** and **public** (health, safety and other social) **harms of adult pornography**

**Harms** include –

- Harms to viewers, both adult and children
- Harms specific to viewers who are children
- Harms to intimate partners and intimate partner relationships
- Harms to vulnerable groups in society (victims of sexual violence and crimes)



**Specific forms of harm** include –

- loss of interest in sexual encounters with real people (as opposed to online representations)
  - loss of libido and erectile dysfunction
  - sexual addiction/compulsivity
  - unhealthy expectations about sex and self-inflicted pressure to live up to imagery in pornography
  - devaluing of the opposite sex by viewing the opposite sex as objects to be used for sexual pleasure
  - acceptance of aggression as being part of a normal sexual experience
  - causing people with a predisposition to violence to act out in sexual violence against intimate partners
  - desensitisation towards and/or acceptance of rape and other sexual crimes
  - greater propensity to divorce and to commit infidelity
  - physiological brain changes which fuel addiction behaviour
  - reduction in ability to critically assess harm towards others (focus on impulsive benefit to self)
- Summary of research findings by [National Centre on Sexual Exploitation \(Porn Harms Research\)](#)

# IS 'PORNOGRAPHY' SEXUAL EXPLOITATION?

The distribution of pornography is either **restricted** ('X18' and 'XX' classification) or its **possession entirely prohibited** ('refused' classification) ([Films and Publications Act](#)) and **criminalised** ([Criminal Law \(Sexual Offences and Related Matters\) Act](#))

Pornography is **harmful** ([research evidence](#))

Pornography **commodifies the human body** (i.e. **violates human dignity** – [S v Jordan](#))

# IS 'PORNOGRAPHY' A HUMAN RIGHTS VIOLATION?

[S v Jordan 2002 \(6\) SA 642 \(CC\)](#) at para [74] –

"Our **Constitution values human dignity** which inheres in various aspects of what it means to be a human being. One of these aspects is the **fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected.** We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. **The very nature of prostitution is the commodification of one's body.** Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but by their engaging in commercial sex work. **The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.**"

# DOES PORNOGRAPHY IMPACT PROSTITUTION, AND VICE VERSA?

## **PORNOGRAPHY**

Does **pornography** contribute to (or exacerbate) impact of prostitution in relation to –

- Prevalence of prostitution
- Level of harm experienced by persons in prostitution

Is **pornography** a cause (driver for and supply) of prostitution?



## PROSTITUTION

Does **prostitution** contribute to (or exacerbate) impact of pornography?

Is **prostitution** a cause of pornography production, distribution and use?



Dr Gail Dines “[Debunking “Sex Work”: Conversations about Prostitution \(Pornography and Prostitution\)](#)” –

Pornography **drives demand for prostitution** (and **sex trafficking**)

- **Domestication of internet** has made pornography **accessible, affordable, anonymous**.
- Pornography is a **billion-dollar industry**.
- Major form of **sex education for boys** (**mainstream pornography is violent** – want to act and experience pornographic scenario with real women)
- **Cannot eradicate prostitution and trafficking unless we eradicate pornography**

Dr Melissa Farley "[Pornography, Prostitution, & Trafficking: Making the Connections](#)" –

***"Pornography is an act of prostitution. A survivor of prostitution explained, "Pornography is prostitution that is legalized as long as someone gets to take pictures." Pornography documents and facilitates trafficking.*** (49% of women in prostitution said that pornography was made of their sexual exploitation)

- *"In the real world, from the perspective of the person in the sex trade - pornography, prostitution, and sex trafficking are the same (same kinds of violence against women are perpetrated in pornography, prostitution, and trafficking)*
- *Women are coerced into pornography by deception, threats, or violence (the same oppressive experiences channel women into pornography, prostitution, and trafficking)*



- *Pornographers are specialty pimps who use pornography to advertise prostitution and to traffic women"*

**Dr Melissa Farley** "[Prostitution and Trafficking in](#)

[Nine Countries](#)" –

49% of women in prostitution said that pornography was made of their sexual exploitation



# DOES 'PORNOGRAPHY' AND 'PROSTITUTION' IMPACT SEX TRAFFICKING, AND VICE VERSA?

**GROWING FOCUS ON IMPLICIT OVERLAP (NEXUS)  
BETWEEN PORNOGRAPHY AND SEX TRAFFICKING**

Impractical to separate (ubiquitous at crime scenes)

Pornography is a vehicle (part of infrastructure) for  
exploitation – potent mix to create vulnerability when  
combined with alcohol and drugs

Online adult entertainment and escort websites  
(Pornhub and Redvelvet)

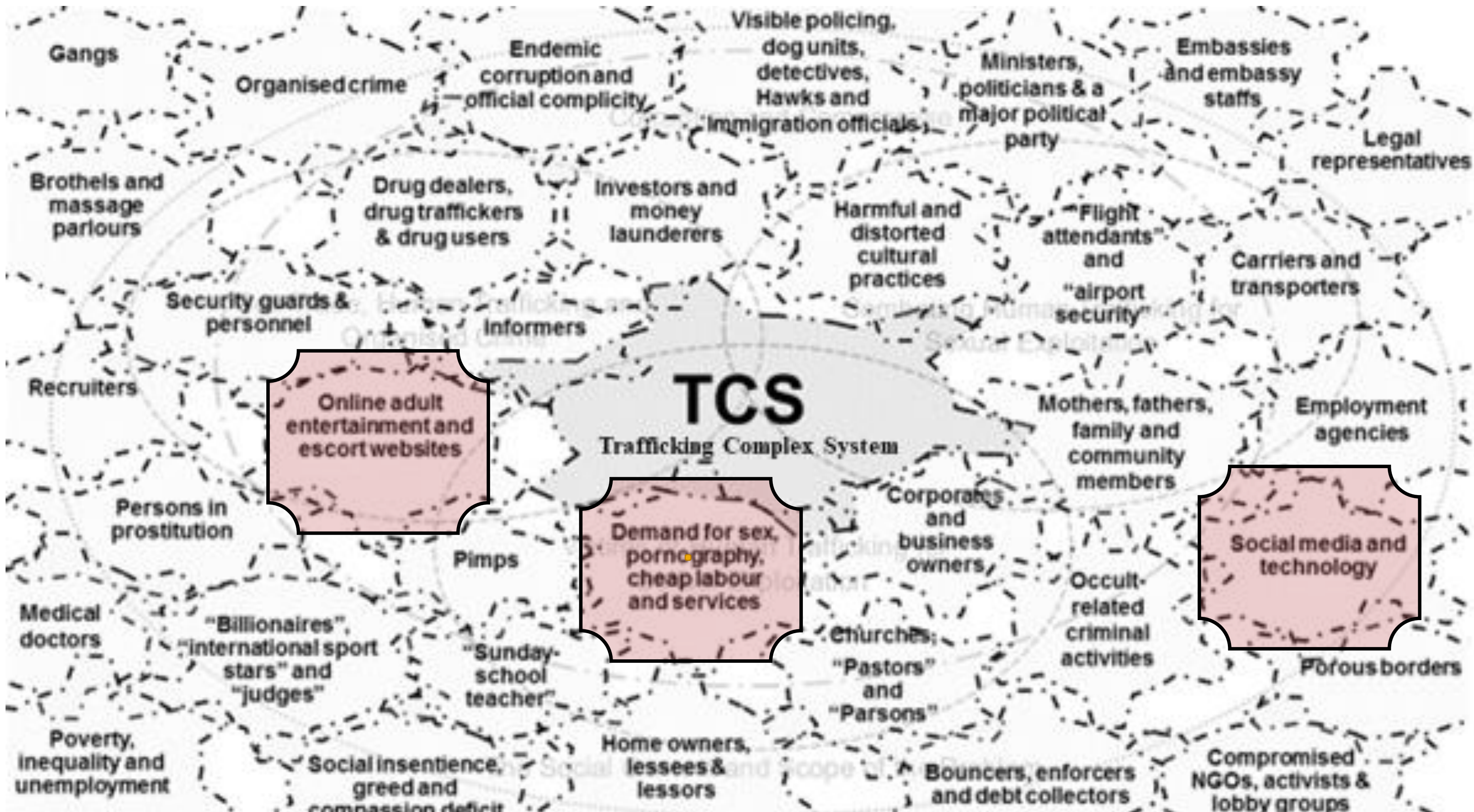


Monetisation of sexual exploitation (overlapping of commodities) – making pornography by recording sex trafficking

Need to thoroughly investigate role and impact of pornography on sex trafficking









POINT TO PONDER

# CAN PORNOGRAPHY BE SEEN AS A FORM OF TRAFFICKING?

**Increasing discussions on classifying crimes related to child sexual abuse material (CSAM) as sex trafficking**

- With children need only prove recruitment and exploitation elements (not means element)
- Need for technical legal discussion



# WHY DOES THE LAW CURRENTLY CRIMINALISE ALL ASPECTS OF THE PROSTITUTION INDUSTRY?

## Criminalising prostitution is constitutional

- Prostitution is a **violation of human dignity** ([S v Jordan](#)) –
  - *"The very nature of prostitution is the **commodification** of one's body."*
  - *"The **very character** of the work they undertake **devalues the respect** that the Constitution regards as **inherent in the human body.**"*

## Existence of strong public policy reasons

- Prostitution is **exploitation** and **harmful** ([research evidence](#))
- Harms and socio-economic marginalisation of prostitution flow from nature and practice of prostitution itself (and its underlying causes) – **can only reduce harms of prostitution by reducing prostitution**



# WHAT WILL BE THE IMPACT ON PORNOGRAPHY IF PROSTITUTION IS LEGALISED TO ANY EXTENT?

## **Risks and consequences of legalising any aspect of an inherently or endemically exploitative industry**

- Reinforces sexual exploitation industry
- Normalisation or desensitisation of sexual exploitation
- Detrimental to societal norms and values (law as normative standard or public guidepost)
- Can only reduce prostitution by reducing or eliminating the underlying causes of prostitution



**Increase in pornography** production, distribution, and use.

**Increase in sexual exploitation and harm** (to individuals and society)

**Detrimental impact seen from public interest and legal theory perspective**

- Waters down legal protections against and normalises other forms of sexual exploitation and human rights violations



# WHAT WILL BE THE IMPACT ON PROSTITUTION AND SEX TRAFFICKING IF PORNOGRAPHY INCREASES?

*"Pornography is prostituted sex with the camera going"* – Dr Melissa Farley "[#MeToo Must Include Prostitution](#)"

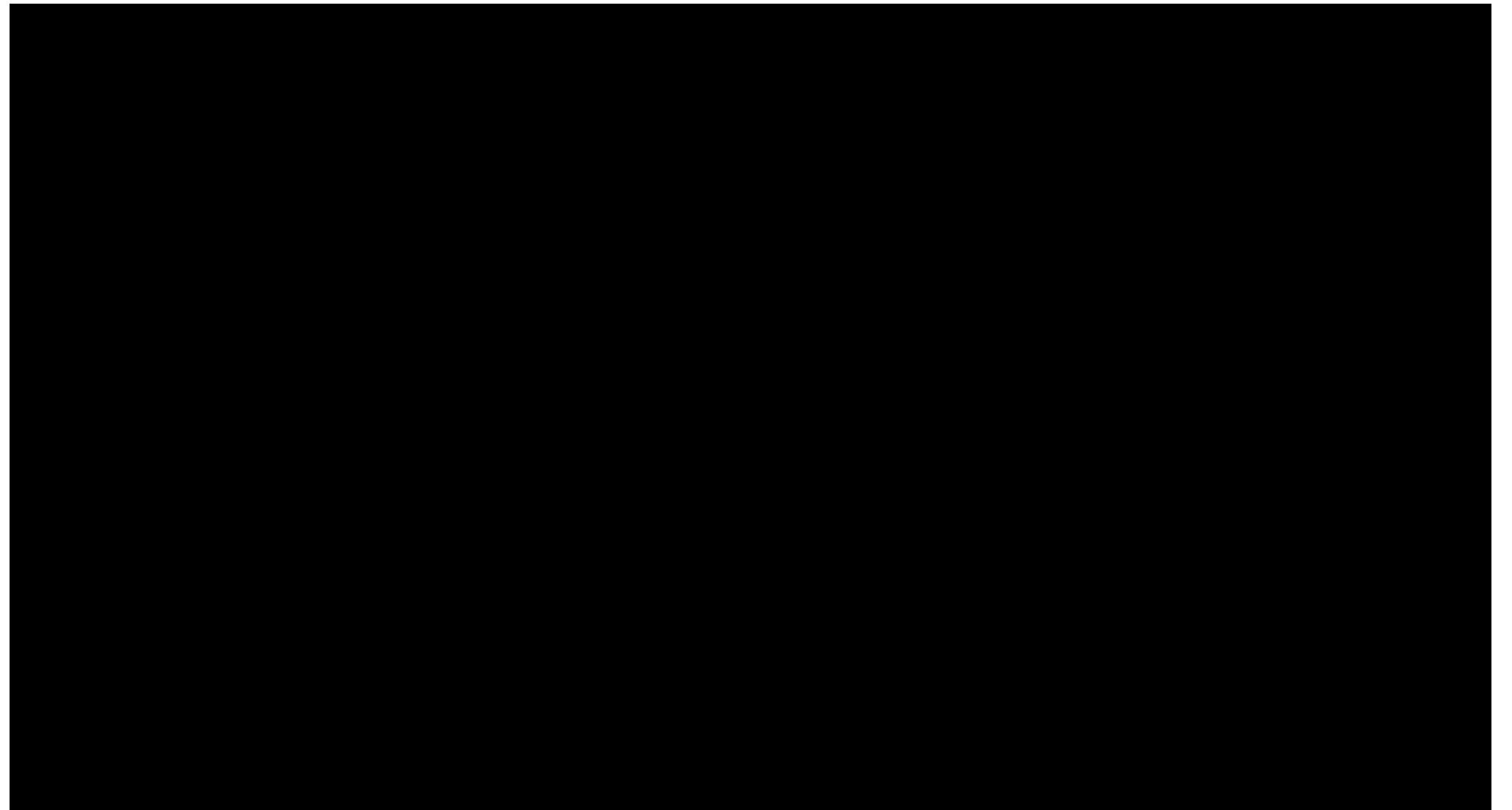
**Pornography feeds and stimulates demand – Dr Gail Dines and Catharine MacKinnon** in David Guinn "[Pornography, Prostitution and International Sex Trafficking: Mapping the Terrain](#)"



# CONCLUSION

If the **approach and objectives of laws and policies** are **not to prevent, respond to and eradicate all forms of sexual exploitation**, it creates the risk of –

- Legalising aspects of an exploitative industry
- Normalising and desensitising exploitation
- Compromising or diminishing the normative standard set by the law



FINAL THOUGHT

# PORNOGRAPHY, PROSTITUTION, AND SEX TRAFFICKING CANNOT BE ABOLISHED SEPARATELY OR INDEPENDENTLY

– IT MUST AND CAN ONLY BE ABOLISHED TOGETHER

**CENTRE**

**AGAINST**

**SEXUAL**

**EXPLOITATION**

SOUTH AFRICA

Together we can  
#EndSexploitation  
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