



Submission

to

Civil Society-Led Summit Regarding the Implementation of Sexual Offences Legislation in South Africa

On

Sex Workers Experiences and Sex Workers Ability to Access Services and Justice

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Ishtar Lakhani
Human Rights and Lobbying Officer
IshtarI@sweat.org.za

Cherith Sanger
Human Rights and Advocacy Manager
Email: cheriths@sweat.org.za

Sex Workers Education and Advocacy Taskforce
19 Anson Street
Observatory, 7925
Tel: 021 448 7875
Fax:021 448 7875

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19 Anson Street
Observatory, 7925
Tel: 021 448 7875
Fax:021 448 7875

The Structure of this Submission

In this submission, we will highlight our concerns with the Bill and will make recommendations in regard to what we have identified as gaps.

The submission is structured as follows:

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1 Introduction

1.1 About SWEAT

The Sex Worker Education and Advocacy Taskforce ('SWEAT') is South Africa's leading sex worker human rights organisation. SWEAT is registered as a non-profit organisation and has been working on human rights and health issues that affect adult sex workers since 1994. The organisation's main functions are to provide healthcare services to sex workers and to support sex workers to access their human rights in a criminalised system whilst simultaneously advocating for the decriminalisation of sex work in South Africa. SWEAT also hosts the Sisonke Sex Worker Movement which was launched in 2003. The movement was formed by sex workers to unite them to address stigma and unfair discrimination against sex workers.

1.2 The Purpose of this Submission

The purpose of this submission is to share sex workers experiences and their ability to access services and justice under the current Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 with a view to:

- 1.2.1 Exploring the practicality of the SOA provisions that criminalise sex work; and
- 1.2.2 Analysing the effectiveness of the implementation of the SOA.

2 Legal Framework on Sex Work

2.1 Constitutional Rights

2.1.1 The Right to Human Dignity

Section 10 of the South African Constitution provides that: “Everyone has inherent dignity and the right to have their dignity respected and protected”.

2.1.2 The Right to Equality

Section 9(1) of the Constitution provides that: “Everyone is equal before the law and has the right to equal protection and benefit of the law”. Section 9 (3) further provides that: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, . . . colour, sexual orientation, . . .”

2.1.3 The Right to Freedom and Security of the Person

Section 12(1) states that “everyone has the right to freedom and security of the person which includes the right -

- (a) Not to be deprived of freedom arbitrarily or without just cause;
- (b) Not be detained without trial;
- (c) To be free from all forms of violence from either public or private sources;
- (d) Not to be tortured in any way; and
- (e) Not to be treated or punished in a cruel, inhuman or degrading way.”

Section 12 (2) further states that “everyone has the right to bodily and psychological integrity, which includes the right –

- (a) To make decisions concerning reproduction;
- (b) To security in and control over the body; . . .”

2.1.4 The Right to Freedom of Trade, Occupation and Profession

Section 22 provides that: “Every citizen has the right to choose their trade, occupation or profession freely”. This right may however be regulated by law. This means that sex work may be criminalised or made illegal in terms of the law.

2.1.5 The Right to Fair Labour Practices

Section 23 states that: “Everyone has the right to fair labour practices. In the *Kylie v the Commission for Conciliation, Mediation and Arbitration 2010* that case, the Labour Appeal Court ruled that even though sex work is illegal under South African law, sex workers have the right to fair labour practices and can utilise legal avenues under the law where unfair labour practices are used against them.

2.1.6 The Right to Healthcare Services

Section 27(1) (a) states that: “Everyone has the right to have access to ... healthcare services including reproductive healthcare ...”

2.1.7 The Right to Access the Courts

Section 34 vests “Everyone . . . with the right to have a dispute . . . resolved by application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.”

2.1.8 The Rights of Arrested Detained and Accused Persons

Section 35 of the Constitution vests arrested, detained and accused persons with, inter alia, the following rights:

- 2.1.4.1 The right to be brought to court as soon as reasonably possible, but not later than 48 hours after the arrest. (Section 35(d))
- 2.1.4.2 The right to be informed of the reason for their arrest and detention.(Section 35(1)(e) and (f); and
- 2.1.4.3 To be released from detention if the interest of justice permits (Section 35(1)(e) and (f).

2.2 The Sexual Offences Act 23 of 1957

The primary prohibition against sex work is Section 20(1)(aA) of the Sexual Offences Act which provides that any person who has unlawful carnal intercourse, or commits acts of indecency, with any other person for reward¹ commits an offence.²

Although Section 20(1)(aA) effectively prohibits the core function of the sex worker's work, it does not penalise "being" a sex worker. A person cannot therefore be arrested for being known to the police as a sex worker – there has to be at least a reasonable suspicion that he or she had engaged in sexual intercourse or had performed an indecent act for reward (at a specified time with a specified person).³

The Sexual Offences Act of 1957 also prohibits the following:

- 2.2.1 Brothel-keeping (Section 2)
- 2.2.2 Procurement i.e. recruiting a person to work as a sex worker (Section 10(a) or procuring someone to work in a brothel (Section 10(b))
- 2.2.3 Facilitating sex work, for example where escort agencies supply escorts knowing that they will supply sex for reward to their customers (Section 12A(1)). It is also an offence for any person to knowingly live off the earnings of sex work. This section is targeted at pimps;
- 2.2.4 Soliciting – any person who entices, solicits or importunes in any public place for immoral purposes commits an offence (Section 19(a)). This refers to a direct physical invitation by the accused through words, gestures, signs or display;
- 2.2.5 Indecent exposure in view of the public (Section 18(a)) this refers to a direct physical invitation by the accused through words, gestures, signs or displays;
- 2.2.6 Indecent exposure in view of the public (Section 19(b)) and public indecency (Section 20(1)(b)).

¹ The offence consists of the following elements: having unlawful carnal intercourse or committing an indecent act; a reward and mens rea

² The penalty is imprisonment for a period not exceeding three years with or without a fine not exceeding R6000 for imprisonment

³ This does not of course preclude the possibility of arrest on other charges related to prostitution, e.g. soliciting in contravention of sec 20(1)(a) of the Act, or in terms of municipal by-laws

2.3 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

The SOA addresses the criminality of clients. Section 11 of the SOA criminalises the actions of clients of adult sex workers by providing that a person who engages the services of a person 18 years or older for financial or other reward, favour or compensation for the purpose of engaging in a sexual act, irrespective of whether the act is committed or not; or by committing a sexual act with the person is guilty of the offence of engaging the sexual services of a person 18 years of older.⁴

2.4 Municipal By-Laws

Often municipal by-laws are used to arrest sex workers instead of the Sexual Offences Acts because of the difficulties involved in proving the elements of the offence that the sex worker or client is accused of.

The most common by-laws used are those dealing with loitering⁵, drunken behavior and soliciting for the purposes of prostitution. In many cases the sex workers have not committed the offence in question.

Even where the sex worker is guilty of the offence, the by-laws set out procedures relating to the arrest of a person that has allegedly violated the by-law:

- a. The response to the alleged commission of the offence is to give such person a written notice to stop the offending activity and only if he or she fails to adhere to the terms of the notice, can the person be fined or given a notice to appear in court;

⁴ Engaging in child prostitution is a separate offence in the Sexual Offences Amendment Act which forms part of the comprehensive offence of sexual exploitation of a child.

⁵ Regulation 2 of the Western Cape By-Laws PG 6469 of 28 September 2007 provides that 'no Person, excluding a peace officer or any other official or person acting in terms of the law, shall –

- (a) When in a public place –
 - (i) Intentionally block or interfere with the safe passage or free passage of a pedestrian or motor vehicle; or
 - (ii) intentionally touch or cause physical contact with another person, or his property, without that person's consent.

Regulation 2(3)(f) provides that, "no person shall in a public place, perform any sexual act.

Regulation 2(3)(j) provides that, "no person shall in a public place, solicit or importune any person for the purpose of position or immorality". Section 12 of the City of Johannesburg Metropolitan Municipality's Road and Miscellaneous By-laws, states the following in relation to loitering: "No person may-

- (a) Lie, sit, stand, congregate, loiter or walk, or otherwise act, on any public road in any manner that may obstruct traffic.
- (b) Jostle or loiter at or within twenty meters of the entrance of any place of public worship during the time of divine service or during an assembly at the place of worship or departure from such place of the congregation so as to obstruct or annoy any person going to, attending at, or leaving such place of worship

- b. Where a person has been fined they should have an opportunity to make representations if the fine was incorrectly levied against them, similar to the current system allowed for traffic fines;
- c. Where a fine has not been paid after it becomes due, arrest would be allowed only as a last resort if necessary to be able to secure a person's attendance in court. In most cases a summons would be sufficient to ensure attendance at court.

3 Realities of Sex Workers

SWEAT has compiled a summary of all the human rights violations perpetrated against sex workers that have been brought to its attention through client complaints, referrals by partner organisations and the media in 2014. SWEAT found that there had been 697 human rights violations reported to Women's Legal Center and the SWEAT hotline. There were 25 incidents of rape, 39 murders, 150 assaults by sex workers' clients or partners, 65 assaults by members of the South African Police Service ('the police'), 5 incidents of theft by the police, 23 incidents of harassment sex workers' clients or partners, and 329 incidents of harassment by the police.

Sex workers' criminal status in society increases vulnerability to violence in a number of ways. Sex workers around the world continue to be murdered at rates higher than the general population. The vulnerability that sex workers have is exacerbated by criminal sanctions because of the difficulty and fear of laying a criminal charge. By revealing their identities and coming forward to lay charges, sex workers both incriminate themselves and expose themselves to further discrimination and prosecution. Attitudes such as 'sex workers cannot be raped' prevail among some police officers'.

The human rights abuse of sex workers in South Africa is alarming and demands urgent attention:

- 3.1 Sex workers suffer systematic and regular violence and rape. In Cape Town alone, 37% of 'street-based' and 20% of brothel-based sex workers are subject to violence that they cannot report to the police. These unreported crimes include verbal abuse, refusal to pay and being robbed, threats of physical assault and rape.
- 3.2 Female sex workers are 18 times more likely to be murdered than other women⁶.
- 3.3 Most sex workers are extremely reluctant to report the crimes committed against others to the police, partially because in many cases, police officers are themselves perpetrators.

⁶ Statistic comes from this article John J. Potterat and others "Mortality in a Long-term Open Cohort of Prostitute Women" American Journal of Epidemiology Volume 159, Issue 8pp. 778-785.

3.4 Although many sex workers report abuse by the police⁷, the role and behaviours of the police contributes toward a generalised skepticism from sex workers around resorting to the police for help and redress.

4 Implementation of the Provisions of Sexual Offences Act Relating to Sex Work

One of the largest contributing factors to the growing number of human rights violations experienced sex workers is that the laws as they stand are not able to be implemented. Both Sexual Offences Acts serve to further drive sex work and sex workers to the periphery of society. It is on this periphery that sex workers experience stigma, unfair discrimination, violence and exploitation. Not only is the implementation of the legislation impossible but the legislation itself is problematic as it does not accord with the imperatives set out in the Bill of Rights of the Constitution.

4.1 Access to Justice

The provisions of the Sexual Offences Acts that criminalise the buying and selling of sexual services is very difficult to enforce as it requires intensive and intrusive police methods such as entrapment to secure evidence required for prosecution and conviction. The provisions of Sexual Offences Act of 2007 which criminalises the purchase of sex services is particularly difficult to enforce because it is difficult to produce evidence that proves elements of the offence. The only way to convict the client is by entrapment whereby the sex worker testifies against the client, and implicates her or himself.

The current policing of sex work drains scarce resources that could for example be used to roll-out more effective HIV prevention, treatment and care programmes. Technikon South Africa's Institute for Human Rights and Criminal Studies claims that:⁸

- 4.1.1 At a minimum, it costs the police close to R14 million a year to prosecute sex workers;
- 4.1.2 Police action against sex workers is inconsistent;
- 4.1.3 Most cases against sex workers are dropped after coming to court, wasting valuable court time; and
- 4.1.4 Sex work is more heavily policed than serious violent crime.⁹

⁷ SWEAT submission to the South African Law Reform Commission, 27.

⁸ "Criminalising the act of sex: Attitudes to adult commercial sex work in South Africa", Jillian Gardner, www.hsrcpress.co.za

In a study in Johannesburg, Cape Town and Rustenburg more than 15% of female sex workers reported negative interactions with police in the last month, including police violence, arrest, harassment, theft, bribery and fines.¹⁰

The reality is that sex workers are seldom prosecuted, and are more likely to be arrested, harassed and then released. In the case of *SWEAT v Minister of Safety & Security and Others* 2009 (6) 513 (C),¹¹ the Cape High Court interdicted the police from arresting sex workers in order to harass them.

Once arrested, they are required to pay a fine to the arresting officer or they are taken to the police cells where they are required to pay a fine and kept overnight and then released the next morning. They do not appear in court nor do they receive any receipts for the fines paid.

Some experiences of sex workers are recorded as follows:

I was arrested by an SAPS officer. I do not know the officer's particulars as he removed all forms of identification during the arrest. The officer had a gold tooth. At the time of my arrest I was sitting on a corner. I was told that I was being arrested for drunken behavior and taken to Claremont Police Station. I was given a R500 fine. I was detained in the holding cells from on or about 2pm to 4pm. During that period I was not offered any food or water. The cell in which I was held was dirty. I was not allowed to make a phone call or receive visitors. At no point was I taken to court.

I was arrested in Parksig, Bellville. I was standing on the street when I was approached by the officer. The officer was a male with whom I was familiar. I was informed that I was being arrested for loitering. When the police officer approached me he requested that I have sex with him for free. When I refused he locked me in the van and sprayed me with pepper spray. I was driven around in the van for two hours before being taken to Bellville Police Station. I was detained in police custody for 24 hours. During that period I was provided with no food or water. The cell was very dirty, especially the toilet and the blankets. I was not allowed to make a phone call or receive any visitors. I never appeared before a magistrate.

The continued arrest of sex workers when they have not committed the acts for which they have received fines conveys a practice of abusing the law to deliberately persecute a specific group of

⁹ Above note 8. Also states that 91% of the 4390 reported prostitution offences in 2000 went to court with convictions secured 33%, while the convictions for carjacking in 2000 stood at 2.3%, aggravated robbery at 2.3% and rape at 7.56%. The institutes work is available at <http://www.crimeinstitute.ac.za>

¹⁰ Richter, Marlise et al (2012). "Female sex work and international sport events-no major changes in demand or supply of paid sex during the 2010 Soccer World Cup: a cross-sectional study". *BMC Public Health* 2012, 12:763.

¹¹ *SWEAT v Minister of Safety & Security & 7 Others*. Judgment delivered in the Cape High Court on 20 April 2009.

people. This practice violates the right to be treated equal before the law and amounts to unfair discrimination. In addition, the police often take photographs of those they suspect to be sex workers and display them at police stations.

A sex worker reported the following:

While I was detained at the police station the officers took photographs of me and put the photo on the wall. They told me that they were taking pictures in case I died or went missing. I was held in the police station for two days and never given the option of paying a fine. During that time I was provided with food and water. The cell in which I was held was dirty, especially the toilet which did not flush and contained no water. The officers would not allow myself or any of the people held in the cell to wash. I was not allowed to make a phone call or receive visitors.

Sex workers further complain of the violation of their constitutional rights to be informed promptly of the reason for being detained, to choose and consult with a legal practitioner, to challenge the lawfulness of the detention, to communicate with or be visited by next of kin or a doctor, and the conditions of detention that are inconsistent with right to human dignity. In the case of transgender women sex workers, they are frequently placed in male cells.

A SWEAT service user reported her experience as set out below:

Flavina, transgender female - I was at home...The police officer only told me to come with them; they would transport me to the police station. Did not tell me I was arrested...I was humiliated at the police station because the coloured man said, 'I was a man, I have a penis'.

4.2 Access to Healthcare

SWEAT, Sisonke, and one of its key party organisations, the Women's Legal Centre, participated in a seven country research study to illustrate how the police's use of condoms as evidence for sex work hinders sex workers' rights to health and access to health care services. When the police use condoms as an indicator for sex work, sex workers are often afraid to carry them for fear of harassment and arrest. Almost 50% of sex workers interviewed said there were times they did not carry condoms for fear that it would lead to issues with the police. Not carrying condoms increases the risk of HIV and other STIs, in addition to unwanted pregnancy. Sex workers have even cited the police committing violence against them because they were carrying condoms. Current South African law neither prohibits nor prescribes the use of condoms as evidence.

Sex workers have reported their experiences in relation to the confiscation of condoms as evidence of their occupation as sex workers as follows:

Rochelle, female – I was walking on the road and I was wearing a brown skirt and a white top. The officials stopped me and asked what I was doing there. I told them I was going to my friend's place. They searched for condoms in my bag and they found two condoms and said I was lying and that I was doing sex work, so they issued me with a fine.

Female Cape Town based sex worker - We use condoms to protect ourselves from HIV/AIDS, but they don't allow us to carry them, so how can we protect ourselves?

A 34-year old sex worker was raped for being found with condoms:

I had sex with two police (officers) against my will. I was threatened that I would be sentenced so I had sex with them.

The police frequently use violence during their efforts to fine and arrest sex workers, which includes beating them, spraying them with pepper spray and sexually assaulting them. The Women's Legal Center research study revealed that 33% of sex workers had been harassed by the police and 17% had been sexually or physically assaulted by the police.

A female sex worker in Cape Town stated:

Then a police officer unzipped his pants and put a condom on. I got a shock. They started speaking to me rudely. They told me that I must give each one of them a blow job (oral sex), which I did. He put me on the floor. The police officer raped me, then the second one, after that the third one did it again. I was crying after the three left without saying anything. Then the first one appeared again. He let me out by the back gate without my property. I was so scared that my family would find out.

The police also directly deter sex workers from seeking health care. There have been multiple incidents of police officers following sex workers to mobile clinics and using that as proof that they can be arrested for being sex workers. There have also been incidents of police arresting sex workers and taking them to clinics where they are then humiliated because the police revealed that they are sex workers to the public.

A female sex worker in Cape Town - The police arrested me with 3 other sex workers. They took us all to the clinic in Du Noon and then they called over the loudspeaker to other people to 'come and see the prostitutes.' I was very embarrassed.

In addition, SWEAT has received information from sex workers that they receive poor healthcare services from public health facilities including clinics and hospitals due to stigma and discrimination by health care workers. Healthcare workers are also sometimes reluctant to provide who they suspect to be sex workers with condoms and other forms of contraception on the basis

that they are sex workers. The criminalization of sex work contributes to the stigmatisation of sex workers and perpetuates discriminatory attitudes to sex workers by healthcare workers. The stigmatization of sex workers and discriminatory attitudes towards sex workers coupled with poor healthcare services makes sex workers reluctant to access healthcare services which leads to making sex workers more susceptible to poor health outcomes related to HIV and AIDS and STIs.

5 Recommendation

Legal Reform

SWEAT submits that selling sex is a legitimate form of labour and to criminalise this activity violates the fundamental rights of sex workers. We dispute the position that sex work constitutes a sexual offence and that sex for reward between consenting adults is criminalised. It is SWEAT's recommendation that the decriminalisation of adult sex work is the only feasible legal option for South Africa which would promote and fulfil sex workers fundamental human rights.

These aims can be achieved through:

- 5.1.1 The repeal of the provisions of the criminal laws as set out in the Sexual Offences Acts that criminalise and prohibit the sale and purchase of consensual adult sex and related criminal offences. The law should be amended to align it with the fundamental rights of all persons living in South Africa in the Bill of Rights.
- 5.1.2 The application of the full range of the existing labour laws to sex workers and the development of specific occupational health and safety laws that ensure that the law puts in place specific protections for sex workers based on the inherent health risks that sex workers are exposed to due to the nature of their work. This also entails that sex workers will be given safer places from which to work.
- 5.1.3 Passing of a law that validates what may currently be illegal contracts but prohibits coercion and affirms that every sex worker can refuse to provide any sexual service.
- 5.1.4 The promulgation of a national directive scrapping the application of by-laws used to arrest and penalise adult sex workers for providing sex services in exchange for reward.

6 Conclusion

South Africa is a country with high levels of unemployment and poverty where transactional sex occurs on a daily basis. Often women exchange for a number of rewards such as groceries, school

fees for children etc. The policing of consensual adult sex is impractical and ineffective and require resources that would be far better served tackling the high levels of violent crime in the country.

The current legal framework is inconsistent with international, regional and domestic laws including South Africa's supreme Constitution in relation to violence against women and gender equality more broadly. Over and above the impracticality of the Sexual Offences Acts, they create an environment conducive to high levels of abuse by law enforcement and poor access to imperative healthcare services.

The continued criminalisation of criminalisation of sex work keeps stigma and unfair discrimination against sex workers alive and facilitates the non-observance of sex workers human rights, rights that all persons living in South Africa are entitled to.

SWEAT concludes that the current legal system criminalising of sex work in its entirety is impractical and ineffective. The law needs to be reformed to make it consistent with South Africa's constitutional obligations from a human rights perspective. The decriminalisation of sex work can reduce sex workers vulnerability to violence at the hands of police, clients and intimate partners and contribute to eliminating stigma that is a barrier to service delivery.