



Submission to

The Civilian Secretariat for Police

on the

Draft White Paper on Police

31 March 2015

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1 About SWEAT and the Sisonke Sex Worker Movement

The Sex Worker Education and Advocacy Taskforce ('SWEAT') is South Africa's leading sex worker human rights organisation. We are a registered a non- profit organisation that has been providing services to adult sex workers and advocating for sex workers human rights for 20 years.

SWEAT's mission is 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. We do this through the continuous improvement to the design and development of our 4 programmes which include:

- Outreach and education
- Community systems strengthening and social mobilisation
- Advocacy and networking
- Research and knowledge management

These 4 programmes collectively aim to address the structural impediments to achieving a legitimate and respected sex work industry in which informed, empowered and safe sex workers are able to make choices about their working lives, career options, health and are able to claim and enforce their human rights as well as seek recourse where their human rights are violated. Whilst having a specific advocacy program, a human rights approach underpins the work of all the different programmes.

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. Since its formation in the Western Cape (Cape Town), Sisonke has set up offices in the Eastern Cape (Easton London); Gauteng (Johannesburg); Kwa-Zulu Natal (Durban); and Limpopo (Polokwane) and has members in 7 provinces across South Africa. Sisonke plans to set up offices in 9 provinces going forward and to apply to be registered as an independent non-governmental organisation. Sisonke is also a member of the African Sex Worker Alliance (ASWA), which unites sex workers throughout Africa as well as the Global Network of Sex Work Projects (NSWP).

SWEAT and Sisonke have built strong relationships with sex workers over the 20 years of its existence and continues to build new relationships with new sex workers entering the industry. These relationships allow SWEAT to have direct access to information about sex workers experiences, needs and wants and keeps our work grounded, current and applicable.

Our approach to our work is to have sex workers lead in projects with SWEAT and Sisonke staff providing technical support and resources. In order to equip sex workers to lead on matters affecting them, SWEAT and Sisonke provides ongoing capacity building opportunities for sex workers to enable them to become advocates for change and sex worker human rights defenders.

SWEAT and Sisonke aim to empower sex workers by encouraging them to explore, and voice, their own actualities, experiences, and protests using a human rights approach. It aims to create spaces in which sex workers can act with self-determination, in a society which does not encourage sex workers to speak out on their own behalf. We also provide a place where we can build on advocacy: to educate, inform and mobilise sex workers and society as a whole, around the issues that sex workers face.

2 General Comments

We applaud the Secretariat's Draft White Paper in that it seeks to create a police force that realises and upholds the core values of the Constitution and South Africa's democracy. The objectives relating to improving accountability, building the professional and ethical police force and responding to the needs of vulnerable groups are of particular importance to SWEAT and Sisonke. We are of the view that the White Paper is a concrete and progressive step towards improving and strengthening the police force to better serve and protect vulnerable groups of people, such as sex workers. Nonetheless, the Draft White Paper is silent on policing and sex workers. In this submission, SWEAT and Sisonke aim to raise concerns relating to policing and sex workers in hope that the Draft White Paper will be amended to include approaches and strategies for improving the policing of sex work.

3 Purpose of this Submission

The purpose of this submission is to raise concerns with the Civilian Secretariat of Police ('the Secretariat') about problems with the South African Police Service's ('SAPS') policing of sex work under the current criminalised status of sex work in South Africa. The submission specifically includes information on:

- Unlawful and unconstitutional methods utilised by SAPS members to enforce the criminalisation of sex work; and

- The abuse and use of violence against sex workers by police members flowing from the stigmatisation of sex workers within the SAPS and in the broader community

resulting in gross violations of sex workers fundamental human rights to human dignity, equality and freedom.

In addition, at the end of this submission, SWEAT and Sisonke make recommendations for the improved policing of sex work in South Africa which seek to encourage policing which aligns with the Constitution and sets the foundations for meeting the objectives of the NDP.

All information provided in this submission is based on SWEAT and Sisonke's daily interactions with sex workers through training workshops and support groups, complaints lodged with SWEAT and Sisonke by sex workers using our complaints mechanisms and engagements with South African Police Service ('SAPS') at police station level.

This submission attempts, in line with the values of the Constitution and objectives of the National Development Plan ('NDP'), to shed light on the need for a reformed ('SAPS') that exercises its policing powers in a manner that respects and protects the fundamental human rights of sex workers. Despite the fact that sex work industry is criminalised, sex workers human rights must be respected, protected, promoted and fulfilled by the state and individuals, an entitlement that all people living in South Africa are entitled to.

4 The Law and Sex Work

Sex work is criminalised in South Africa. South Africa is one of the only countries in the world that fully criminalises both the buying and selling of sex by consenting adults, as well as the associated activities such as brothel-keeping, and living off the proceeds of sex work. In addition to the Sexual Offences Act of 1957 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007, the Business Act of 1991 and provincial level by-laws on soliciting, drunken behaviour and loitering are used indirectly to further criminalise the sex industry.

Sex work is criminalised under South African law despite the fact that our supreme Constitution requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights including the rights to human dignity, equality and freedom and security of the person. Section 9 of the Constitution (the equality clause), further obligates the state to 'promote the achievement of equality' by taking legislative and other measures to 'protect or advance persons' or groups of people 'disadvantaged by unfair discrimination'.

5 Policing Sex Work under the Criminalisation

One of the major consequences of the criminalisation of sex work is stigma which has resulted in sex workers being viewed as immoral and as easy targets for harassment and violence. Sex workers report intimidation, harassment and physical and sexual abuse by police. Apart from unlawful arrests, bribery and arbitrary fines and detention, sex workers face beatings, sexual violence and are bribed into exchanging sex for release from police custody.

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 Centre and the SWEAT hotline which included 65 assaults by SAPS, 5 incidents of theft by the police and 329 incidents of harassment by the police.

Although many sex workers report abuse by the police¹, the role and behaviours of the police contributes toward a generalised skepticism from sex workers around resorting to the police for help and redress. According to a 2012 report from the Women's Legal Centre, 7 out of 10 sex workers who spoke with the organisation had been abused by the police, and 1 out of 6 had been physically or sexually assaulted². Evidence suggests that sex workers are routinely beaten, pepper sprayed, and sexually assaulted by police during arrests³. Evidence also shows that police regularly fail to follow proper procedure when arresting sex workers, and frequently detain them beyond the maximum 48 hours, often in inadequate conditions and without provision of food⁴.

The largest contributing factor to the growing number of human rights violations experienced by sex workers is that the law as it stands is not able to be implemented and serves to further drive 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. There is a clear disjuncture between formal law and the practices of law enforcement agents.

Some of the major problems with the policing of sex work and police members treatment of sex workers under criminalisation are set out in more detail below:

¹ SWEAT submission to the South African Law Reform Commission, 27.

² Women's Legal Centre 'Stop Harassing us! Tackle Real Crime!' Report on Human Rights Violations by Police against Sex Workers in South Africa. (2012). Available at: <http://www.wlce.co.za/images/stopharassingus.pdf> accessed on 24 February 2015.

³ Ibid, footnote 2.

⁴ Ibid, footnote 2.

5.1 Policing of Sex Work and Access to Justice

The vulnerability that sex workers 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. SWEAT's service users have reported that they are reluctant to report criminal offences committed against themselves and other sex workers to the police, partially because in many cases, police officers are themselves perpetrators of violence. This is particularly evident from the findings of survey conducted by Chandre Gould and Nicole Fick on sex work and human trafficking in Cape Town, released in July 2008. They found that 47% of sex workers were threatened with violence by the police, 12% had been raped and 28% of sex workers had been asked for sex by policemen in exchange for release from custody⁵.

In a study conducted 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 fines⁶.

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),⁷ the Cape High Court interdicted the police from arresting sex workers in order to harass them. Despite this interdict, sex workers continue to be arrested without being prosecuted and also do not 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

⁵ Survey findings can be found at: http://blogs.uct.ac.za/blog/gender_studies/sex-work

⁶ 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.

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

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.

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'.

The existing legal framework is unacceptably liable to police discretion and encourages police corruption due to the potential repercussions for example bribes and demands of sex.

Technikon South Africa's Institute for Human Rights and Criminal Studies claims that:⁸

- Police action against sex workers is inconsistent;
- Most cases against sex workers are dropped after coming to court, wasting valuable court time; and

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

- Sex work is more heavily policed than serious violent crime.⁹

The reality is that sex workers are seldom prosecuted, and are more likely to be arrested, harassed and then released. 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.

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 people. This practice violates the right to be treated equal before the law and amounts to unfair discrimination.

5.2 The Confiscation of Condoms as Evidence of Sex Work

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 services¹⁰. 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.

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

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.

Two years ago I was strolling on Milnerton beach, cops asked me if I had condoms. I replied yes and he made me give them to him and said I wasn't permitted to carry condoms.

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

⁹ 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 *Ibid*, footnote 2.

6 The Cost of Policing Sex Work

Technikon South Africa's Institute for Human Rights and Criminal Studies claims that At a minimum, it costs the police close to R14 million a year to prosecute sex workers.¹¹ The cost of policing the criminalisation of sex work drains scarce resources that could for example be used to roll-out more effective HIV prevention, treatment and care programmes.

7 Police Statistics and Access to Information about Sex Work

The South African Police Service national office has not been able to provide SWEAT with statistics on the number of people arrested in terms of the provisions of the Sexual Offences Acts relating to adult prostitution upon applying for access to this information in terms of the provisions of the Promotion of Access to Information Act 2 of 2000. The fact that no data is available on the numbers of persons charged nationally, disables a rigorous investigation and undermines efforts to assess the applicability and impact of the law as it stands¹².

8 Recommendations

8.1 Sex Workers to be Recognised as a Group of Persons in Need of Special Support

The Draft White Paper states that "Special efforts have to be directed towards supporting women, children, persons with disabilities, older persons, gay, bi-sexual, transgendered and intersex (LGBTI) communities." In light of the evidence and reports of sex workers experiences set out above, we recommend that sex workers also be recognised as a group of persons that should be recipients of targeted support. We further suggest that the Draft make provision for the recognition of the compounded effect of unfair discrimination on multiple grounds i.e. many sex workers are women or present or identify as gay or transgender.

8.2 Police Sensitisation Training

We recommend that all police members be mandated to attend police sensitisation training that equips police members with knowledge and skills in dealing with sex workers and policing sex work under criminalisation. Sensitisation training can assist in shifting police members attitudes

¹¹ *Ibid*, footnote 8.

¹² SWEAT's application for access to information in Promotion of Access to Information Act 2 of 2000 was submitted with the national office of the South African Police Service on 1 September 2014. We received a response to our application stating that the information was not in their possession or under their control on 30 October 2014.

towards sex workers – specifically in relation to stigma – and can contribute to encouraging sex workers to report criminal offences.

The recommended police sensitisation training is currently available through SWEAT and the Women’s Legal Centre. The Secretariat is urged to recommend that the South African Police Service works with SWEAT and the WLC to train police officers nationally. The latter accords with the Draft White Paper’s objective for the police service to work more closely with civil society and in adopting a more community based approach to policing generally.

8.3 Specialised Police Services

In line with the recommended development of specialised services, SWEAT and Sisonke have noted an increase in crimes against sex workers¹³ requiring investigation officers to work closely with sex workers and ourselves in order to obtain information which is crucial for successful prosecution. Due to the criminalisation of the sex industry sex workers and those working in the industry are often reluctant to provide information to investigating officers for fear of prosecution or exposure as being involved in illegal activity. On this basis, sex workers, SWEAT and Sisonke’s access to sex workers and long-standing relationships of trust can go a far way in assisting in successful evidence collection for prosecution. Our experience in dealings with investigating officers, has assisted us in identifying the need for designated investigating officers in various clusters across the country in dealing with cases involving the perpetration of crimes against sex workers. This will result in investigating officers developing specialised skills in dealing with the sex industry and will assist SWEAT and Sisonke in facilitating access to those working in the industry. We are of the view that the number of murders of sex workers recorded by SWEAT in 2014 warrant the appointment of designated investigating officers in itself.

8.3 Recording of Statistics and Making Information Accessible

Noting the provisions of the Draft White paper on the utilisation of improved and more sophisticated systems for improved evidence based policing, the police service needs to be compelled to record all crime reports and more specifically crimes relating to the sex work industry and crimes committed against sex workers. This will enable the police to provide civil society and

¹³ 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 Centre 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, 5 incidents of theft by the police, 23 incidents of harassment sex workers’ clients or partners, and 329 incidents of harassment by the police.

other government departments with information required for monitoring the implementation and effectiveness of laws required to improve the lived realities of unfair discrimination experienced by sex workers and other vulnerable groups.

8.4 Disciplinary Action

Acknowledging the provisions of the Draft White Paper recognises the need for improved disciplinary processes within the police service, SWEAT and Sisonke suggests that disciplinary hearings based on allegations/charges involving crimes against sex workers are monitored and well documented to enable the police service to track the frequency of crimes against sex workers. In addition, we recommend that victims of crime at the hands of police members are allowed to have representatives in testifying as witnesses/complainants in disciplinary processes to ensure that victims feel safe and secure in an environment which they are likely to perceive as threatening and to mitigate fears around targeting and retaliatory violence or harassment because of speaking out about police dereliction of duties or abuse of power.

8.5 Prohibition of Confiscation of Condoms as Evidence

We call of the Secretariat to make a recommendation to the Minister to issue a national instruction prohibiting police members from confiscating condoms from sex workers in light of the health related risks that flow from such action and for the Minister to support the passing of legislation or an amendment to existing legislation prohibiting the confiscation of condoms from sex workers.

8.6 Support for Law Reform for the Decriminalisation of Sex Work

SWEAT and Sisonke recommend that the Secretariat, in its capacity as strategic advisor to the Minister of Police on the development and implementation of policing policies, advise the Minister of the difficulties in policing sex work under criminalisation and how criminalisation harms sex workers and facilitates the violation of their human rights. We further recommend that the Secretariat encourage the Minister to support the decriminalisation sex work in South Africa on the basis that decriminalisation can, amongst others:

- Contribute to eliminating stigma that is a barrier to service delivery;
- Facilitate the respect, protection, promotion and fulfilment of sex workers human rights by members of society and the state;
- Reduce sex workers vulnerability to violence and high levels of violence, intimidation and harassment against sex workers at the hands of the police, their clients and their managers;

- Legally acknowledge sex work as a legitimate form of work which will entitle sex workers to the full range of labour law protections which all other workers enjoy; and
- Improve access to healthcare services and the criminal justice system without fear of prejudice because of the nature of sex workers work.

SWEAT and Sisonke is available to provide information to the Secretariat and Minister on the various legal models available for law reform and how these models will impact on sex workers and South Africans from lessons learnt in other jurisdictions.

9 Conclusion

South Africa is a country with high levels of unemployment and poverty where transactional sex occurs on a daily basis. Often, women exchange sex 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. Over and above the impracticality of the Sexual Offences Acts, criminalisation of sex work supports stigma and unfair discrimination against sex workers which create an enabling environment for the abuse of sex workers by law enforcement.
