



BACKGROUND

- The **Sex Worker Education and Advocacy Taskforce** ('SWEAT') is South Africa's leading sex worker human rights organisation. SWEAT 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 nationally representative movement was formed by sex workers to unite them to address stigma and unfair discrimination against sex workers.
- The **Women's Legal Centre** (WLC) is an independently funded non-profit law centre. WLC's core function is to advance women's human rights, specifically those of black and poor women, through strategic litigation and legal advocacy in the areas of: violence against women; labour law; land law; relationship rights and reproductive and health rights. The WLC also provides a free daily legal advice service to women.
- **Sonke Gender Justice** is a non-partisan, non-profit organisation, established in 2006. Sonke works to create the change necessary for men, women, young people and children to enjoy equitable, healthy and happy relationships that contribute to the development of just and democratic societies.

1. What is sex work?

In its most simple form, sex work can be defined as ‘sex-for-reward’. Sex work is labour or a service related to the exchange of sex or acts of sexuality for a negotiated reward. The United Nations Programme on HIV/AIDS (UNAIDS) defines sex workers as: *“Female, male and transgender adults aged over 18 years who sell consensual sexual services in return for cash or payment in kind, and who may sell sex formally or informally, regularly or occasionally.”*

2. Terminology: Sex worker or prostitute?

‘Sex worker’ is the preferred term. ‘Prostitute’ historically refers to shameful acts and carries negative connotations linked to inaccurate information about sex workers and the sex industry. ‘Sex worker’ avoids moral judgement and points to the selling and buying of sexual services as a work matter with implications for labour law and occupational health and safety rights. It is also the term used by international organisations, such as WHO and UNAIDS.

3. Who are sex workers?

It is estimated that:

- There are between 130 000 and 180 000 sex workers in South Africa;
- 90% of sex workers in South Africa are female; and
- 10% are male or transgender¹.

4. What does the South African law say about sex work?

In South Africa, all aspects of sex work are illegal. Sex work has been explicitly criminalised by the Sexual Offences Act (No. 23 of 1957) and the Criminal Law (Sexual Offences and related matters) Amendment Act (No. 32 of 2007). Provincial municipal by-laws also contain provisions that prohibit sex work such as ‘importuning any person for the purpose of prostitution’ and ‘soliciting’.

The basis for the criminalisation of sex work was that sex work was seen as a social ill that needed to be eradicated and so it was outlawed. But despite severe penalties, sex work continues. Criminalising sex work has proved ineffective, maintains high levels of violence, and leads to the spread of illness.

¹Konstant TL1, Rangasami J, Stacey MJ, Stewart ML, Nogoduka C. “Estimating the number of sex workers in South Africa: rapid population size estimation. “ *AIDS Behav.* 2015 Feb;19 Suppl 1:S3-15 and M. Richter, Chersich MF, Temmerman M, Luchters S (2013) "Characteristics, sexual behaviour and risk factors of female, male and transgender sex workers in South Africa" *South African Medical Journal* 103(4):246-251

The four legal models for sex work that are generally used are: full criminalisation, partial criminalisation, legalisation and decriminalisation²:

- a. **Full criminalisation:** criminalising all aspects of sex work as criminal offences, maintaining the current legal protocols surrounding sex work, for example, South Africa's current law.
- b. **Decriminalisation:** decriminalise sex work, thereby removing all laws that criminalise sex work, including outdated by-laws, for example, New Zealand.
- c. **Partial criminalisation:** partially criminalise sex work by criminalising some aspects of sex work but not others, for example, the buying of sex by clients is an offence, but selling sex by sex workers is not, for example, Sweden.
- d. **Legalisation:** regulate or legalise sex work within certain areas and subject to certain conditions, for example, Mali, Senegal and the Netherlands.

5. Has the current criminal law been successful in suppressing sex work?

Criminalising sex work in South Africa has not eradicated sex work. Instead, the illegal status of sex work creates conditions in which exploitation and abuse can thrive.³ The Sexual Offences Act as it stands is a very difficult law to prosecute under and requires intensive and intrusive police methods such as entrapment to secure a conviction. The indoor industry is rarely targeted except when the brothel tends to become too high profile or there are community complaints. In these instances entrapment procedures are used.⁴

The reality is that sex workers are seldom prosecuted under the criminal law, and are more likely to be arrested, harassed and then released. To our knowledge, no client has been prosecuted under the old or the amended laws.

6. How does criminalisation affect sex workers?

² South African Law Reform Commission (2009) *Discussion Paper 0001/2009 Sexual Offences: Adult Prostitution*, Project 107.

³ Chandre Gould and Nicole Fick, "Selling Sex in Cape Town, Sex work and Human Trafficking in a South African City, page 69; Fick N. Sex workers experiences with the local law enforcement in South Africa. *Research for Sex Work*. 2005;8:4-8.; Fick N. Enforcing Fear - Police abuse of sex workers when making arrests. *SA Crime Quarterly*. 2006;16:27-33.; Fick N. Sex Workers Speak Out - Policing and the sex industry. *SA Crime Quarterly*. 2006;15(March):13-18 and Pauw I, Brener L. 'You Are Just Whores: You Can't Be Raped': Barriers to Safer Sex Practices among Women Street Sex Workers in Cape Town. *Culture, Health & Sexuality*. 2003;Nov - Dec:465-481.

⁴ Ibid page 27

Like many other jobs, sex work comes with risks. These risks could be minimised if sex work was not treated as a crime. Globally, several studies have documented the negative effects of making sex work a crime.

Criminalisation of sex work has been shown to:

- Drive sex workers underground and away from services⁵
- Increase stigma and create obstacles to accessing health and social programmes⁶
- Reduce sex workers' power, rendering them vulnerable to violence, human rights violations and corruption⁷.

a. Violence against sex workers

Sex workers experience high levels of violence – perpetuated by clients, police and even the public. Studies have found that a third to half of all sex workers have experienced violence in their workplaces in the last year.⁸ In Cape Town, one study found that 12% of street-based sex workers had been raped by a policeman.⁹ Approximately 70% of sex workers who approached the WLC for legal advice and assistance reported police abuse in a two-year research study in Cape Town, Johannesburg, Pretoria and Durban.¹⁰ Because sex work is criminalised, it is almost impossible for a sex worker to report rape and abuse to the relevant authorities.

b. HIV and other STIs

Due to the nature of their work, the Human Immunodeficiency Virus (HIV) and other STIs pose a risk for sex workers and their clients. Studies in 1998 showed that between half and two-thirds (46–69%) of female sex workers tested positive for HIV.¹¹ People involved in sex work are at an increased risk of HIV through exposure to more sexual partners, the higher threat of violence in

⁵ Gable et al (2008). "HIV/AIDS, Reproductive and Sexual Health, and the Law". *American Journal of Public Health*, 8 October.

⁶ UNAIDS 2009. "Guidance Note on HIV and Sex Work". In: *UNAIDS* (ed). Geneva..

⁷ Scorgie, F et al (2012). "Socio-demographic characteristics and behavioral risk factors of female sex workers in sub-Saharan Africa: a systematic review". *AIDS Behav*, 16, 920-33.

⁸ Deering, K. Amin, A., Shoveller, J., Nesbitt, A., Garcia-Moreno, C., Duff, P., Argento, E., & Shannon, K. (2014) "A Systematic Review of the Correlates of Violence Against Sex Workers". *American Journal of Public Health*: Vol. 104, No. 5, pp. e42-e54. (May)

⁹ Gould, C & Fick, N. (2008) *Selling sex in Cape Town: Sex work and human trafficking in a South African city*. Pretoria/Tshwane, Institute for Security Studies.

¹⁰ Women's Legal Centre (2012) Stop Harassing Us! Tackle Real Crime! A report on Human Rights Violations By Police Against Sex Workers In South Africa, WLC, SWEAT and Sisonke

¹¹ Richter, M., Chersich M.F., Temmerman M., Luchters S. (2013) "Characteristics, sexual behaviour and risk factors of female, male and transgender sex workers in South Africa" *South African Medical Journal* 103(4):246–251

sexual encounters, riskier sex, the use of substances such as drugs and alcohol, and because of limited access to health care services.¹²

The risk of HIV and STIs could be significantly reduced if sex workers and their clients practised safer sex and could seek treatment from health care facilities. However, sex workers are often prevented from doing so by prejudiced health care workers, who prevent sex workers from accessing quality health care and education. Research has shown that the decriminalisation of sex work would have a powerful impact on the AIDS epidemic, by averting between one-third and one-half (33–46%) of HIV infections among female sex workers and their clients within a decade.¹³

The current situation is untenable, as it makes sex workers and society more vulnerable to violence and ill-health. This has to change urgently.

7. What is decriminalisation?

It means sex work is not a crime and places it within a human rights framework:

Decriminalisation of sex work is when all laws that criminalise sex work in a country are removed and sex work is governed by the same laws that affect other employment, such as occupational health and safety and employment legislation.

- Sex workers are able to work as independent contractors or as employees.
- Sex workers are able to unionise, mostly regulate the industry themselves and can expect protection from the police.
- Brothel operators and management are expected to comply with existing employment and occupational health and safety legislation.

8. What are the effects of decriminalisation of sex work?

Decriminalisation would recognise sex work as ‘work’ and thus sex workers would enjoy the full protection of labour and occupational health laws. If decriminalised, the sex work industry would be regulated like any other industry: sex workers would have access to necessary police services, they could visit clinics without fear of harassment, and could work in any location, as opposed to less public (and thus more dangerous) places to avoid police. Sex workers themselves, through

¹² Brown, B., Duby, Z., and L Bekker (2012) *Sex workers: An Introductory Manual for Health Care Workers in South Africa*, Desmond Tutu HIV Foundation

¹³ Shannon et al (2014) “*Global epidemiology of HIV among female sex workers: influence of structural determinants*” *Lancet* 22 July 2014.

the Sisonke Sex Worker Movement, support decriminalisation, claiming that it is the best policy choice for South Africa.

In 2003, New Zealand decriminalised sex work by passing the Prostitution Reform Act of 2003 (PRA); the first country to do so in the world.

In a review five years after the implementation of the new legislation sex workers reported that:

- Their working conditions and well-being had improved
- They felt safer
- They were more likely to report abuse to the police¹⁴.

Researchers also found that:

- Sex workers were generally practising safer sex¹⁵
- There was no increase in the number of sex workers in the industry – a popular public fear associated with decriminalisation¹⁶.

A study in Australia showed better coverage of health promotion programmes for sex workers in a city that had a decriminalised legal framework, as compared to cities with a legalised or criminalised framework¹⁷.

Legalisation is not the same as decriminalisation:

In a legalisation model, the state would be the main regulator of the industry and would decide on the conditions under which sex work could take place. With a decriminalisation model, sex workers are more empowered to make decisions about the way they would like to work.

Under decriminalisation, consensual activity between an adult sex worker and client would not be illegal; under legalisation it could be.

The following bodies support the decriminalisation of sex work:

¹⁴ Prostitution Law Reform Committee (2008). Report of the Prostitution Law Reform Committee on the operation of the Prostitution Reform Act of 2003. In: New Zealand Government (ed.). Wellington.

¹⁵ Prostitution Law Reform Committee (2008). Report of the Prostitution Law Reform Committee on the operation of the Prostitution Reform Act of 2003. In: New Zealand Government (ed.). Wellington.

¹⁶ Abel, G. & Fitzgerald, L. 2010. "Risk and risk management in sex work post-Prostitution Reform Act: a public health perspective". In: Abel, G, Fitzgerald L Healey C & Taylor A. (eds.) *Taking the crime out of sex work. New Zealand sex workers' fight for decriminalisation*. Bristol: Policy Press.

¹⁷ Harcourt C et al (2010). "The decriminalisation of prostitution is associated with better coverage of health promotion programs for sex workers". *Aust NZ J Public Health*, 34, 482-6.

- UNAIDS¹⁸
- World Health Organisation¹⁹
- The UN Committee on the Elimination of Discrimination Against Women²⁰
- The UN Special Rapporteur on Health²¹
- The Global Commission on HIV and the Law²²
- The Commission for Gender Equality in South Africa²³
- Amnesty International²⁴

9. Is sex work the same as human trafficking or child prostitution?

No. Often sex work and human trafficking are mistakenly conflated, leading to sensational, but inaccurate coverage.²⁵ Human trafficking has a clear definition recognised internationally that relates to the movement of people, under coercion or false pretences, for the purposes of exploitation.²⁶ Sex work refers to the choice to sell sexual services – albeit sometimes under constrained circumstances, and involves adult, consensual sex (and therefore not children). Trafficking is sometimes likened to sexual slavery, while sex work is a job or livelihood strategy.

10. Will the criminalisation of clients but not of sex workers (the Swedish model) improve the realities of sex workers?

No.

¹⁸ UNAIDS (2002). "Sex Work and HIV/AIDS". In: UNAIDS (ed). Technical Update. Geneva.

¹⁹ WHO (2012). "Prevention and Treatment of HIV and other sexually transmitted infections for sex workers in low- and middle-income countries: Recommendations for a public health approach". In: WHO (ed.). Geneva: WHO, UNFPA, UNAIDS and NSWP.

²⁰ See Human Rights Committee, "Concluding Observations on El Salvador", CCPR/C/SLV/CO/6, para. 10;

Human Rights Committee, "Concluding Observations on Costa Rica", CCPR/C/79/Add.107, para. 11;

Committee on the Rights of the Child, "Concluding Observations on Nicaragua", CRC/C/NIC/CO/4, para. 59

(b); Report of the Special Rapporteur on "the right of everyone to the highest attainable standard of physical and mental health", Report to the General Assembly, paras 21 and 65(h).

²¹ Grover, A (2010). Human Rights Council, Fourteenth session, Agenda item 3: "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development"; Report of the Special Rapporteur on "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", 27 April 2010; A/HRC/14/20.

²² Secretariat: The Global Commission on HIV and the Law (2012). "The Global Commission on HIV and the Law - risks, rights and health". In: UNDP (ed.). Geneva: UNDP, HIV/AIDS Group, Bureau for Development Policy.

²³ Commission for Gender Equality (2013). "Decriminalising sex work in South Africa".

http://www.gov.za/sites/www.gov.za/files/Commission%20for%20gender%20equality%20on%20sex%20work_a.pdf

²⁴ <https://www.amnesty.org/en/latest/news/2015/08/sex-workers-rights-are-human-rights/>

²⁵ Before the 2010 Soccer World Cup in South Africa, a lot of fear was generated that there would be an influx of about 40 000 trafficked women and girls into the sex industry. Yet, after the World Cup, little attention was paid to the fact that research showed no changes to the sex industry and, in fact, that not a single case of human trafficking was found by the Department of Justice during the World Cup period.

See African Centre for Migration & Society (2014) *Understanding Human Trafficking* Issue Brief. Available:

<http://www.migration.org.za/uploads/docs/issue-brief-10.pdf>

²⁶ The United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (UN General Assembly Resolution 55/25) defines human trafficking or trafficking in persons as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation"

- This model assumes that all sex workers are victims, which is not true and was passed without consultation with sex workers.
- Although the goal of the Swedish model was to decrease levels of sex work, there is little evidence to show any overall decrease²⁷.
- Under the Swedish model, increased vulnerability and stigma have worsened violence against sex workers. Sex workers often have to protect their clients from being prosecuted, which can mean working in out-of-the-way areas, pressured negotiations and allowing clients to remain anonymous, all of which has an impact on the negotiation of safer sex and makes sex workers more vulnerable to attack²⁸.
- Increased stigma against sex workers has resulted in them being refused services, including condom provision. For example, the Stockholm Unit opposes providing condoms to sex workers, believing that condoms will attract sex workers²⁹.

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.

²⁷ Swedish National Police Board (2012). "Trafficking in human beings for sexual and other purposes", p. 13. Available: http://www.polisen.se/Global/www%20och%20intrapolis/Informationsmaterial/01%20Polisen%20nationellt/Engelskt%20informationsmaterial/Trafficking_1998_/Trafficking_report_13_20130530.pdf

²⁸ Levy, J. (2015). "Criminalising the Purchase of Sex: Lessons from Sweden."

²⁹ NSWP (2014). "The Real Impact of the Swedish Model on Sex Workers". Available: <http://www.nswp.org/resource/the-real-impact-the-swedish-model-sex-workers-advocacytoolkit>

We conclude 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.

We trust that you will find this information useful.



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