

Submission

to the

The Joint Multi-Party Women's Caucus

on the

Response to the South African Law Reform Commission's Report on 'Sexual
Offences: Adult Prostitution'

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1. Introduction

1.1. The Centre for Applied Legal Studies ('CALs') is a civil society organisation based at the School of Law at the University of the Witwatersrand. CALs is also a law clinic, registered with the Law Society of the Northern Provinces. As such, CALs connects the worlds of both academia and social justice. CALs' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights.

1.2. CALs operates across a range of programs including: rule of law, business and human rights, environmental justice, basic services, and gender. A specific focus of the gender program is the intersection of violence and gender with other rights in the Bill of Rights.

1.3. Historically CALs has engaged in gendered issues through numerous submissions to parliament. Some of CALs' submissions include submission to the Department of Women on the United Nations, Convention on the Elimination of Discrimination Against Women (CEDAW)¹, the Speaker of the National Assembly on the Choice on Termination of Pregnancy Amendment Draft Bill², the Director-General of Justice and Constitutional Development on the Draft Regulations to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 made in 2015³, and to Director-General of Justice and Constitutional Development on the Draft Regulations Relating to

¹ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/CALS%20submission%20CEDAW%20Final-Oct%202015.pdf>.

² <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20Submissions%20on%20the%20Termination%20of%20Pregnancy%20Amendment%20Bill%20.pdf>.

³ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/Sexual%20Offences%20Court%20November%202015.pdf>.

Sexual Offences Courts: Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) in 2018⁴.

1.4. In light of the above CALS asserts that it has sufficient expertise to comment on the Law Reform Commission's report on sex work and welcomes the opportunity to make oral submissions.

2. Reflections on the proposed amendment

2.1. Listening to the voices of marginalised groups

2.1.1. Historically sex workers have experienced marginalisation by both the State and society. Adding to this marginalisation, is the silencing of these individuals by not being properly listened to and heard by the legislature, law enforcement, healthcare services and their communities. This silencing ensures that sex workers interests as *they* describe them are not being met and thus they encounter further marginalisation as a consequence. Due to the participatory nature of our democracy, there is a requirement for the legislature to listen to the voices of even the most vulnerable groups and marginalised groups in society, when crafting and amending legislation.⁵ There is by inference also the need for bodies such as the Law Reform Commission to fully engage with those individuals who directly experience the consequences of such law which the Commission will be advising upon.

⁴ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Centre%20for%20Applied%20Legal%20Studies%20-%20Submissions%20on%20the%20Draft%20Regulations%20Relating%20to%20Sexual%20Offences%20Courts.pdf>.

⁵ Section 57(1)(b) of the Constitution creates a duty on the National Assembly to 'make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement'.

2.1.2. With regard to engagement with those groups who are marginalised, and further affected by ineffectual legislation, there is a need to truly and meaningfully engage with these individuals and understand their interests according to *them*. The importance of this type of engagement was explained by Justice Sachs in *Doctors for Life International v Speaker of the National Assembly and Others*, when he said,

Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy. Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits.⁶

2.1.3. This type of participation is not only supported by our Constitution as set out above but is also entrenched in African Charters such as the African (Banjul) Charter on Human People's Rights.⁷ For example article 20 of the Banjul Charter affirms the rights of communities to self-determination which is defined as the ability of the people to freely determine their political status and freely pursue their economic, social and cultural developments.

⁶ *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), para 234.

⁷ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

2.1.4. In light of the above CALS asserts that the Law Reform Commission failed to adequately and meaningfully engage with sex workers in relation to the report. Although the report does sporadically reference the views of sex workers, it does not truly listen to and engage with the views and interests expressed by sex workers in the process of engagement. Unfortunately, the mention of the views and interests expressed by sex workers in the report are instead only chosen to be used when they support the Law Reform Commission and other moralising and theological groups' views around sex work. This process has resulted in the Law Reform Commission inadvertently silencing sex workers instead of truly representing their interests.

2.2. Moving away from (de)moralising sex work

2.2.1. CALS submits that it is problematic for the Law Reform Commission to insistently use the term 'prostitution' or 'prostitute' in the title of the report as well as when referencing sex work or sex workers in the report more generally.⁸

2.2.2. At paragraph 17 of the report the Law Reform Commission explains its rationale on the use of the term 'prostitution' when it states

[i]n the Discussion Paper the Commission proposed the continued use of the words —prostitution and —prostitute. The Commission has decided to retain the term —prostitution when referring to the selling

⁸ In reference to the previous submission 'listening to the voices of marginalised groups' CALS acknowledges that individuals must be given the opportunity to choose their own designation, whether this be using the term 'prostitution' or 'prostitute', or 'sex work' or 'sex worker' to define oneself. CALS however adheres to the global trend where there is movement away from the terms 'prostitution' and 'prostitute' due to the negative connotation associated with the term and furthermore the movement that asserts that sex work is work and should be acknowledged as such. For further information on an example of the movement around rebranding sex work as work in South Africa see SWEAT.org.za, available at <http://www.sweat.org.za/>.

and buying of sexual acts and related activities. For the sake of consistency, the Commission elects to refer to 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 as a prostitute.

2.2.3. As Smith explains the terms ‘prostitution’ and ‘prostitute’ are linked to problematic perceptions that sex and especially sex for money is central to woman’s notions of self.⁹ The issue with this perception is that sexual identity becomes a main signifier of what people think about the woman and who the woman is.¹⁰ What then emerges is that various perceptions around sex and sex work such as sex workers being ‘dirty, diseased, sinful, deviant and victims’ becomes the definitive characteristic imposed by others (including media, the law, health care services, and their communities) on these women.¹¹ The term ‘prostitute’ does not simply denote a person who sells her sexual labour but goes on to connote what Smith calls ‘layers of “knowledge” about her [the woman’s] worth’.¹² These layers of knowledge around the value of the individual includes judgments about her childhood, socioeconomic status, drug status, personal hygiene and sexual health.¹³ Smith explains that the use of the terms and stigma created have far reaching consequences for sex workers. The stigma feeds into violence-supporting attitudes, this occurs because the knowledge of the likelihood of violence around sex work

⁹ L, Smith ‘Dehumanizing sex workers: what’s ‘prostitute’ got to do with it?’ *The Conversation* 29 July 2013. Available at <http://theconversation.com/dehumanising-sex-workers-whats-prostitute-got-to-do-with-it-16444>.

¹⁰ As above.

¹¹ Smith.

¹² Smith.

¹³ Smith.

is said to be known by the sex worker and from this it is wrongly asserted that the sex worker deserves such violence.¹⁴

- 2.2.4. The type of stigma associated with 'prostitution' and experienced by sex workers was captured in a study by van den Borne which looked at experiences of sex workers in Malawi.¹⁵ Van den Borne explains the stigma around the term 'prostitution' and 'prostitute' and recounts that

[o]n various occasions I was told and had experienced myself that Malawians, like so many other people in the world, look down upon prostitutes, and blame them for the fast spread of AIDS, "the killer disease".¹⁶

- 2.2.5. This experience of stigma by sex workers is supported by a study, cited by Vickermann, which found a female sex worker who had agreed to partake in a study surrounding the stigma attached to sex work stated that in social situations when asked what she did for a living she usually replied by saying "I don't feel like telling you". The majority of sex workers do this to protect themselves from the stigmatising labels that people assign to their professions. They are found not to be reluctant to share the nature of their work because they dislike their work or personally perceive it as immoral but because of negative attitudes towards their work.¹⁷

¹⁴ Smith.

¹⁵ F, van den Borne "*I am not a prostitute*": *Discords in targeted HIV/AIDS prevention interventions in urban and trading centers in Malawi* (unpublished PHD thesis, University of Amsterdam, 2003). Available at <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/114/2012/10/RP214.pdf>.

¹⁶ Above, 27.

¹⁷ S, Vickermann 'The Lived Experiences of Female Sex Workers in the Cape Town Area: A Qualitative Study' available at <http://www.sweat.org.za/wp-content/uploads/2016/02/Lived-Experience-of-Sex-Workers-Thesis-1.pdf>.

2.2.6. Moving on from the archaic, moralising (and in fact demoralising) and dehumanising use of the terms ‘prostitution’ and ‘prostitute’ is the issue of the general moralising nature of the report. A specific example of this is the Law Reform Commission’s reference to ‘decent’ work as set out in the International Labour Office Decent Work Agenda and Decent work Programme for South Africa as discussed at paragraph 30 in the report. CALS asserts that the Law Reform Commission’s use of the term ‘decent’ work and the assertion that sex work does ‘fit comfortably into the international definition of “decent work”’ are acts of moralising sex work as well as discrimination of a marginalised group.¹⁸

2.2.7. ‘Decent work’ is a term loaded with subjective, moral assessment. This is supported if one looks at the Oxford Dictionary definition of ‘decent’ which states ‘decent’ to mean ‘conforming with generally accepted standards of respectable or moral behaviour’.¹⁹ According to Symons and Gillis moral judgments attached to sex workers is that of the deviant women.²⁰ The judgment is based on what Symons and Gillis terms the ‘whore stigma’ referring to negative images of sex workers because they break social norms associated with appropriate behaviour.²¹ Extending from this then, sex work would be seen as a deviant form of work committed by such deviant women. In light of this CALS asserts that the International Labour Office and the Law Reform Commission adopt moralising and discriminatory language around sex workers. With the Law Reform Commission’s adoption of moralising language around sex work and sex workers there can be the inference that the Law Reform Commission

¹⁸ The report, para 31.

¹⁹ <https://en.oxforddictionaries.com/definition/decent>.

²⁰ K, Symons and K, Gillis ‘Talking about prostitution and the representation of a (problematic) group: Identifying frames in Flemish news coverage on prostitution’ N, Persak and G, Vermeulen (eds) in *Reframing Prostitution* (2014), 123.

²¹ As above.

(un)intentionally adopts a moralistic lens in compiling the report and its recommendations and thus conflate law and rights discourse with subjective morals and theological points of view.

2.3. Decriminalisation of sex work

2.3.1. Sex work or sex workers are adults who receive money or goods in exchange for sexual services, either regularly or occasionally. In South Africa they are largely referred to by a derogatory term of 'prostitutes'.²² Sex work varies between places and changes over time. Attempts to regulate or eradicate the practice have, historically, been incorporated into both canon and penal law. A sex worker can be female, male, intersex or transgender. In most countries, sex work and activities associated with it are criminal acts.²³ Sex work in South Africa is illegal or criminalised for both buying and selling sex, as well as related activities such as brothel keeping, and assisting procurement of sexual services.²⁴

2.3.2. In addition, Sexual Workers Education & Advocacy Taskforce (SWEAT) highlights that

sex workers are frequently prosecuted not for soliciting of sex, however for noncriminal offenses often municipal-level administrative offenses such as loitering, vagrancy, and impeding the flow of traffic. By reducing the freedom of sex workers to negotiate condom use with clients, organize for fair treatment, and publicly advocate for their

²² Open Society Foundations 'What are key terms related to sexual health and human rights for LGBT and sex workers? Health and Human Rights: A Resource Guide' (2007).

²³ UNAIDS Global Network of People Living with HIV, et al 'Making the law work for the HIV response' (2010). Available at http://files.unaids.org/en/media/unaids/contentassets/documents/priorities/20100728_HR_Poster_en.pdf

²⁴ Section 11 of the Criminal Law (Sexual Offences) Amendment Act 32 of 2007 (SORMA) and sections 3; 4; 5; 6; 7; 8; 10; 12A of the Sexual Offences Act 23 of 1957.

*rights, criminalization and aggressive policing have been shown to increase sex workers' vulnerability to violence, extortion, and health risks.*²⁵

- 2.3.3. The report endorses a recommendation that the reading of section 268 of the Criminal Procedure Act 51 of 1977 (CPA), section 11 of SORMA read with 19 of the Sexual Offences Act shows that its objective is to curb the social nuisance associated with street prostitution, including noise, street congestion, and interference with innocent bystanders.²⁶ Section 19 prohibits enticing or soliciting for immoral purposes. The Commission believes that this section meets the legislative objective of addressing blatantly visible and harmful aspects of prostitution and thereby discouraging prostitution.²⁷
- 2.3.4. CALS submits that sex work recruits most of its servant from the lower strata of the population including: low-paid work, homelessness, acute poverty and the need to support their children, younger brothers and sisters, and other dependents; these are the factors that produce the largest percentage of sex workers.
- 2.3.5. CALS submits that criminalisation of sex work in South Africa is drawn heavily from Patriarchal and Christian religious traditions that equate sex work with sinful conduct, female sexuality with temptation, and male sexuality with dominance and sanctioned insatiability.²⁸

²⁵ <http://www.sweat.org.za/wp-content/uploads/2016/02/10-Reasons-to-Decriminalize-Sex-Work-OSF-1.pdf>.

²⁶ The report, para 45.

²⁷ The report, para 46.

²⁸ A, Mathieson et al 'Prostitution Policy: Legalization, Decriminalization and the Nordic Model' *Seattle Journal For Social Justice* (2015) 14.2, 368.

- 2.3.6. CALS further submits that legislation enacted within this context takes an approach which defines sex workers as criminals thus disproportionately target them for arrest, either because of a presumed inability to control sexual impulse or because of an inalienable entitlement to sexually access women, men have historically faced far less scrutiny or accountability as buyers of prostitution sex.
- 2.3.7. The act of continued criminalisation of sex work by section 268 of the CPA, section 11 of SORMA read with 19 of the Sexual Offences Act, further marginalises sex workers, particularly women.
- 2.3.8. The Constitutional Court minority judgement in *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*, observed that;
- [i]t is our view that by criminalising primarily the prostitute, the law reinforces and perpetuates sexual stereotypes which degrade the prostitute but does not equally stigmatise the client if it does so at all. The law is thus partly constitutive of invidious social standards which are in conflict with our Constitution.²⁹
- 2.3.9. We call for sex work to be decriminalised in our country as per the continued voices of sex workers. SWEAT expresses that decriminalisation of sex work will empower them to freely negotiate condom use with clients, organise for fair treatment, and publicly advocate for their rights. Criminalisation and aggressive policing

²⁹ 2002 (6) CC para 72.

have been shown to increase sex workers' vulnerability to violence, extortion, and health risks.³⁰

- 2.3.10. Decriminalisation and removing of criminal prosecution of sex work essentially recognises sex work as labour that ought to be protected through workplace health and safety standards. SWEAT, further asserts that decriminalisation of sex work allow workers to access financial services like bank accounts, insurance and other financial services. Moreover, decriminalisation means sex workers are more likely to live without stigma, social exclusion, and fear of violence.³¹
- 2.3.11. We further submit that decriminalisation of sex work respects human dignity and the right to economic activity of workers. There are many reasons why people enter into sex work, regardless of their reasons the 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. Sex workers must be freely able to engage in economic activity thus pursue a better livelihood.

³⁰ K, Shannon and J, Csete 'Violence, condom negotiation and HIV/STI risk among sex workers' *Journal of the American Medical Association* (2010), 304.

³¹ <http://www.sweat.org.za/wp-content/uploads/2016/02/10-Reasons-to-Decriminalize-Sex-Work-OSF-1.pdf>.