



27 October 2017

**To:**

The Joint Multi-Party Women's Caucus  
Chair: Hon RMS Morutoa

**Attention:**

Bryan Mantyi  
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Dear Honourable Members

Submission on the South African Law Reform Commission's Report on "Adult Prostitution"

**About SWEAT**

The Sex Workers Education and Advocacy Taskforce (SWEAT) is South Africa's leading sex worker human rights organisation. It was registered as a non-profit organisation in 2002 but has been providing services to sex workers since 1996. The organisation works exclusively with adult sex workers on issues of health and human rights. Our services that reach over 30 000 sex workers annually, this includes providing safer sex education, health services, legal services, crisis counselling, legal advice, and skills development for sex workers. SWEAT advocates for the protection, promotion and fulfilment of sex workers human rights through human rights defence and in advocating for law reform for the decriminalisation of sex work in South Africa.

SWEAT hosts the Sisonke National Sex Worker Movement of South Africa (Sisonke) which was started and is led by sex workers with the aim of organising sex workers across South Africa to address stigma and unfair discrimination against sex workers. Sisonke is the only movement in South Africa for sex workers by sex workers, based on the principle of "nothing about us without us".

## **Purpose of this Submission**

The purpose of this submission is to place on record our dissatisfaction with the South African Law Reform Commission (SALRC) Report. The Report itself was developed through a problematic process that lacked transparency as well as accountability. In addition to process discrepancies we would like to make evident the overall weakness of the Report noting the Reports inherent bias; lack of evidence and insufficient research; failure to include sex worker voices; and deeply problematic recommendations

## **Concerns with the Report**

### **- Report Timeline**

This “Investigation into Adult Prostitution” had as its starting point in 1997 originally entitled ‘Sexual Offences By and Against Children’. In 1999 and then 2001 the 1<sup>st</sup> and 2<sup>nd</sup> Discussion Papers was issued. In 2002 the ‘Adult Prostitution’ Issue Paper released. 7 years later in 2009 a 3<sup>rd</sup> Discussion Paper was released and SALRC began to prepare their official report. SALRC continues to work on the report for the next 6 years finally handing the report to the Department of Justice in 2015. The report then spent 2 years at the DoJ. It was approved by Cabinet in April 2017 and was released to the public in May 2017.

SWEAT and Sisonke have invested large amounts of time and resources to remain active participants over this 20 year process. However, the lack of the SALRC’s commitment to this process made it evident that the SALRC has lacked the political will to take the lives of sex workers seriously. Countless attempts over the last decade had been made to the SALRC to inquire about the progress of the report as well as to provide them with current research. Our requests were routinely ignored while thousands of sex workers suffered from human rights violations that were enabled by our current laws.

The Report itself was released on the 26 May 2017 in Pretoria. Warning of the release took the form of a posting on the Department of Justice’s website 24 hours prior to the release. In addition, the content and recommendations of the report were made available before its release to selected individuals. Evidence of this was an opinion piece that appeared in the newspaper the morning of the Report’s scheduled release.<sup>1</sup>

Even with superficial inspection, the due process of this report has been marred with a lack accountability and transparency and therefore content of the Report should be seriously called into question.

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<sup>1</sup> <https://mg.co.za/article/2017-05-26-will-sa-be-the-first-african-country-to-pass-effective-laws-to-end-prostitution>

- **Inherent Bias**

The Report begins from an already established opinion that overall aim is to “identify alternative policy and legislative responses that might *regulate, prevent, deter or reduce prostitution*”. Similarly, respondents from the public are asked to state "how their preferred legislative option would affect the following issues: *reduce the demand for prostitution*". This is extremely problematic as it lays a moral foundation of abolitionism which then proceeds to skew the entire framing of the Report. This is evident in the author/s blatantly ignoring large amount of peer reviewed, current and relevant research in favour of less rigorous information that serves to validate their moral assumption that sex work should be abolished.

The pattern of argumentation in the Report is clearly biased in favour of the continued criminalisation of sex work. Evidence of this is that arguments that might support decriminalisation are held out as targets for rebuttal (arguments are made extremely briefly before rebuttals are offered) and arguments that might support criminalisation, on the other hand, are often left unquestioned or simply repeated as fact

The inherent bias in this report would not withstand basic academic scrutiny.

- **Failure to provide the perspective of sex workers**

While the Report is allegedly about the lives of sex workers, it fails to provide the perspective of sex workers. Although SWEAT as well as Sisonke participated actively in the process, the Report does not accurately convey what transpired in consultations. Aside from very few exceptions, the only people identified as sex workers who are cited or quoted in the Report were participants in the "Rocking Chair documentary". This film was produced and directed by the Christian Broadcasting Network (CBN) an American Religious Television Network. It is very concerning that the Report ignores the voices of the largest sex worker movement in Africa. The fact that that these voices are silenced, but the voice of a mediated minority was included, confirms the moral bias of this Report. We feel that a Report that fails to take sex workers seriously is highly unlikely to be able to represent a position that will actually improve the lives of sex workers.

- **Failure to reflect evidence or references**

The report fails to cite up-to-date, credible research, most especially in the field of public health. The Report's conclusion was:

"One of the most vocal lobby arguments in favour of non-criminalising adult prostitution stems from the need to curtail the spread of HIV and other STIs and to provide access to adequate health care. The argument is that non-criminalising prostitution would enhance the health and safety of women who sell sex by enhancing their access to health care and increasing their practice of safe sex. *However, there is scant evidence to suggest that these ideals are achievable in reality.*"

This statement makes abundantly clear that the author/s chose to ignore the wealth of peer-reviewed, academically published, public health research showing the far-reaching harms of the criminalisation of sex work.<sup>2</sup> This includes a failure to include the content of the South African National AIDS Council (SANAC) “South African National Sex Worker HIV Plan 2016 - 2019”. This Plan was launched by SANAC and the Deputy President Cyril Ramaphosa in March 2016 in partnership with the Sex Work Sector. This Plan includes the recommendation for the *full decriminalisation* of sex work. However, this important document is not cited in the Report - as well as the growing number of National and International Health bodies that support the full decriminalisation of sex work for example: the World Health Organisation; UNAIDS; the Southern African HIV Clinicians Society; AIDS Healthcare Foundation; Doctors Without Borders etc. In addition to failing to cite relevant research that may oppose the author/s view, the Report also fails to reference research that affirms their support of criminalisation. For example, at multiple times it is stated that criminalisation is ‘best option’ to reduce eliminate sex work, and thus the harms associated with it – yet no evidence is provided to defend this view.

The lack of academic rigor in the Report confirms for us the use of moral opinions rather than evidence to inform the recommendations that the Report makes.

#### - **Lack of Human Rights Framing**

The South African Constitution and international agreements such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recognise universal human rights for every human being protected by law. In many countries around the world, including South Africa, sex workers currently suffer major human rights abuses. This is why the full decriminalisation of sex work is backed by major human rights organisations including: Human Rights Watch; Amnesty International; South Africa’s Commission for Gender Equality to name a few. This is not at all cited in the Report.

The Report hinges its “Labour Rights” position on the 2011 Federation of Unions of South Africa (FEDUSA) resolution that urged “a total ban on prostitution”. However, in 2017 FEDUSA released a position paper in full support for the *full decriminalisation* of sex work. In addition, the Congress of South African Trade Unions supports full decriminalisation and acknowledges sex work as legitimate work. Both COSATU and FEDUSA are active members of the Asijiki Coalition for the Decriminalisation of Sex Work in South Africa.

We note with concern that the Report chooses to ignore the fact that the two largest trade unions in South Africa support the full decriminalisation of sex work (COSATU, FEDUSA).

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<sup>2</sup>The Lancet series on HIV and sex workers (2015). 385(9962). Available: <http://www.thelancet.com/series/hiv-and-sex-workers>

## - Recommendations of the Report

The Report gives two possible options for sex work legislation in South Africa.

First option: Full Criminalisation plus diversion where both the sellers and buyers of sex are criminalised and a prosecutor may divert a matter involving a person who is alleged to have committed a 'prostitution related offence' and may select an appropriate diversion option.

Second option: Partial Criminalisation - which decriminalises the sex worker but continues to criminalise the buyer, as third parties like brothel keepers.

Both options that were recommended by the Report were provided with very little qualitative or quantitative support. For the reasons provided above we urge a more critical look at the quality of the Report itself and subsequent recommendations.

The first option of continued full criminalisation plus diversion is problematic for a number of reasons, the most obvious being that full criminalisation is South Africa's *current* legal model. This Apartheid era legislation and has done little to address that high rates of violence, stigma and discrimination that sex workers are subject to as well as a lack of access to basic justice and health care services. In the United States, where this practice is criminalised, female sex workers are almost 18 times more likely to be murdered than other women, a 2004 study published in the American Journal of Epidemiology found<sup>3</sup>. Sex workers fear arrest and suffer abuse from the police, clients and the community, including rape, violence and being made to pay bribes. They are also unable to report violence against them as they fear further abuse from the police as illustrated by a review by the Women's Legal Centre of cases reported between 2011 and 2015. Of the abuse reported to the centre by sex workers, more than 60% of cases identified the police as perpetrators<sup>4</sup>. Sex workers have little or no power and fear violence which makes it hard for sex workers to negotiate condom use. Sex workers may avoid carrying condoms because these can be confiscated by the police or used as "evidence" of law-breaking.

In addition, due to criminalisation sex workers have no access to their labour rights and as a result are more vulnerable to exploitation. In our 20-years experience working in this environment, where there have been cases of exploitation including human trafficking and exploitation of minors, sex workers have been best placed to report these crimes but have been reluctant to go to the police for fear of abuse.

Evidence substantiating the harm of criminalisation is plentiful.<sup>5678</sup> Criminalisation has not stopped people from selling - or buying - sex, it has harmed those who do. As such the evidence for why

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<sup>3</sup> <https://www.ncbi.nlm.nih.gov/pubmed/15051587>

<sup>4</sup> <http://wlce.co.za/wp-content/uploads/2017/02/Police-abuse-of-sex-workers.pdf>

<sup>5</sup>Hindle, K., Barnett, L. & Casavant L. (2003). "Prostitution: A Review of Legislation in Selected Countries", prepared for Parliamentary Information and Research Service of Canada". Library of Parliament (Revised 19 November 2008)

<sup>6</sup> Gould, C. and Fick, N. (2008). "Selling sex in Cape Town: Sex work and human trafficking in a South African city". Available: Institute for Security Studies, Pretoria/Tswane.

criminalising sex work has not and does not work is obvious. The Law Reform Commission's recommendation is, at best, perplexing and, at worst, insulting.

The second option of partial criminalisation is also problematic for a number of reasons. Firstly because the Report makes little to no argument for this model in over 500 pages. This option reads as a last-minute addition to the Report and is totally out of context with content of the Report. However, we will state for clarity that this model is often touted, by people who believe sex work must be eradicated, as a tool to "end demand" for sex work. The claim that proponents hinge this argument on is that this model reduces the number of people selling sex. However, this claim is based on one report commissioned by the Swedish government that has since been completely discredited. The Swedish National Board of Health and Welfare stated in a 2008 report that it has been impossible to gauge whether overall numbers have changed since the implementation of the 1999 law<sup>9</sup>. Moreover, three Swedish government reports confirm that sex workers have been pushed into more isolated spaces, far from the reach of support services<sup>10</sup>. In Norway, under the partial decriminalisation model, vulnerability and stigma have increased violence against sex workers, a report by the country's ministry of justice and police found<sup>11</sup>. Also to note an important fact that is never cited, that clients are *already* criminalised in South Africa and the sex industry has not disappeared. Moreover, South Africa has a radically different context to any country where versions of this model have been applied.

The two options provided by the Reports make it clear that: evidence was not consulted sufficiently; a moral rather than a human rights framework was applied; the realities and lives of sex workers were not taken into account and the voices of sex workers were ignored.

The following organisations from across sectors have also publicly rejected SALRC's Report and its recommendations:

- South Africa's Parliamentary Multi Party Women's Caucus<sup>12</sup>
- Sisonke South Africa's National Sex Worker Movement<sup>13</sup>

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<sup>7</sup> Richter, M. 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, 12: 763.

<sup>8</sup> Scorgie, F. et al. (2012). "Socio-demographic characteristics and behavioral risk factors of female sex workers in sub-Saharan Africa: a systematic review". AIDS and Behavior, 16, 920–33.

<sup>9</sup> [http://www.socialstyrelsen.se/lists/artikelkatalog/attachments/8806/2008-126-65\\_200812665.pdf](http://www.socialstyrelsen.se/lists/artikelkatalog/attachments/8806/2008-126-65_200812665.pdf)

<sup>10</sup>

[https://www.academia.edu/12081869/Seksuaalipalveluiden\\_oston\\_kriminalisoiva\\_laki\\_tutkimuksen\\_valosa\\_Report\\_on\\_the\\_Effects\\_of\\_the\\_Sex\\_Purchase\\_Act\\_in\\_Sweden\\_](https://www.academia.edu/12081869/Seksuaalipalveluiden_oston_kriminalisoiva_laki_tutkimuksen_valosa_Report_on_the_Effects_of_the_Sex_Purchase_Act_in_Sweden_)

<sup>11</sup> [http://www.nswp.org/sites/nswp.org/files/232216-purchasing\\_sexual\\_services\\_in\\_sweden\\_and\\_the\\_nederlands.pdf](http://www.nswp.org/sites/nswp.org/files/232216-purchasing_sexual_services_in_sweden_and_the_nederlands.pdf)

<sup>12</sup> <https://www.parliament.gov.za/press-releases/multi-party-womens-caucus-concerned-about-law-reform-commission-report-adult-prostitution>

<sup>13</sup> <http://www.news24.com/SouthAfrica/News/why-we-want-to-be-legal-20170611-2>

- Networking HIV & AIDS Community Of Southern Africa (NACOSA) – a network of over 1500 civil society organisations<sup>14</sup>
- Asijiki Coalition for the Decriminalisation of Sex Work – a coalition of over 70 organisations
- Former SALRC Commissioner Professor Cathi Albertyn<sup>15</sup>
- The Women’s Legal Centre<sup>16</sup>
- Sonke Gender Justice<sup>17</sup>
- Aids Healthcare Foundation<sup>18</sup>
- South African HIV Clinicians Society<sup>19</sup>
- Triangle Project<sup>20</sup>
- Sexual and Reproductive Justice Coalition<sup>21</sup>
- The Coalition of African Lesbians
- People Opposing Women Abuse (POWA)
- Oxfam South Africa<sup>22</sup>
- Doctors without Borders (MSF)<sup>23</sup>

These organisations that advocate for the human rights and health of vulnerable people all condemn the recommendations of Report and all advocate for the full decriminalisation of sex work.

### **SWEAT’s Recommendation**

SWEAT calls for a human rights and evidence based approach to law reform in South Africa. SWEAT has been advocating for the support of the full decriminalisation of sex work in South Africa for over 20 years. 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. 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 more dangerous places to avoid police.

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<sup>14</sup> <http://www.nacosa.org.za/wp-content/uploads/2017/05/NACOSA-Statement-on-Law-Reform-Commission-Report-on-Sex-Work.pdf>

<sup>15</sup> <http://www.iol.co.za/saturday-star/news/legal-blow-for-sa-sex-trade-9380126>

<sup>16</sup> <http://www.news24.com/SouthAfrica/News/criminalising-sex-work-is-ineffective-wlc-expressing-disappointment-20170526>

<sup>17</sup> <http://www.genderjustice.org.za/news-item/sonke-gender-justice-strongly-rejects-south-african-law-reform-commissions-recommendations-continued-criminalisation-sex-work/>

<sup>18</sup> <http://www.sowetanlive.co.za/news/2017/05/27/organisations-condemn-report-on-adult-prostitution>

<sup>19</sup> <https://www.health-e.org.za/2017/05/29/sex-workers-remain-criminals/>

<sup>20</sup> <http://www.iol.co.za/capetimes/news/sex-work-report-on-prostitution-rejected-9438555>

<sup>21</sup> <https://www.dailymaverick.co.za/article/2017-05-29-analysis-what-happened-to-the-sex-work-report/#.WWyLsoiGPIU>

<sup>22</sup> <http://www.oxfam.org.za/wp-content/uploads/2016/06/MEDIA-STATEMENT-1.pdf>

<sup>23</sup> <http://bhekisisa.org/article/2017-06-27-00-im-a-nurse-and-this-is-why-sa-should-decriminalise-sex-work>

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. Criminalisation as well as partial criminalisation 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.

Not only does this model respect the rights of sex workers, it's based on rigorous, peer-reviewed research, and it's the model that the largest sex worker movement in South Africa supports.

#### **Actions since report release**

- SWEAT has sent the Department of Justice a request for a meeting as well as a request for clarity as to the process going forward. This was resent 3 times. We have not received a response.
- SWEAT subsequently delivered a meeting request in-person to the Deputy Minister of Justice John Jeffery. We have not received a response.
- SWEAT as part of the steering committee of the Asijiki Coalition for the Decriminalisation of Sex Work, requested a meeting with SALRC commissioners. We received a response stating that "The Commission therefore notes Asijiki's disappointment but is of the view that further engagement with the Commission as described in the letter will not serve any purpose".

#### **Recommendations going forward**

- The sex worker sector, made up of service providers, rights organisations and the sex worker movement, continue to support the Multi Party Women's Caucus' position that supports the full decriminalisation of sex work
- The Department of Justice sets aside the Report due to its poor quality
- The Department of Justice provides clarity on the law reform process going forward as well as a timeline for this process

## **Conclusion**

SWEAT continues to support the Multi Party Women's Caucus' call for the full decriminalisation of adult, consensual sex work. We will continue to fight for the human rights of sex workers despite the South African Law Reform Commission's failure to take sex workers lives seriously. We must also remember that this is not the first time in democratic South Africa we have had to struggle in the face of dangerous moralistic conjecture. We have succeeded in providing access to safe abortions, we have abolished capital punishment and we have recognised rights for the lesbian, gay, bisexual, transgender and intersex people in this country because we recognised that people's lives trump our socialised distaste for their choices. We will continue to be guided by our desire to live free from discrimination, prejudice and violence and not fall prey to unsubstantiated opinions. In our call for the full decriminalisation of sex work, we will remain steadfast with the facts and realities of sex workers' lives.

## **For more information contact**

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