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## **Submission**

to

### **Multi-Party Women's Caucus**

on

### **South African Law Reform Commission (SALRC) Report 107 on Adult Prostitution**

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# **1 INTRODUCTION**

## **1.1 About Sonke Gender Justice**

Sonke Gender Justice (Sonke)<sup>1</sup> is a non-profit, human rights and social justice organisation that strives to achieve gender equality in South Africa by building capacity and mobilising communities. Sonke works to create the change necessary for women, men, young people and children to enjoy equitable, healthy and happy relationships that contribute to the development of just and democratic societies.

Sonke pursues this goal across Southern Africa by using a human rights framework to build the capacity of government, civil society organisations and citizens to achieve gender equality, prevent gender-based violence (GBV), and reduce the spread of HIV and the impact of AIDS.

Through its policy and advocacy work, Sonke specifically seeks to shape law and policy in accordance with the values of human dignity, equality and freedom that underlie the principles of democracy under a constitutional supremacy.

## **1.2 Sonke's interest in the SALRC Report**

Sonke's Policy Development and Advocacy (PDA) portfolio has a dedicated programme which advocates and lobbies for the decriminalisation of sex work in South Africa. Sonke is also a co-founder and steering committee member of the Asijiki Coalition for the Decriminalisation of Sex Work.<sup>2</sup>

We strongly support the evidence-based view that the current legal dispensation criminalising sex work causes considerable harm to sex workers, their clients, and partners. Such harm includes: stigmatisation, abuse, physical and sexual assault, rape, and the transmission of HIV and other sexually transmitted infections (STIs). Therefore we consider decriminalisation to be a crucial violence prevention intervention.

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<sup>1</sup> [www.genderjustice.org.za](http://www.genderjustice.org.za)

<sup>2</sup> [www.asijiki.org.za](http://www.asijiki.org.za)

Sonke greatly anticipated the release of SALRC's report on sex work, recognising the long-overdue need for government to consider law reform on the issue. We appreciated the opportunity to make evidence-based submissions, and looked forward to the publication of a report that would be substantiated by evidence and reflect the views of all relevant stakeholders.

### **1.3 Sonke's position on the SALRC Report**

Sonke is deeply disappointed with the Report in several respects, some of which will be discussed in the section below. Overall it is perplexing that the SALRC Report's primary recommendation for law reform is continued criminalisation, considering the abundance of evidence indicating the harms associated with the criminalisation of sex work as well as the advantages of decriminalisation. The SALRC Report is definitely a missed opportunity to advance violence prevention in this country.

## **2 KEY CONCERNS**

### **2.1 Biased framing of the Report**

It is clear from the outset that the drafters of the SALRC Report decidedly adopted a prohibitionist approach. This is evident from the stated aim of the Report to "identify alternative policy and legislative responses that might *regulate, prevent, deter or reduce prostitution*." As such, the drafters begin with a *prima facie* bias towards the continued criminalization of sex work.

A further indication of bias can be found in the terminology used in the Report. The drafters deliberately use the terms "prostitute" and "prostitution" – which are inherently derogatory – instead of the international accepted terms "sex work" and "sex worker", which are also incidentally the terms preferred by sex workers themselves.

Finally, the argumentation used in the Report is skewed in favour of proponents of criminalization. The latter's views are presented unquestioningly in the Report, whereas proponents of decriminalisation are given less exposure and any arguments or considerations that might support decriminalisation are held out as targets for immediate rebuttal.

## **2.2 Illogical justification for continued criminalisation**

A fundamental flaw of the Report is that the drafters seem to consider decriminalisation to be a condonation of the abuse that is often related to sex work. It is not – rather it is an acknowledgement that such abuses exist, and offers the most protection and recourse to sex workers who experience violence.

Another flaw is that the Report relies on evidence from the status quo to reason that the current legal framework should continue. For instance, in paragraph 3.114 the Report provides the following justification for the retention of criminalisation: “Because of entrenched gender and sexual inequality as well as dire financial or survival needs, the reality for most South African prostitutes is that the transaction is seldom – if ever – a contract entered into by equals”; yet the Report fails to consider that under a different legal model, sex workers and buyers may very well be on a more equal footing to one another. Similarly at paragraph 3.117, the report states that a sex worker “is virtually powerless...to prevent him [the client] assaulting her” – this is provided as a reason for continued criminalisation, yet fails to take into account that under decriminalisation the sex worker would indeed have recourse against the client.

Furthermore, at paragraph 3.122, the Commission states that “in terms of the existing law a buyer who engages in violent or harmful behaviour can already be charged for committing common law crimes” and therefore there is no reason to change the current legal dispensation in terms of selling and buying sex. However, this view fails to take into account the fact that under a system of criminalisation, sex workers are fearful (and for good reason, according to evidence) of reporting abuse and crimes to the police. In

fact, evidence has shown that decriminalisation would lead to greater cooperation between police and sex workers.<sup>3,4</sup>

Essentially, the Report seems adamant that the harms resulting from sex work are independent of its legal status. According to evidence and logic, this is not true.

### **2.3 Failure to cite evidence on police abuse**

There is a wealth of primary evidence which shows that sex workers are routinely abused and harassed by police officials. In particular, sex workers in South Africa report that they have been harassed, robbed, verbally abused, physically assaulted and raped by police, as well as subjected to unlawful arrest or demands for bribes.<sup>5,6,7</sup> Since these harms are being perpetrated by law enforcement officials, it means that they are usually committed with impunity.

Though the Report does mention that sex workers experience harm at the hands of the police, it does so relatively briefly and does not cite any relevant research. Moreover, the Report indulges several harmful and stigmatising rationalisations for such abuse, including that police coercion comes about because sex workers are often under the influence of drugs and alcohol and become "hysterical and uncontrollable" when faced with arrest.

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<sup>3</sup> Mossman, E. & Mayhew, P. (2007) "Key Informant Interviews Review of the Prostitution Reform Act 2003", prepared for the New Zealand Ministry of Justice. Available at: <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/key-informant-interviews/documents/report.pdf>

<sup>4</sup> New Zealand Ministry of Justice (2008) "Report Of The Prostitution Law Review Committee On The Operation Of The Prostitution Reform Act 2003". Available at: <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>

<sup>5</sup> Fick, N (2006). "Enforcing fear – Police abuse of sex workers when making arrests". *SA Crime Quarterly*, 16: 27–33 and "Sex Workers Speak Out – Policing and the sex industry". *SA Crime Quarterly*, 15: 13-18.

<sup>6</sup> Scorgie, F. et al (2011). "'I expect to be abused and I have fear': Sex workers' experiences of human rights violations and barriers to accessing healthcare in four African countries". African Sex Worker Alliance. Available at: [http://www.plri.org/sites/plri.org/files/ASWA\\_Report\\_HR\\_Violations\\_and\\_Healthcare\\_Barriers\\_14\\_April\\_2011.pdf](http://www.plri.org/sites/plri.org/files/ASWA_Report_HR_Violations_and_Healthcare_Barriers_14_April_2011.pdf)

<sup>7</sup> Manoek, S. (2012) "'Stop Harassing Us! Tackle Real Crime!': A Report On Human Rights Violations By Police Against Sex Workers In South Africa", Women's Legal Centre. Available at: [http://www.wlce.co.za/images/sex\\_workers/210812%20FINAL%20WEB%20version.pdf](http://www.wlce.co.za/images/sex_workers/210812%20FINAL%20WEB%20version.pdf)

## **2.4 Failure to provide the perspective of sex workers**

As an organisation that works with sex workers and supports other civil society organisations that have been established by and for sex workers (such as the Sex Workers Education and Advocacy Taskforce and Sisonke National Sex Workers Movement), Sonke recognises the need to engage with sex workers themselves with regards to law reform. Laws cannot be made and changed without a deep understanding of the people that they affect directly.

Therefore Sonke is concerned that the Report does not adequately reflect the views of sex workers. The only sex workers who are quoted verbatim in the Report are those that support criminalisation – sex workers with differing perspectives are not given a voice. Thus the Report gives the impression that sex workers are not in favour of decriminalisation, which is incorrect and irresponsible reporting.

## **2.5 Failure to cite research on HIV/AIDS**

HIV prevalence is disproportionately high amongst sex workers in South Africa. This is evidenced by a recently published study that estimates that HIV prevalence among female sex workers in Johannesburg is 71.8%, in Cape Town 39.7%, and in Durban 53.5% (this is extremely high relative to the 23.2% estimated prevalence of HIV in all South African women aged 15-49).<sup>8</sup> There are various risk factors that make sex workers particularly vulnerable to HIV, including the following: sex workers are often especially vulnerable to rape and other forms of sexual violence,<sup>9</sup> which is a risk factor for HIV transmission; many sex workers and their clients engage in penetrative sex with multiple partners over a prolonged period of time, putting them at risk for HIV infection if they do not use condoms; and stigma negatively affects sex workers' access to

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<sup>8</sup> University of California, San Francisco (UCSF), Anova Health Institute & Wits Reproductive Health and HIV Research Institute (2015). "South African Health Monitoring Study (SAHMS), Final Report: The Integrated Biological and Behavioural Survey among Female Sex Workers, South Africa 2013-2014". San Francisco: UCSF. Available: <http://www.health-e.org.za/wp-content/uploads/2016/03/South-African-Health-Monitoring-Survey-An-Integrated-Biological-and-Behavioral-Survey-among-Female-Sex-Workers-South-Africa-2013-2014.pdf>

<sup>9</sup> Reproductive Health & HIV Research Unit, Sociology of Work Unit of the University of the Witwatersrand & Vrije University Amsterdam (2002). "Women at Risk: A study of sex work in Hillbrow, Johannesburg".

healthcare.<sup>10</sup> Therefore, it is of utmost importance for South Africa's laws to reflect the best policy option to protect and prevent sex workers from HIV transmission and infection.

Although the Report discusses the problem of HIV/AIDS at some length, its conclusions can be summarized by the following paragraph (2.464):

*"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."*

The claim that "there is scant evidence" is particularly disturbing since there is now essentially a consensus among public health professionals that the criminalisation of sex work is a significant barrier to HIV prevention and treatment of sex workers and their clients. International and South African agencies that have a mandate over public and/or reproductive health - including the WHO, UNAIDS, the UNFPA and SANAC - have all repeatedly affirmed this position. Furthermore, in 2014 the Lancet Journal published a special series entitled "HIV and Sex Workers" which found that decriminalisation could lead to a decrease in HIV amongst sex workers.<sup>11</sup> It is negligent and incredibly irresponsible for the SALRC Report to not only omit this research, but to not take it into account in making its recommendations.

### **3 CONCLUSION**

As an organisation that devotes its work towards violence prevention in this country – particularly gender-based violence – Sonke cannot endorse the SALRC Report. Its

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<sup>10</sup> Scorgie, F. et al (2013). "'We are despised in the hospitals': sex workers' experiences of accessing health care in four African countries". *Culture, Health & Sexuality*, 15(4): 450–465.

<sup>11</sup> *The Lancet*, HIV and Sex Workers series, published July 2014. Available at: <http://www.thelancet.com/series/HIV-and-sex-workers>

blatant disregard, and even in some instances omissions of crucial public health evidence indicating the benefits of decriminalisation is deplorable. Furthermore, the publication of a Report whose aims, framing and argumentation belies a particular bias is unacceptable. Sex workers in this country must be given a fair chance to have their voices heard, their harmful experiences exposed, and to be free from violence in their work and their lives.

We request that we be given an opportunity to make oral submissions on the SALRC Report at the Multi-Party Women's Caucus' upcoming submit.

Please direct any queries or requests for additional information to the contact persons whose details appear on the cover of this submission.

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