



The Chairperson
The Multi Party Women's Caucus
Parliament of the Republic of
South Africa
c/o Ms. MS Moratoua
Per email: bmantyi@parliament.gov.za

Dear Ms. Moratoua,

Written Submissions on Report 107 on Sex Work

Please find attached written submission from the above organizations on Report 107 in response to your call for submissions.

Kindly confirm receipt. Should you have any queries please do not hesitate to contact Charlene May at charlene@wlce.co.za and/or Mandi Mudarikwa at mandy@lrc.org.za

Your sincerely,

Women's Legal Centre

Legal Resources Centre

Submissions to the Multi-Party Women's Caucus (MPWC) on Report 107 on Sex Work

15 December 2017

Introduction

1. We hereby express our gratitude to yourself and the Multi-Party Women's Caucus (MPWC) for inviting these submissions and for creating a space to engage with stakeholders. This is a joint submission by the Women's Legal Centre (WLC) and the Equality and Non-Discrimination Project of the Legal Resources Centre (LRC).

Women's Legal Centre

2. The WLC is an African feminist legal centre that advances women's rights and equality through strategic litigation, advocacy, education and training. We aim to develop feminist jurisprudence that recognizes and advances women's rights. WLC has as one of its core focus areas the advancement of women's right to work including recognition of women's work in what is often perceived as gendered professions such as domestic workers, care workers and sex workers. Our work specific to the rights of sex workers have included providing Court support services and legal representation in Court, Representation at the CCMA to advance sex workers labour rights and litigation against the Minister of Police in instances where members of the South African Police have violated the rights of sex workers.

Legal Resources Centre

3. The LRC is a public interest law clinic that uses law as an instrument of justice for poor and marginalized persons. Through its Equality and Non-Discrimination project, the LRC focuses on promoting and advocating for the rights of marginalised and vulnerable persons that require specific protection due to their vulnerability and marginalisation. Sex workers, transgender sex workers, women, among other minority groups continue to be vulnerable and marginalised in most areas of law. The Equality and Non-Discrimination project therefore promotes the constitutional rights of these individuals through providing legal advice, legal representation, strategic and impact litigation and by participating in multi-pronged advocacy and law reform. All which have been used in pursuing the rights of sex workers in South Africa.
4. These submissions are based on our experiences and engagements with sex workers, and our expertise as human rights and Constitutional litigators. Both the WLC and the LRC works from a place of empowerment and believe that it is critical to invest in and work collaboratively in order to expand spaces for women to exercise their own agency and vindicate their rights. We therefore make these submissions on our own behalf as we believe that sex workers should be provided the agency and opportunity to present their opinions themselves, and we welcome the call for submissions and the summit that enable them to do so.

Foundational Framework informing the Submission

5. The main foundational framework of our position and these submissions is the Constitution of the Republic as the supreme law of South Africa. The Constitution specifically entrenches following rights:

- 5.1 Section 9: The right to equal treatment and not to be discriminated against by public as well as private actors;
- 5.2 Section 10: The right to human dignity and to have that dignity respected;
- 5.3 Section 12: The freedom and security of the person and the right to safety and security and control over one's body; and
- 5.4 Section 22: the right to freedom of trade and to choose one's profession.

We therefore submit that whatever legislative model is adopted it must be based on the principles of human rights as enshrined in our Constitution.

6. The South African Law Reform Commission ("the Commission") states that in making all its recommendations, it was mindful of the constitutional imperatives of promoting the values of *"human dignity, the achievement of equality and the advancement of human rights and freedoms"*. The Commission stated that the *"legislative stance taken is one of the clearest statements of who we are as a nation"*.¹ Our Constitutional democracy is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. It is also founded on the values of non-racialism and non-sexism and supremacy of our Constitution². The obligation on the state is to balance these rights of citizens within a manner which is fair and just, and which seeks to respect, protect, promote and fulfill the rights in the Constitution. Any desired legislation must be cushioned within this constitutional ambit.
7. Further, our values and rights are not only tools which place the state in the position of the protector of rights. The obligation requires that positive steps are taken to realize rights, acknowledge rights which are not recognized and promote the enjoyment of such rights in a just and equitable manner. These require proactive action on the part of the state to recognize the inequality and discrimination faced by women and ways of addressing such discrimination. Given its recommendation to continue decriminalization, we submit Commission has failed to apply these Constitutional imperatives.
8. As the Constitution of South Africa recognizes the application of International Law in the application of the constitution, we submit that whatever position adopted on sex work must find its basis and recommendations on the international instruments to which South Africa is a party, which include:
 - Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**) signed by South Africa on 29 January 1993;
 - International Covenant on Economic, Social and Cultural Rights (**ICESCR**) signed by South Africa on 3 October 1994;
 - International Covenant on Civil and Political Rights (**ICCPR**) signed by South Africa on 3 October 1994; and
 - Protocol to the African Charter on Human and Peoples' Rights in the Rights of Women in Africa (**ACHPRW**) signed by South Africa on 16 March 2004

¹ Para 1.128 and 2.40 of the Report

² Section 1 of the Constitution of the Republic of South Africa, 1996.

9. The submissions that follow are premised on the applicable rights that are entrenched in our constitution as well as national and international mechanisms.
10. Human right violations of sex workers are a current occurrence in South Africa, and have been well documented in the media and in civil society reports. The state has a positive constitutional obligation to protect all persons within South Africa's border from such violations. The state also has an obligation to recognize, respect and promote the rights of sex workers in terms of section 7 of the Constitution of South Africa. The submitting organizations, in advancing the decriminalization position of sex work, are concerned with the current human rights violations that sex workers suffer as a direct result of the current legal framework. The decriminalization of sex work will be a significant step in realizing the rights of sex workers.

Terminology

11. The Commission made a deliberate decision in the report to use the terms 'prostitution' and 'prostitute' to describe an adult person who offers or provides sexual services for financial or other reward (para 2.3). While the Commission states the use of the term is not meant to stigmatise or marginalise any person, it nevertheless has that effect. It is a derogatory and dehumanising term that is based on a moral value judgment. The Commission therefore at the outset has declared its own moral judgment. This submission uses the term 'sex work' and 'sex workers.' This language is employed by international organisations including Amnesty International,³ the World Health Organisation⁴ and UNAIDS⁵ as the preferred terminology. It is also the term that our clients and the women with whom we work within the sector prefer. It is intended to be non-judgmental and avoid the stigma associated with the term 'prostitute.'

Submissions and responses to the findings and recommendations of the Commission

12. We provide here a direct responses and comments to the recommendations made by the South African Law Reform Commission Report 107. The submissions are structured to address the Commissions key findings and our response on the following four issues: Labour, Police Abuse of Sex Workers, HIV/AIDS and Loitering. This is done to ensure that are submissions are easy to read and understand and ensure that they are not unnecessarily lengthy.

Labour

Labour - Key Findings

13. The Commission found that prostitution should not be recognized as work.
14. The Commission noted that the absence of employment contracts for 'prostitutes' was due to the fact that some 'prostitutes' preferred to work independently and therefore independent 'prostitutes' would not enjoy the benefits flowing from the Labour Relations Act (LRA).

³ <https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/>

⁴ HIV/AIDS Programme, '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', World Health Organization, 2012, p.12

⁵ http://www.unaids.org/sites/default/files/media_asset/2015_terminology_guidelines_en.pdf

15. The Commission found that noncriminalisation would not automatically give prostitutes labour or work-related benefits (para 2.444). By contrast, the Commission found it would reinforce gender subordination and may lead to greater objectification and economic inequality of women (66).
16. The Commission found that neither the International Labour Organisation (**ILO**) nor South African policy documents have promoted legalising sex work as a solution to poverty or identified prostitution as an employment option for the poor and marginalized.
17. The Commission is of the view that sex work does not fit comfortably into the international definition of decent work and that there are inherent difficulties in trying to integrate sex work into formal employment laws and structures (67).
18. Throughout its report, the Commission assumes that women lack agency, are 'coerced into a lifestyle of sex work through economic marginalisation' (para 35) or the practice of selling sexual services is often the result of a choice made in severely limiting socio-economic circumstances (para 28, 55).

Labour – Submissions in response

19. The position adopted by the Commission that prostitution should not be recognized as work is flawed and leads to various contraventions of national and international human rights mechanisms.
20. The Commission assumes that women are always victims, lacking agency to choose their employment and work as a prostitute. The continual criminalization of sex work perpetuates lack of agency in that a sex worker is unable to choose her employment, her employer and the manner in which she works. These are guaranteed rights under the Constitution,⁶ ICESCR⁷, CEDAW⁸ and ACHPRW.⁹ It is the State's obligation to safeguard the right to work. The ICESCR also provides that State Parties are to recognize the right of everyone to the enjoyment of just and favourable conditions of work, including safe and healthy working conditions.¹⁰ The State is much better positioned to protect these rights for sex workers if the work is decriminalized.¹¹
21. When one engages in a profession which is criminalized there can hardly be an expectation that one uses the law of contract to protect one's interests in an unlawful activity. Without entering into a debate on the different employment options that sex workers prefer, we submit that it is common cause that the criminalization of sex work and related activities directly negates a sex worker's ability to enter into an employment contract.

⁶ Section 22 of the Constitution of the Republic of South Africa, 1996 (the Constitution)

⁷ Art 6 of the ICESCR

⁸ CEDAW Art 11(1)(c) the right to free choice of profession and employment and Art 11(f) the right to protection of health and safety in working conditions.

⁹ ACHPRW Art 13(d) guarantees women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations.

¹⁰ Article 7 of the ICESCR

¹¹ Decriminalisation would allow South Africa to comply with up a number of other rights under the ICESCR relating to employment for sex workers including rights relating to the formation of trade unions (art 8) and the right to social security (art 9) .

22. There is no basis on which the Commission can conclude that decriminalizing sex work would not automatically provide sex workers with labour protection. The decriminalization of sex work would recognize the sex worker as an employee (if she should choose not to be self-employed) with an enforceable employment contract and who would enjoy the work-related benefits that would flow therefrom. Our Labour Court has recognized in the *Kylie* judgment¹² that a sex worker could be an employee in terms of the Labour Relations Act, and is entitled to the same protection as any other employee. This position is reinforced by the ILO's report¹³ calling for the economic recognition of the sex industry. The report stated that recognition would include extending "labour rights and benefits to sex workers", improving "working conditions" in the industry, and "extending the taxation net to cover many of the lucrative activities connected with it".
23. The Commission's finding that the ILO has not *promoted* legalising prostitution as a solution to poverty or identified prostitution as an employment option for the poor and marginalized is flawed to the extent that it is cited in support of not recognizing prostitution as work. Firstly, the ILO clearly stated in its report that it is outside of its purview to take a position on whether or not prostitution should be legalized.¹⁴ Secondly, the Commission itself noted that while the ILO stopped short of advocating legalization, the economic recognition of the sex sector that it promotes would not be possible without legal acceptance of the industry (para 2.43). The ILO does not actively promote legalizing prostitution as it recognizes it is not its role to do so, but it does promote improving working conditions and social protection, which must involve some form of legalization or recognition of sex work to succeed.
24. The Commission's position makes certain assumptions about sex workers, their autonomy and their Constitutional right to make decisions in respect of their bodily autonomy.¹⁵ The Commission at paragraph 2.50 asks the following question "*However, does this mean that because there are often no better job options for women, their desperate economic plight should be manipulated against them by institutionalizing their exploiters as 'entrepreneurs'?*" The Commission goes on to state in paragraph 2.51 that "*recognizing the legitimacy of the sex sector and prostitution merely as an economic contract may reinforce women's subordination and worsen their sexual objectification and economic equality.*"
25. These assumptions have a direct bearing on the dignity of the person and their ability in their most dire of circumstances to make decisions for themselves in respect of the profession that they seek to enter and the work that they choose to do.¹⁶ In effect, the Commission is advocating from a position that is not affirming the rights of sex workers to recognition and realization of their rights, but rather a position where the state has decided what is best. It is rather telling that a patriarchal view of the state as protector is taken on a profession dominated by women.

¹² *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA10/08) [2010] ZALAC 8; 2010 (4) SA 383 (LAC); 2010 (10) BCLR 1029 (LAC); (2010) 31 ILJ 1600 (LAC); [2010] 7 BLLR 705 (LAC) (26 May 2010).

¹³ Lim, Lin Lean (ed.) 'The Sex Sector: The economic and Social Bases of Prostitution in Southeast Asia Geneva International Labour Office, 1998' available at

http://staging.ilo.org/public/libdoc/ilo/1998/98B09_134_engl.pdf.

¹⁴ *Ibid.*

¹⁵ Section 12(2) the Constitution

¹⁶ As noted above, the right to make decisions about employment is guaranteed under s 2 of the Constitution and Art 11(1) of CEDAW.

26. Further, the position appears to have been adopted based on a hypothetical scenario when factually sex workers are at risk of violence and abuse by state agents in the form of the South African police who brutalize and violate the rights of sex workers on a daily basis (this is discussed further in the following section on police abuse).

Police Abuse of Sex Workers

Police Abuse– Key Findings

27. The Commission agrees that acts of violence, abuse and exploitation by police officers need to be addressed in the strongest terms and has endorsed non-legislative recommendations as the solution. (2.456).
28. The Commission noted that fear of the police means that prostitutes are unable to approach the police for protection or even to report crimes that they may have witnessed and that in many instances the actions ascribed to police officers themselves constitute crimes, including theft, assault, indecent assault and rape (2.99).
29. The Commission found that allegations of police brutality and extortion are not unique to prostitution and should be dealt with as a police problem that requires corrective measures to be taken. (2.454) The Commission did not believe a change in the law would address this problem and found that the remedy lies in police training, skills and institutional discipline (also at 2.468).

Police Abuse– Submissions in Response

30. The state has an obligation to address the current problem faced by sex workers at the hands of the police. Section 9 of the Constitution is clear in the equal treatment by all people by the law and equal benefit of the law. The ongoing criminalization and stigma allows for the growing discrimination and rights violations that sex workers suffer. South Africa is a signatory to the International Covenant on Civil and Political Rights (ICCPR) and it places an obligation on the state to ensure that “all persons have the right to equality before the law and equal protection of the law”¹⁷ The ICCPR also states that “every person has the right to an effective remedy for violations of rights of freedoms, notwithstanding that the violation has been committed by persons acting in an official capacity.” Further, as sex work is a highly gendered profession and the problems faced by sex workers affect women more than men, the Commission has acknowledges that the obligations under CEDAW are relevant. Article 15 of CEDAW requires states to accord women equality with men before the law.
31. The Commission has made a number of non-legislative recommendations to deal with police abuse of sex workers, including establishing guidelines, administrative mechanisms and establishing a specialization to deal with prostitution (2.59). While we welcome these recommendations, the reality is that the criminalization of sex work legitimizes sex workers as targets of police attention. The Commission’s solution of police training, skills and institutional discipline is an insufficient when considering the benefits of decriminalization.

¹⁷ Article 26 of the UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>

32. The Women's Legal Centre has engaged extensively with sex workers and with members of the SAPS over the years in relation to their treatment of sex workers and we have engaged in training of various stakeholders including members of the SAPS. Training does not go far enough to address the severity of the problem of police abuse. With partners we have produced training materials for police officers and trainers. We have also worked collaboratively to produce the "Transgender Standard Operational Procedure" which are guidelines on the arrest and detention of transgender sex workers. Although there may have been some anecdotal change in behavior from these training initiatives they have no way changed the overall attitude and behavior of SAPS members who believe that they can abuse sex workers with impunity. We submit that the impunity with which they operate is directly linked to the vulnerability of sex workers working in a criminalized profession.
33. At paragraph 2.64, the Commission noted that the (then) Deputy Minister of Police, Honourable Makhoso Sotyo, at the SWEAT National Sex Work Symposium said that the Department was committed to take severe steps against any police member who is found guilty of unlawful behavior towards prostitutes in 2012. The Women's Legal Centre has between 2011 and 2015 documented 414 cases of police abuse and violence against sex workers. 20% of the women who reported abuse to us complained of physical assault, Almost 40% percent reported verbal abuse and at least 5% had been the victims of sexual violence. The Commission's report is silent on how their recommendations and position will address the violence perpetrated by members of the SAPS against sex workers. It is also silent on how the approach taken will ensure justice for sex workers against the violations that they have to endure not from the person who engages them for sex, but the person who is paid for by the state to protect and secure their rights.
34. The undertaking made by the previous Deputy Minister has not been realized and the police have consistently neglected violations complaints lodged by sex workers. This violates a key human right enshrined in the Constitution, that everyone is equal before the law and has the right to equal protection and benefit of the law.¹⁸ The fact that police themselves are committing crimes against sex workers including theft, assault, indecent assault and rape highlights the extent to which access to justice, as required by the Constitution, is denied.¹⁹
35. The Commission states that it agrees that act of violence; abuse and exploitation by police officers need to be address in the strongest terms (2.456). Yet, its endorsement of only non-legislative solutions fails to grapple with the benefits of non-criminalisation. Decriminalization of sex work is supported by a number of significant international human rights organizations including Amnesty International²⁰ and Human Rights Watch²¹ as well as the South African Commission for Gender Equality, the body established in terms of Section 187 of the Constitution to promote respect for gender equality.²²

¹⁸ Section 9 of the Constitution of the Republic of South Africa, 1996. See also Art 26 ICCPR, Art 15 CEDAW

¹⁹ Section 34 of the Constitution

²⁰ <https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/>

²¹ Human Rights Watch (2014). "World Report 2014" Human Rights Watch, New York, p. 47.

²² Commission for Gender Equality (2013). "Decriminalising sex work in South Africa". Available: <http://www.cge.org.za/wp-content/uploads/2014/05/CEG-Decr.pdf>

36. South Africa has one of the highest levels of violence against women in the world.²³ Government has of course sought to respond to the high levels of violence by enacting various laws and policies. Notwithstanding these efforts it remains undeniable that violence against women remains widespread, pervasive and that it takes place with impunity. Sex workers are women within their homes, communities and society, and they are of particular risk of violence because of the nature of the work that they do, and the criminalized environment in which it takes place. The criminalized environment therefore facilitates the abuse that sex workers experience. The failures within the criminal justice system increases for sex workers because of the criminal environment in which they work and police attitudes towards them. We submit that sex workers are at risk of violence because they have to rely on the criminal justice system that persecutes them to protect them. The contradiction between their work environment and their Constitutional rights to safety and security places them at risk.
37. Sex workers' vulnerability to violence is also exacerbated by the patriarchal constructs within our homes, communities and society. Violence against women has been described as endemic²⁴. The cause of sexual violence is difficult to identify and falls within the ambit of multiple disciplinary studies. Our country has a rich history of violence and exploitation. The assertion of white male masculine power and authority over the bodies of black men and women and the impact of this on our society cannot be discounted²⁵. The reflections undertaken by the Commission to base its conclusions upon fall far short of a proper examination of the causes or consequences of women's vulnerability to the violence and the states obligation to ensure the safety and security of women in the country.
38. These sentiments are echoed in paragraph 2.197 of the Report by POWA as they outline the obligation that the state has in ensuring that ALL persons, including sex workers, are protected from all forms of violence. In the absence of political will to change the conditions of the sex workers, the state has an obligation under section 9(1) of the Constitution²⁶ to ensure that sex workers are afforded the equal protection and benefit of the law. Section 9(2)²⁷ of the Constitution compels the state to promote the legislative measures to ensure the realization of the section 9(1) right. A simple reading of these two sections evidences their mandatory nature as a duty owed to all persons living within the borders of South Africa.

The Right to Health: HIV/AIDS

HIV/AIDS- Key Findings

39. The Commission found that decriminalization of sex work is not a solution for the HIV pandemic (para 2.114). It notes that the real issues are poverty, inequality and inability to access sustainable employment and until those are addressed, irrespective of the legislative model followed, condom usage will not increase and STI's and HIV will continue to spread. It argues that if the South African National Aids Counsel (**SANAC**) National Strategic Plan (**NSP**) objectives (which are silent on the legislative model and stand apart from the need of

²³ Masimanyane CEDAW Working Group NGO Shadow Report to CEDAW: South Africa: Violence Against Women (1998)

²⁴ F Boonzaier and C de La Rey 'He's a Man, and I am a Woman': Cultural Construction of Masculinity and Femininity in South African Women's Narrative of Violence.

²⁵ H Britton Organising Against Gender Violence in South Africa (2006) at 32 Journal of Southern African Studies

²⁶ Constitution of the Republic of South Africa, 1996.

²⁷ Ibid.

legislative intervention) are implemented and achieved, that may have a substantial effect on people's understanding of, access to and uptake of the need for health services. In turn such improvements might substantially curb the spread of STI's and HIV.

40. Regarding the issue of police confiscating condoms as evidence, the Commission found that guidelines should be implemented which prohibit police from confiscating condoms and from interfering or harassing health or outreach workers who distribute condoms. Discrimination affecting a prostitute's access to health care or right to equality can be dealt with through the equality courts. (2.468)
41. The Commission found that stigma and discrimination deny people at risk of HIV infection the tools they need to protect themselves and that such discrimination deepens social marginalisation, increases the risk of harassment or violence, and inhibits communities from mobilizing to address the epidemic. (2.94). However, the Commission found that discrimination and stigma are not wiped away or discarded as a result of legislative intervention. (2.95)

HIV/AIDS- Submissions in Response

42. The right to health is enshrined in the Constitution²⁸ as well as international instruments to which South Africa is a party, including article 12 of the ICESCR which recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.²⁹ Further, CEDAW imposes the obligation on States to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.³⁰ The United Nations Committee on the Elimination or Discrimination Against Women states in its general recommendation 24 that special attention should be given to the health needs of women in the sex work industry.³¹ That recommendation states that women in the industry are particularly vulnerable to HIV/AIDS and other sexually transmitted diseases and States parties should ensure, without prejudice and discrimination, the right to sexual health information, education and services for all women and girls even if they are not legally in the country.³² While this is referred to in the Commission's report (1.89), the Commission fails to grapple with the contradiction between the obligation of States to ensure the right to access to services for HIV/AIDs and the use of condoms and medication in police enforcement of the laws against prostitution.
43. The Commission's findings contradict the World Health Organisation (**WHO**) findings³³ in respect of key populations, which it believes needs to be decriminalized and prioritized in

²⁸ Section 27 of the Constitution of the Republic of South Africa, 1996.

²⁹ Art 12 ICESCR; See also Art 27 of CEDAW

³⁰ Art 12 CEDAW

³¹ Committee on the Elimination of Discrimination against Women, General Recommendation No. 24 (20th session, 1999), para 6

³² Committee on the Elimination of Discrimination against Women, General Recommendation No. 24 (20th session, 1999), para 18

³³ WHO (2014) "Prevention, Diagnosis, Treatment and Care for Key Populations", World Health Organisation (2005) "Violence Against Sex Workers and HIV Prevention", World Health Organisation (2013) "Implementing comprehensive HIV/STI programmes with sex workers: practical approaches from collaborative interventions"

order to address the spread of HIV/AIDS. The Commission appears to dismiss the recommendations and findings of this international body without any justification or evidence, which is extremely problematic given the risks to sex workers and the violation of their right to health.

44. The Commission refers at para 1.92 to UNAIDS's International Guidelines on HIV/AIDS and Human Rights (**the Guidelines**) and state that they reflect the apparent lack of an integrated and co-ordinated UN policy on sex work and the fact that various UN instruments and bodies adopt differing ideological stances. This statement ignores the fact that the Guidelines are quite clear when it comes to decriminalization of sex work. They state at 21(c) that criminal law should be reviewed with the aim of decriminalizing, then legally regulating occupational health and safety conditions to protect sex workers and their clients.
45. The Commission recommends implementation of the SANAC NSP. The SANAC NSP objectives do not address the profiling of sex workers on the basis of their status as women carrying condoms or the confiscation and/or destroying of medication (including HIV medication) of profiled sex workers upon arrest and detention. In fact the SANAC NSP was adopted without the inclusion of a dedicated section on sex workers, which made strategic findings and recommendations. The Commission does acknowledge that abuse of power by police, particularly in confiscating condoms, is a barrier to the ability for sex workers to protect themselves against the risk of exposure to HIV and other STIs (2.96). Further, at 2.86, the Commission notes a number of facts that militate against the use of condoms. While this may be so, police confiscating condoms should not be one of those factors. Police should be on the side of encouraging condom use or at least not inhibiting it. Decriminalization would eliminate the need for police to confiscate condoms as evidence to inform a prosecution.
46. The non-criminality of sex work allows for sex workers to carry condoms freely without the fear of the condoms being confiscated as evidence of contravention of the Sexual Offences Act by the police. It provides her with the agency to negotiate her conditions of work and ensures that her working conditions are safe. As already discussed above, the right to safety in working conditions is enshrined in CEDAW.³⁴
47. The criminality of sex work has resulted in the police confiscation and/or destroying sex workers' medication (including HIV medication). The Women's Legal Centre has been approached by a number of sex workers stating that their medication (including medication for hypertension, asthma and cold and flu) was either confiscated or destroyed by the police. This is a direct result of the criminalization of sex work. The Women's Legal Centre is not making the argument that the decriminalization of sex work will prevent the spread of HIV/AIDS. Instead, the Women's Legal Centre is arguing that the decriminalization will prevent and remedy the real lived risk of contracting HIV through the above mentioned violations conducted by the police.
48. The Commission's findings relating to stigma discrimination fail to acknowledge the effect of criminalization on stigma and on sex workers' ability to access the health care system.

³⁴ Art 11(1)(f) CEDAW

Loitering

Loitering – Key Finding

49. The Commission at paragraph 2.119 acknowledges that someone being charged under the Sexual Offences Act cannot be arrested in terms of section 40(1)(f) of the Act by simply loitering in a public space. It argues that it is simply not sufficient evidence to form the basis of the reasonable suspicion.

Loitering – Submissions in Response

50. The Commission has failed to grasp that there is a difference between what the law makes provision for and the lived reality of sex workers. We submit that our Courts have adopted a position where formal equality is not sufficient, and that substantive equality needs to be provided for if we are address discrimination and ensure gender equality in our country.

51. During the period of 2011 to 2015 The Women’s Legal Centre received 725 complaints from sex workers in respect of unlawful arrests and detentions. In 35% of the reported cases the standing orders in respect of arrest and detention was not followed. 10% of the women interviewed were arrested and detained for between 18 hours and 48 hours without any formal charges after initially having been arrested for breaching a municipal by-law. More often than not these women are arrested and fined for loitering or being a public nuisance.

52. Municipal by laws are therefore more often than not used by local law enforcement to harass and arrest sex workers. The United Nations Human Rights Council adopted the Guiding Principles on Extreme Poverty and Human Rights by consensus through resolution 21/11 in September 2012. The Guiding Principles reiterate human rights obligations and emphasises that persons should be treated equally and that states must create an enabling environment for those living in poverty. “No policy in any area, should exacerbate poverty or have a disproportionate negative impact on persons living in poverty.³⁵” the principles go further to place an obligation on states to ensure that persons living in poverty are free from stigma and that authorities (national or local) are prohibited from stigmatizing or discriminating against persons living in poverty³⁶.

Conclusion

53. Lastly we wish to emphasize that the SALRC report makes a number of moralistic pronouncements and base their findings and recommendations on these moral assumptions and judgments. The continued criminalization of sex work disregards the agency and autonomy exercised by sex workers. By not recognizing their autonomy, sex work is considered ‘prostitution’ from a higher moral and social engineering ground. In the Kylie case provides us with some legal clarity in that the Court found sex work to be “illegal work” but still work that entitles the person performing the work to protection and legal safeguards. The Labour Appeal Court accepted that sex work is work but that it is criminalized by the state. The Court did not refer to sex work as slavery devoid of choice and agency.

³⁵ The Guiding Principles on Extreme Poverty and Human Rights para.7

³⁶ Para. 21

54. We thank you for the opportunity to provide these written submissions and trust that they will be useful to the work of the Multi Party Women's Caucus.

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