



Commission for Gender Equality  
A society free from gender oppression and inequality

# POSITION PAPER ON SEX WORK

16 JANUARY 2013



## PREAMBLE

The CGE aims to transform society by exposing gender discrimination in laws, policies and practices; advocating changes in sexist attitudes and gender stereotypes; and instilling respect for women's rights as human rights, among all citizens of South Africa. The CGE is aware of the different expectations of civil society and government, and of the fact that the 'ideal' role of a chapter 9 organisation (as an institution supporting constitutional democracy) is to serve the interests of particular groups and individuals

to ensure their rights. The CGE consistently applies effective, creative and innovative ways of raising public awareness of gender equality issues; of exposing gender-based discrimination and abuse, and securing redress; and of monitoring the transformation of gender relations on all levels of society. The most challenging aspect is to bring about change in the real-life experiences, social behaviour and psyches of women and men, girls and boys. The eradication of prejudice, stereotypes and gender-based discrimination is central to this challenge.

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## INTRODUCTION

All countries struggle with the legal treatment of prostitution or sex work, a practice that is as old as history itself. South Africa is no exception. The current legal situation in South Africa involves the criminalization of sex work with consequences such as the abuse of sex workers' rights, violence against them and abusive treatment by the police. Very often societal perceptions of sex work are informed by religious opinion that views sex work as "sin" and sex workers as "fallen or sinful" women, splitting the world into a dichotomy of good and bad girls/women, and treating it as a moral issue. These views very rarely stigmatize the buyers of sex work who are mostly men. Outshoorn (2001: 475) points out that the moral discourses of the 1890s and 1900s had defined prostitution as immoral and based it on biblical interpretations, therefore viewing the abolition of prostitution as the solution.

Sexwork and prostitution are strictly speaking not the same concept – prostitution is viewed as coerced sex work where women have no choice in the matter and is necessarily demeaning and women are victims. Sex work, on the other hand, indicates agency and therefore allows for women's decision making power, in capitalist systems. These views have been influenced by feminist thinking on issues of prostitution.

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feminists prefer law reform that would lead to the regulation of sex work (e.g. registration, mandatory health checks etc) while radical feminists would prefer different solutions for sex work. Some radical feminists view sex work as "an institution of male supremacy" under patriarchal conditions, where in the view of Andrea Dworkin (1987), no sexual intercourse, even consensual sex is without coercion because of women's subordinate position in all societies. Others view sex work as a right to self determination and freedom of choice, especially among self-identified feminist sex workers.

Christine Overall (1992: 707) uses criteria developed by Gale Rubin for a democratic morality (not religious morality) to evaluate sex work. A democratic morality includes the way that partners treat each other, the level of mutual consideration; the presence or absence of coercion; the quantity and quality of pleasures being provided. Applying these criteria to sex work Overall (1992) comes to the conclusion that not all sex work is necessarily dangerous, coerced, without consideration for the sex worker or not providing pleasure for both provider and client. More importantly she points out that

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a lot of work that is mainly done by women (but that is not sex work) is dangerous, coerced (because many women do not have a choice but to do certain work due to a lack of education), without consideration of the worker's humanity and not providing mutual pleasure such as factory work (that is often linked to very long hours, being tedious and boring, not leading to any personal satisfaction, at much lower pay per hour as sex workers). Yet, this type of work is not as stigmatized as sex work. Clearly something else is problematic about sex work.

Overall comes to the conclusion that the criteria are inadequate to evaluate sexual relationships because they do not take into consideration the "politics of human interaction" (1992: 716), such as the structural asymmetry between men and women in capitalist patriarchal systems and the reasons for the existence of sex work. Sex work differs in a crucial way from other forms of labor done by women, because it is predicated on the asymmetrical relationship

of economic exchange between men and women, without which it cannot be sex work. It is the commoditization of sex involving not only the sexual activity but the buying and selling of the activity – and in this sense it is classist, racist, ageist and sexist. The reason for it being classist is that for the most part it involves the work of poor, disadvantaged and desperate women, ageist because some women are deemed too old to be sex workers and young women are preyed upon, and racist because it often promotes the perception that black and Asian women are "exotic" and "sexually insatiable". Men are most often the bosses and women the workers – it is women servicing men (Overall 1992: 717). Sex work, involving women, is therefore inherently gendered and a manifestation of a heterosexual, patriarchal institution.

Therefore sex work is very difficult to deal with under legislation that criminalizes it. In cases where trafficking is involved the law often conflates voluntary and non-voluntary forms of sex work. It may be the case that given the asymmetrical structural nature of the buying and selling of sex work in capitalist patriarchal societies sex work should not have separate legislation, but should be decriminalized and considered *work*, and be regulated by other types of existing legislation, such as legislation dealing with labor related issues, sexual violence, racism etc.

Given the conceptual dilemmas that different interpretations of sex work create, the type

of legal intervention that is needed in South Africa in the context of a developing country, where poverty and economic desperation often fuels sex work (for the sake of survival), and where non-voluntary sex work due to trafficking is on the increase and the risk of contracting the HI virus is high, we will analyse different legal remedies in this paper. In the end we conclude with a CGE position that is feasible in the context of South Africa.

## INTERNATIONAL CONTEXT

The current South African approach on sex work is that of criminalisation and prohibitionism i.e. a legislation approach prohibiting sex work and activities associated with it, and treating it as a criminal offence. Though a number of countries adhere to an approach that is very similar to that of South Africa, other countries approach sex work very differently.

### Criminalisation

Criminalisation is a position that deems sex work illegal. Criminalisation seeks to reduce or eliminate the sex industry and is supported by those who are opposed to sex work on moral, religious or feminist grounds (Mossman 2007, Hughes 2009). Criminalised jurisdictions are those jurisdictions where it is not legally possible to engage in sex work, because sex work or its associated activities results in contravening some law regardless of the level of tolerance existing.

There are, primarily, two approaches found in jurisdictions that have criminalised sex work. The one approach is referred to as prohibitionism. Jurisdictions within the prohibitionist framework render all forms of sex work unacceptable and therefore illegal (Jordan 2005, Mossman 2007). South Africa, most states of the USA, and most countries in the Middle East fall within the prohibitionist framework.

The other approach is referred to as abolitionism. Abolitionism is essentially a modified form of prohibitionism. Jurisdictions within this framework allow the sale of sex, but ban all related activities (e.g. soliciting, living off the earnings of sex work, brothel keeping, and procurement) (Hughes 2009). Making these related activities illegal effectively criminalises sex work as it is virtually impossible to carry out sex work without contravening one law or another. An abolitionist approach often focuses on eliminating or reducing the negative impacts of sex work. This approach is currently operational in countries such as England and Canada (Jordan 2005, Mossman 2007).

Sweden has taken a different approach to criminalisation, being the first country to criminalise the *buyers* of sex rather than sex workers themselves. Sex work is seen as sexual abuse and an act of violence against women (Mossman 2007, Hughes 2009). Proponents of the Swedish legal system hope that by targeting the demand side of the sex industry, they may reduce or eliminate it altogether (Mossman 2007).

## Legalisation

Legalisation is a term used to refer to jurisdictions where sex work is controlled by government and is legal only under certain legal conditions and constraints. Legalisation is also often referred to as regulation.

Legalisation recognises sex work as necessary for a stable social order (Mossman 2007). It, however, posits that, controls are necessary to protect public order and health. Some jurisdictions opt for legalisation as a means to reduce crimes associated with sex work (e.g. organised crime, police corruption, child sex work, and sex trafficking) (Mossman 2007).

Key indicators of a legalised system are the existence of sex work-specific controls and conditions specified by the state (Mossman 2007). These often include licensing, registration, and mandatory health checks. Licenses can be managed by police and the judiciary, elected municipal authorities, or independent specialist boards. Businesses or workers without the necessary permits

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are subject to criminal penalties (Mossman, 2007).

Regarding the Swedish model, the research paper of Dodillet & Ostergren (2011) documents the most recent findings of the impact of the Swedish model. The paper shows that:

- . Claims of reductions in sex workers and trafficking after the Act cannot be substantiated by National Police Board figures for the past few years;
- . Interviews with clients in various research studies show that the Act does not deter buyers and few clients were in any event prosecuted in terms of the new law.
- . The law did not address public perceptions around gender equality, legislation alone cannot deal with gender inequality.

### **The Act has impacted negatively on sex workers:**

- Lack of trust and access to services by sex workers
- Increased vulnerability – quicker negotiations, reduced bargaining power, reduced ability to negotiate safer sex
- Sex workers still disproportionately targeted for arrest under unrelated laws
- Policing of clients subjects sex workers to invasive searches, surveillance and high levels of harassment in their homes and work places
- Police surveillance patrols aimed at locating clients drive sex workers on the

street into less public areas where more vulnerable to violence

- Since client criminalisation, sex workers on the streets in Sweden reported greater competition, declining prices and harsher conditions. Fewer clients on the streets can force sex workers to accept aggressive or drunken clients. Violence against sex workers has increased following anti-client measures
- Sex workers continue to suffer harassment from police and seldom report incidents of violence or coercion. It is harder to gather evidence from sex worker and clients against people who have coerced or exploited sex workers.
- Significant increase in stigma and discrimination after the passing of anti-client measures
- Reduction in condom usage in indoor venues since can be used as evidence
- Increased mobility and displacement of sex workers to hidden venues – impedes provision of health and services to sex workers

Sex work has been legalised in countries such as the Netherlands, Germany, Iceland, Switzerland, Austria, Denmark, Greece, Turkey, Senegal, the USA state of Nevada, and many Australian states (Mossman 2007, Hughes 2009).

## Decriminalisation

Decriminalisation, also known as non-criminalisation, is a position advancing for the repeal of all laws against sex work and the removal of provisions that criminalise all aspects of sex work (Mossman 2007, Hughes 2009). Decriminalised jurisdictions make a distinction between (i) voluntary sex work and (ii) that involving either force and coercion or child sex work. The latter are criminal in decriminalisation states (Hughes 2009).

The key difference between legalisation and decriminalisation is that with the latter there are no sex work-specific regulations imposed by the state (Jordan 2005). Rather, any regulation of the industry is predominantly through existing statutes and regulations. Thus sex work is recognised as a legitimate business and, as such, it comes under conventional employment and health regulations (Mossman 2007, Jordan 2009). Those involved in sex work have the same rights and responsibilities as other workers, such as the right to state protection and the responsibility to pay taxes.

The aims of decriminalisation differ from legalisation in their emphasis. The main objective of legalisation is to protect the social order (Mossman 2007). While this is relevant to decriminalisation, the main emphasis here is on the sex worker – respecting their human rights, and improving their health, safety and working conditions (Jordan 2005).

Proponents of decriminalisation argue that the cost of keeping sex work illegal

outweighs the gains, and that sex work should essentially be seen as consenting behaviour between adults (Jordan, 2005). They also point to potential violation of civil liberties that state-regulated legalisation might involve, through controls such as registration and mandatory health checks (Jordan, 2005). In decriminalised regimes, there is typically a shift in power away from the state and clients to sex workers themselves. Decriminalization is also advanced as a way of avoiding the two-tier reality of legal and illegal operations, with the latter operating underground (Jordan 2005). Decriminalization also aims to remove the social exclusion which makes sex workers vulnerable to exploitation and difficult for them to move out of the industry. Leading countries on decriminalization includes New Zealand and one State in Australia. A review of the merits of this system is presented in the section below, in the proposed position for the CGE. (See Annexure A for a model for legislation on decriminalization)<sup>1</sup>.

## COMMON MISCONCEPTIONS ABOUT PROSTITUTION/SEX WORK

In a study by the New Zealand committee on Prostitution Act review (2005), common assumptions about sex workers and the sex industry were examined. The research undertaken for the review has provided information that challenges, and in some

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cases refutes, commonly held perceptions about the sex industry commonly and those who work in it. The Committee considers many commonly held perceptions have been based on stereotypes and lack of information. The research point out that findings that relate to sex industry as a whole, may not apply to individual sex workers.

Common misconceptions about prostitution are: coercion, links with crime and gangs, drug use, media influence on public perception.

Common misconceptions about decriminalisation are: Increase on the number of sex workers, public health issues, human trafficking,

Abel et al (2009) and Donovan et al (2010) state that decriminalisation of sex work does not lead to an increase of sex workers as popularly feared. Five years after New Zealand implemented decriminalisation, the impact of the law was assessed: contrary to public fears, there seemed to be no increase in the number of people who entered the industry.

<sup>1</sup> We would like to thank Anneke Meerkotter, Marlise Richter and Sally Shackleton for their help

It was found by the New Zealand Committee that the press was more likely than other newspapers to publish articles and letters containing negative assumptions about the law reform. The most common negative assumptions were that decriminalisation will increase the numbers of underage people involved in prostitution, and that there is or will be more crime associated with sex work post Prostitution Reform Act.

A study by Harcourt et al (2010) compared the health coverage of 3 Australian cities with different sex work legal frameworks. More Sydney sex workers reported a sexual health centre as a source of sex training and information Sydney (decriminalised) 52%, Melbourne (legalised) 33% and Perth (Criminalised) 35%]. The legal context appeared to affect the conduct of health promotion programs targeting the sex industry.

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## The criminalization of sex work harms sex workers and denies them access to the rights contained in our constitution.

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Fears that decriminalisation of sex work will lead to an increase in human trafficking and child sex works are unfounded. In a study by Gould (2010), evidence from New Zealand indicates that decriminalising sex work has no impact on the number of

underage sex workers, or on the prevalence of sex trafficking. In fact, five years after decriminalisation, the Review Committee could find no credible claims of trafficking in New Zealand. In New Zealand, several brothel owners and clients have been prosecuted after decriminalisation for hiring underage sex workers.

## CGE'S POSITION

The Commission for Gender Equality (CGE) together with COSATU had conducted a consultative dialogue on sex work legislative reform and key outcomes of this process were that the current regime, namely the full criminalization of sex work has failed society in general, and sex workers in particular. The criminalization of sex work is difficult to implement and enforce, and has not resulted in the reduction of the levels of sex work or violence against sex workers. The criminalization of sex work harms sex workers and denies them access to the rights contained in our constitution. Sex workers are subjected to numerous human rights violations, predominately harassment and abuse at the hands of police officers, and are not able to access and exercise legal or labour rights, or social protections.

The position of the Commission of Gender Equality regarding the sex work is informed by research that focuses on the impact of decriminalization of sex work includes New Zealand and some parts of Sydney. Legislation relating to sex work should adopt the principle that sex work is work and allow

the industry to be governed by the wealth of existing labour and business laws aimed at preventing unsafe, exploitative and unfair business practices. The discussion about the decriminalization of sex should take place within a broader framework – a variety of activities fall under the definition of adult entertainment including sex work, adult shops, strip clubs, adult film theatres, escort agencies and massage parlours.

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In June 2003, New Zealand became the first country to decriminalise sex work when it passed the Prostitution Reform Act(PRA). One of the New Zealand's key objectives in decriminalising sex work was to improve sex workers' safety. During the passage of the legislative, the New Zealand Parliament amended the Prostitution Reform Bill to form the Prostitution Law Review committee('the Committee') to study the effects of the law, and report after it had

been in place for five years. The committee's final report ('the Committee Report'), along with other published studies on the effects of decriminalization in the country, provides numerous evidence-based insights into the positive impact of decriminalising sex work. These studies offer strong, concrete evidence that decriminalization empowers sex workers to protect themselves from violence, improves the relationship between sex workers and police, does not lead to an increase in sex trafficking or the commercial sexual exploitation of children, and has no impact on levels of demand for sex work. In the late 1970s, the Australian state of New South Wales began the process of decriminalising sex work, with legislation passed in 1995, and subsequent report analysing its effects also confirm some of these findings. Decriminalization's success in New Zealand and New South Wales provides clear evidence of the positive impact decriminalization will have in South Africa.

*The Commission for Gender equality acknowledges that in relation to our Constitution, every South African has human rights. It is in relation to the violation of those rights that we recommend decriminalisation of sex work. South Africa has foundational rights expressed with clarity and force in its constitution. These rights apply to all who live in the country, and include key rights of relevance to sex workers, namely:*

**Section 10.** Human dignity: everyone has inherent dignity and the right to have their dignity respected.

**Section 12.** Freedom and security of the person: everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body;

**Section 22.** Freedom of trade, occupation and profession: every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

We argue that these rights should be applied to sex workers, and that the current law criminalising sex workers, and most of the alternative legal models, clearly offend against these elements of the constitution.

### **A Rights-Based Approach to Sex Work: How Decriminalisation Fulfills South Africa's Constitutional and Human Rights Commitments**

#### **Summary of Arguments**

##### **I. Decriminalisation will deliver sex workers' constitutional and human right to free choice of work.**

- Criminalisation violates sex workers' right to free choice of work by making a legitimate form of labour illegal.

##### **II. Decriminalisation will deliver sex workers' constitutional and human rights to form unions and challenge unfair labour conditions.**

- Criminalisation violates sex workers' right to association because sex workers are effectively barred from unionising and cannot engage in collective bargaining.

##### **III. Decriminalisation will deliver sex workers' constitutional and human right to freedom from discrimination.**

- Criminalisation of sex work discriminates against women because laws against sex work disproportionately affect women and stigma against sex workers fuels societal discrimination.

##### **IV. Decriminalisation will deliver sex workers' constitutional and human right to the highest attainable standard of health.**

- Criminalising sex work violates sex workers' right to health because it impedes access to health services and HIV prevention strategies, and increases sex workers' risk of violence.
- Criminalisation prevents sex workers from participating in health policy decisions, leading to ineffective health interventions.

##### **V. Decriminalisation will deliver sex workers' constitutional and human rights to freedom and security of the person, which includes the right to be free from arbitrary arrest and detention, the right to be free from violence, and the right to bodily and psychological integrity.**

- Criminalisation violates sex workers' right to be free from arbitrary arrest and detention because police use the law to harass and target sex workers.
- Criminalisation violates sex workers' rights to be free from violence and to bodily and psychological integrity because police physically and sexually abuse sex workers, and sex workers are

unable to access justice when they are the victims of violent crime.

## **VI. Decriminalisation will preserve sex workers' fundamental right to human dignity.**

- Under criminalisation sex workers suffer the indignity of discrimination, police abuse, health services stigma, and other violations.

## **CONTEXTUALIZATION**

### **I. Decriminalisation Will Deliver Sex Workers' Constitutional and Human Right to Free Choice of Work.**

South Africa is required under its constitutional and international legal commitments to fulfill sex workers' right to free choice of work. Criminalisation of sex work violates this right by making sex work as a form of labour illegal, thus denying sex workers their right to make an autonomous decision to work in the sex work industry. If South Africa decriminalises sex work, it will fulfill its obligations under constitutional and international law by recognising sex work as a legitimate form of labour and acknowledging sex workers' choice to earn their living through sex work. South Africa's Constitution guarantees all citizens, including sex workers, the right to freedom of trade, occupation, and profession.<sup>2</sup> South Africa is a party to several international and African regional human rights treaties which recognise the right to free choice

of work, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and People's Rights (African Charter), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>3</sup>

The International Labour Organisation recognises sex work as a form of industry, and encourages governments to focus on improving labour and working conditions for voluntary adult sex workers.<sup>4</sup>

Under criminalisation, sex workers are denied their right to choose to engage in sex work as a form of work, and can be arrested and prosecuted for making this choice. This is a clear denial of the rights guaranteed by the South African Constitution and South Africa's international human rights commitments.

Sex work is fundamentally a labour issue. It is a form of service work that should enjoy the same protections that any other type of service work entails.<sup>5</sup> As one South African sex worker stated, "Not everyone can do the same work. I chose this in particular and all I am asking is to have my choice respected."<sup>6</sup>

<sup>3</sup> International Covenant on Economic, Social and Cultural Rights, art.6 (1), Dec. 16, 1966, 999 U.N.T.S. 3 [hereinafter ICESCR]. South Africa became a signatory to the ICESCR in 1994, but has not ratified this treaty. See Status of the International Covenant on Economic, Social and Cultural Rights, <http://treaties.un.org/pages/>.

African Charter on Human and People's Rights, art. 15, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter African Charter]. Convention on the Elimination of All Forms of Discrimination Against Women, art. 11(a), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

<sup>4</sup> The Sex Sector: The economic and social bases of prostitution in Southeast Asia 212 (ed. Lin Lean Lim, International Labour Office, Geneva, 1998).

<sup>5</sup> Gillian Abel, Decriminalisation: A Harm Minimisation and Human Rights Approach to Regulating Sex Work, at 34 (2010).

<sup>6</sup> Interview with Tim Barnett, former New Zealand MP, and Mickey Meji, SWEAT staff, Cape Town (Nov. 8, 2011) [hereinafter Barnett and Meji interview].

<sup>2</sup> S. Afr. Const., § 22 (1996), available at <http://www.info.gov.za/documents/constitution/1996/index.htm>.

Decriminalisation of sex work will allow sex workers to freely choose their occupation, and in doing so to provide for their families.<sup>7</sup> Sex workers choose to do sex work for a variety of reasons. Some enter the industry out of economic necessity.<sup>8</sup> As one South African sex worker explains, “Sex work is our job – we work to put food on the table for our children.”<sup>9</sup> Others enjoy the income and freedom that sex work provides them. One South African sex worker explained that she freely chose sex work over cleaning laundry or making clothing, and stated, “I’m not asking for rescue, I’m asking for recognition in front of the law as a woman and in South Africa.”<sup>10</sup> Decriminalising sex work will recognise the right of sex workers to engage in the type of labour of their choice and treat the demand and supply side in the same way.

## **II. Decriminalisation Will Deliver Sex Workers’ Constitutional and Human Rights to Form Unions and Challenge Unfair Labour Conditions.**

<sup>7</sup> Interviews with Sex Workers attending Creative Space session at SWEAT, Cape Town (Nov. 9, 2011) [hereinafter Creative Space interviews]. Many sex workers who entered the profession due to economic need emphasized the economic freedom that would come with decriminalisation. One sex worker said, “Decriminalisation will help poverty, because it will open more options. Women will be able to earn money more easily, and won’t have to rely on their husbands for limited funds.”

<sup>8</sup> Interview with Sally Shackleton, Executive Director of SWEAT, Cape Town (Nov. 8, 2011) [hereinafter Shackleton interview]. “Many people only do sex work because of the economic imperative. Their only other options are cleaning and domestic work, which don’t offer as much money - they do not have economic opportunities. The other side of this is that many sex workers in SA are also fiercely independent. They work when they want, they like their own hours, and no one tells them how to make money.”

<sup>9</sup> Creative Space interviews.

<sup>10</sup> Barnett and Meji interview (“I didn’t do this because of economic status. I am the daughter of a chief. I started doing this because I didn’t want a Nokia 360 phone, I wanted a Nokia 620i. . . I could have been a cleaner, but I didn’t want to spend my time washing another woman’s underwear. There’s a lot of things I could have done. I had choices at my disposal. Maybe not the same or as many [choices] as a high class woman, but I had choices.”).

The South African government is required by its Constitution and international human rights obligations to fulfill sex workers’ right to freedom of association. South Africa’s criminalisation of sex work denies this right because sex workers are unable to engage in meaningful unionisation activities or collective bargaining when sex work is itself illegal. Decriminalisation of sex work will fulfill South Africa’s legal obligation to sex workers by allowing them to form professional organisations, to access the protections afforded by South Africa’s employment laws, and to challenge unfair labour conditions in court.

The South African Constitution guarantees South African sex workers the rights to freedom of association and fair labour practices.<sup>11</sup> These rights encompass the right to organise into a union and the right to engage in collective bargaining.<sup>12</sup> South Africa is also bound by international and African regional human rights treaties which protect labour-related association rights, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the African Charter on Human and People’s Rights (African Charter).<sup>13</sup> South Africa is also party to two International Labour Organisation (ILO) conventions, No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise, and No. 98 (1949) concerning the Application of

<sup>11</sup> S. Afr. Const. at § 18.

<sup>12</sup> S. Afr. Const. at § 23.

<sup>13</sup> International Covenant on Civil and Political Rights, art.22, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; ICESCR at art.8; African Charter at art. 10.

the Principles of the Right to Organise and to Bargain Collectively.<sup>14</sup>

Under criminalisation, South African sex workers' right to freedom of association is violated in several ways. The illicit nature of sex work forces sex workers to operate in isolation and impede efforts to collectively organise sex workers. Without collective action, a large power imbalance exists between sex workers and brothel owners or pimps, who abuse sex workers by controlling their prices for services, demanding they work for long hours, and forcing them to work in unsafe conditions.<sup>15</sup>

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While the South African Labour Appeals Court has stated that constitutional labour rights, including the rights to association and fair working conditions, can apply to sex workers, the fact that contracts for sex work are unenforceable under South Africa's current laws makes it impossible for sex

workers to enforce their right to fair working conditions or to access the protections of South Africa's employment laws.<sup>16</sup>

Indoor sex workers in South Africa report that because they must rely on informal arrangements with brothel owners, they generally have little control over their earnings, working hours, leave time, or the agency fees owners charge them.<sup>17</sup> In Johannesburg, where much of the sex work industry takes place in hotels, sex workers report that hotel owners and security staff often make abusive demands of sex workers and threaten to fine them, turn them out on the street, or have them arrested if they complain.<sup>18</sup> As one sex worker explained, "Right now, no one wants to file a complaint against a hotel manager because they are afraid they will be arrested."<sup>19</sup> Outdoor sex workers have more control over their hours and wages, but in return, they face a much greater risk of violence and arrest.<sup>20</sup>

If South Africa decriminalises sex work, sex workers will be empowered to join together to challenge exploitative working conditions and unfair labour practices. Sex workers will be able to access existing workplace laws, collectively bargain for improved work

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<sup>14</sup> Freedom of Association and Protection of the Right to Organise Convention (ILO No. 87), 68 U.N.T.S. 17, entered into force July 4, 1950; Right to Organise and Collective Bargaining Convention (ILO No. 98), 96 U.N.T.S. 257, entered into force July 18, 1951; see also Press release, *South Africa Ratifies Conventions on Freedom of Association and Collective Bargaining*, INTERNATIONAL LABOUR ORGANISATION, Feb. 20, 1996, [http://www.ilo.org/global/about-the-ilo/press-and-media-centre/news/WCMS\\_008060/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/press-and-media-centre/news/WCMS_008060/lang-en/index.htm).

<sup>15</sup> IneVan wesenebeck, *Another Decade of Social Scientific Work on Sex Work: A Review of Research 1990-2000*, 12 ANNU. REV. SEX RES. 242, 276, 279 (2001); World AIDS Campaign, *Sex Work and the Law: The Case for Decriminalisation* 7 (2010) available at <http://www.worldaidscampaign.org/en/Constituencies/Sex-Workers/Announcements/Sex-Work-the-Law-the-Case-for-Decriminalisation> [hereinafter World AIDS Campaign].

<sup>16</sup> *Kylie v CCMA* 2011 4 SA 383 (LAC); see also *Dhlamini v Protea Assurance Co Ltd*, 1974 (4) SA 906 (A) at 915; *Booyesen v Shield Insurance Co Ltd*, 1980 (3) SA 1211 (E).

<sup>17</sup> Chandré Gould, *Selling Sex in Cape Town: Sex Work and Human Trafficking in a South African City* 40-48, SWEAT and INSTITUTE FOR SECURITY STUDIES (2008) [hereinafter Gould].

<sup>18</sup> Interview with Tshwaranang Legal Advocacy Centre Staff, including Lisa Vetten, Executive Director, Shameka Dwarika, attorney, paralegals and sex workers, Johannesburg (Nov. 7, 2011) [hereinafter Tshwaranang interview]. Hotel owners charge sex workers a fee to work at the hotel, charge additional fees if the sex workers take time off, and may fine sex workers if they refuse to see a client or engage in particular acts. Failure to pay these fines or complaining may cause sex workers to be turned out, even in the middle of the night.

<sup>19</sup> Tshwaranang interview.

<sup>20</sup> Gould at 50.

conditions, and enforce contracts against employers or clients.<sup>21</sup> Collective action is especially important for sex workers because they lack community support due to their stigmatised status.<sup>22</sup> Decriminalising sex work will also enable sex workers to work together to address the discrimination and human rights abuses they suffer at the hands of police, health workers, and government agents.<sup>23</sup>

The South African government is bound by constitutional and international legal obligations to ensure sex workers' freedom from discrimination. South Africa violates this right by criminalising sex work, because laws against sex work disproportionately affect women, and criminalisation contributes to the stigma and discrimination sex workers face from public and private actors. South Africa can fulfill its obligation to protect sex workers from discrimination by decriminalising sex work, which will end state-sponsored discrimination against sex workers and reduce the stigma against them that fuels discrimination from private actors. The South African Constitution guarantees all South Africans, including sex workers, the right to freedom from discrimination, and prohibits non-state actors from discriminating against others on any basis.<sup>24</sup> South Africa also has an obligation under regional and international human rights treaties to combat all forms of discrimination, including the

International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights (African Charter).<sup>25</sup>

South Africa is obligated to combat discrimination against women by several international and African regional treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Protocol), and the Southern African Development Community (SADC) Protocol on Gender and Development.<sup>26</sup> The right to freedom from discrimination is also upheld by the Beijing Declaration and Platform for Action of 1995.<sup>27</sup> CEDAW, in particular, requires states to repeal "all national penal provisions which constitute discrimination against women."<sup>28</sup>

The criminalisation of sex work in South Africa violates sex workers' right to be free from discrimination. The police enforce South Africa's laws against sex work by targeting sex workers, who are predominantly female. In contrast, law enforcement efforts rarely, if ever, focus on the clients of sex workers.<sup>29</sup> The effect of this is a gender-specific

<sup>21</sup> See, e.g., Occupational Health and Safety Act, No. 85 of 1993.

<sup>22</sup> Oliver J. McKinstry, *We'd Better Treat Them Right: A Proposal for Occupational Cooperative Bargaining Associations of Sex Workers*, 9 U. PA. J. LAB. & EMP. L. 679, 685 (2007).

<sup>23</sup> CENTRE FOR ADVOCACY ON STIGMA AND MARGINALISATION, *Rights-Based Sex Work Empowerment Guide 9*, July 2008, available at <http://sangram.org/Download/D3.pdf> [hereinafter CASAM].

<sup>24</sup> S. Afr. Const. at §9.

<sup>25</sup> ICCPR at art.26; African Charter at arts.2, 18.

<sup>26</sup> CEDAW at art.2; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art.2, OAU Doc. CAB/LEG/66.6, Sept. 13, 2000 [hereinafter African Women's Charter]; Southern African Development Community Protocol on Gender and Development art. 3, Aug. 17, 2008.

<sup>27</sup> Beijing Declaration and Platform for Action, Report of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20/Rev.1, Sept. 15, 1995.

<sup>28</sup> CEDAW at art.2(g).

<sup>29</sup> Sex workers interviewed in Johannesburg and Cape Town overwhelmingly described police efforts as targeting them, rather than clients or other employees of the sex work industry. See also Chi Mgbako & Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 FORDHAM INT'L L.J. 1178, 1203 (2010) [hereinafter Mgbako and Smith].

application of the law against sex work that disproportionately affects women and amounts to gender-based discrimination.<sup>30</sup> Additionally, because sex work is most often undertaken by women, the criminalisation of sex work also constitutes a gender-discriminatory restriction on the right to work.<sup>31</sup>

Criminalisation of sex work fuels discrimination against sex workers by private actors as well. Their criminalised status promotes the belief that sex workers deserve to be abused. As a result, sex workers suffer stigma, discrimination, and abuse from police, health workers, schools, and banks.<sup>32</sup> Criminalisation also impacts sex workers' families. Despite being breadwinners for their families, stigma causes many sex workers to feel shame and to try to conceal their profession. Sex workers' children are also stigmatised.<sup>33</sup>

If South Africa decriminalises sex work, this gender-based discrimination will end when police no longer enforce a law that disproportionately penalises women. Decriminalisation will also reduce the negative perceptions associated with sex work, and thereby decrease the stigma and

discrimination sex workers and their families experience in society.<sup>34</sup> Decriminalisation is a necessary step towards ending discrimination against sex workers and promoting respect for their human rights.

### **III. Decriminalisation Will Deliver Sex Workers' Constitutional and Human Right to the Highest Attainable Standard of Health.**

The South African government is bound by its constitutional and international human rights commitments to fulfill sex workers' right to health. South Africa violates sex workers' right to health because criminalisation fuels stigma against sex workers in health services. Decriminalising sex work will help South Africa fulfill its legal obligations by facilitating sex workers' access to health care, lowering their susceptibility to HIV/AIDS, and reducing their risk of violence.

The South African Constitution guarantees all South Africans, including sex workers, the right to access health care services, including reproductive health care.<sup>35</sup> South Africa is also bound by regional and international human rights treaties which recognise the right to health, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Charter on Human and People's Rights (African Charter), and the Protocol to the African Charter on Human and People's

<sup>30</sup>Mgbako and Smith.

<sup>31</sup>In 2002, the South African Constitutional Court ruled that anti-prostitution laws did not violate the South African Constitution's ban on discrimination because the law was facially neutral and applied to both male and female sex workers. *State v. Jordan*, 2002 (6) SA 642 (CC). However, this court decision was based on South Africa's interim constitution and it is possible that an evaluation of the question under the current constitution would produce a different result. Marlise Richter, *HUMAN RIGHTS ARE FOR EVERYONE: WHY SEX WORK SHOULD BE DECRIMINALISED IN SOUTH AFRICA 3* (2008), available at [http://www.womensnet.org.za/sites/womensnet.org.za/files/resources/decrim\\_booklet\\_complete](http://www.womensnet.org.za/sites/womensnet.org.za/files/resources/decrim_booklet_complete).

<sup>32</sup>Open Society Institute, *RIGHTS NOT RESCUE: A REPORT ON FEMALE, TRANS, AND MALE SEX WORKERS' HUMAN RIGHTS IN BOTSWANA, NAMIBIA, AND SOUTH AFRICA 3* (2008) [hereinafter Open Society Institute]; Creative Space interviews.

<sup>33</sup>Creative Space interviews.

<sup>34</sup>Mgbako and Smith at 1209.

<sup>35</sup>S. Afr. Const. at §27.

Rights on the Rights of Women in Africa (African Women's Charter).<sup>36</sup>

The United Nations Special Rapporteur on the Right to Health has taken particular notice of sex workers' right to health. The Special Rapporteur maintains that criminalisation of sex work violates sex workers' right to health in numerous ways, and notes that: "Decriminalisation, along with the institution of appropriate occupational health and safety regulations, safeguards the rights of sex workers."<sup>37</sup>

Criminalisation promotes stigma against sex workers, which leads many health care professionals to take a negative and disapproving attitude toward them. This discriminatory treatment from health workers violates sex workers' right to health because sex workers are generally reluctant to go to health clinics for fear that they will be poorly treated.<sup>38</sup> Sex workers' avoidance of

<sup>36</sup>ICESCR at art.12; CEDAW at arts.11 (1), 12; African Charter at art.16; African Women's Charter at art. 14 ("States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted....States Parties shall take all appropriate measures to provide adequate, affordable and accessible health services, including information, education and communication programmes to women."). See also U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, Aug. 11, 2000, U.N. Doc. E/C.12/2000/4, available at <http://www.unhcr.org/refworld/docid/4538838d.html>.

<sup>37</sup>U.N. Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, para. 46, Apr. 27, 2010, U.N. Doc. A/HRC/14/20, available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A\\_HRC.14.20.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A_HRC.14.20.pdf) [hereinafter UN Special Rapporteur Report].

<sup>38</sup>Women's Legal Centre, *Every Sex Worker, Human Rights Defender*, at 70 (Draft Report, 2011) [hereinafter Women's Legal Centre]; Ilse Pauw & Loren Brener, *You are Just Whores—You Can't be Raped': Barriers to Safer Sex Practices Among Women Street Sex Workers in Cape Town*, 5 CULTURE, HEALTH & SEXUALITY 465, 472 (2003) [hereinafter Pauw and Brener]. UN Special Rapporteur Report at para. 36. In fact, the Esselen clinic in Johannesburg exists because discrimination against sex workers from health professionals is such a widespread problem. The Esselen clinic offers health services to sex workers because they have difficulty obtaining services from other clinics due to their criminalised status. However, this clinic can only serve sex workers in nearby areas of Johannesburg, and sex workers elsewhere in South Africa remain vulnerable and at risk for health issues. See Tshwaranang interview.

## The United Nations Special Rapporteur on the Right to Health has taken particular notice of sex workers' right to health.

health clinics due to health services stigma prevents them from accessing vital health care information and STI and HIV/AIDS prevention and treatment.<sup>39</sup> In addition, their inability to access the protections of labour laws and health and safety regulations in order to challenge unhealthy working conditions constitutes a further violation of their right to health.<sup>40</sup>

Criminalisation reduces the effectiveness of South Africa's HIV/AIDS prevention strategies.<sup>41</sup> Sex workers are connected to 19.8% of new HIV infections in South Africa.<sup>42</sup> Sex workers' increased vulnerability to HIV infection is attributed to several factors, including prejudicial treatment from health workers and restricted access to health information and services.<sup>43</sup> Sex workers should be provided with every means necessary to practice safer sex. Instead, sex workers are given condoms by the South African Department of Health, only to have police officers arrest them for carrying the

<sup>39</sup>UN Special Rapporteur Report at para. 39.

<sup>40</sup>UN Special Rapporteur Report at para. 43.

<sup>41</sup>UN Special Rapporteur Report at para. 36.

<sup>42</sup>South Africa Centre for Epidemiological Modeling and Analysis, *Mode of Transmission Study* (2010).

<sup>43</sup>Andrew Scheibe et al., *Key Populations, Key Solutions: A Gap Analysis for Key Populations and HIV in South Africa, and Recommendations for the National Strategic Plan for HIV/AIDS, STIs and TB (2012-2016)* 43, 46, DESMOND TUTU HIV FOUNDATION, JOINT UN TEAM ON HIV AND AIDS, SOUTH AFRICA (October 2011).

condoms.<sup>44</sup> Sex workers' criminalised status also reduces their bargaining power with clients, making it difficult for them to insist on condom use.<sup>45</sup>

Criminalisation also violates sex workers' right to health because it increases their risk of physical violence at the hands police and clients.<sup>46</sup> Police violate sex workers' right to health by demanding unprotected sex from sex workers who seek to avoid arrest. In addition, HIV-positive sex workers who get caught in the common cycle of arbitrary police arrest and detention are sometimes unable to stay on schedule with their anti-retroviral treatment when detained.<sup>47</sup>

If South Africa decriminalises sex work, sex workers will realize their right to health because they will be empowered to access health services, including HIV prevention strategies. Their vulnerability to violence from police and clients will decrease because they will be able to report crimes and hold their attackers accountable. Sex workers will also be in a better position to insist on safer sex with clients. Once sex workers are no longer criminalised, the government will be able to improve the effectiveness of its health policies by designing interventions targeted at sex workers and training health professionals on the particular needs of sex workers.<sup>48</sup>

<sup>44</sup>Barnett and Meji interview.

<sup>45</sup>UN Special Rapporteur Report at para. 37.

<sup>46</sup>Piona Scorgieet. al., "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* 16, AFRICAN SEX WORKER ALLIANCE, April 2011; WORLD HEALTH ORGANISATION, *Preventing HIV in Sex Work Settings in Sub-Saharan Africa* 13 (2011); UN Special Rapporteur Report at para. 42.

<sup>47</sup> Interviews with the SWEAT Outreach Staff including current and former sex workers, Cape Town (Nov. 8, 2011) [hereinafter SWEAT Outreach Staff interview].

<sup>48</sup>See UN Special Rapporteur Report at para. 46-50.

Under criminalisation in South Africa, sex workers rarely have formal input in the formulation of health policy decisions that affect them because of their illegal, stigmatised status.<sup>49</sup> This impedes the creation of responsive health care services for sex workers, as policy makers cannot identify the interventions that would be most effective for sex workers without consulting sex workers themselves. Health workers, for instance, need training to know how best to assist sex workers. But it is difficult to fight for such necessary trainings and other specialised responses when the groups who need them are forced into the shadows due to their criminalised status.

Decriminalising sex work in South Africa will allow the government to offer sex workers a seat at the table when discussing relevant health policy issues.<sup>50</sup> Sex workers can offer policy makers unique insights into HIV and STI prevention strategies. As industry insiders, sex workers are well placed to promote health programmes among other sex workers, brothel owners, and clients.<sup>51</sup> Decriminalisation will further promote the participation of sex workers in public health efforts and will empower them to proactively pursue their right to health.

<sup>49</sup>Interview with David Scamell, Program Officer, Open Society Institute (New York, Nov. 1, 2011). For political reasons, it is difficult for governments to allow criminalised groups to engage in policy discussions; however, if these groups were decriminalised they could help shape better public policies to address the health concerns of marginalised groups [hereinafter David Scamell interview].

<sup>50</sup>David Scamell interview.

<sup>51</sup>CASAM at4.

**IV. Decriminalisation Will Deliver Sex Workers' Constitutional and Human Rights to Freedom and Security of the Person, Which Includes the Right to be Free From Arbitrary Arrest and Detention, the Right to be Free From Violence, and the Right to Bodily and Psychological Integrity.**

The South African government is bound by its constitutional and international human rights commitments to uphold and defend sex workers' rights to freedom and security of the person. However, South Africa routinely violates these fundamental rights because criminalisation results in rampant abuse of sex workers, in the form of arbitrary arrests and detention and physical and sexual violence. If South Africa decriminalises sex work, it will fulfill its legal obligations by removing the indignity of police abuse of sex workers and increasing sex workers' access to justice when they are victims of violence. The South African Constitution guarantees all South Africans, including sex workers, the right to freedom and security of the person, which includes the right to be free from arbitrary arrest and detention;<sup>52</sup> the right to be free from violence from public or private sources;<sup>53</sup> the right to be free from torture and other cruel, inhuman or degrading treatment;<sup>54</sup> and the right to bodily and psychological integrity.<sup>55</sup>

South Africa is also bound by international and African regional human rights treaties, which uphold these rights, including the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and People's Rights (African Charter), the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Protocol), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Specifically, the ICCPR guarantees the right to life, liberty, and security of the person,<sup>56</sup> and mandates that "no one shall be subjected to arbitrary arrest or detention."<sup>57</sup> The right to security of the person is also enumerated in Articles 4 and 6 of the African Charter<sup>58</sup> and Article 4 of the African Women's Protocol.<sup>59</sup> In regard to the right to be free from violence, the African Women's Protocol requires state parties to take "appropriate and effective measures to...prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public," and to punish perpetrators of violence.<sup>60</sup> In General Recommendation 19 of CEDAW, the CEDAW Committee underscores the link between criminalisation of sex work and violence against women, stating that: "Prostitutes are especially vulnerable to violence because their status,

<sup>56</sup>ICCPR at arts.6, 9.

<sup>57</sup>ICCPR. at art. 9.

<sup>58</sup>African Charter at art. 4 ("Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.") and art. 6 ("Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested and detained.").

<sup>59</sup>African Women's Charter at art. 4 ("Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.").

<sup>60</sup>African Women's Charter at art. 4

<sup>52</sup>S. Afr. Const. at §12(1).

<sup>53</sup>S. Afr. Const. at §12(1).

<sup>54</sup>S. Afr. Const. at §12(1).

<sup>55</sup>S. Afr. Const. at §12(2).

which may be unlawful, tends to marginalise them. They need the equal protection of laws against rape and other forms of violence.”<sup>61</sup> Under criminalisation, South Africa routinely violates sex workers’ right to be free from arbitrary arrest and detention as guaranteed by the South African Constitution and South Africa’s international human rights commitments. Police subject sex workers to arbitrary arrest and detention in a variety of ways. For instance, it is illegal for police to arrest sex workers simply for being “known sex workers.”<sup>62</sup> However, police disregard this and arrest sex workers even when they are not engaging in specific acts of prostitution.<sup>63</sup> In addition, police often improperly use municipal by-laws, including those concerning loitering and nuisance, to harass and arrest sex workers,<sup>64</sup> and force them to pay arbitrary fines even when they have not contravened these by-laws.<sup>65</sup>

The police also arbitrarily arrest sex workers simply as a way to harass them. In *SWEAT v. The Minister of Security*, the Western Cape High Court ruled that: “A peace officer who arrests a person, knowing with a high degree of probability that there will not be

<sup>61</sup>CEDAW General Recommendation No. 19 at para. 6 (1992), available at <http://www.unhchr.ch/tbs/doc.nsf/0/300395546e0dec52c12563ee0063dc9d?OpenDocument>. See also Declaration on the Elimination of Violence Against Women (1993), available at <http://www.un.org/documents/ga/res/48/a48r104.htm>. The Declaration on the Elimination of Violence against Women defines violence against women as “any act of gender-based violence that results in...physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” The Declaration also mandates that Parties ensure the implementation of policies to prevent, investigate and punish violence against women.

<sup>62</sup>Women’s Legal Centre at 18.

<sup>63</sup>Women’s Legal Centre at 18.

<sup>64</sup>Police also arrest sex workers using public drinking/drunkenness, soliciting and public indecency. Interview with Stacey-Leigh Manoek, Attorney, Women’s Legal Centre, Cape Town (Nov. 9, 2011) [hereinafter Manoek interview]; see also Tshwaranang interview.

<sup>65</sup>Women’s Legal Centre at 20, 61.

a prosecution, acts unlawfully.”<sup>66</sup> The fact that few arrests of sex workers result in prosecutions speaks to the arbitrary nature of these arrests and thus their illegality.<sup>67</sup> Furthermore, although South African law also criminalises clients in the sex work industry, since 2007 only 11 clients of sex workers have been prosecuted, speaking again to the arbitrary nature of sex worker arrests.<sup>68</sup> When they are arbitrarily detained, sex workers are often held in dirty cells<sup>69</sup> and deprived of food, medication (including

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antiretroviral treatment), visitors, phone calls, and clothes.<sup>70</sup> These violations of sex workers’ rights to be free from arbitrary arrest and detention also often breach other associated constitutional guarantees for individuals who are arrested, detained, and accused, such as the right to conditions of detention that are consistent with human

<sup>66</sup>*SWEAT v. The Minister of Security*, 2009 (6) SA 513 (WCC) at para. 27

<sup>67</sup>SWEAT Outreach Staff interview; Manoek interview.

<sup>68</sup>SWEAT Outreach Staff interview; Telephone Interview with Sally Shackleton, Executive Director, SWEAT (Sept. 8, 2011).

<sup>69</sup>Tshwaranang interview; Women’s Legal Centre at 40.

<sup>70</sup>Tshwaranang interview; SWEAT Outreach Staff interview.

dignity, including adequate accommodation, nutrition, and medical treatment.<sup>71</sup>

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## South African Constitution and the Policy on the Prevention of Torture and Treatment of Persons in Custody of the South African Police.

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Decriminalisation will uphold sex workers' rights to be free from arbitrary arrest and detention. It will create a new and positive relationship between police and sex workers. Because sex workers will no longer be subject to arrest, their abusive interactions with police will significantly diminish. Police will no longer be able to use criminal laws, municipal by-laws, or the threat of arrest to harass sex workers.

Under criminalisation, South Africa routinely violates sex workers' rights to be free from violence and to bodily and psychological integrity enshrined in the South African Constitution and international human rights guarantees. Some of these abuses may even rise to the level of torture and cruel, inhuman, or degrading treatment, violating both the South African Constitution and the Policy on the Prevention of Torture and Treatment of Persons in Custody of the South African Police.<sup>72</sup> In fact, sex workers'

vulnerability to violence is so severe that the murder rate among sex workers has been as high as six times the rate for women in the general population.<sup>73</sup>

Sex workers experience many different forms of sexual and physical violence, often at the hands of police, that amount to a clear violation of their rights. Police demand sexual favors from sex workers in exchange for release from jail or to avoid arrest and have also sexually assaulted sex workers.<sup>74</sup> Police have physically abused sex workers by beating them, throwing them into police vans,<sup>75</sup> and spraying them with tear gas.<sup>76</sup> Sex workers have also faced brutal treatment while in detention. In one incident, Cape Town police kicked a sex worker while she was in custody with such force that they damaged her internal organs, and she nearly died.<sup>77</sup> Sex workers also report incidents when police have shot them with rubber bullets and pepper sprayed their genitals.<sup>78</sup>

Under criminalisation, sex workers are also vulnerable to violence from clients. One study revealed that 34% of street-based sex workers reported being raped by a client.<sup>79</sup> Whether the perpetrator of violence is a police officer, client, or another, sex workers do not have access to justice when they are

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<sup>71</sup>S. Afr. Const. at §35.

<sup>72</sup>Women's Legal Centre at 40; Policy on the Prevention of Torture and Treatment of Persons in Custody of the South African Police, available at [http://www.saps.gov.za/docs\\_pubs/legislation/policies/torture.htm](http://www.saps.gov.za/docs_pubs/legislation/policies/torture.htm)

<sup>73</sup>Women's Legal Centre at 26.

<sup>74</sup>Open Society Institute at 2-3.

<sup>75</sup>SWEAT Outreach Staff interview. Sex workers described what they called 'dumping' where police officers would force a sex worker into a police van and 'dump' her in a remote location with no means of transportation. This often happens late at night and thus puts sex workers in dangerous situations where they might be raped or assaulted.

<sup>76</sup>Nicolé Fick, *Sex Work and Law Enforcement, Sex Workers Experiences with the Local Law Enforcement in South Africa*, 8 RESEARCH FOR SEX WORK 5 (June 2005), available at <http://www.sexworkersproject.org/downloads/R4SW8.pdf> [hereinafter Fick]

<sup>77</sup>Fick at 5.

<sup>78</sup>Open Society Institute at 1.

<sup>79</sup>Women's Legal Centre at 28.

the victims of violent crimes. Sex workers are reluctant to report cases of rape, physical violence, robbery, or other crimes committed against them for fear of additional ill treatment. And even when sex workers do report crimes, police and prosecutors do not take them seriously.<sup>80</sup>

Decriminalisation will safeguard sex workers' rights to be free from violence and to bodily and psychological integrity by removing the indignity of police abuse of sex workers and increasing their access to justice when they are victims of crimes. Under decriminalisation, sex workers will no longer be criminals in conflict with the law. Thus, police and others will not have the opportunity to take advantage of sex workers' criminalised and stigmatised status to sexually and physically abuse them. Decriminalisation will also improve sex workers' access to justice because it will encourage sex workers to report violations against them without fear of indifference or retaliation by state authorities.

#### **V. Decriminalisation Will Preserve Sex Workers' Fundamental Right to Human Dignity.**

The South African Constitution states that: "Everyone has inherent dignity and the right to have their dignity respected and protected."<sup>81</sup> The right to dignity is also a foundational human right guaranteed by the International Covenant on Civil and

Political Rights (ICCPR),<sup>82</sup> the International Covenant on Economic, Social, and Cultural Rights (ICESCR),<sup>83</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>84</sup> the African Charter on Human and People's Rights (African Charter),<sup>85</sup> and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Protocol).<sup>86</sup> Thus, South Africa is bound by its constitutional and international legal commitments to preserve and protect sex workers' right to dignity. But, as has been explored in this paper, under criminalisation sex workers suffer the indignity of discrimination, police abuse, health services stigma, and other violations. If South Africa decriminalises sex work, it will fulfill its legal obligations to preserve sex workers' fundamental right to human dignity.

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**Decriminalisation will safeguard sex workers' rights to be free from violence and to bodily and psychological integrity by removing the indignity of police abuse of sex workers.**

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<sup>80</sup>Creative Space interviews; SWEAT Outreach Staff interview.

<sup>81</sup>S. Afr. Const. at §10.

<sup>82</sup>ICCPR at preamble.

<sup>83</sup>ICESCR at preamble.

<sup>84</sup>CEDAW at preamble.

<sup>85</sup>African Charter at art. 5

<sup>86</sup>African Women's Charter at art. 3.

## CONCLUSION

The multiple and conflicting positions held on sex work in South Africa seem to derail the development of a comprehensive approach, strategy and relevant legislation on sex work. Issues of exploitation, morality, agency and choice are at the core of differences articulated on sex work. The paper recommends for a position whose point of departure is the experience and human rights of sex workers. This means that sex workers should be at the forefront of measures taken to bring about transformations in the sex work industry and in the country's legislation. Therefore, drawing on the international obligations and constitutional framework in relation to the rights of sex workers, drawing on international approaches and examining impact each of the options has had; and drawing on international best practice, this position paper unequivocally calls on the CGE to campaign for the decriminalization of sex work, as the only viable legislative approach to protecting and promoting the right and dignity of sex workers.

## RECOMMENDATIONS

The current position of total criminalisation has not succeeded in addressing problems associated with sex work in the country. This calls for a definite shift away from the current position of total criminalization.

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## MANDATE:

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*Section 187(1) of the Constitution of South Africa reads: "The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality." The CGE is a catalyst for the attainment of gender equality. Section 187(2) grants the CGE "the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality."*

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