



CEDAW Shadow Report
Submitted by:
Sisonke South Africa

20 September 2021

 **aidsfonds**

Table of Contents

Acknowledgements	3
Acronyms	4
Executive Summary	5
• Article 2: Policy Measures to Eliminate Discrimination	6
• Article 6: Trafficking and Exploitation of Prostitution	7
• Article 11: Employment Practices and Labour	8
• Article 12: Right to Health Care	9
Impact of the COVID-19 Pandemic	9
Recommendations	10

Acknowledgements

Sisonke would like to thank Hands Off, for supporting the production of our CEDAW Shadow Report. Further thanks to the Global Network of Sex Work Projects (NSWP) in particular, Nadine Gloss for guidance throughout the drafting this report. We would like to thank the lead consultant, Chikondi Mbwana for compiling this report in a way that is honest and reflects the lived realities of sex workers in South Africa. Thanks to Sisonke the provincial coordinators, staff members and the interns who provided information and support for this process. We would also like to offer thanks to Kholi Buthelezi and Pamela Chakuvunga for providing the data and resources needed for the completion of this report. Their hard work, leadership and dedication to fighting for the rights of sex workers is ever inspiring. Thanks also to Ntokozo Yingwana who facilitated the validation process and reviewed this report. Finally, a sincere thank you to all the sex workers – some who are no longer with us – whose stories and experiences have made this report possible.

Acronyms

AIDS – Acquired Immunodeficiency Syndrome
ARV – Antiretroviral Treatment
CEDAW – Convention on the Elimination of Discrimination Against Women
CCMA – Commission for Conciliation, Mediation and Arbitration
CGE – Commission for Gender Equality
COVID-19 – Coronavirus
DOH – Department of Health
DSD – Department of Social Development
DV – Domestic Violence
FSW – Female Sex Worker
GBV – Gender-based Violence
GHJRU – Gender Health and Justice Research Unit
HIV – Human Immunodeficiency Virus
HPV – Human Papillomavirus
MSM – Men who have sex with Men
NPO – Non-profit Organisation
NGO – Non-government Organisation
NPO – Non-profit Organisation
PEP – Post-exposure Prophylaxis
PrEP – Pre-exposure Prophylaxis
SALRC – South African Law Reform Commission
SANAC – South African National Aids Council
SAPS – South African Police Service
SRHR – Sexual and Reproductive Health and Rights
STI – Sexually Transmitted Infections
SWEAT – Sex Workers Education and Advocacy Taskforce
TB – Tuberculosis
TSW – Transgender Sex Worker
UNAIDS – Joint United Nations Programme on HIV/AIDS

Executive Summary

The fifth periodic report¹ submitted by the South African government to the CEDAW does little to acknowledge or address the human rights violations experienced by sex workers in South Africa. Given that there are an estimated 153 000 sex workers² in South Africa, it is vital that sex workers' voices are heard. Sisonke believes that national – as well as global – efforts to combat gender-based violence will not be successful unless sex workers can enjoy access to their basic human rights.³

Sisonke submits this shadow report to the CEDAW as a complement to the fifth periodic report submitted by the South African government in October 2019, specifically on the issue of sex workers' rights. This report aims to highlight the ways in which the Apartheid-era laws⁴ that continue to criminalise sex work in South Africa place sex workers at an increased risk of violence, poverty, ill health, stigma, discrimination and death. Sex workers in the country face violence and abuse when conducting their work as well as prejudice and discrimination when accessing the justice system or health care services.

Highlighting some crucial issues faced by sex workers in South Africa, this report will focus on addressing Articles 2, 3, 6, 11 and 12 of the CEDAW. It is also important to highlight the current plight of sex workers during these unprecedented times. The advent of COVID-19 has drastically impacted the sex work landscape, and it is pivotal for policy makers to take note of the disproportionate impact this has had on all sex workers.

Introduction

In South Africa, the Immorality Act 1957 that was infamously used to criminalise sex between individuals across the race line, was renamed the Sexual Offences Act of 1957⁵ (amended in 2007) to prohibit all aspects related to sex work. This law continues to criminalise all forms of sex work and associated activities.

Additionally, several municipal by-laws are misused by authorities to fine, arrest and detain sex workers.⁶ These fall under the authority of Section 160 (Act 108 of 1996), of the Constitution.⁷ All these laws are Apartheid-era laws that were originally used to control and

¹ Convention on the Elimination of All Forms of Discrimination against Women. (2019). *Fifth periodic report submitted by South Africa under article 18 of the Convention, due in 2015*. Retrieved on 19 September 2021 from: <https://digitallibrary.un.org/record/3840063?ln=en>.

² Stacey, M., Mbwana, J., Rangasami, J., Boshoff, N., Konstant, T. (2013). SWEAT: National Sex Worker Programme Evaluation: Beginning to build the picture: South African National Survey of Sex Worker Knowledge, Experiences and Behaviour.

³ Luthuli, L. No bad women, just bad laws. (2019). *Izwi Letbu Our Voice Newsletter*.

⁴ Gerntholtz, L, Wheeler, S, and Legge, Chelsea. (2019). Why Sex Work should be decriminalized in South Africa. Human Rights Watch. Retrieved on 19 September 2021 from: <https://www.hrw.org/report/2019/08/07/why-sex-work-should-be-decriminalised-south-africa>.

⁵ The Sexual Offences Act 23 of 1957 (previous short title, 'Immorality Act' substituted by s. 10 Act 2 of 1988).

⁶ Killander, M. (2019). Op-Ed: It's time to rethink by-laws that criminalise poverty. University of Pretoria. Retrieved on 19 September 2021: <https://www.chr.up.ac.za/news-archive/2019/1340-op-ed-it-s-time-to-rethink-by-laws-that-criminalise-poverty>.

⁷ See Open By-laws South Africa website: <http://openbylaws.org.za> (accessed 19 September 2021).

regulate the movement of ‘non-white’ people, and are now currently being used to illegally profile, harass, abuse and unlawfully arrest sex workers, as the Sexual Offences Act laws on sex work are difficult to enforce.⁸

Violation of sex workers’ rights in South Africa under the CEDAW

- **Article 2: Policy Measures to Eliminate Discrimination**

Sex workers in South Africa are vulnerable to discrimination and violence from both state and non-state actors.⁹ Due to the criminalisation of sex work, they are unable to report these cases out of fear of arrest or harassment by law enforcement officials. Vulnerability to violence and inability to access justice mechanisms is further increased for sex workers who are members of other marginalised groups such as: transgender sex workers, sex workers living with HIV, migrant sex workers, and sex workers who use drugs. These issues have been further compounded by sex workers’ inability to work, report intimate partner violence or other forms of abuse by family members or clients. They have struggled with sustainable livelihoods due to COVID-19 protocols that prevent access to justice.

We continue to fight the criminalisation of sex work, violence and discrimination because most of us don’t know how to fight for our human rights. This year though, Sisonke has empowered us by educating us about our rights. – Sisonke member, Limpopo, 2021

Criminalisation puts sex workers under constant threat of arrest and abuse. Sex workers in South Africa have consistently reported that law enforcement officials extort money from them, and demand free sex for them to avoid arrests or fines. Sisonke has received reports of sex workers being arrested even while shopping or when they are at their own home and not engaging in sex work at the time of arrest. Due to COVID–19 sex workers are the last priority when it comes to gaining justice, health care or social services, further putting them at risk.

- **Article 3: Guarantee of Basic Human Rights and Fundamental Freedoms**

The South African Constitution, which contains the country’s Bill of Rights, has been identified as one of the most comprehensive and inclusive in the world. Section 9 of the Constitution guarantees equality before the law, and freedom from discrimination to all citizens. It stipulates – particularly under the Bill of Rights – that the state may not unfairly discriminate directly or indirectly against anyone on the grounds of: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.¹⁰

⁸ Gould, C. and Fick, N. (2008). *Selling sex in Cape Town: Sex Work and Human Trafficking in a South African City*. Institute for Security Studies.

⁹ Vidima, N., Tenga, R. & Richter, M. (2020). *#Say Her Name: Sex Worker Deaths in South Africa – 2018-2019*, Sex Workers Education and Advocacy Taskforce.

¹⁰ Section 9 of the Constitution of South Africa.

Other rights enshrined in the Constitution include: the right to health services (guaranteed in Section 27),¹¹ the right to legal representation (in Chapter 2),¹² and the right to social services (see Section 28 (1)(C)).¹³ As a direct result of the criminalisation of sex work, these fundamental human rights are denied to sex workers. Therefore, they continue to experience high levels of violence and discrimination from state and non-state actors.¹⁴ Section 12 of the Constitution states that “everyone has a right to freedom, security, not be detained without cause or trial, to be free from all forms of violence (either from public or private sources), not to be tortured, not to be treated or punished in a cruel or inhumane degrading way”. However, sex workers face disproportionate levels of police harassment and abuse, and have very limited access to the justice mechanism.

The police follow us when we go to sex work hotspots to provide condoms and safe-sex counselling. So now sex workers are too afraid to approach the mobile clinic because police will harass them; take away the condoms as evidence; take their ARV medication; and even ask them for bribes. – Sisonke Peer Educator, Durban, 2020

A recent Human Rights Watch report¹⁵ highlighted that, “South Africa’s laws on sex work undermine the government’s own efforts to reduce high rates of violence against women and reduce the rates of HIV infection in sex worker population.” The study showed that street-based sex workers remain the most vulnerable as they are forced to work in dangerous areas and under precarious conditions to avoid harassment from the police.¹⁵ Sex workers experience multiple layers of discrimination in South Africa depending on their gender, race, sexual orientation, social class or migrant status. For instance, migrant sex workers often cannot carry identifying documentation (if they have access to them) for fear that they could get lost or be stolen, which puts them at greater risk of experiencing harassment from law enforcement officials.

- **Article 6: Trafficking and Exploitation of Prostitution**

This article obliges states to “take all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women.”¹⁶ In South Africa, the conflation of sex work with human trafficking means that migrant/mobile sex workers are often framed as victims of trafficking while arguments for the decriminalisation of sex work are discounted due to claims about the risks of increased

¹¹ See the South African Human Rights Commission website: <http://www.sahrc.org.za> (accessed 19 September 2021).

¹² See ‘Chapter 2 of the Bill of Rights’ on the Department of Justice and Constitutional Development website: <https://www.justice.gov.za/legislation/constitution/chp02.html> (accessed 19 September 2021).

¹³ See ‘Chapter 6: The Right to Social Services’, Section 28 (1)(c) of the Constitution on the SAHRC website (accessed 19 September 2021): <http://sahrc.org.za>.

¹⁴ Amnesty International. (2015). *Global movement votes to adopt policy to protect human rights of sex workers*.

¹⁵ Human Rights Watch. (2019). *Why Sex Work Should be Decriminalised in South Africa*.

¹⁶ See CEDAW articles on the OHCHR website: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> (accessed 20 September 2021).

trafficking. This is despite the lack of clear evidence that trafficking, including in the sex industry, is a widespread problem.¹⁷

The problem that we face is that when a case of trafficking is reported, and you hint or tell them that it's a sex worker involved, some take time saying they want to investigate more. But not all say so; some police are so useful in trafficking cases. – Sisonke/SWEAT Helpline Manager, Cape Town, 2021

While there are laws against trafficking in South Africa,¹⁸ the conflation between sex work and human trafficking causes confusion, and perpetuates stigma and violence against sex workers. This conflation not only makes it difficult to effectively identify and deal with suspected cases of human trafficking in sex work, but also causes tensions and distrust between sex worker rights, anti-trafficking activists and the police.¹⁹

- **Article 11: Employment Practices and Labour**

South Africa has numerous laws that exist to protect employees and employers from unfair and unconstitutional workplace practices. However, as a direct result of criminalisation, sex workers are unable to access their basic labour rights, such as: negotiating safe working conditions, working hours, reporting sexual harassment, or challenging unfair dismissals. Thus, they are often exploited by their employers, and are unlikely to seek legal assistance. They do not speak out because they are criminalised and fear experiencing stigma, discrimination, abuse, and arrest if they do speak out.²⁰

Since there have been many lockdowns now, we sometimes have to pay the brothel owners extra money daily just so we have a safe space to do sex work. [...] Sometimes even the bouncers take our money that we make and if we don't give them money, they rape us. – Sisonke member, Johannesburg, 2021

The case of *Kylie v Commission for Conciliation Mediation and Arbitration (CCMA)*²¹ is an important example of how a sex worker's labour rights can still be exercised even though sex work is criminalised. 'Kylie' was a sex worker who had been unfairly dismissed from the massage parlour she worked at. Her case was eventually referred to the Labour Appeal Court where its decision was that everyone has the constitutional right to fair labour practices – even if the employment contract is illegal. Although this was a monumental legal victory for

¹⁷ Peters, D. and Wasserman, Z. (2018). *“What Happened to the Evidence?” – A Critical Analysis of the South African Law Reform Commission's Report on 'Adult Prostitution (Project 107)' and Law Reform Options for South Africa*, Asijiki Coalition, Cape Town.

¹⁸ See South Africa's Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013): <https://www.justice.gov.za/legislation/acts/2013-007.pdf> (accessed 20 September 2021).

¹⁹ Yingwana, N., Walker, R. and Etchart, A. (2019). 'Sex Work, Migration, and Human Trafficking in South Africa: From polarised arguments to potential partnerships', *Anti-Trafficking Review*, Issue12, 74-90.

²⁰ Manoek, S. and Sanger, C. (n.d). *SWEAT: Sex Worker Labour Law Guide: A Guide to Your Rights*.

²¹ *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).

sex workers' rights, most sex workers are unable to benefit from the ruling, due to the inaccessibility of court processes.

- **Article 12: Right to Health Care**

Sex workers in South Africa often face discrimination and prejudice while accessing health care services; they are humiliated, outed, verbally abused, and reported to the police.²²

It's almost two years and the National Department of Health does not think of what sex workers face during COVID-19. How are we going to make money and support our families?
– Sisonke member, North West, 2021

A 2013 rapid population size estimation study commissioned by the South African National Aids Council (SANAC) reported that sex workers are vulnerable to high rates of HIV, TB, and STI incidence and prevalence.²³ The prevalence of HIV is as high as 71.8% among female sex workers in Johannesburg – one of the highest rates in the world. Laws that criminalise sex work, as well as law enforcement practices that consider the carrying of condoms as evidence of sex work, creates an environment in which sex workers are at a higher risk of acquiring HIV.²⁴ The stigma associated with sex work also makes it difficult for sex workers to access PEP or PrEP from health care services even when they have experienced sexual violence.²⁵

Impact of the COVID-19 Pandemic

The COVID-19 pandemic has had a devastating effect on all communities worldwide. This crisis, and responses to it, has also exposed and deepened existing inequalities experienced by marginalised communities such as sex workers who live in precarious health and economic contexts.²⁶ Following the pandemic-induced lockdown in South Africa, sex workers have faced severe loss of income; an inability to access any form of social support including government grants and unemployment benefits; an inability to access basic necessities such as food and housing; increased stigma and discrimination at the hands of law enforcement and health care service providers; lack of access to basic healthcare services and increased targeting by law enforcement officials under the pretext of implementing lockdown regulations.:

On Thursday, 9 April 2020 a 39-year-old sex worker, was arrested and detained at a police station in Cape Town. She was not released on bail as per lockdown regulations, and

²² Brown, B., Dube, Z. and Bekker, L.G. (2012). *Sex Workers - An Introductory Manual for Health Care workers in South Africa*. Desmond Tutu Foundation, Cape Town.

²³ Stacey, M., Konstant, T., Rangasami, J., & Stewart, M. (2013). SANAC: Estimating the size of the sex worker population in South Africa 2013.

²⁴ Scorgie, F., et al. (2011). *"I expect to be abused and I have fear": Sex workers experience of human rights violations and barriers to accessing healthcare in four African countries*. African Sex Worker Alliance.

²⁵ South African National AIDS Council. *National Strategic Plan for HIV Prevention, Care and Treatment of Sex Workers*. (2013). Pretoria, South Africa.

²⁶ See the Global Network of Sex Work Projects' 'COVID-19' webpage: <https://www.nswp.org/page/covid-19> (accessed 19 September 2021).

subsequently died in custody under suspicious circumstances. The police have yet to fully explain what occurred. This case was referred to the Human Rights Commission (HRC) and the Commission for Gender Equality (CGE).²⁷ Unfortunately, such cases are not the exception but the norm for sex workers in South Africa.

Criminalisation has been the biggest barrier to sex workers' rights before COVID-19 and continues to be during COVID-19. If sex work was decriminalised, we could have planned for COVID-19 better. It would have been easier, because as sex workers we would have been recognised and have access to labour rights. – Sisonke National Coordinator, Cape Town, 2020

Conclusion

The current legal framework is inconsistent with international, regional, and domestic laws – including South Africa's own Constitution – in addressing violence against women and gender equality. Criminalisation of sex work leads to stigma, discrimination, and disproportionate violence against sex workers, and creates an enabling environment for law enforcement officials to abuse their power. The complete decriminalisation of sex work has been proven to reduce sex workers' vulnerability to violence at the hands of police, clients, and intimate partners. Decriminalisation would contribute to eliminating stigma as a barrier to sex workers' access to justice, economic rights, and health care services.²⁸

Recommendations

- The South African government must fully decriminalise sex work; including partners, clients and third parties who benefit from the earnings of sex work (e.g. their children).
- Government needs to make COVID-19 vaccines available to all those who live in South Africa regardless of origin or sex worker status.
- The South African Police Services should immediately stop discriminatory law enforcement practices such as using the possession of condoms as evidence of sex work, and the abuse of municipal by-laws to arrest sex workers.

²⁷ See SWEAT's 'PRESS STATEMENT: How did Robyn Montsumi die in the custody of Mowbray Police Station?' (29 May 2020): <http://www.sweat.org.za/2020/05/29/press-statement-how-did-robyn-montsumi-die-in-the-custody-of-mowbray-police-station/> (accessed 19 September 2021).

²⁸ Global Network of Sex Worker Projects. (2017). *Policy Brief: The Impact of Criminalisation on Sex Workers' Vulnerability to HIV and Violence*. Retrieved 19 September 2021: <https://www.nswp.org/resource/nswp-policy-briefs/the-impact-criminalisation-sex-workers-vulnerability-hiv-and-violence>.

- The Department of Justice, Women, Health, Labour, Correctional Services, and Social Development should convene a high-level, inter-ministerial committee to investigate the human rights' violations of sex workers. This committee must include representatives from the sex work community.
- Donors are to fund and support the implementation of the SANAC National Sex Worker HIV Plan, and the South Africa's National Human Rights Plan.²⁹
- All state actors who engage with sex workers, including healthcare workers and law enforcement personnel, must attend sensitisation trainings, which take place alongside accountability measures and zero tolerance for abuses.
- All stakeholders to ensure that sex workers are trained and actively involved in the conceptualisation and implementation of policies, legislation and programmes that impact their lives.

²⁹ See 'South Africa's National Human Rights Plan': [AFRICAhttps://sanac.org.za/wp-content/uploads/2020/03/HR-STRATEGY-FULL-electronic.pdf](https://sanac.org.za/wp-content/uploads/2020/03/HR-STRATEGY-FULL-electronic.pdf) (accessed 20 September 2021).