



## Amnesty International's submission supporting the Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022

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### Introduction

1. Amnesty International is a global movement of people who campaign for a world where human rights are enjoyed by all. Today, Amnesty International is the largest human rights movement with over 10 million members, supporters and activists who take injustice personally. Amnesty International has evolved to become a global community of human rights defenders based on the principles of international solidarity, effective action for the individual victim, global coverage, the universality and indivisibility of human rights, impartiality and independence and mutual respect.
2. As a human rights organisation, Amnesty International investigates human rights violations and regularly makes recommendations on how abuses can be prevented. Our recommendations are based on our independent research and aligned with international human rights laws and standards.
3. We are independent of any government, political ideology, economic interest, or religion and are funded mainly by our members and public donations.
4. Our vision is for everyone to enjoy all the rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights law and standards.
5. We welcome the opportunity to make this submission on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (hereafter referred to as "the Bill"). Amnesty International's research has found that all forms of criminalization of sex work results in disproportionate harm to sex workers.<sup>1</sup> We, therefore, support the Bill in its current form. It will positively impact on the lives of sex workers and contribute to South Africa's national and international human rights obligations.
6. We support the repeal of the Sexual Offences Act of 1957, and the amendment to the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 to ensure that sex work is fully decriminalized, including both the sale and purchase of adult sexual services. **We**

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<sup>1</sup> Amnesty International, 2018, 'Body politics: a primer on criminalization of sexuality and reproduction, CRIMINALIZING SEX WORK, p. 150. Available at: <https://www.amnesty.org/en/documents/pol40/7763/2018/en/>

**welcome Section 1 of the Bill** that does so. The Bill will contribute significantly toward ensuring that the human rights, dignity, and equal worth of sex workers enshrined in the Constitution are protected and respected.

7. **We further support Section 2 and 3 of the Bill** providing for the expungement of criminal records of persons convicted of, engaged in, rendering, or receiving sexual services from persons 18 years or older, and criminal proceedings instituted prior to the commencement of the Act be ceased and withdrawn.
8. In this submission, we highlight three specific human rights violations that occur when sex work is criminalized, including the international legal obligations of the state to respect, protect and fulfil the human rights of sex workers. These include the right to security of a person; the right to health, including reproductive health; and the right to just and favourable conditions of work.
9. The observations we make below are based on South Africa's obligations under both national and international human rights law and standards. The submission is grounded in the principles of harm reduction, gender equality, recognition of the personal agency of sex workers, and general international human rights principles.

#### **Disproportionate and negative human rights impact of laws criminalizing sex work**

10. The primary and secondary evidence gathered by Amnesty International demonstrates that criminalization and penalization of sex work have a foreseeably negative impact on a range of human rights. These include: the rights to life, liberty, autonomy and security of person; the right to equality and non-discrimination; the right to be free from torture or cruel, inhuman or degrading treatment or punishment; the right to privacy; the right to the highest attainable standard of health; the right to information and education; the right to freedom of opinion and expression; the right to adequate housing; the right to just and favourable conditions of work; the right to family life and to found a family; and the right to remedy for human rights abuses.
11. Multiple and intersecting forms of discrimination and structural inequalities have an impact on the lives of many sex workers and can play a role in a person's decision to engage or remain in sex work, as well as their experiences while in sex work.
12. People who face multiple forms of discrimination and structural inequalities, such as women and those who face discrimination on the basis of their sexual orientation, gender identity, race, caste, ethnicity, Indigenous identity, migrant or other status, are often over-represented in sex work.
13. In addition to the marginalization that sex workers can experience on the basis of their gender and/or other aspects of their identity or status, they also frequently encounter censure, judgement and blame for being seen to transgress social or sexual norms and/or gender stereotypes on the basis of their participation in sex work.

#### **The right to security of a person**

14. The stigmatized and criminalized nature of sex work routinely forces sex workers to operate at the margins of society in clandestine and dangerous environments with little recourse to safety or state protection. As a result, sex workers face an increased risk of violence and abuse, and such crimes against them often go unreported, under-investigated and/or unpunished, offering perpetrators impunity.

15. A survey of female sex workers found that 50.9% in Johannesburg, 47.3% in Cape Town, and 14.1% in Durban had been physically assaulted in the preceding 12 months. Around 1 in 5 in all three cities had been sexually assaulted in the past year.<sup>2</sup>
16. Criminalization of sex work also creates an environment where law enforcement officers and other officials can perpetrate violence, harassment, and extortion against sex workers with impunity. Where sex workers face the threat of criminalization, penalization, or loss of livelihood when or if they report crimes against themselves to police, their access to justice and equal protection under the law is significantly compromised.<sup>3</sup> This, in turn, offers impunity to perpetrators of violence and abuse against sex workers.
17. Sex workers in South Africa have reported harm experienced at the hands of police. This includes the abuse of power, violence, committing crimes against sex workers (such as rape), as well as refusing to investigate crimes against them (particularly when committed by police). This leads to sex workers being less likely to report crimes, low prosecution rates, and an increase in sex workers' risk of experiencing crime and violence.<sup>4</sup>
18. A study focusing on Cape Town and Johannesburg found that 70% out of the 308 sex workers surveyed, had experience some form of abuse at the hands of police.<sup>5</sup>

#### **The right to health, including reproductive health**

19. Evidence further indicates that criminalization interferes with and undermines sex workers' right to health services and information, in particular the prevention, testing and treatment of sexually transmitted infections (STIs) and HIV. Criminalization of sex work has specifically been shown to directly undermine global HIV prevention efforts.<sup>6</sup>
20. The World Health Organisation has identified 'key populations' that are at an increased risk of HIV. One of these populations are sex workers.<sup>7</sup> A study carried out in 2013 and 2014, found that 71.8% of female sex workers in Johannesburg, 39.7% in Cape Town, and 53.5% in Durban were HIV positive.<sup>8</sup>
21. Criminalization and stigma continue to create a barrier to accessing healthcare for sex workers, despite the burden of HIV. Negative attitudes by healthcare workers can make accessing sexual and reproductive health services challenging. In some cases, sex workers are refused services at clinics or hospitals.<sup>9</sup>
22. Research has further shown that it is common for some South African police officers to confiscate condoms from people they believe to be sex workers, to arrest people carrying

<sup>2</sup> UCSF, Anova Health Institute and WRHI, 2015, 'South African Health Monitoring Survey (SAHMS), Final Report: The Integrated Biological and Behavioural Survey among Female Sex Workers, South Africa 2013 – 2014'.

<sup>3</sup> See CEDAW, General Recommendation 33 (women's access to justice), UN Doc. CEDAW/C/GC/33, 2015, paras. 9, 51(l).

<sup>4</sup> Asijiki Coalition, 2018, 'A touchstone document of peer-reviewed academic evidence on the decriminalization of sex work'. Available at: <https://asijiki.org.za/wp-content/uploads/Decrim-report-WEB.pdf>

<sup>5</sup> Manoek, S., 2012, "'Stop Harassing Us! Tackle Real Crime!": A Report On Human Rights Violations By Police Against Sex Workers In South Africa'. Women's Legal Centre. Available at: <http://wlce.co.za/wp-content/uploads/2017/02/210812-FINAL-WEB-version.pdf>

<sup>6</sup> See generally Global Commission on HIV and the Law, *Risks, Rights and Health*, 2012; UNAIDS Guidance Note on HIV and Sex Work, Annex 3; UNAIDS, UNFPA, UNDP, *Sex Work and the Law in Asia and the Pacific*, 2012; UNDP, UNFPA, APNSW, SANGRAM, *The Right(s) Evidence: Sex, Violence and HIV in Asia – A Multi-country Qualitative Study*, 2015.

<sup>7</sup> WHO, 2016, Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations. Available at: <https://www.who.int/publications/i/item/9789241511124>

<sup>8</sup> University of California, San Francisco (UCSF), Anova Health Institute & Wits Reproductive Health and HIV Research Institute, 2015, 'South African Health Monitoring Study (SAHMS), Final Report: The Integrated Biological and Behavioural Survey among Female Sex Workers, South Africa 2013-2014'. San Francisco: UCSF.

<sup>9</sup> Asijiki Coalition, 2018, A touchstone document of peer-reviewed academic evidence on the decriminalization of sex work. Available at: <https://asijiki.org.za/wp-content/uploads/Decrim-report-WEB.pdf>

condoms on suspicion of being sex workers, and aggravating health workers distributing condoms to sex workers. This negatively impacts sex workers' willingness to carry condoms, increases chances of them engaging in unprotected sex, and further jeopardizes the right to the highest attainable standard of health.<sup>10</sup>

23. Criminalizing consensual adult sexual activities has been recognized as violating states' obligation to respect the right to sexual and reproductive health as it amounts to a legal barrier that impedes access to sexual and reproductive health services.<sup>11</sup> States have an immediate obligation to "repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine [an] individual's or particular group's access to sexual and reproductive health facilities, services, goods and information".<sup>12</sup> The UN Committee on Economic Social and Cultural Rights has confirmed that states must specifically ensure that sex workers have access to the full range of sexual and reproductive health care services.<sup>13</sup>
24. Moreover, the right to health contains both freedoms and entitlements, including the "right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference," as well as "equality of opportunity for people to enjoy the highest attainable level of health."<sup>14</sup>

### **The right to just and favourable conditions of work**

25. The criminalization of sex work also frequently works to exclude sex workers from protections available to others under labour laws, as well as health and safety laws, and can impede or prohibit them from forming or joining trade unions to secure better working conditions and health and safety standards. This, in turn, can render sex workers at greater risk of exploitation by third parties.<sup>15</sup>
26. International human rights law stipulates that everyone is entitled to just and favourable conditions of work, including safe and healthy working conditions<sup>16</sup> including those who are self-employed or who make their living in informal settings. This is affirmed in General Comment 23 issued by the UN Committee on Economic, Social and Cultural Rights, which states that "laws and policies should explicitly extend to workers in the informal economy".<sup>17</sup>
27. Along these lines, states have an obligation to ensure that all persons, including sex workers, have access to just and favourable conditions of work (which includes matters of safety)<sup>18</sup> and

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<sup>10</sup> Open Society Foundations, 2012, 'Criminalizing Condoms: How Policing Practices Put Sex Workers and HIV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe'.

<sup>11</sup> See CESCR, General Comment 22 (right to sexual and reproductive health (Article 12)), (UN Doc. E/C.12/GC/22), 2016, para. 57.

<sup>12</sup> CESCR, General Comment 22 (UN Doc. E/C.12/GC/22), 2016, para. 49(a).

<sup>13</sup> See CESCR, General Comment 22 (UN Doc. E/C.12/GC/22), 2016, para. 32.

<sup>14</sup> CESCR, General Comment 14 (The right to the highest attainable standard of health (article 12 of the ICESCR)), UN Doc. E/C.12/2000/4, 2000, para. 8.

<sup>15</sup> NSW, *Sex Work and the Law: Understanding Legal Frameworks and the Struggle for Sex Work Law Reform*, 2014.

<sup>16</sup> Article 7 (b) of the International Covenant on Economic, Social and Cultural Rights, which states: "the States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular;... (b) Safe and healthy working conditions"

<sup>17</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the Right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, 8 March 2016, para.47(iv). See also ILO Recommendation 200, Recommendation Concerning HIV and AIDS and the World of Work, adopted by the Conference at its Ninety-Ninth Session, Geneva, 17 June 2010 defines a "workplace" as "any place in which workers perform their activity"; and a "worker" as referring to "any persons working under any form or arrangement." p. 6.

<sup>18</sup> See CESCR, General Comment 23 (right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), 2016, UN Doc. E/C.12/GC/23, 2016, paras. 25-30.

are protected against exploitation, including those who are self-employed or who make their living in informal settings.<sup>19</sup>

### **Conclusion**

28. The state has an obligation to respect, protect, promote, and fulfil the human rights of every person, including sex workers.
29. The rights of all sex workers to participate without discrimination in decisions affecting their lives must be respected.<sup>20</sup> In establishing laws and policies relevant to sex work, whether they relate to entry, participation or exit, governments should ensure the meaningful participation and consultation of sex workers, including in particular current sex workers.
30. Decisions at all levels of government including at the national, regional, local and community levels, must ensure the protection of the human rights of sex workers, including by refraining from criminalizing or penalizing sex work. This must include municipal bylaws.
31. This amendment Bill is a critical first step towards achieving this and ensure that sex workers have equal access to justice, health care and other public services, and to equal protection under the law.
32. Amnesty International therefore supports the Bill in its current form.

### **Should you require further information, please contact:**

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<sup>19</sup> Universal Declaration of Human Rights, Article 23; CESCR, General Comment 23 (right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), 2016, UN Doc. E/C.12/GC/23, 2016, para. 5 (The right to just and favourable work conditions applies to everyone, including self-employed people and those in the informal sector. Additionally, “[w]hile the overall objective should be to formalize work, laws and policies should explicitly extend to workers in the informal economy and States parties should take steps to gather relevant disaggregated data so as to include this category of workers in the progressive realization of the right. For that purpose the informal economy should be included in the mandate of a respective monitoring and enforcement mechanism” para. 47 (iv).

<sup>20</sup> For example, the UN Committee on Economic, Social and Cultural Rights has stated that the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12”, General Comment No. 14: The right to the highest attainable standard of health, para. 54.