

Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Working Group on discrimination against women and girls

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31 January 2023

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and Working Group on discrimination against women and girls, pursuant to Human Rights Council resolutions 51/21 and 50/18.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received, concerning the Sexual Offences and Related Matters Amendment Bill, 2022 (hereinafter 2022 Amendment Bill),¹ introduced at the National Assembly (proposed section 75), which intends to repeal the Sexual Offences Act, 1957 (Act No. 23 of 1957) and the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007).² We welcome these positive developments aiming at decriminalizing sex work in South Africa.

According to the information received:

The 2022 Amendment Bill intends to expunge criminal records of persons convicted of, engaged in, rendering or receiving sexual services from persons 18 years or older.

In addition, as transitional measure, the 2022 Amendment Bill indicates that “[a]ll criminal proceedings relating to sexual services rendered or received by persons 18 years or older, which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act must be ceased and withdrawn.”

We welcome these important developments, and we wish to bring to your Excellency's Government attention some issues related to the criminalization of sex work and remind you of international standards in this matter.

The impact of sex work criminalization, punitive legal frameworks and public policies

Discrimination and violence

Several UN mechanisms, including Special Procedures and Treaty Bodies, have expressed concerns about the impact of criminalization and punitive legal frameworks and public policies on sex work. They have stated that the use of criminal law by States as a tool of social and political control, including on the basis of race, gender, disability

¹ Available at: [Criminal Law \(Sexual Offences and Related Matters\) Draft Amendment Bill | PMG](#)

² Available at: [20221208-CriminalLawSexualOffences- AmendmentBill.pdf \(pmg.org.za\)](#)

and social status, among others, is discriminatory and fuels structural violence, adding that the application of criminal law in areas related to consensual sex, including sex work is inconsistent with international human rights law.

For instance, the former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has indicated that “basic rights afforded to other workers are [also] denied to sex workers because of criminalization, as illegal work does not afford the protections that legal work requires, such as occupational health and safety standards” (A/HRC/14/20, para. 27). Criminalization leads to poorer health outcomes for sex workers, because of the latter’s fear of legal consequences, harassment and judgement, as well as because of the stigmatization affecting them (A/HRC/14/20, paras. 36 and 39). Sex workers are affected by stigma and marginalization, and that they are “at significant risk of experiencing violence in the course of their work, often as a result of criminalization” where access to health services is impeded and occupational risks increase (A/HRC/14/20, para. 27) The former Special Rapporteur further stressed that a common aspect of sex work is the violence encountered by sex workers, which is often perpetrated by those in position of authority (Ibid. para. 41).

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health stressed that violence is a major obstacle in the realization of the right to health, including sexual and reproductive rights, adding that structural violence (a form of violence normalized through laws, policies and the institutionalization of certain practices) “creates unjust barriers that are socially and systematically designed to marginalize individuals and populations across the race, class and gender divide”. Structural violence has deep roots in patriarchal hegemonic and colonial definitions of society, which is “deeply entwined with sexual and gender-based violence and the denial of survivors’ access to health care and medical services”, which includes the criminalization of sex work (A/HRC/50/28, paras. 11 and 70).

The Special Rapporteur highlights that structural violence, when suffered at the hands of law enforcement, among others, “creates similar barriers to the right to the highest attainable standard of health”, adding that police brutality and impunity contribute to the fact that victims of sexual or gender-based violence do not report these crimes, which perpetuates this type of violence, and arises in particular where sex work is criminalized. In addition, the Special Rapporteur indicates that “criminalization enables abuse and exploitation” adding that “sex workers are exposed to conditions that include exposure to sexually transmitted infections but also to violence, extortion and intimidation by clients and policy” (A/HRC/50/28, para. 71).

We wish to bring to your Excellency’s attention that, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, together with the Special Rapporteur on violence against women and girls stressed that the criminalization of sex work in the country increases the vulnerability of sex workers to violence, as it further enhances their social stigmatization and discrimination.³

³ See: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=21643>

We also wish to highlight that the Working Group on discrimination against women and girls has stressed that the discriminatory use of criminal law, punitive sanctions and legal restrictions to regulate women's control over their own bodies was a severe and unjustified form of State control. This can include punitive provisions in criminal, civil and administrative laws and regulations including governing sex work. The enforcement of such provisions generates stigma and discrimination and violates women's human rights. It infringes women's dignity and bodily integrity by restricting their autonomy to make decisions about their own lives and health (A/HRC/32/44 15, para 76).

The Working Group has further emphasized that criminal laws and other punitive regulations had imposed custodial sentences on women involved in sex work in a manner that has been shown to harm rather than protect them. The Working Group considered that the criminalization of women involved in sex work placed them in a situation of injustice, vulnerability and stigma and is contrary to international human rights law (A/HRC/32/44, para 84).

The Working Group has also stressed that States should also ensure that law enforcement officials serve a protective function, as opposed to engaging in or perpetuating violence against women sex workers. (A/HRC/32/44, para 85).

The Working Group has also observed that women involved in sex work were likely to face deprivation of liberty because of laws and social attitudes that seek to control women's morality and sexuality. The Working Group has noted that female sex workers were disproportionately affected and targeted by law enforcement agents, not only where sex work is criminalized, but also in countries where sex work itself is not a criminal offence: women who engage in it may be prosecuted and incarcerated for other offences, including loitering, vagrancy and public indecency, and for migration-related infractions. In this context, the Working Group has recommended banning laws and practices policing, targeting, punishing or confining women in relation to (inter alia) sex work (A/HRC/41/33, paras 36 and 80).

The Working Group has concluded that violations of the rights of sex workers had long been committed with impunity and that these violations were gendered, as laws penalizing sex workers (most of whom are women) were based on patriarchal moral standards about women's sexuality and that laws targeting sex work were enforced disproportionately against women and facilitated systemic violence against them, including sexual violence by police and other actors (Amicus Brief on Nigeria, 2020)⁴.

We also wish to remind your Excellency's Government, that, following her visit to South Africa, the Special Rapporteur on violence against women and girls, indicated that, at the time of the visit, there were no data available on the number of people being arrested and prosecuted under the relevant provisions of the Sexual Offences Act, but that the law was reportedly applied to women sex workers only. The Special Rapporteur stressed that the criminalization of sex work had driven women sex workers "underground, increased stigma and discrimination, created obstacles to them accessing services and made them very vulnerable to violence, human rights violations and

⁴ https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/Amicus_Brief_1_Nigeria.pdf

corruption”. The Special Rapporteur also indicated that when women sex workers were arrested, they were often denied access to their medication, including HIV/AIDS (A/HRC/32/42/Add.2, para. 35) and recommended to the Government to review the relevant legislation and regulations in force in order to decriminalize women sex workers and take a comprehensive approach to addressing the question of sex work ((para. E/C.12/ZAF/CO/1, para. 83 (d)).

In its 2018 Concluding Observations, the Committee on Economic, Social and Cultural Rights (CESCR Committee) expressed concern that sex workers, “most whom are women, do not enjoy the rights covered by [ICESCR], particularly the right to work, the right to health and trade union rights” and stressed that they are exposed “to frequent harassment and arbitrary arrest and detention” and of “being coerced into free sex and the giving of bribes by the police owing to the criminalization of the sale of sex” making difficult the reporting of physical and sexual violence against them (E/C.12/ZAF/CO/1, para. 32).

Due to the harmful effects criminalization of sex work has on sex workers, the Committee called upon South Africa “to impose an immediate moratorium on arrests of sex workers until the legal status of sex work is determined” and also recommended to “consider decriminalizing the sale of sex; to protect sex workers from police harassment, as well as from sexual and physical violence and exploitation by traffickers, establishment owners and others; provide support and assistance to victims of harassment, violence and exploitation”, among others (E/C.12/ZAF/CO/1, para. 33 (a) (b) and (c)).

In relation to the concerns related to discrimination and violence mentioned above, we also wish to bring to your Excellency’s Government attention to article 4(b) of the United Nations Declaration on the Elimination of Violence against Women, which stipulates that States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should refrain from engaging in violence against women. In that sense, we would also like to recall article 4 (c & d) of the Declaration, which notes the responsibility of States to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.

In this context, we wish to recall that the Committee on the Elimination of Discrimination against Women (CEDAW Committee) in its General Recommendation No. 19 defines gender-based violence against women as impairing or nullifying the enjoyment by women of human rights and fundamental freedoms, and constitutes discrimination within the meaning of article 1 of the Convention on the Elimination of All forms of Discrimination Against Women (ratified by South Africa on 15 December 1995), whether perpetrated by a State official or a private citizen, in public or private life. In this General Recommendation, the Committee recognised how law often facilitated marginalisation and violence (including by the State agents) and it asked the states to take punitive, preventative and rehabilitative measures to protect sex workers (para. 24).

In its General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, the CEDAW Committee “regards

gender-based violence against women as being rooted in gender-related factors, such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, and the need to assert male control or power, enforce gender roles or prevent, discourage or punish what is considered to be unacceptable female behaviour" (para. 19). It also indicates that, "a State party is responsible for acts or omissions of its organs and agents that constitute gender-based violence against women, which include the acts or omissions of officials in its executive, legislative and judicial branches" (para. 22). In this regard, article 2 (d) of the Convention provides that States parties, and their organs and agents, are to refrain from engaging in any act or practice of direct or indirect discrimination against women and ensure that public authorities and institutions act in conformity with that obligation.

We also wish to bring to your Excellency's Government attention to article 6.1 of ICESCR, which protects the right to freely chosen, gainful work and which states that the States should take appropriate steps to safeguard this right. In addition, article 8.1 (a) ensures the right of everyone to form trade unions or join the trade union of his choice.

Finally, we wish to highlight that the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (so-called Maputo Protocol) that your Excellency's Government ratified on 17 December 2004, requested to adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence (art. 3).

The effects of criminalization on right to health, including sexual and reproductive health rights

The former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health indicated that the criminalization of sex work infringes on the enjoyment of the right to health, by creating barriers to access by sex workers to health services and legal remedies. In addition, sex workers often cannot gain access to State benefits, and are not protected by occupational health and safety regulations that routinely protect employees in other industries and the criminalization of practices related to sex work can create barriers to the realization of safe working conditions (A/HRC/14/20, para. 43 and 44). In addition, the former Special Rapporteur noted that HIV has been disproportionately affecting sex workers in many regions (A/HRC/14/20, para. 36). In 2019, female sex workers were 30 times more at risk of acquiring HIV than the general female population and approximately 8 per cent of the of new adult HIV infections globally were among sex workers of all genders.⁵

In South Africa, health statistics suggest that decriminalisation is urgent: HIV prevalence rates amongst female sex workers are estimated to be between 40 per cent and 88 per cent, compared to 14.4 per cent among women who do not identify as sex

⁵ <https://www.unaids.org/en/resources/documents/2021/05-hiv-human-rights-factsheet-sex-work>

workers.⁶ HIV prevalence is as high as 71.8 percent among female sex workers in Johannesburg, one of the highest rates in the world.⁷

In 2017, in a Joint United Nations statement on ending discrimination in health care settings, UN agencies indicated that, in order to achieve SDGs, States should be supported to put in place guarantees against discrimination in law, policies, and regulations by “reviewing and repealing punitive laws that have proven to have negative health outcomes and that counter established public health evidence [... which includes] laws that criminalize [...] consensual sex work”, among others.⁸

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health indicates that globally, sex workers confront “greater barriers to sexual and reproductive health rights with national averages” (A/76/172, para. 10). The former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health highlighted that criminalization has been noted to diminish “the bargain power” of sex workers to choose their clients and negotiate the use of condoms (A/HRC/14/20, para. 37).

According to UNAIDS, “the criminalization of the clients of sex workers has also been repeatedly shown to negatively affect sex workers’ safety and health, including reducing condom access and use, and increasing the rates of violence”.⁹ UNAIDS indicates that “[i]ntersecting socio-structural contexts of racism, transphobia, economic insecurity and migration status can also serve to increase vulnerability to violence for different groups of sex workers” and increases the risk of sex workers acquiring HIV.¹⁰ In this regard, a study undertaken on 10 countries in Sub-Saharan Africa indicates that sex workers living in a country that criminalizes sex work has 7.17 higher times chances to contract HIV, compared with a country that partially legalized sex work.¹¹

In this regard, we wish to bring your Excellency’s Government attention to the fact that following her visit to South Africa, the Special Rapporteur on violence against women and girls, indicated that when women sex workers are arrested, they are often denied access to their medication, noting that HIV/AIDS prevalence is particularly high among sex workers (A/HRC/32/42/Add.2, para. 35).

In that respect, we also would like to refer to paragraph 96 of the Beijing Women's Conference Platform for Action, which reaffirms that equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.

⁶ South African National AIDS Council (SANAC), “South African National Sex Worker HIV Plan, 2016-2019,” <https://southafrica.unfpa.org/sites/default/files/pub-pdf/South%20African%20National%20Sex%20Worker%20HIV%20Plan%202016%20-%202019%20FINAL%20Launch%20Copy...%20%282%29%20%281%29.pdf>, p. 13.

⁷ *Ibid.*, p. 8.

⁸ <https://www.who.int/news/item/27-06-2017-joint-united-nations-statement-on-ending-discrimination-in-health-care-settings>

⁹ https://www.unaids.org/sites/default/files/media_asset/05-hiv-human-rights-factsheet-sex-work_en.pdf

¹⁰ *Ibid.*

¹¹ https://www.unaids.org/sites/default/files/media_asset/05-hiv-human-rights-factsheet-sex-work_en.pdf

In addition, article 12, coupled with article 2.2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by South Africa on 12 January 2015, enshrines the right of everyone, to the enjoyment of the highest attainable standard of physical and mental health without discrimination. We wish to also recall article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, ratified by South Africa on 15 December 1995, condemns discrimination against women in all its forms.

In this regard, General Comment No. 14 of the Committee on Economic, Social and Cultural Rights (CESCR) states that the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. (General Comment No 14, para. 18). The Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care (General Comment No. 3, para. 10). It also interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information (General Comment No. 14, para. 11).

Furthermore, the Committee states that the right to health contains both freedoms and entitlements and that the freedoms include the right to control one's health and body, including sexual and reproductive freedom, among others (General Comment No. 14, para. 8). In this sense, the Committee stresses that reproductive health is an integral part of the right to health and that States have the obligation to respect this right. It stresses that “violations of the obligation to respect occur when the State, through laws, policies or actions, undermines the right to sexual and reproductive health”, which includes “State interference with an individual’s freedom to control his or her own body and ability to make free, informed and responsible decisions in this regard” (General Comment No. 14, para. 8).

Distinction between sex work and trafficking

The Joint United Nations Programme on HIV/AIDS (UNAIDS Secretariat), the United Nations Development Programme (UNDP), and the United Nations Population Fund (UNFPA) presented the position of UNAIDS as a Joint Programme¹² in relation to the distinction between sex work and trafficking in women and girls, as provided under guidance documents issued by the UNAIDS Secretariat and its co-sponsors,

¹² UNAIDS was established pursuant to UN Economic and Social Council Resolution 1994/24 with a mandate to coordinate the global response to HIV, including through the creation of enabling legal and policy environments at national level. See UN Economic and Social Council Resolution 1992/24, available at: http://data.unaids.org/pub/externaldocument/1994/ecosoc_resolutions_establishing_unaids_en.pdf.

namely the Guidance Note on HIV and sex work and the Recommendations for a public health approach to HIV among sex workers.¹³

We wish to draw Your Excellency's Government attention as well to the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, in particular to the implementation of the principle of non-punishment (principle 7).

The Special Rapporteur on Trafficking in Persons, especially women and children highlighted that, "Detention, forced return, [...] and the imposition of sanctions for immigration offences or engagement in sex work [...] violate both the principle of non-punishment and the principle of non-discrimination." (A/HRC/47/34, para. 26).

Additional views in favour of the decriminalization of sex work

In the background paper concerning article 6 of the Convention on the Elimination of All Forms of Discrimination against Women, the CEDAW Committee noted positively the decriminalization of sex work in some countries. It recommended the decriminalization in some countries where sex work was considered illegal and the review or enforcement of laws relating to sex work to ensure that sex workers are not criminalized (CEDAW/2003/II/WP.2, paras. 12 and 14).

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health expressed support to the removal of all laws and policies criminalizing or otherwise punishing sex work, among others (A/HRC/50/28, para. 92). Her predecessor had also indicated that decriminalization of sex work is necessary, alongside with other measures as part of a comprehensive right-to-health approach, which include human rights education, the participation and inclusion of vulnerable groups and efforts to reduce stigma and discrimination in respect of these groups (A/HRC/14/20). The Working Group on discrimination against women and girls noted that the criminalization of sex workers in most of the country exposed them further to violence, placed them in a situation of injustice, vulnerability and stigma and was contrary to international human rights standards. As the Committee on the Elimination of Discrimination against Women has systematically reiterated, women should not be criminalized for being in a situation of sex work.¹⁴

The former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health noted that "the decriminalization or legalization of sex work with appropriate regulation forms a necessary part of a right-to-health approach to sex work, and can lead to improved health outcomes for sex workers" and that decriminalization should be undertaken, along with "the institution of appropriate occupational health and safety regulations, safeguards the rights of sex workers". The former Special Rapporteur stressed that

¹³ UNAIDS, *Guidance note on HIV and sex work*. Geneva, 2009, updated 2012. www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf; WHO, UNFPA, UNAIDS & NSWP, *Prevention and treatment of HIV and other sexually transmitted infections for sex workers in low- and middle-income countries*:

¹⁴ See A/HRC/32/44/Add.2 Report of the Working Group on the issue of discrimination against women in law and in practice on its mission to the United States of America, Available at: <https://uhri.ohchr.org/en/document/c5d4459b-56b3-4a46-9387-906586d58376>.

“where sex work is legally recognized, the incidence of violence may also be reduced, through the enforcement of laws against abuse and exploitation” (A/HRC/14/20, para. 46).

In this regard, the Special Rapporteur called on States to repeal all laws and practices criminalizing sex work and to establish appropriate regulatory frameworks to ensure that sex workers can enjoy “the safe working conditions to which they are entitled”. He also recommended States to implement programmes and educational initiatives to allow sex workers to have access to appropriate, quality health services (A/HRC/14/20, para. 76 (b)). Finally, he recommended that States “introduce monitoring and accountability mechanisms that allow them to comply with their obligation to safeguard the enjoyment of the right to health through legislative, judicial and administrative mechanisms” and to “provide human rights education for health professionals” (A/HRC/14/20, para. 76 (d) (e)).

Finally, we also would like to indicate that UNAIDS has recommended that ending the criminalization of sex work should entail the decriminalization of purchase, sale and management of sex work, the extension of labour protections to sex workers, the protection of sex workers against violence, and the adoption of measures to end stigma and discrimination.¹⁵

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all the situations brought to our attention, we would be grateful for your comments on the following matters:

1. Please provide any additional information or comments in relation to the above-mentioned situation.
2. Please indicate how the Government is currently ensuring protection and remedy for victims of discrimination and stigmatization due to the criminalization of sex work.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency’s Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

Tlaleng Mofokeng
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable
standard of physical and mental health

Dorothy Estrada-Tanck
Chair-Rapporteur of the Working Group on discrimination against women and girls

¹⁵ https://www.unaids.org/sites/default/files/media_asset/05-hiv-human-rights-factsheet-sex-work_en.pdf